

Customary International Humanitarian Law

Volume II: Practice

Part 1

Edited by

JEAN-MARIE HENCKAERTS
AND LOUISE DOSWALD-BECK



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INTERNATIONAL COMMITTEE OF THE RED CROSS

CUSTOMARY
INTERNATIONAL
HUMANITARIAN LAW

VOLUME II

PRACTICE

Part 1

Edited by

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EDITORS' NOTE

This volume catalogues practice of international humanitarian law collected for the purpose of the study of customary international humanitarian law conducted by the International Committee of the Red Cross. The rules of customary international humanitarian law based on this practice are found in Volume I; each chapter in Volume II has a corresponding chapter in Volume I, and each section within a chapter in Volume II corresponds to a rule in Volume I. An explanation of the selection of the catalogued sources of practice is to be found in the introductory section of Volume I entitled "Assessment of Customary International Law".

The practice recorded in each chapter, section or subsection has been organised as follows:

I. Treaties and Other Instruments

Treaties

This category includes universal, regional and other treaties. They are presented in chronological order and are indicated by their short names. Their full references can be found in the relevant list at the end of this volume. Reservations and declarations made by individual States to treaty provisions are indicated immediately following the provisions in question. The status of ratification of the treaties most frequently referred to can be found in the relevant table at the end of this volume.

Other Instruments

Instruments other than treaties are presented in chronological order and are indicated by their short names. Their full references can be found in the relevant list at the end of this volume.

II. National Practice

National practice is presented in alphabetical order according to the country names that were in use at the time of the practice in question. Country names

are expressed in their short form. For example, the practice of the USSR is given under "U", while the practice of the Russian Federation, referred to as Russia, is under "R".

Military Manuals

This category of practice includes all types of instructions to armed and security forces found in manuals, directives and teaching booklets. In both the text and the footnotes, manuals are indicated by their short names. Their full references can be found in the relevant list at the end of this volume.

National Legislation

This category of practice includes constitutional law, pieces of legislation and executive orders. In both the text and the footnotes, each piece of legislation is indicated by its short name. The full references can be found in the relevant list at the end of this volume.

National Case-law

National case-law is indicated by the short name in both text and footnotes. The full references can be found in the relevant list at the end of this volume.

Other National Practice

Other national practice is organised in alphabetical order by country name and is fully referenced in the footnotes.

III. Practice of International Organisations and Conferences

United Nations

United Nations practice is ordered as follows: (i) resolutions adopted by the UN Security Council; (ii) statements by the President of the UN Security Council; (iii) resolutions adopted by the UN General Assembly; (iv) resolutions adopted by ECOSOC; (v) resolutions adopted by the UN Commission on Human Rights; (vi) resolutions adopted by the UN Sub-Commission on Human Rights; (vii) resolutions adopted by UN specialised organisations and agencies; and (viii) statements and reports of the UN Secretary-General, UN Special Rapporteurs, UN special committees and other UN officials and bodies.

Resolutions of the UN Security Council, UN General Assembly, ECOSOC, UN Commission on Human Rights and UN Sub-Commission on Human Rights are indicated in the footnotes by their number only; their full references can be found in the corresponding lists at the end of this volume. Other resolutions, reports and statements are fully referenced in the footnotes.

Each type of practice is arranged in chronological order.

Other International Organisations

This category includes resolutions and reports of regional organisations and other international organisations outside the United Nations. They are presented in alphabetical order according to the organisation and within each organisation in chronological order. Resolutions are indicated in the footnotes by their number only; their full references can be found in the relevant list at the end of this volume.

International Conferences

The practice of international conferences is presented in chronological order. Resolutions of the International Conference of the Red Cross and Red Crescent are referenced in the footnotes by their number only; their full references can be found in the relevant list at the end of this volume.

IV. Practice of International Judicial and Quasi-judicial Bodies

This category includes the various types of practice emanating from judicial and quasi-judicial bodies, such as judgements, advisory opinions, views and general comments. This practice is organised by body in the following order: (i) International Military Tribunal (Nuremberg and Tokyo); (ii) International Court of Justice; (iii) International Criminal Tribunal for Rwanda; (iv) International Criminal Tribunal for the Former Yugoslavia; (v) Human Rights Committee; (vi) Committee on the Elimination of Racial Discrimination; (vii) Committee on the Elimination of Discrimination against Women; (viii) Committee against Torture; (ix) Committee on the Rights of the Child; (x) United Nations Compensation Commission; (xi) regional judicial and quasi-judicial bodies; and (xii) arbitral tribunals.

Cases are referenced in the text and footnotes according to their short names. Their full references can be found in the relevant list at the end of this volume. Other practice in this category is fully referenced in the footnotes.

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

The practice in this category is presented in chronological order. Resolutions of the Council of Delegates of the International Red Cross and Red Crescent Movement are referenced in the footnotes with their number only; their full references can be found in the relevant list at the end of this volume.

VI. Other Practice

This category includes statements by armed opposition groups, reports by non-governmental organisations and other types of publications from non-governmental sources. The practice in this category is presented in chronological order.

ABBREVIATIONS

ABiH	Armija Bosne i Hercegovine (Army of Bosnia and Herzegovina)
ACHPR	African Charter on Human and Peoples' Rights (1981)
ACiHPR	African Commission on Human and Peoples' Rights
ACHR	American Convention on Human Rights (1969)
ACP	African, Caribbean and Pacific Group of States
ADF	Australian Defence Forces
ADFL	Alliance of Democratic Forces for the Liberation of Congo/Zaire
AD	Annual Digest and Reports of Public International Law Cases
AFP	Armed Forces of the Philippines
AFP	Agence France-Presse
AJIL	American Journal of International Law
ALN	Armée de Libération Nationale (National Liberation Army, Algeria)
AP	Associated Press
ARBiH	Army of the Republic of Bosnia and Herzegovina
ARDE	Alianza Revolucionaria Democrática (Democratic Revolutionary Alliance, Nicaragua)
ARDU	Asociația Română de Drept Umanitar (Romanian Association of Humanitarian Law)
BBC	British Broadcasting Corporation
BBC-SWB	BBC-Summary of World Broadcasts
BH	Bosnia and Herzegovina
BiH	Bosnia and Herzegovina
BT	Bundestag (Lower House of Parliament, Germany)
BWC	Convention on the Prohibition of the Development, Production and Stockpiling of Bacteriological (Biological) and Toxin Weapons and on their Destruction (1972)
BYIL	British Year Book of International Law

CADIH	Comisión de Aplicación del Derecho Internacional Humanitario (Committee on the Implementation of International Humanitarian Law, Argentina)
CAT	Committee against Torture
CBOZ	Central Bosnia Operative Zone
CEDAW	Committee on the Elimination of Discrimination Against Women
CCW	Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons which may be deemed to be Excessively Injurious or to have Indiscriminate Effects (1980)
CDDH	Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts (Geneva, 1974–1977)
CE (1971)	Conference of Government Experts on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts (Geneva, 24 May–12 June 1971)
CE (1972)	Conference of Government Experts on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts (Geneva, 3 May–3 June 1972)
CERD	Committee on the Elimination of Racial Discrimination
CF	Canadian Forces
CFSP	Common Foreign and Security Policy (European Union)
CIDIH-ES	Comité Interinstitucional de Derecho Internacional Humanitario de El Salvador (Interinstitutional Committee of International Humanitarian Law of El Salvador)
CIS	Commonwealth of Independent States
CIVPOL	Civilian police component of UN peacekeeping missions
CJMC	Conference on Jewish Material Claims against Germany
CJTF	Combined Joint Task Force (US)
CRC	Committee on the Rights of the Child
CSCE	Conference on Security and Cooperation in Europe
CWC	Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on their Destruction (1993)
DFAT	Department of Foreign Affairs and Trade (Australia)

DFF	De Facto Forces (Lebanon)
DoD	Department of Defense (US)
DRA	Democratic Republic of Afghanistan
DRC	Democratic Republic of the Congo (formerly Zaire)
EC	European Community or European Communities
ECHR	European Convention for the Protection of Human Rights and Fundamental Freedoms (1950)
ECiHR	European Commission of Human Rights
ECtHR	European Court of Human Rights
ECOWAS	Economic Community of West African States
ECOMOG	ECOWAS Monitoring Group
ECOSOC	United Nations Economic and Social Council
EEC	European Economic Community
EHRH	European Human Rights Reports
ELN	Ejército de Liberación Nacional (National Liberation Army, Colombia)
ENMOD Convention	Convention on the Prohibition of Military or Any Other Hostile Use of Environmental Modification Techniques (1976)
EPLF	Eritrean People's Liberation Front
ERP	Ejército Revolucionario del Pueblo (People's Revolutionary Army, El Salvador)
EU	European Union
EZLN	Ejército Zapatista de Liberación Nacional (Zapatista Army for National Liberation, Mexico)
FALINTIL	Forças Armadas de Libertação Nacional de Timor-Leste (National Liberation Armed Forces of East Timor)
FAR	Forces Armées Rwandaises (Rwandan Armed Forces)
FARC	Fuerzas Armadas Revolucionarias de Colombia (Revolutionary Armed Forces of Colombia)
FAZ	Forces Armées Zaïroises (Zairian Armed Forces)
FCO	Foreign and Commonwealth Office (UK)
FDN	Fuerzas Democráticas Nicaragüenses (Nicaraguan Democratic Forces)
FLN	Front de Libération Nationale (National Liberation Front, Algeria)
FMLN	Farabundo Martí para la Liberación Nacional (Farabundo Martí Front for National Liberation, El Salvador)
FPR	Front Patriotique Rwandais (Rwandan Patriotic Front)

FRETILIN	Frente Revolucionária de Timor-Leste Independente (Revolutionary Front for an Independent East Timor)
FRG	Federal Republic of Germany
FRY	Federal Republic of Yugoslavia
FYROM	Former Yugoslav Republic of Macedonia
GC	Geneva Convention
GCC	Gulf Cooperation Council
GDR	German Democratic Republic
GHQ	General Headquarters
GSF	General Settlement Fund
HDZ	Hrvatska Demokratska Zajednica (Croatian Democratic Community)
HQ	Headquarters
HR	Hague Regulations
HRC	Human Rights Committee
HRLJ	Human Rights Law Journal
HV	Hrvatska Vojska (Army of the Republic of Croatia)
HVO	Hrvatsko Vijeće Obrane (Croatian Defence Council, Bosnia and Herzegovina)
HZHB	Hrvatska zajednica Herceg-Bosne (Croatian Community of Bosnia and Herzegovina)
IACiHR	Inter-American Commission on Human Rights
IACtHR	Inter-American Court of Human Rights
IAEA	International Atomic Energy Agency
ICA	International Council on Archives
ICAO	International Civil Aviation Organization
ICBL	International Campaign to Ban Landmines
ICC	International Criminal Court
ICCPR	International Covenant on Civil and Political Rights (1966)
ICDO	International Civil Defence Organization
ICESCR	International Covenant on Economic, Social and Cultural Rights (1966)
ICJ	International Court of Justice
ICJ Reports	International Court of Justice, Reports of Judgments, Advisory Opinions and Orders
ICLQ	International and Comparative Law Quarterly
ICRC	International Committee of the Red Cross
ICTR	International Criminal Tribunal for Rwanda
ICTY	International Criminal Tribunal for the Former Yugoslavia

IDF	Israel Defence Forces
IFOR	Implementation Force in Bosnia and Herzegovina (December 1995–December 1996)
IGNU	Interim Government of National Unity (Liberia)
IHL	International Humanitarian Law
IIHL	International Institute of Humanitarian Law (San Remo)
ILA	International Law Association
ILC	International Law Commission
ILM	International Legal Materials
ILO	International Labour Organization
ILR	International Law Reports
IMCO	Inter-governmental Maritime Consultative Organization (now the International Maritime Organization)
IMO	International Maritime Organization
IMT	International Military Tribunal
IOM	International Organization for Migration
IRRC	International Review of the Red Cross
ITU	International Telecommunications Union
IUCN	International Union for the Conservation of Nature (now known as the World Conservation Union)
JNA	Jugoslovenska Narodna Armija (Yugoslav People's Army)
LOAC	Law of Armed Conflict(s)
LRA	Lord's Resistance Army (Uganda)
LTTE	Liberation Tigers of Tamil Eelam (Sri Lanka)
MAG	Medical Action Group (Philippines)
MDC	Mouvement Démocratique de Casamance (Movement of Democratic Forces of Casamance, Senegal)
MFUA	Mouvements et Fronts Unifiés de l'Azawad (Unified Fronts and Movements of Azawad, Mali)
MINUGUA	Misión de Verificación de las Naciones Unidas en Guatemala (United Nations Verification Mission in Guatemala) (January–May 1997)
MONUA	Mission d'Observation des Nations Unies en Angola (United Nations Observer Mission in Angola) (June 1997–February 1999)
MOU	Memorandum of Understanding
MPLA	Movimento Popular de Libertação de Angola (Popular Movement for the Liberation of Angola)

MRND	Mouvement révolutionnaire national pour le développement (National Revolutionary Movement for Development, Rwanda)
MRTA	Movimiento Revolucionario Tupac Amaru (Tupac Amaru Revolutionary Movement, Peru)
MSF	Médecins Sans Frontières (Doctors Without Borders)
MVD	Ministerstvo Vnutrennykh Del (Ministry of Internal Affairs, Russian Federation)
NATO	North Atlantic Treaty Organisation
NILR	Netherlands International Law Review
NLA	National Liberation Army (Macedonia)
NPA	New People's Army (Philippines)
NPFL	National Patriotic Front of Liberia
NRA	National Resistance Movement (Uganda)
NS	National Society
OAS	Organization of American States
OAU	Organization of African Unity (now African Union)
OCHA	Office for the Coordination of Humanitarian Affairs (UN)
ODIHR	Office for Democratic Institutions and Human Rights (OSCE)
OECD	Organisation for Economic Co-operation and Development
OIC	Organization of the Islamic Conference
OLF	Oromo Liberation Front (Ethiopia)
OLS	Operation Lifeline Sudan
OPCW	Organisation for the Prohibition of Chemical Weapons
ONUSCA	Grupo de Observadores de las Naciones Unidas en Centroamérica (United Nations Observer Group in Central America) (November 1989–January 1992)
ONUSAL	Misión de Observadores de las Naciones Unidas en El Salvador (United Nations Observer Mission in El Salvador) (July 1991–April 1995)
OSCE	Organization for Security and Cooperation in Europe
PMHC	Politico-Military High Command of the SPLM/A (Sudan)
PLA	People's Liberation Army (China)
PAHO	Pan American Health Organization
PCIJ	Permanent Court of International Justice
PDF	Popular Defence Forces (Sudan)
PLO	Palestine Liberation Organization

PNP	Philippine National Police
POW	Prisoner of War
PW	Prisoner of War
RAF	Royal Air Force (UK)
RAN	Royal Australian Navy
RBDI	Revue Belge de Droit International
RDPC	Revue de Droit Pénal et de Criminologie
Res.	Resolution
Rec.	Recommendation
RIAA	Reports of International Arbitral Awards
RENAMO	Resistência Nacional Moçambicana (Mozambique National Resistance)
RPF	Rwandese Patriotic Front
RUF	Revolutionary United Front (Sierra Leone)
RGDIP	Revue Générale de Droit International Public
RSA	Republic of South Africa
RSK	Republika Srpska Krajina (Republic of Serb Krajina, Croatia)
SADC	Southern African Development Community
SADF	South African Defence Forces
SANDF	South Africa National Defence Force
SC	Security Council
SCF	Save the Children Fund
SIPRI	Stockholm International Peace Research Institute
SFRY	Socialist Federal Republic of Yugoslavia
SLA	South Lebanon Army
SPLA	Sudan People's Liberation Army
SPLM	Sudan People's Liberation Movement
SS	Schutzstaffel (Protective Echelon, Hitlerite Germany)
SSIA	Southern Sudan Independent Army
SWAPO	South Western Africa People's Organisation (Namibia)
TO	Teritorijalna zastita (odbrana) Bosne i Hercegovine (Bosnian Territorial Defence)
TPLF	Tigray People's Liberation Front (Ethiopia)
UAE	United Arab Emirates
UAR	United Arab Republic
UDHR	Universal Declaration on Human Rights (1948)
ULIMO	United Liberation Movement of Liberia
ULIMO-J	United Liberation Movement of Liberia for Democracy
UN	United Nations

UNAMIR	United Nations Assistance Mission for Rwanda (October 1993–March 1996)
UNAMSIL	United Nations Mission in Sierra Leone (October 1999–)
UNAVEM	United Nations Angola Verification Mission (I: December 1988–May 1991, II: May 1991–February 1995, III: February 1995–June 1997)
UNCC	United Nations Compensation Commission
UNCHS	United Nations Centre for Human Settlements (Habitat)
UNCRO	United Nations Confidence Restoration Operation (Croatia) (March 1995–January 1996)
UNEF	United Nations Emergency Force (Egypt) (I: October 1956–June 1967, II: October 1973–July 1979)
UNEP	United Nations Environmental Programme
UNESCO	United Nations Education, Scientific and Cultural Organization
UNFICYP	United Nations Peacekeeping Force in Cyprus (March 1964–)
UNGA	United Nations General Assembly
UNGAOR	United Nations General Assembly Official Records
UNHCR	United Nations High Commissioner for Refugees
UNIFIL	United Nations Interim Force in Lebanon (March 1978–)
UNIKOM	United Nations Iraq-Kuwait Observation Mission (April 1991–)
UNITA	União Nacional para Independência Total de Angola (National Union for the Total Independence of Angola)
UNMEE	United Nations Mission in Ethiopia and Eritrea (July 2000–)
UNMOGIP	United Nations Military Observers Group in India and Pakistan
UNMOT	United Nations Mission of Observers in Tajikistan (December 1994–May 2000)
UNMOVIC	United Nations Monitoring, Verification and Inspection Commission (Iraq) (December 1999–)
UNOMIG	United Nations Observer Mission in Georgia (August 1993–)
UNOMIL	United Nations Observer Mission in Liberia (September 1993–September 1997)
UNOMSIL	United Nations Observer Mission in Sierra Leone (July 1998–October 1999)

UNOSOM	United Nations Operation in Somalia (I: April 1992–March 1993, II: March 1993–March 1995)
UNPO	Unrepresented Nations and Peoples Organisation
UNPROFOR	United Nations Protection Force (former Yugoslavia) (February 1992–March 1995)
UNRIAA	United Nations Reports of International Arbitral Awards
UNSCOM	United Nations Special Commission (Iraq) (April 1991–December 1999)
UN Sub-Commission on Human Rights	United Nations Sub-Commission on the Promotion and Protection of Human Rights (formerly the Sub-Commission on Prevention of Discrimination and Protection of Minorities)
UNTAES	United Nations Transitional Authority in Eastern Slavonia, Baranja and Western Sirmium (Croatia) (January 1996–January 1998)
UNTAET	United Nations Transitional Administration in East Timor (October 1999–)
UNTAC	United Nations Transitional Authority in Cambodia (March 1992–September 1993)
UNTS	United Nations Treaty Series
URNG	Unidad Revolucionaria Nacional Guatemalteca (Guatemalan National Revolutionary Unity)
USSR	Union of Soviet Socialist Republics
UK	United Kingdom of Great Britain and Northern Ireland
US	United States
USA	United States of America
UTO	United Tajik Opposition
VJ	Vojska Jugoslovenska (Army of the Federal Republic of Yugoslavia)
VRS	Vojska Republike Srpske (Army of Republika Srpska)
WARC	World Administrative Radio Conference
WCR	Law Reports of Trials of War Criminals
WEU	Western European Union
WMA	World Medical Association
WWI	World War I
WWII	World War II
YIHL	Yearbook of International Humanitarian Law
YPA	Yugoslav People's Army

PART I

THE PRINCIPLE OF DISTINCTION

DISTINCTION BETWEEN CIVILIANS AND COMBATANTS

A.	General (practice relating to Rule 1)	§§ 1–475
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	Attacks against combatants	§§ 83–153
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C.	Definition of Combatants (practice relating to Rule 3)	§§ 570–627
D.	Definition of Armed Forces (practice relating to Rule 4)	§§ 628–704
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	Incorporation of paramilitary or armed law enforcement agencies into armed forces	§§ 684–704
E.	Definition of Civilians (practice relating to Rule 5)	§§ 705–753
F.	Loss of Protection from Attack (practice relating to Rule 6)	§§ 754–919
	Direct participation in hostilities	§§ 754–817
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	Presence of combatants among the civilian population	§§ 865–886
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A. General

The principle of distinction

I. Treaties and Other Instruments

Treaties

1. Article 48 AP I provides that “the Parties to the conflict shall at all times distinguish between the civilian population and combatants”. Article 48 AP I was adopted by consensus.¹

2. Article 24(1) of draft AP II submitted by the ICRC to the CDDH provided that “in order to ensure respect for the civilian population, the parties to the conflict...shall make a distinction between the civilian population and

¹ CDDH, *Official Records*, Vol. VI, CDDH/SR.41, 26 May 1977, p. 161.

combatants".² This proposal was amended and adopted by consensus in Committee III of the CDDH.³ The approved text provided that "in order to ensure respect and protection for the civilian population . . . the Parties to the conflict shall at all times distinguish between the civilian population and combatants".⁴ Eventually, however, it was deleted in the plenary, because it failed to obtain the necessary two-thirds majority (36 in favour, 19 against and 36 abstentions).⁵

3. According to the preamble to the 1997 Ottawa Convention, States parties based their agreement on various principles of IHL, including "the principle that a distinction must be made between civilians and combatants".

Other Instruments

4. Article 22 of the 1863 Lieber Code states that "as civilization has advanced during the last centuries, so has likewise steadily advanced, especially in war on land, the distinction between the private individual belonging to a hostile country and the hostile country itself, with its men in arms".
5. Article 1 of the 1880 Oxford Manual provides that "the state of war does not admit of acts of violence, save between the armed forces of belligerent States. Persons not forming part of a belligerent armed force should abstain from such acts." In its commentary on Article 1, the manual states that "this rule implies a distinction between the individuals who compose the 'armed force' of a State and its other 'ressortissants'".
6. Paragraph 6 of the 1991 Memorandum of Understanding on the Application of IHL between Croatia and the SFRY requires that hostilities be conducted in accordance with Article 48 AP I.
7. Paragraph 2.5 of the 1992 Agreement on the Application of IHL between the Parties to the Conflict in Bosnia and Herzegovina requires that hostilities be conducted in accordance with Article 48 AP I.
8. Paragraph 39 of the 1994 San Remo Manual states that "parties to the conflict shall at all times distinguish between civilians or other protected persons and combatants".
9. Section 5.1 of the 1999 UN Secretary-General's Bulletin states that UN forces "shall make a clear distinction at all times between civilians and combatants".

II. National Practice

Military Manuals

10. Argentina's Law of War Manual provides that "the parties to the conflict must distinguish at all times between the [civilian] population and combatants".⁶

² CDDH, *Official Records*, Vol. I, Part Three, Draft Additional Protocols, June 1973, p. 37.

³ CDDH, *Official Records*, Vol. XV, CDDH/215/Rev.1, 3 February–18 April 1975, p. 288, § 113.

⁴ CDDH, *Official Records*, Vol. XV, CDDH/215/Rev.1, 3 February–18 April 1975, p. 319.

⁵ CDDH, *Official Records*, Vol. VII, CDDH/SR.52, 6 June 1977, p. 135, § 78.

⁶ Argentina, *Law of War Manual* (1989), § 4.01.

11. Australia's Defence Force Manual states that the law of armed conflict "establishes a requirement to distinguish between combatants and civilians, and between military objectives and civilian objects. This requirement imposes obligations on all parties to a conflict to establish and maintain the distinction."⁷
12. Belgium's Law of War Manual provides that "a distinction must always be made between the civilian population and those participating in hostilities: the latter may be attacked, the former may not".⁸
13. Benin's Military Manual provides that "a distinction shall be made at all times between combatants and civilians".⁹
14. Cameroon's Instructors' Manual requires "respect for the principle of distinction, that is to say, the definition and separation of soldiers and civilians".¹⁰ It adds that "a soldier cannot fight without knowing exactly who is a combatant and who is not".¹¹
15. Canada's LOAC Manual states that "commanders shall at all times distinguish between the civilian population and combatants".¹²
16. Colombia's Circular on Fundamental Rules of IHL states that "the Parties to the conflict must at all times make a distinction between civilians and combatants in order to protect the civilian population and civilian objects".¹³
17. Colombia's Basic Military Manual provides for the obligation "to distinguish between combatants and the civilian population".¹⁴
18. Croatia's LOAC Compendium states that a distinction must always be made between combatants and civilians.¹⁵
19. Croatia's Instructions on Basic Rules of IHL requires all relevant personnel to distinguish between combatants and civilians in order to protect the civilian population and civilian property.¹⁶
20. Ecuador's Naval Manual states that "the law of armed conflicts is based largely on the distinction to be made between combatants and noncombatants".¹⁷
21. France's LOAC Summary Note states that "the civilian population and civilian objects must be spared and distinguished at all times from combatants and military objectives".¹⁸

⁷ Australia, *Defence Force Manual* (1994), § 504.

⁸ Belgium, *Law of War Manual* (1983), p. 26.

⁹ Benin, *Military Manual* (1995), Fascicule II, p. 5 and Fascicule III, p. 11.

¹⁰ Cameroon, *Instructors' Manual* (1992), p. 55.

¹¹ Cameroon, *Instructors' Manual* (1992), p. 143.

¹² Canada, *LOAC Manual* (1999), p. 4-1, § 4, see also p. 2-2, § 12.

¹³ Colombia, *Circular on Fundamental Rules of IHL* (1992), § 7.

¹⁴ Colombia, *Basic Military Manual* (1995), pp. 48-49.

¹⁵ Croatia, *LOAC Compendium* (1991), p. 37.

¹⁶ Croatia, *Instructions on Basic Rules of IHL* (1993), § 7.

¹⁷ Ecuador, *Naval Manual* (1989), § 5.3, see also §§ 8.1 and 11.1.

¹⁸ France, *LOAC Summary Note* (1992), Part I, preamble; see also *LOAC Teaching Note* (2000), p. 4.

22. France's LOAC Manual imposes the obligation "to distinguish between military objectives, which may be attacked, and civilian objects and persons, which must not be made the object of deliberate attack".¹⁹
23. Germany's Military Manual states that it is prohibited "to injure military objectives, civilians, or civilian objects without distinction".²⁰
24. Hungary's Military Manual provides that a distinction must always be made between combatants and civilians.²¹
25. With reference to Israel's Law of War Booklet, the Report on the Practice of Israel states that "in principle, the IDF (Israel Defence Forces) accepts and applies the principle of distinction".²²
26. The Military Manual of the Netherlands states that "the parties to the conflict must at all times distinguish between the civilian population and combatants".²³
27. New Zealand's Military Manual states that "the principle of distinction... imposes an obligation on commanders to distinguish between legitimate military objectives and civilian objects and the civilian population when conducting military operations, particularly when selecting targets".²⁴
28. According to Nigeria's Military Manual, "the main aim for all commanders and individual combatants is to distinguish combatants and military objectives from civilian persons and objects at all times".²⁵
29. Sweden's IHL Manual states that "a distinction shall always be made between persons participating in hostilities and who are thereby legitimate objectives, and members of the civilian population, who may not constitute objectives in warfare".²⁶ The manual considers that the principle of distinction as stated in Article 48 AP I is part of customary international law.²⁷
30. According to Switzerland's Basic Military Manual, "the Parties to the conflict must at all times make a distinction between the civilian population and combatant troops".²⁸
31. Togo's Military Manual provides that "a distinction shall be made at all times between combatants and civilians".²⁹
32. The UK Military Manual refers to "the division of the population of a belligerent State into two classes, namely, the armed forces and the peaceful population".³⁰

¹⁹ France, *LOAC Manual* (2001), p. 13.

²⁰ Germany, *Military Manual* (1992), § 401, see also § 429.

²¹ Hungary, *Military Manual* (1992), p. 60.

²² Report on the Practice of Israel, 1997, Chapter 1.1, referring to *Law of War Booklet* (1986), Chapter 1.

²³ Netherlands, *Military Manual* (1993), p. IV-1, § 1.

²⁴ New Zealand, *Military Manual* (1992), p. 2-4, § 205.

²⁵ Nigeria, *Military Manual* (1994), p. 41.

²⁶ Sweden, *IHL Manual* (1991), Section 3.2.1.5, p. 40.

²⁷ Sweden, *IHL Manual* (1991), Section 2.2.3, p. 19.

²⁸ Switzerland, *Basic Military Manual* (1987), Article 25(1).

²⁹ Togo, *Military Manual* (1996), Fascicule II, p. 5 and Fascicule III, p. 11.

³⁰ UK, *Military Manual* (1958), § 86.

33. The US Air Force Pamphlet states that “in order to insure respect and protection for the civilian population and civilian objects, the parties to the conflict must at all times distinguish between the civilian population and combatants”.³¹

34. According to the US Naval Handbook, “the law of armed conflicts is based largely on the distinction to be made between combatants and noncombatants”.³²

National Legislation

35. Under Ireland’s Geneva Conventions Act as amended, any “minor breach” of AP I, including violations of Article 48 AP I, is a punishable offence.³³

36. Under Norway’s Military Penal Code as amended, “anyone who contravenes or is accessory to the contravention of provisions relating to the protection of persons or property laid down in . . . the two additional protocols to [the Geneva] Conventions . . . is liable to imprisonment”.³⁴

National Case-law

37. No practice was found.

Other National Practice

38. A report submitted to the Belgian Senate in 1991 noted that the principle of distinction remained the foundation of the law of armed conflict.³⁵

39. In its written statement submitted to the ICJ in the *Nuclear Weapons case* in 1995, Ecuador stated that “the use of nuclear weapons does not discriminate, in general, military objectives from civilian objectives”.³⁶

40. In its written statement submitted to the ICJ in the *Nuclear Weapons case* in 1995, Egypt stated that:

The distinction between combatants and non-combatants is one of the most important victories and accomplishments of international law since the early beginnings of the nineteenth century. Any authorization of nuclear weapons will definitely cause this principle to collapse.³⁷

41. The instructions given to the French armed forces for the conduct of Opération Mistral, simulating a military operation under the right of self-defence or a mandate of the UN Security Council, state that “all parties must

³¹ US, *Air Force Pamphlet* (1976), § 5-3(b).

³² US, *Naval Handbook* (1995), § 5.3, see also §§ 8.1 and 11.1.

³³ Ireland, *Geneva Conventions Act as amended* (1962), Section 4(1) and (4).

³⁴ Norway, *Military Penal Code as amended* (1902), § 108(b).

³⁵ Belgium, Senate, Report, Enquête parlementaire sur l’existence en Belgique d’un réseau de renseignements clandestin international, 1990–1991 Session, Doc. 1117-4, 1 October 1991, § 20.

³⁶ Ecuador, Written statement submitted to the ICJ, *Nuclear Weapons case*, 20 June 1995, § D.

³⁷ Egypt, Written statement submitted to the ICJ, *Nuclear Weapons case*, 20 June 1995, § 24, see also §§ 17 and 35(B)(4).

at all times make a distinction between the civilian population and military objectives in order to spare the civilian population".³⁸

42. In its written statement submitted to the ICJ in the *Nuclear Weapons case* in 1995, India concluded that "the use of nuclear weapons in an armed conflict is unlawful being contrary to the conventional as well as customary international law because such a use cannot distinguish between the combatants and non-combatants".³⁹

43. In its oral pleadings before the ICJ in the *Nuclear Weapons case* in 1995, Japan stated that "with their colossal power and capacity for slaughter and destruction, nuclear weapons make no distinction between combatants and non-combatants".⁴⁰

44. The Report on the Practice of Lebanon refers to a 1996 report by the Lebanese Ministry of Justice which stated that Israel had committed serious violations of the Geneva Conventions by failing to distinguish between civilians and combatants.⁴¹

45. In its written statement submitted to the ICJ in the *Nuclear Weapons case* in 1995, New Zealand stated that "discrimination between combatants and those who are not directly involved in armed conflict is a fundamental principle of international humanitarian law".⁴²

46. According to the Report on the Practice of Nigeria, it is Nigeria's *opinio juris* that the principle of distinction between combatants and civilians is part of customary international law.⁴³

47. In 1991, in a Letter Directive to Commanders of Major Services and Area Commands, the Chief of Staff of the armed forces of the Philippines stated that all units must distinguish between combatants and the civilian population in order to ensure that civilians receive the respect and protection to which they are entitled.⁴⁴

48. In its written statement submitted to the ICJ in the *Nuclear Weapons case* in 1995, the Solomon Islands stated that:

Under international law it is clear beyond any doubt that the use of a nuclear weapon against civilians, whatever the nature or size and destructive power of the

³⁸ France, *Etat-major de la Force d'Action Rapide, Ordres pour l'Opération Mistral*, 1995, Section 6, § 66.

³⁹ India, Written statement submitted to the ICJ, *Nuclear Weapons case*, 20 June 1995, p. 4, see also p. 5.

⁴⁰ Japan, Oral pleadings before the ICJ, *Nuclear Weapons case*, 7 November 1995, Verbatim Record CR 95/27, p. 36.

⁴¹ Report on the Practice of Lebanon, 1998, Chapter 1.4, referring to Report by the Lebanese Ministry of Justice on possibilities for legal action against Israel, 12 April 1996.

⁴² New Zealand, Written statement submitted to the ICJ, *Nuclear Weapons case*, 20 June 1995, § 71.

⁴³ Report on the Practice of Nigeria, 1997, Chapter 1.1.

⁴⁴ Philippines, Letter Directive to Commanders of Major Services and Area Commands, Office of the Chief of Staff, 1991, § 3a.

weapon, will be rendered illegal by virtue of the application of the customary rule which states that belligerents must always distinguish between combatants and non-combatants and limit their attack only to the former. This is an old and well-established rule which has achieved universal acceptance.⁴⁵

49. In its consideration of the legality of the attack by the South African defence forces on the SWAPO base/refugee camp at Kassinga in Angola in 1978, the South African Truth and Reconciliation Commission stated that “international humanitarian law stipulates that a distinction must at all times be made between persons taking part in hostilities and civilians”.⁴⁶

50. In its written statement submitted to the ICJ in the *Nuclear Weapons case* in 1995, the UK stated that “the parties to an armed conflict are required to discriminate between civilians and civilian objects on the one hand and combatants and military objectives on the other and to direct their attacks only against the latter”.⁴⁷

51. In explaining the US government’s position on the basic principles applicable in armed conflicts before the Third Committee of the UN General Assembly in 1968, the US representative stated that the principle of distinction, as set out in draft General Assembly Resolution 2444 (XXIII), constituted a reaffirmation of existing international law.⁴⁸ Subsequently, US officials have referred to General Assembly Resolution 2444 (XXIII) as an accurate statement of the customary rule that a distinction must be made at all times between persons taking part in hostilities and the civilian population.⁴⁹

52. In 1991, in response to an ICRC memorandum on the applicability of IHL in the Gulf region, the US Department of the Army pointed out that “the obligation of distinguishing combatants and military objectives from civilians and civilian objects is a shared responsibility of the attacker, defender, and the civilian population as such”.⁵⁰

53. In 1992, in its final report to Congress on the conduct of the Gulf War, the US Department of Defense stated that Article 48 AP I “is generally regarded

⁴⁵ Solomon Islands, Written statement submitted to the ICJ, *Nuclear Weapons case*, 19 June 1995, § 3.47; see also Written statement submitted to the ICJ, *Nuclear Weapons (WHO) case*, 10 June 1994, § 3.38.

⁴⁶ South Africa, *Truth and Reconciliation Commission Report*, 1998, Vol. 2, pp. 52–55, §§ 44–45.

⁴⁷ UK, Written statement submitted to the ICJ, *Nuclear Weapons case*, 16 June 1995, § 3.67.

⁴⁸ US, Statement before the Third Committee of the UN General Assembly, UN Doc. A/C.3/SR.1634, 10 December 1968.

⁴⁹ US, Letter from J. Fred Buzhardt, General Counsel of the Department of Defense, to Senator Edward Kennedy, Chairman of the Subcommittee on Refugees of the Committee on the Judiciary, 22 September 1972, *AJIL*, Vol. 67, pp. 122–126; Statement of the Acting Assistant Legal Adviser for Politico-Military Affairs during a symposium at the Brooklyn Law School, 25 September 1982, reprinted in Marian Nash (Leich), *Cumulative Digest of United States Practice in International Law, 1981–1988*, Department of State Publication 10120, Washington, D.C., 1993–1995, pp. 3421–3422.

⁵⁰ US, Letter from the Department of the Army to the legal adviser of the US Army forces deployed in the Gulf region, 11 January 1991, § 8(E), Report on US Practice, 1997, Chapter 1.4.

as a codification of the customary practice of nations, and therefore binding on all".⁵¹ It also stated that:

The law of war with respect to targeting, collateral damage and collateral civilian casualties is derived from the principle of discrimination; that is, the necessity for distinguishing between combatants, who may be attacked, and noncombatants, against whom an intentional attack may not be directed, and between legitimate military targets and civilian objects.⁵²

54. According to the Report on US Practice, "it is the *opinio juris* of the United States that . . . a distinction must be made between persons taking part in the hostilities and the civilian population to the effect that the civilians be spared as much as possible".⁵³

III. Practice of International Organisations and Conferences

United Nations

55. In Resolution 2444 (XXIII), adopted in 1968, the UN General Assembly affirmed Resolution XXVIII of the 20th International Conference of the Red Cross and the basic humanitarian principle applicable in all armed conflicts laid down therein that "distinction must be made at all times between persons taking part in the hostilities and members of the civilian population to the effect that the latter be spared as much as possible".⁵⁴

56. In Resolution 2675 (XXV), adopted in 1970, the UN General Assembly recalled that "in the conduct of military operations during armed conflict, a distinction must be made at all times between persons actively taking part in the hostilities and civilian populations".⁵⁵ Resolution 2673 (XXV), adopted the same day and dealing with journalists in conflict zones, referred in its preamble to the principle of distinction.⁵⁶

57. In 1998, in a report on protection for humanitarian assistance to refugees and others in conflict situations, the UN Secretary-General noted that the changing pattern of conflicts in recent years had dramatically worsened the problem of compliance with international law and listed as an example that "in situations of internal conflicts, whole societies are often mobilized for war and it is difficult to distinguish between combatants and non-combatants".⁵⁷

⁵¹ US, Department of Defense, Final Report to Congress on the Conduct of the Persian Gulf War, Appendix O, The Role of the Law of War, 10 April 1992, *ILM*, Vol. 31, 1992, p. 625.

⁵² US, Department of Defense, Final Report to Congress on the Conduct of the Persian Gulf War, Appendix O, The Role of the Law of War, 10 April 1992, *ILM*, Vol. 31, 1992, p. 621.

⁵³ Report on US Practice, 1997, Chapter 1.4.

⁵⁴ UN General Assembly, Res. 2444 (XXIII), 19 December 1968, § 1(c).

⁵⁵ UN General Assembly, Res. 2675 (XXV), 9 December 1970, § 2.

⁵⁶ UN General Assembly, Res. 2673 (XXV), 9 December 1970, preamble.

⁵⁷ UN Secretary-General, Report on protection for humanitarian assistance to refugees and others in conflict situations, UN Doc. S/1998/883, 22 September 1998, § 12.

58. The report pursuant to paragraph 5 of UN Security Council resolution 837 (1993) on the investigation into the 5 June 1993 attack on UN forces in Somalia noted that:

The [Geneva] Conventions were designed to cover inter-State wars and large-scale civil wars. But the principles they embody have a wider scope. Plainly a part of contemporary international customary law, they are applicable wherever political ends are sought through military means. No principle is more central to the humanitarian law of war than the obligation to respect the distinction between combatants and non-combatants. That principle is violated and criminal responsibility thereby incurred when organizations deliberately target civilians or when they use civilians as shields or otherwise demonstrate a wanton indifference to the protection of non-combatants.⁵⁸

Other International Organisations

59. In a declaration adopted on the occasion of the 50th anniversary of the Geneva Conventions in 1999, the EU stated that it deplored the persistence of violations of IHL. It added that present-day conflicts often did not make the important distinction between combatants and civilians and that children and other vulnerable groups were targets of the conflicts.⁵⁹

International Conferences

60. The 20th International Conference of the Red Cross in 1965 solemnly declared that:

All Governments and other authorities responsible for action in armed conflicts should conform at least to the following principles: . . . that distinction must be made at all times between persons taking part in the hostilities and members of the civilian population to the effect that the latter be spared as much as possible.⁶⁰

IV. Practice of International Judicial and Quasi-judicial Bodies

61. In its advisory opinion in the *Nuclear Weapons case* in 1996, the ICJ considered the principle of distinction between combatants and non-combatants to be one of the “cardinal principles contained in the texts constituting the fabric of humanitarian law” and also one of the “intransgressible principles of international customary law”.⁶¹

⁵⁸ Report pursuant to paragraph 5 of Security Council resolution 837 (1993) on the investigation into the 5 June 1993 attack on United Nations forces in Somalia conducted on behalf of the UN Security Council, UN Doc. S/26351, 24 August 1993, Annex, § 9.

⁵⁹ EU, Declaration on the occasion of the 50th anniversary of the Geneva Conventions, 12 August 1999, Pesc/99/77 10394/99 (presse 247).

⁶⁰ 20th International Conference of the Red Cross, Vienna, 2–9 October 1965, Res. XXVIII.

⁶¹ ICJ, *Nuclear Weapons case*, Advisory Opinion, 8 July 1996, §§ 78–79.

62. In its judgement in the *Blaškić case* in 2000, the ICTY held that “the parties to the conflict are obliged to attempt to distinguish between military targets and civilian persons”.⁶²

63. In its final report to the ICTY Prosecutor in 2000, the Committee Established to Review the 1999 NATO Bombing Campaign Against the Federal Republic of Yugoslavia stated that “one of the principles underlying IHL is the principle of distinction, which obligates military commanders to distinguish between military objectives and civilian persons or objects”.⁶³

64. In 1997, in the case concerning the events at La Tablada in Argentina, the IACiHR underlined the obligation of the contending parties, on the basis of common Article 3 of the 1949 Geneva Conventions and customary principles applicable to all armed conflicts, “to distinguish in their targeting between civilians and combatants and other lawful military objectives”.⁶⁴

65. According to an IACiHR report on the human rights situation in Colombia issued in 1999, IHL prohibits:

the launching of attacks against the civilian population and requires the parties to an armed conflict, at all times, to make a distinction between members of the civilian population and persons actively taking part in the hostilities and to direct their attacks only against the latter and, inferentially, other legitimate military objectives.⁶⁵

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

66. To fulfil its task of disseminating IHL, the ICRC has delegates around the world teaching armed and security forces that a distinction must be made between combatants and civilians at all times.⁶⁶

67. In an appeal issued in 1979 with respect to the conflict in Rhodesia/Zimbabwe, the ICRC stated that “fundamental humanitarian rules accepted by all nations – such as the obligation to distinguish between combatants and civilians, and to refrain from violence against the latter – have been largely ignored”.⁶⁷

68. In a press release issued in 1984 in the context of the Iran–Iraq War, the ICRC stated that “in violation of the laws and customs of war, and in particular of the essential principle that military targets must be distinguished from

⁶² ICTY, *Blaškić case*, Judgement, 3 March 2000, § 180.

⁶³ ICTY, Final Report to the Prosecutor by the Committee Established to Review the NATO Bombing Campaign Against the Federal Republic of Yugoslavia, The Hague, 14 June 2000, § 29.

⁶⁴ IACiHR, *Case 11.137 (Argentina)*, Report, 18 November 1997, § 177.

⁶⁵ IACiHR, Third report on the human rights situation in Colombia, Doc. OEA/Ser.L/V/II.102 Doc. 9 rev. 1, 26 February 1999, § 40.

⁶⁶ Frédéric de Mulinen, *Handbook on the Law of War for Armed Forces*, ICRC, Geneva, 1987, § 387.

⁶⁷ ICRC, Conflict in Southern Africa: ICRC appeal, 19 March 1979, § 2, *IRRC*, No. 209, 1979, p. 87.

civilian persons and objects, the Iraqi armed forces have continued to bomb Iranian civilian zones".⁶⁸

69. In several press releases issued in 1992, the ICRC reminded the parties to the armed conflict in Afghanistan of their duty to distinguish at all times between combatants and civilians.⁶⁹

70. In a Memorandum on the Applicability of International Humanitarian Law sent in 1990 to all States party to the Geneva Conventions in the context of the Gulf War, the ICRC stated that "the following general rules are recognized as binding on any party to an armed conflict: . . . a distinction must be made in all circumstances between combatants and military objectives on the one hand, and civilians and civilian objects on the other".⁷⁰

71. In a communication to the press in 1993, the ICRC reminded the parties to the conflict in Georgia of their obligation "to distinguish at all times between combatants and military objectives on the one hand, and civilians and civilian objects on the other".⁷¹

72. In a communication to the press in 1993, the ICRC reminded the parties to the conflict in Nagorno-Karabakh of their obligation "to distinguish at all times between combatants and military objectives on the one hand and civilians and civilian property on the other".⁷²

73. In 1994, in a Memorandum on Respect for International Humanitarian Law in Angola, the ICRC stated that "a clear distinction must be made in all circumstances between civilians and civilian objects on the one hand and combatants and military objectives on the other".⁷³

74. In 1994, in a Memorandum on Compliance with International Humanitarian Law by the Forces Participating in Opération Turquoise in the Great Lakes region, the ICRC stated that "a clear distinction must be made, in all circumstances, between civilian persons who do not participate in confrontations and refrain from acts of violence and civilian objects on the one hand, and combatants and military objectives on the other".⁷⁴

⁶⁸ ICRC, Press Release No. 1480, Conflict between Iran and Iraq and breaches of international humanitarian law: a renewed ICRC appeal, 15 February 1984, *IRRC*, No. 239, 1984, pp. 113–115.

⁶⁹ ICRC, Press Release No. 1712, Afghanistan: Appeal for Compliance with Humanitarian Rules, 5 May 1992; Press Release No. 1724, Kabul: ICRC urges respect for civilians as medical facilities struggle to cope, 20 July 1992; Press Release No. 1726, Afghanistan: Renewed ICRC Appeal for Compliance with Humanitarian Rules, 14 August 1992.

⁷⁰ ICRC, Memorandum on the Applicability of International Humanitarian Law, 14 December 1990, § II, *IRRC*, No. 280, 1991, p. 24.

⁷¹ ICRC, Communication to the Press No. 93/31, Georgia: ICRC activities in Abkhazia, 20 September 1993.

⁷² ICRC, Communication to the Press No. 93/25, Nagorno-Karabakh conflict: 60,000 civilians flee fighting in south-western Azerbaijan, 19 August 1993.

⁷³ ICRC, Memorandum on Respect for International Humanitarian Law in Angola, 8 June 1994, § II, *IRRC*, No. 320, 1997, p. 503.

⁷⁴ ICRC, Memorandum on Compliance with International Humanitarian Law by the Forces Participating in Opération Turquoise, 23 June 1994, § II, reprinted in Marco Sassòli and Antoine A. Bouvier, *How Does Law Protect in War?*, ICRC, Geneva, 1999, p. 1308.

75. In a communication to the press in 1999, the ICRC called upon all the parties to the internal conflict in Sierra Leone to abide by the rules of IHL and in particular to make a clear distinction between combatants and civilians so as to protect persons not or no longer taking part in hostilities.⁷⁵

VI. *Other Practice*

76. In a resolution adopted at its Edinburgh Session in 1969, the Institute of International Law recalled that “the obligation to respect the distinction between military objectives and non-military objects, as well as between persons participating in the hostilities and members of the civilian population, remains a fundamental principle of the international law in force”.⁷⁶

77. In 1980, an armed opposition group expressed its acceptance of the fundamental principles of IHL as formulated by the ICRC, including the principle that “the parties to the conflict shall at all times distinguish between the civilian population and combatants in order to spare the civilian population and civilian objects”.⁷⁷

78. In 1985, in a report on violations of the laws of war in Nicaragua, Americas Watch stated that:

Certain general principles of the customary law of armed conflict were recognized in U.N. General Assembly Resolution 2444 (XXIII), 13 January 1969, which was adopted by unanimous vote. This resolution affirms . . . that distinction must be made at all times between persons taking part in the hostilities and members of the civilian population.⁷⁸

79. In 1989, in a report on violations of the laws of war in Angola, Africa Watch stated that:

United Nations General Assembly Resolution 2444, *Respect for Human Rights in Armed Conflicts* . . . adopted by unanimous vote on December 19, 1969, expressly recognized this customary principle of civilian immunity and its complementary principle requiring the warring parties to distinguish civilians from combatants at all times . . . Furthermore, the International Committee of the Red Cross has long regarded these principles as basic rules of the laws of war that apply in all armed conflicts. The United States government also has expressly recognized these principles as declaratory of existing customary international law.⁷⁹

80. Rule A1 of the Rules of International Humanitarian Law Governing the Conduct of Hostilities in Non-international Armed Conflicts, adopted in 1990

⁷⁵ ICRC, Communication to the Press No. 99/02, Sierra Leone: ICRC pulls out of Freetown, 14 January 1999.

⁷⁶ Institute of International Law, Edinburgh Session, Resolution on the Distinction between Military Objectives and Non-military Objects in General and Particularly the Problems Associated with Weapons of Mass Destruction, 9 September 1969, § 1.

⁷⁷ ICRC archive document.

⁷⁸ Americas Watch, *Violations of the Laws of War by Both Sides in Nicaragua: 1981–1985*, New York, March 1985, pp. 19–20.

⁷⁹ Africa Watch, *Angola: Violations of the Laws of War by Both Sides*, New York, April 1989, p. 126.

by the Council of the IIHL, provides that “the obligation to distinguish between combatants and civilians is a general rule applicable in non-international armed conflicts”. The commentary on this rule notes that it is based on the St. Petersburg Declaration, Article 25 HR, UN General Assembly Resolutions 2444 (XXIII) and 2675 (XXV), common Article 3 of the 1949 Geneva Conventions and Article 13(2) AP II.⁸⁰

81. In 1992, in a report on war crimes committed in the conflict in Bosnia and Herzegovina, Helsinki Watch stated that:

United Nations General Assembly Resolution 2444, adopted by unanimous vote on December 19, 1969, expressly recognized the customary law principle of civilian immunity and its complementary principle requiring the warring parties to distinguish civilians from combatants at all times.⁸¹

82. In 1995, the IIHL stated that any declaration on minimum humanitarian standards should be based on “principles . . . of *jus cogens*, expressing basic humanitarian consideration[s] which are recognized to be universally binding”. According to the IIHL, this includes the principle that “in the case where the situation is characterized by hostilities, the difference between combatants and civilians shall be made”.⁸²

Attacks against combatants

I. Treaties and Other Instruments

Treaties

83. The preamble to the 1868 St. Petersburg Declaration states that “the only legitimate object which States should endeavour to accomplish during war is to weaken the military forces of the enemy”.

84. Article 48 AP I states that “Parties to the conflict . . . shall direct their operations only against military objectives”. Article 48 AP I was adopted by consensus.⁸³

85. Article 52(2) AP I states that “attacks shall be limited strictly to military objectives”. Article 52 AP I was adopted by 79 votes in favour, none against and 7 abstentions.⁸⁴

⁸⁰ IIHL, Rules of International Humanitarian Law Governing the Conduct of Hostilities in Non-international Armed Conflicts, Rule A1 and Commentary, *IRRC*, No. 278, 1990, Commentary, pp. 387–388.

⁸¹ Helsinki Watch, *War Crimes in Bosnia-Herzegovina*, Vol. I, New York, August 1992, p. 203.

⁸² IIHL, Comments on the Declaration of Minimum Humanitarian Standards submitted to the UN Secretary-General, §§ 1 and 12, reprinted in Report of the Secretary-General prepared pursuant to UN Commission on Human Rights resolution 1995/29, UN Doc. E/CN.4/1996/80, 28 November 1995, pp. 8–9.

⁸³ CDDH, *Official Records*, Vol. VI, CDDH/SR.41, 26 May 1977, p. 161.

⁸⁴ CDDH, *Official Records*, Vol. VI, CDDH/SR.41, 26 May 1977, p. 168.

86. Upon ratification of AP I, Australia stated that “it is the understanding of Australia that the first sentence of paragraph 2 of Article 52 is not intended to, nor does it, deal with the question of incidental or collateral damage resulting from an attack directed against a military objective”.⁸⁵

87. Upon ratification of AP I, Canada stated that:

It is the understanding of the Government of Canada in relation to Article 52 that . . . the first sentence of paragraph 2 of the Article is not intended to, nor does it, deal with the question of incidental or collateral damage resulting from an attack directed against a military objective.⁸⁶

88. Upon ratification of AP I, France stated that “the Government of the French Republic considers that the first sentence of paragraph 2 of Article 52 does not deal with the question of collateral damage resulting from attacks directed against military objectives”.⁸⁷

89. Upon ratification of AP I, Italy declared that “the first sentence of paragraph 2 of [Article 52] prohibits only such attacks as may be directed against non-military objectives. Such a sentence does not deal with the question of collateral damage caused by attacks directed against military objectives.”⁸⁸

90. Upon ratification of AP I, New Zealand stated that “the first sentence of paragraph 2 of [Article 52] is not intended to, nor does it, deal with the question of incidental or collateral damage resulting from an attack directed against a military objective”.⁸⁹

91. Upon ratification of AP I, the UK stated that:

It is the understanding of the United Kingdom that . . . the first sentence of paragraph 2 [of Article 52] prohibits only such attacks as may be directed against non-military objectives; it does not deal with the question of collateral damage resulting from attacks directed against military objectives.⁹⁰

92. Article 24(1) of draft AP II submitted by the ICRC to the CDDH stated that “in order to ensure respect for the civilian population, the parties to the conflict shall confine their operations to the destruction or weakening of the military resources of the adversary”.⁹¹ This proposal was amended and adopted by consensus in Committee III of the CDDH.⁹² The approved text provided that “in order to ensure respect and protection for the civilian population . . . the Parties to the conflict . . . shall direct their operations only against military

⁸⁵ Australia, Declarations made upon ratification of AP I, 21 June 1991, § 5.

⁸⁶ Canada, Reservations and statements of understanding made upon ratification of AP I, 20 November 1990, § 8(b).

⁸⁷ France, Declarations and reservations made upon ratification of AP I, 11 April 2001, § 12.

⁸⁸ Italy, Declarations made upon ratification of AP I, 27 February 1986, § 8.

⁸⁹ New Zealand, Declarations made upon ratification of AP I, 8 February 1988, § 4.

⁹⁰ UK, Reservations and declarations made upon ratification of AP I, 28 January 1998, § j.

⁹¹ CDDH, *Official Records*, Vol. I, Part Three, Draft Additional Protocols, June 1973, p. 37.

⁹² CDDH, *Official Records*, Vol. XV, CDDH/215/Rev.1, 3 February–18 April 1975, p. 288, § 113.

objectives".⁹³ Eventually, however, it was deleted in the plenary, because it failed to obtain the necessary two-thirds majority (36 in favour, 19 against and 36 abstentions).⁹⁴

Other Instruments

93. Article 15 of the 1863 Lieber Code states that "military necessity admits of all direct destruction of life or limb of 'armed' enemies... it allows of the capturing of every armed enemy, and every enemy of importance to the hostile government, or of peculiar danger to the captor".

94. The commentary on Article 3 of the 1880 Oxford Manual refers to the principle laid down in the 1868 St. Petersburg Declaration that "the only legitimate object which States should endeavour to accomplish during war is to weaken the military forces of the enemy".

95. According to Article 24(2) of the 1923 Hague Rules of Air Warfare, "military forces" are military objectives.

96. Article 7 of the 1956 New Delhi Draft Rules states that "in order to limit the dangers incurred by the civilian population, attacks may only be directed against military objectives". Paragraph I(1) of the proposed annex to Article 7(2) stated that "armed forces, including auxiliary or complementary organizations, and persons who, though not belonging to the above-mentioned formations, nevertheless take part in the fighting" were military objectives considered to be of "generally recognized military importance".

97. Paragraph 6 of the 1991 Memorandum of Understanding on the Application of IHL between Croatia and the SFRY requires that hostilities be conducted in accordance with Articles 48 and 52(2) AP I.

98. Paragraph 2.5 of the 1992 Agreement on the Application of IHL between the Parties to the Conflict in Bosnia and Herzegovina requires that hostilities be conducted in accordance with Articles 48 and 52(2) AP I.

99. Paragraph 41 of the 1994 San Remo Manual provides that "attacks shall be limited strictly to military objectives".

100. Section 5.1 of the 1999 UN Secretary-General's Bulletin states that "military operations shall be directed only against combatants and military objectives".

II. National Practice

Military Manuals

101. Australia's Defence Force Manual states that "military operations must only be conducted against enemy armed forces and military objects".⁹⁵

⁹³ CDDH, *Official Records*, Vol. XV, CDDH/215/Rev.1, 3 February–18 April 1975, p. 319.

⁹⁴ CDDH, *Official Records*, Vol. VII, CDDH/SR.52, 6 June 1977, p. 135, § 78.

⁹⁵ Australia, *Defence Force Manual* (1994), § 210.

- 102.** Belgium's Teaching Manual for Soldiers states that only enemy combatants may be attacked.⁹⁶
- 103.** Benin's Military Manual states that "a combatant must fight only combatants".⁹⁷
- 104.** Cameroon's Instructors' Manual states that armed forces are considered military objectives, with the exception of religious and medical personnel.⁹⁸
- 105.** Canada's LOAC Manual states that "combatants are legitimate targets and may be attacked".⁹⁹
- 106.** Canada's Code of Conduct requires Canadian forces to "engage only opposing forces and military objectives".¹⁰⁰
- 107.** Colombia's Circular on Fundamental Rules of IHL states that "neither the civilian population, as such, nor individual civilians may be made the object of attack. Attacks may only be directed against military objectives."¹⁰¹
- 108.** Colombia's Instructors' Manual states that it is a rule of combat to "fight only combatants".¹⁰²
- 109.** Croatia's LOAC Compendium includes armed forces among military objectives.¹⁰³
- 110.** Croatia's Commanders' Manual states that "combatants may be attacked".¹⁰⁴
- 111.** The Military Manual of the Dominican Republic states that only combatants are proper targets for attack.¹⁰⁵
- 112.** Ecuador's Naval Manual states that only attacks against combatants and other military objectives are lawful.¹⁰⁶
- 113.** France's LOAC Summary Note states that combatants are military objectives.¹⁰⁷
- 114.** Germany's Military Manual provides that military objectives include, in particular, armed forces.¹⁰⁸
- 115.** Hungary's Military Manual states that armed forces are military objectives.¹⁰⁹
- 116.** Israel's Manual on the Laws of War states that "any soldier (male or female!) in the enemy's army is a legitimate military target for attack, whether on the battlefield or outside of it".¹¹⁰
- 117.** According to Italy's IHL Manual, armed forces may be attacked.¹¹¹

⁹⁶ Belgium, *Teaching Manual for Soldiers* (undated), pp. 7, 10, 14 and 41.

⁹⁷ Benin, *Military Manual* (1995), Fascicule I, p. 17, see also Fascicule II, p. 18.

⁹⁸ Cameroon, *Instructors' Manual* (1992), p. 17.

⁹⁹ Canada, *LOAC Manual* (1999), p. 4-2, § 12. ¹⁰⁰ Canada, *Code of Conduct* (2001), Rule 1.

¹⁰¹ Colombia, *Circular on Fundamental Rules of IHL* (1992), § 7.

¹⁰² Colombia, *Instructors' Manual* (1999), p. 15.

¹⁰³ Croatia, *LOAC Compendium* (1991), p. 7.

¹⁰⁴ Croatia, *Commanders' Manual* (1992), § 8.

¹⁰⁵ Dominican Republic, *Military Manual* (1980), p. 3.

¹⁰⁶ Ecuador, *Naval Manual* (1989), § 8.1. ¹⁰⁷ France, *LOAC Summary Note* (1992), § 1.2.

¹⁰⁸ Germany, *Military Manual* (1992), § 443. ¹⁰⁹ Hungary, *Military Manual* (1992), p. 18.

¹¹⁰ Israel, *Manual on the Laws of War* (1998), p. 42. ¹¹¹ Italy, *IHL Manual* (1991), Vol. I, § 12.

- 118.** Italy's LOAC Elementary Rules Manual states that "combatants may participate directly in hostilities and may be attacked".¹¹²
- 119.** Kenya's LOAC Manual states that "fighting is only to be directed at the enemy combatant".¹¹³
- 120.** According to South Korea's Military Law Manual, it is only permissible to kill combatants.¹¹⁴
- 121.** Madagascar's Military Manual states that "combatants must fight only enemy combatants".¹¹⁵
- 122.** The Military Manual of the Netherlands states that "operations may only be directed against military objectives". It adds that "combatants who are part of the armed forces" are military objectives "under all circumstances".¹¹⁶
- 123.** The Military Handbook of the Netherlands requires that soldiers "attack only combatants".¹¹⁷
- 124.** New Zealand's Military Manual provides that attacks must be directed against military objectives and that combatants are military objectives.¹¹⁸
- 125.** Nigeria's Military Manual and Soldiers' Code of Conduct state that combatants must "fight only combatants".¹¹⁹
- 126.** The Soldier's Rules of the Philippines requires soldiers to "fight only enemy combatants".¹²⁰
- 127.** The Joint Circular on Adherence to IHL and Human Rights of the Philippines states that "when the use of armed force is inevitable, strict controls must be exercised to insure that only reasonable force necessary for mission accomplishment shall be taken and shall be directed only against hostile elements, not against civilians or non-combatants".¹²¹
- 128.** Romania's Soldiers' Manual states that combatants must "fight only combatants".¹²²
- 129.** South Africa's LOAC Manual requires soldiers in combat to "fight only enemy combatants".¹²³
- 130.** Spain's LOAC Manual states that the armed forces of the enemy are considered a legitimate target of attack.¹²⁴
- 131.** Sweden's IHL Manual states that "a distinction shall always be made between persons participating in hostilities and who are thereby legitimate

¹¹² Italy, *LOAC Elementary Rules Manual* (1991), § 8.

¹¹³ Kenya, *LOAC Manual* (1997), Précis No. 2, p. 15, see also Précis No. 3, p. 2.

¹¹⁴ South Korea, *Military Law Manual* (1996), p. 86.

¹¹⁵ Madagascar, *Military Manual* (1994), Fiche No. 1-T, § B, see also Fiche No. 3-O, § 8.

¹¹⁶ Netherlands, *Military Manual* (1993), pp. V-1 and V-3.

¹¹⁷ Netherlands, *Military Handbook* (1995), p. 7-36.

¹¹⁸ New Zealand, *Military Manual* (1992), p. 5-21, § 515(1) and p. 5-22, § 516(1).

¹¹⁹ Nigeria, *Military Manual* (1994), p. 39, § 5(a); *Soldiers' Code of Conduct* (undated), § 8.

¹²⁰ Philippines, *Soldier's Rules* (1989), § 2.

¹²¹ Philippines, *Joint Circular on Adherence to IHL and Human Rights* (1991), § (2)(a)(2).

¹²² Romania, *Soldiers' Manual* (1991), p. 4. ¹²³ South Africa, *LOAC Manual* (1996), § 25(a).

¹²⁴ Spain, *LOAC Manual* (1996), Vol. I, § 4.2.b.

objectives, and members of the civilian population, who may not constitute objectives in warfare".¹²⁵

132. Switzerland's Basic Military Manual states that only military objectives may be attacked, including enemy armed forces.¹²⁶

133. Togo's Military Manual states that "a combatant must fight only enemy combatants".¹²⁷

134. The UK Military Manual states that:

The most important powers of resistance possessed by a belligerent . . . are his armed forces with their military stores and equipment, and his defence installations of all kinds. The means of reducing these powers of resistance [include] killing and disabling enemy combatants.¹²⁸

135. The US Rules of Engagement for Operation Desert Storm sets as a basic rule "fight only combatants".¹²⁹

136. The US Naval Handbook states that only attacks against combatants and other military objectives are lawful.¹³⁰

137. The YPA Military Manual of the SFRY (FRY) states that "the armed forces are an instrument of force and [may be] the direct object of attack. It is permitted to kill, wound or disable their members in combat, except where they surrender or when due to wounds or sickness they are disabled for combat."¹³¹ The manual further specifies that "it is permitted to directly attack only members of the armed forces and other persons – only if they directly participate in military operations".¹³²

National Legislation

138. Under Ireland's Geneva Conventions Act as amended, any "minor breach" of AP I, including violations of Articles 48 and 52(2) AP I, is a punishable offence.¹³³

139. According to Italy's Law of War Decree as amended, armed forces may be attacked.¹³⁴

140. Under Norway's Military Penal Code as amended, "anyone who contravenes or is accessory to the contravention of provisions relating to the protection of persons or property laid down in . . . the two additional protocols to [the Geneva] Conventions . . . is liable to imprisonment".¹³⁵

¹²⁵ Sweden, *IHL Manual* (1991), Section 3.2.1.5, p. 40.

¹²⁶ Switzerland, *Basic Military Manual* (1987), Article 28.

¹²⁷ Togo, *Military Manual* (1995), Fascicule I, p. 18, see also Fascicule II, p. 18.

¹²⁸ UK, *Military Manual* (1958), § 108.

¹²⁹ US, *Rules of Engagement for Operation Desert Storm* (1991), § 1.

¹³⁰ US, *Naval Handbook* (1995), § 8.1. ¹³¹ SFRY (FRY), *YPA Military Manual* (1988), § 49.

¹³² SFRY (FRY), *YPA Military Manual* (1988), § 67.

¹³³ Ireland, *Geneva Conventions Act as amended* (1962), Section 4(1) and (4).

¹³⁴ Italy, *Law of War Decree as amended* (1938), Article 40.

¹³⁵ Norway, *Military Penal Code as amended* (1902), § 108(b).

National Case-law

141. No practice was found.

Other National Practice

142. At the CDDH, Canada stated that the first sentence of draft Article 47(2) AP I (now Article 52(2)) “prohibits only attacks that could be directed against non-military objectives. It does not deal with the result of a legitimate attack on military objectives and incidental damage that such attack may cause.”¹³⁶

143. At the CDDH, the FRG stated that the first sentence of draft Article 47(2) AP I (now Article 52(2)) “is a restatement of the basic rule contained in Article 43 [now Article 48], namely that the Parties to a conflict shall direct their operations only against military objectives. It does not deal with the question of collateral damage caused by attacks directed against military objectives.”¹³⁷

144. The Report on the Practice of Jordan notes that a booklet on the LOAC prepared by the ICRC is used by military commanders. The booklet gives a list of principles to apply in military action, among which is the obligation of the armed forces to fight only combatants.¹³⁸

145. The Report on the Practice of Malaysia states that attacks should only be “directed against combatant targets which shall be distinguished and confirmed”.¹³⁹

146. At the CDDH, Mexico stated that it believed draft Article 47 AP I (now Article 52) to be so essential that it “cannot be the subject of any reservations whatsoever since these would be inconsistent with the aim and purpose of Protocol I and undermine its basis”.¹⁴⁰

147. At the CDDH, the Netherlands stated that the first sentence of draft Article 47(2) AP I (now Article 52(2)) “prohibits only such attacks as may be directed against non-military objectives and consequently does not deal with the question of collateral damage caused by attacks directed against military objectives”.¹⁴¹

148. At the CDDH, the UK stated that it did not interpret the obligation in the first sentence of draft Article 47(2) AP I (now Article 52(2)) “as dealing with the question of incidental damage caused by attacks directed against military objectives. In its view, the purpose of the first sentence of the paragraph was

¹³⁶ Canada, Statement at the CDDH, *Official Records*, Vol. VI, CDDH/SR.41, 26 May 1977, p. 179.

¹³⁷ FRG, Statement at the CDDH, *Official Records*, Vol. VI, CDDH/SR.41, 26 May 1977, p. 188.

¹³⁸ Report on the Practice of Jordan, 1997, Answers to additional questions on Chapter 1.1.

¹³⁹ Report on the Practice of Malaysia, 1997, Answers to additional questions on Chapter 1.4.

¹⁴⁰ Mexico, Statement at the CDDH, *Official Records*, Vol. VI, CDDH/SR.41, 26 May 1977, p. 193.

¹⁴¹ Netherlands, Statement at the CDDH, *Official Records*, Vol. VI, CDDH/SR.41, 26 May 1977, p. 195.

to prohibit only such attacks as might be directed against non-military objectives.”¹⁴²

149. At the CDDH, the US stated that the first sentence of draft Article 47(2) AP I (now Article 52(2)) “prohibits only such attacks as may be directed against non-military objectives. It does not deal with the question of collateral damage caused by attacks directed against military objectives.”¹⁴³

III. Practice of International Organisations and Conferences

150. No practice was found.

IV. Practice of International Judicial and Quasi-judicial Bodies

151. No practice was found.

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

152. To fulfil its task of disseminating IHL, the ICRC has delegates around the world teaching armed and security forces that “combatants may be attacked”.¹⁴⁴

VI. Other Practice

153. In 1980, an armed opposition group expressed its acceptance of the fundamental principles of IHL as formulated by the ICRC, including the principle that “attacks shall be directed solely against military objectives”.¹⁴⁵

Attacks against civilians

I. Treaties and Other Instruments

Treaties

154. Article 51(2) AP I states that “the civilian population as such, as well as individual civilians, shall not be the object of attack”. Article 51 AP I was adopted by 77 votes in favour, one against and 16 abstentions.¹⁴⁶

155. According to Article 85(3)(a) AP I, “making the civilian population or individual civilians the object of attack” is a grave breach of the Protocol. Article 85 AP I was adopted by consensus.¹⁴⁷

¹⁴² UK, Statement at the CDDH, *Official Records*, Vol. VI, CDDH/SR.41, 26 May 1977, p. 169, § 153.

¹⁴³ US, Statement at the CDDH, *Official Records*, Vol. VI, CDDH/SR.41, 26 May 1977, p. 204.

¹⁴⁴ Frédéric de Mulinen, *Handbook on the Law of War for Armed Forces*, ICRC, Geneva, 1987, § 210.

¹⁴⁵ ICRC archive document.

¹⁴⁶ CDDH, *Official Records*, Vol. VI, CDDH/SR.41, 26 May 1977.

¹⁴⁷ CDDH, *Official Records*, Vol. VI, CDDH/SR.44, 30 May 1977.

156. Article 13(2) AP II provides that “the civilian population as such, as well as individual civilians, shall not be the object of attack”. Article 13 AP II was adopted by consensus.¹⁴⁸

157. Article 3(2) of the 1980 Protocol II to the CCW and Article 3(7) of the 1996 Amended Protocol II to the CCW provide that “it is prohibited in all circumstances to direct [mines, booby-traps and other devices], either in offence, defence or by way of reprisals, against the civilian population as such or against individual civilians”.

158. Article 2(1) of the 1980 Protocol III to the CCW states that “it is prohibited in all circumstances to make the civilian population as such [or] individual civilians . . . the object of attack by incendiary weapons”.

159. Article 3 of the 1996 Israel-Lebanon Ceasefire Understanding states that “the two parties commit to ensuring that under no circumstances will civilians be the target of attack”.

160. Pursuant to Article 8(2)(b)(i) and (e)(i) of the 1998 ICC Statute, “intentionally directing attacks against the civilian population as such or against individual civilians not taking a direct part in hostilities” constitutes a war crime in both international and non-international armed conflicts.

161. Article 4(a) of the 2002 Statute of the Special Court for Sierra Leone provides that:

The Special Court shall have the power to prosecute persons who committed the following serious violations of international humanitarian law:

- (a) Intentionally directing attacks against the civilian population as such or against individual civilians not taking direct part in hostilities.

Other Instruments

162. Article 22 of the 1863 Lieber Code provides that “the principle has been more and more acknowledged that the unarmed citizen is to be spared in person, property, and honor as much as the exigencies of war will admit”.

163. Article 1 of the 1938 ILA Draft Convention for the Protection of Civilian Populations against New Engines of War provides that “the civilian population of a State shall not form the object of an act of war”.

164. According to Article 6 of the 1956 New Delhi Draft Rules, “attacks directed against the civilian population, as such, whether with the object of terrorizing it or for any other reason, are prohibited. This prohibition applies both to attacks on individuals and to those directed against groups.”

165. Article 3(a) of the 1990 Cairo Declaration on Human Rights in Islam affirms that “in the event of the use of force and in case of armed conflict, it is not permissible to kill non-belligerents such as old men, women and children”.

¹⁴⁸ CDDH, *Official Records*, Vol. VII, CDDH/SR.52, 6 June 1977.

166. In the 1991 Hague Statement on Respect for Humanitarian Principles, the Presidents of the six republics of the former Yugoslavia accepted to apply the fundamental principle that “the civilian population . . . must not be attacked”.

167. Paragraph 6 of the 1991 Memorandum of Understanding on the Application of IHL between Croatia and the SFRY requires that hostilities be conducted in accordance with Article 51(2) AP I.

168. Paragraph 2.5 of the 1992 Agreement on the Application of IHL between the Parties to the Conflict in Bosnia and Herzegovina requires that hostilities be conducted in accordance with Article 51(2) AP I.

169. The 1993 Franco-German Declaration on the War in Bosnia and Herzegovina condemned “the bombardment of the Muslim population” in Gorazde and Mostar.

170. Pursuant to Article 20(b)(i) of the 1996 ILC Draft Code of Crimes against the Peace and Security of Mankind, “making the civilian population or individual civilians the object of attack” is a war crime.

171. Section 5.1 of the 1999 UN Secretary-General’s Bulletin states that “attacks on civilians . . . are prohibited”.

172. The 2000 UNTAET Regulation No. 2000/15 establishes panels with exclusive jurisdiction over serious criminal offences, including war crimes. According to Section 6(1)(b)(i) and (e)(i) of the Regulation, “intentionally directing attacks against the civilian population as such or against individual civilians not taking a direct part in hostilities” constitutes a war crime in both international and non-international armed conflicts.

II. National Practice

Military Manuals

173. Argentina’s Law of War Manual states that “the prohibition to attack civilians and civilian objects implies that any act of violence, whether in offence or defence, against them is prohibited”.¹⁴⁹ With respect to non-international armed conflicts in particular, the manual states that “the civilian population and individual civilians shall not be the object of attack”.¹⁵⁰ Lastly, the manual states that “attacks against the civilian population [and] against individual civilians” constitute grave breaches.¹⁵¹

174. According to Australia’s Commanders’ Guide, “making the civilian population or individual civilians the object of attack” is an example of acts which constitute “grave breaches or serious war crimes likely to warrant institution of criminal proceedings”.¹⁵²

¹⁴⁹ Argentina, *Law of War Manual* (1989), § 4.03.

¹⁵⁰ Argentina, *Law of War Manual* (1989), § 7.08.

¹⁵¹ Argentina, *Law of War Manual* (1989), § 8.03.

¹⁵² Australia, *Commanders’ Guide* (1994), § 1305(g).

175. Australia's Defence Force Manual states that "attacks directed against the civilian population or civilian objects are prohibited".¹⁵³ The manual also states that "making the civilian population or individual civilians the object of attack" is an example of acts which constitute "grave breaches or serious war crimes likely to warrant institution of criminal proceedings".¹⁵⁴

176. Belgium's Teaching Manual for Soldiers states that civilians must not be attacked.¹⁵⁵

177. Benin's Military Manual states that the prohibition on attacking the civilian population, individual civilians and civilian property as a method of combat must be respected.¹⁵⁶

178. Cameroon's Instructors' Manual requires that the civilian population be protected and respected during military operations.¹⁵⁷

179. Canada's LOAC Manual states that "as a general rule, civilians... shall not be attacked".¹⁵⁸ It further states that "making the civilian population or individual civilians the object of attack" is a grave breach of AP I.¹⁵⁹ With respect to non-international armed conflicts in particular, the manual states that "the civilian population and civilians are to be protected against the dangers arising from the conflict. Neither the civilian population nor individual civilians may be made the object of attack."¹⁶⁰

180. Canada's Code of Conduct states that:

Force used during operations must be directed against opposing forces and military objectives. Therefore, civilians not taking part in hostilities must not be targeted. [This rule] not only makes sense morally but also helps to ensure the most efficient use of military resources. In simple terms, "warriors fight warriors"... An "opposing force" is any individual or group of individuals who pose a threat to you or your mission... In an armed conflict, on the other hand, the enemy forces are opposing forces whether or not they pose an immediate threat.¹⁶¹

181. Colombia's Circular on Fundamental Rules of IHL states that "neither the civilian population as such nor individual civilians may be made the object of attack".¹⁶²

182. Colombia's Basic Military Manual provides that "the civilian population is not a military objective".¹⁶³

¹⁵³ Australia, *Defence Force Manual* (1994), § 503; see also *Commanders' Guide* (1994), § 405.

¹⁵⁴ Australia, *Defence Force Manual* (1994), § 1315(g).

¹⁵⁵ Belgium, *Teaching Manual for Soldiers* (undated), p. 7, see also pp. 10, 14 and 41.

¹⁵⁶ Benin, *Military Manual* (1995), Fascicule III, p. 12.

¹⁵⁷ Cameroon, *Instructors' Manual* (1992), pp. 150-151.

¹⁵⁸ Canada, *LOAC Manual* (1999), p. 4-4, § 32, see also p. 7-5, § 46 (air to land operations).

¹⁵⁹ Canada, *LOAC Manual* (1999), p. 16-3, § 16(a).

¹⁶⁰ Canada, *LOAC Manual* (1999), p. 17-5, § 37.

¹⁶¹ Canada, *Code of Conduct* (2001), Rule 1, §§ 3 and 5.

¹⁶² Colombia, *Circular on Fundamental Rules of IHL* (1992), § 7.

¹⁶³ Colombia, *Basic Military Manual* (1995), p. 49; see also *Instructors' Manual* (1999), pp. 15-16.

183. Croatia's Commanders' Manual and Instructions on Basic Rules of IHL emphasise that attacks on civilians and civilian objects are prohibited.¹⁶⁴

184. According to Croatia's LOAC Compendium, "attacks on the civilian population" constitute grave breaches and thus war crimes.¹⁶⁵

185. The Military Manual of the Dominican Republic states that non-combatants (a term defined as including civilians) must not be attacked.¹⁶⁶

186. Ecuador's Naval Manual states that "civilians and civilian objects may not be made the object of attack".¹⁶⁷ The manual further states that "bombardment for the sole purpose of attacking and terrorising the civilian population" constitutes a war crime.¹⁶⁸

187. El Salvador's Soldiers' Manual states that "your honour as a combatant requires that you never attack nor mistreat women, children, the elderly and any person who does not bear arms".¹⁶⁹

188. France's LOAC Summary Note states that "civilians may not be attacked".¹⁷⁰ The manual further considers that "attacks against the civilian population or against individual civilians" constitute grave breaches and thus war crimes.¹⁷¹

189. Germany's Military Manual states that "the prohibition of indiscriminate warfare implies that the civilian population as such as well as individual civilians shall not be the object of attack and that they shall be spared as far as possible".¹⁷²

190. Germany's IHL Manual states that "pursuant to Article 85(3) of Additional Protocol I, attacks against the civilian population constitute serious violations of international law and therefore war crimes".¹⁷³

191. According to Hungary's Military Manual, "attacks on the civilian population" constitute grave breaches and thus war crimes.¹⁷⁴

192. Indonesia's Military Manual considers that attacks on civilians are prohibited.¹⁷⁵

193. With reference to Israel's Law of War Booklet, the Report on the Practice of Israel states that "the IDF is extremely conscious of the necessity to differentiate between civilians and legitimate targets. Attacks on civilians are strictly prohibited."¹⁷⁶

¹⁶⁴ Croatia, *Commanders' Manual* (1992), § 10; *Instructions on Basic Rules of IHL* (1993), § 7.

¹⁶⁵ Croatia, *LOAC Compendium* (1991), p. 56.

¹⁶⁶ Dominican Republic, *Military Manual* (1980), p. 3.

¹⁶⁷ Ecuador, *Naval Manual* (1989), § 8.1.2, see also §§ 11.2 and 11.3.

¹⁶⁸ Ecuador, *Naval Manual* (1989), § 6.2.5. ¹⁶⁹ El Salvador, *Soldiers' Manual* (undated), p. 3.

¹⁷⁰ France, *LOAC Summary Note* (1992), § 1.3; see also *LOAC Teaching Note* (2000), p. 4.

¹⁷¹ France, *LOAC Summary Note* (1992), § 3.4.

¹⁷² Germany, *Military Manual* (1992), § 404, see also § 429.

¹⁷³ Germany, *IHL Manual* (1996), § 404; see also *Military Manual* (1992), § 1209.

¹⁷⁴ Hungary, *Military Manual* (1992), p. 90. ¹⁷⁵ Indonesia, *Military Manual* (1982), § 109.

¹⁷⁶ Report on the Practice of Israel, 1997, Chapter 1.3, referring to *Law of War Booklet* (1986), Chapter 1.

194. Israel's Manual on the Laws of War states that the principle of distinction "clearly imposes the obligation to refrain from harming civilians insofar as possible".¹⁷⁷

195. Italy's IHL Manual states that "bombardment, the sole purpose of which is to attack the civilian population," is prohibited.¹⁷⁸

196. Italy's LOAC Elementary Rules Manual states that "civilians may not be attacked, unless they participate directly in hostilities".¹⁷⁹

197. Kenya's LOAC Manual states that "civilians are protected from attack under the law of armed conflict. They lose their protection when they take a direct part in hostilities."¹⁸⁰ The manual further states that "it is forbidden to attack the civilian population, individual civilians or civilian objects as a deliberate method of warfare".¹⁸¹

198. South Korea's Military Law Manual states that direct attacks against civilians are contrary to international law.¹⁸²

199. South Korea's Military Regulation 187 provides that "killing non-combatants" is a war crime.¹⁸³

200. Madagascar's Military Manual states that "civilian persons may not be attacked, unless they participate directly in hostilities".¹⁸⁴

201. The Military Manual of the Netherlands states that "neither the civilian population, nor individual civilians may be made the target of an attack".¹⁸⁵

The manual further states that "the carrying out of attacks against the civilian population or individual civilians" constitutes a grave breach according to Article 85(3) AP I.¹⁸⁶ With respect to non-international armed conflicts in particular, the manual states that "the civilian population and individual civilians enjoy general protection against the dangers arising from military operations. They may not be made the object of attack."¹⁸⁷

202. The Military Handbook of the Netherlands states that "it is prohibited to attack civilians".¹⁸⁸

203. New Zealand's Military Manual states that "the civilian population as such, as well as individual civilians, shall not be the object of attack".¹⁸⁹

The manual further states that "making the civilian population or individual civilians the object of attack" constitutes a grave breach. With respect to

¹⁷⁷ Israel, *Manual on the Laws of War* (1998), p. 42.

¹⁷⁸ Italy, *IHL Manual* (1991), Vol. I, § 13.

¹⁷⁹ Italy, *LOAC Elementary Rules Manual* (1991), § 10.

¹⁸⁰ Kenya, *LOAC Manual* (1997), Précis No. 1, p. 10.

¹⁸¹ Kenya, *LOAC Manual* (1997), Précis No. 4, p. 2, § a.

¹⁸² South Korea, *Military Law Manual* (1996), p. 88.

¹⁸³ South Korea, *Military Regulation 187* (1991), Article 4.2.

¹⁸⁴ Madagascar, *Military Manual* (1994), Fiche No. 3-O, § 10.

¹⁸⁵ Netherlands, *Military Manual* (1993), p. IV-1.

¹⁸⁶ Netherlands, *Military Manual* (1993), p. IX-5.

¹⁸⁷ Netherlands, *Military Manual* (1993), p. XI-6.

¹⁸⁸ Netherlands, *Military Handbook* (1995), p. 7-36.

¹⁸⁹ New Zealand, *Military Manual* (1992), § 517(1).

non-international armed conflicts in particular, the manual states that “as in international armed conflict, the civilian population and civilians are to be protected against the dangers arising from the conflict. Neither the civilian population nor individual civilians may be made the object of attack.”¹⁹⁰

204. Nigeria’s Military Manual and Soldiers’ Code of Conduct state that “civilian persons and objects must be spared”.¹⁹¹

205. The Joint Circular on Adherence to IHL and Human Rights of the Philippines states that “when the use of armed force is inevitable, strict controls must be exercised to insure that only reasonable force necessary for mission accomplishment shall be taken and shall be directed only against hostile elements, not against civilians or non-combatants”.¹⁹²

206. Russia’s Military Manual states that it is prohibited “to launch attacks against the civilian population or against individual civilians”.¹⁹³

207. South Africa’s LOAC Manual states that “the general rule is that civilians and civilian property may not be the subject, or the sole object, of a military attack”.¹⁹⁴ The manual adds that “making the civilian population or individual civilians the object of attack” constitutes a grave breach.¹⁹⁵

208. Spain’s LOAC Manual prohibits military operations directed against civilians.¹⁹⁶ The manual further states that “intentionally attacking the civilian population or individual civilians” constitutes a grave breach.¹⁹⁷

209. Sweden’s IHL Manual states that “a distinction shall always be made between persons participating in hostilities and who are thereby legitimate objectives, and members of the civilian population, who may not constitute objectives in warfare”.¹⁹⁸

210. Switzerland’s Basic Military Manual considers that “the [civilian] population as well as individual civilians must not be attacked”.¹⁹⁹ The manual further states that “attacks against the civilian population or against individual civilians” constitute grave breaches of the Geneva Conventions and AP I.²⁰⁰

211. Togo’s Military Manual requires that the prohibition of attacks on the civilian population, individual civilians and civilian property as a deliberate method of combat be respected.²⁰¹

212. According to the UK Military Manual, “it is a generally recognised rule of international law that civilians must not be made the object of attack directed exclusively against them”.²⁰²

¹⁹⁰ New Zealand, *Military Manual* (1992), § 1819.

¹⁹¹ Nigeria, *Military Manual* (1994), p. 39, § 5(c); *Soldiers’ Code of Conduct* (undated), § 3.

¹⁹² Philippines, *Joint Circular on Adherence to IHL and Human Rights* (1991), § (2)(a)(2).

¹⁹³ Russia, *Military Manual* (1990), § 8(f). ¹⁹⁴ South Africa, *LOAC Manual* (1996), § 28(a).

¹⁹⁵ South Africa, *LOAC Manual* (1996), § 37(a).

¹⁹⁶ Spain, *LOAC Manual* (1996), Vol. I, § 4.5.b.(1), see also § 5.2.a.(2).

¹⁹⁷ Spain, *LOAC Manual* (1996), Vol. I, § 11.8.b.(1).

¹⁹⁸ Sweden, *IHL Manual* (1991), Section 3.2.1.5, p. 40.

¹⁹⁹ Switzerland, *Basic Military Manual* (1987), Article 25(2), see also Article 27(1).

²⁰⁰ Switzerland, *Basic Military Manual* (1987), Article 192(1)(c) (grave breaches of the Geneva Conventions) and Article 193(1)(a) (grave breaches of AP I).

²⁰¹ Togo, *Military Manual* (1995), Fascicule III, p. 12.

²⁰² UK, *Military Manual* (1958), §§ 13 and 88.

213. The UK LOAC Manual states that “civilians are protected from attack under the law of armed conflict”.²⁰³

214. The US Air Force Pamphlet states that the “civilian population as such, as well as individual civilians, shall not be made the object of attack”.²⁰⁴ It adds that “in addition to the grave breaches of the Geneva Conventions of 1949, the following acts are representative of situations involving individual criminal responsibility: . . . (4) Aerial bombardment for the deliberate purpose of killing protected civilians”.²⁰⁵

215. The US Naval Handbook states that “civilians and civilian objects may not be made the object of attack”.²⁰⁶ The Handbook also states that carrying out a “bombardment, the sole purpose of which is to attack and terrorize the civilian population” is an example of a war crime.²⁰⁷

216. The YPA Military Manual of the SFRY (FRY) states that “the civilian population may not be the direct object of military operations”.²⁰⁸

National Legislation

217. Argentina’s Draft Code of Military Justice punishes any soldier who “makes the civilian population the object of attack” or who orders such attacks.²⁰⁹

218. Under Armenia’s Penal Code, launching, during an armed conflict, an “attack on the civilian population or on individual civilians” constitutes a crime against the peace and security of mankind.²¹⁰

219. Australia’s Geneva Conventions Act as amended provides that “a person who, in Australia or elsewhere, commits a grave breach . . . of [AP I] is guilty of an indictable offence”.²¹¹

220. Australia’s ICC (Consequential Amendments) Act incorporates in the Criminal Code the war crimes defined in the 1998 ICC Statute, including “attacking civilians” in international and non-international armed conflicts.²¹²

221. Azerbaijan’s Law concerning the Protection of Civilian Persons and the Rights of Prisoners of War provides that, in international and non-international armed conflicts, attacks against civilians are prohibited.²¹³

222. Azerbaijan’s Criminal Code provides that “directing attacks against the civilian population or against individual civilians who do not take part in

²⁰³ UK, *LOAC Manual* (1981), Section 3, p. 10, § 9, see also Section 4, p. 14, § 5(a).

²⁰⁴ US, *Air Force Pamphlet* (1976), § 5-3(a)(1)(a).

²⁰⁵ US, *Air Force Pamphlet* (1976), § 15-3(c)(4).

²⁰⁶ US, *Naval Handbook* (1995), § 8.1.2, see also §§ 11.2 and 11.3.

²⁰⁷ US, *Naval Handbook* (1995), § 6.2.5.

²⁰⁸ SFRY (FRY), *YPA Military Manual* (1988), § 67(1); see also § 53.

²⁰⁹ Argentina, *Draft Code of Military Justice* (1998), Article 291, introducing a new Article 875(1) in the *Code of Military Justice as amended* (1951).

²¹⁰ Armenia, *Penal Code* (2003), Article 390.3(1).

²¹¹ Australia, *Geneva Conventions Act as amended* (1957), Section 7(1).

²¹² Australia, *ICC (Consequential Amendments) Act* (2002), Schedule 1, §§ 268.35 and 268.77.

²¹³ Azerbaijan, *Law concerning the Protection of Civilian Persons and the Rights of Prisoners of War* (1995), Article 15.

hostilities” constitutes a war crime in international and non-international armed conflicts.²¹⁴

223. The Criminal Code of Belarus provides that it is a war crime to “direct attacks against the civilian population or against individual civilians”.²¹⁵

224. Belgium’s Law concerning the Repression of Grave Breaches of the Geneva Conventions and their Additional Protocols as amended provides that “making the civilian population or individual civilians the object of attack” constitutes a crime under international law.²¹⁶

225. Under the Criminal Code of the Federation of Bosnia and Herzegovina, it is a war crime to commit or order the commission of “an attack on a civilian population . . . [or] individual civilians”.²¹⁷ The Criminal Code of the Republika Srpska contains the same provision.²¹⁸

226. Under Burundi’s Draft Law on Genocide, Crimes against Humanity and War Crimes, “intentionally directing attacks against the civilian population as such or against individual civilians not taking a direct part in hostilities” constitutes a war crime in both international and non-international armed conflicts.²¹⁹

227. Canada’s Geneva Conventions Act as amended provides that “every person who, whether within or outside Canada, commits a grave breach [of AP I] . . . is guilty of an indictable offence”.²²⁰

228. Canada’s Crimes against Humanity and War Crimes Act provides that the war crimes defined in Article 8(2) of the 1998 ICC Statute are “crimes according to customary international law” and, as such, indictable offences under the Act.²²¹

229. China’s Criminal Code as amended provides for the punishment of anyone who during war “cruelly injures innocent residents in areas of military action”.²²²

230. Colombia’s Penal Code imposes a criminal sanction on “anyone who, during an armed conflict, carries out or orders the carrying out of . . . attacks against the civilian population”.²²³

231. The DRC Code of Military Justice as amended imposes a criminal sanction on “every soldier who is guilty of committing acts of violence . . . against the civilian population in time of war”.²²⁴

²¹⁴ Azerbaijan, *Criminal Code* (1999), Article 116(10).

²¹⁵ Belarus, *Criminal Code* (1999), Article 136(10).

²¹⁶ Belgium, *Law concerning the Repression of Grave Breaches of the Geneva Conventions and their Additional Protocols as amended* (1993), Article 1(3)(11).

²¹⁷ Bosnia and Herzegovina, Federation, *Criminal Code* (1998), Article 154(1).

²¹⁸ Bosnia and Herzegovina, Republika Srpska, *Criminal Code* (2000), Article 433(1).

²¹⁹ Burundi, *Draft Law on Genocide, Crimes against Humanity and War Crimes* (2001), Article 4(B)(a) and (D)(a).

²²⁰ Canada, *Geneva Conventions Act as amended* (1985), Section 3(1).

²²¹ Canada, *Crimes against Humanity and War Crimes Act* (2000), Section 4(1) and (4).

²²² China, *Criminal Code as amended* (1997), Article 446.

²²³ Colombia, *Penal Code* (2000), Article 144.

²²⁴ DRC, *Code of Military Justice as amended* (1972), Article 472.

232. Congo's Genocide, War Crimes and Crimes against Humanity Act defines war crimes with reference to the categories of crimes defined in Article 8 of the 1998 ICC Statute.²²⁵

233. The Geneva Conventions and Additional Protocols Act of the Cook Islands punishes "any person who in the Cook Islands or elsewhere commits, or aids or abets or procures the commission by another person of, a grave breach . . . of [AP I]".²²⁶

234. Under Croatia's Criminal Code, it is a war crime to commit or order the commission of "an attack against the civilian population . . . [or] individual civilians".²²⁷

235. Cuba's Military Criminal Code punishes "anyone who, in areas of military operations, commits violence against the [civilian] population".²²⁸

236. Cyprus's AP I Act punishes "any person who, whatever his nationality, commits in the Republic or outside the Republic any grave breach of the provisions of the Protocol, or takes part or assists or incites another person in the commission of such a breach".²²⁹

237. The Criminal Code as amended of the Czech Republic punishes a commander who in a military operation intentionally "causes harm to the life, health or property of civilians or the civilian population".²³⁰

238. The Draft Amendments to the Penal Code of El Salvador provide for a prison sentence for "anyone who, during an international or non-international armed conflict, attacks protected persons". Protected persons are defined as including civilians and the civilian population.²³¹

239. Under Estonia's Penal Code, "attacking civilians in war zones" is a war crime.²³²

240. Under Georgia's Criminal Code, "making the civilian population or individual civilians the object of an attack" in an international or a non-international armed conflict is a crime.²³³

241. Germany's Law Introducing the International Crimes Code punishes anyone who, in connection with an international or a non-international armed conflict, "directs an attack by military means against the civilian population as such or against individual civilians not taking a direct part in hostilities".²³⁴

242. Under Hungary's Criminal Code as amended, a military commander who "pursues a war operation which causes serious damage to the life [and]

²²⁵ Congo, *Genocide, War Crimes and Crimes against Humanity Act* (1998), Article 4.

²²⁶ Cook Islands, *Geneva Conventions and Additional Protocols Act* (2002), Section 5(1).

²²⁷ Croatia, *Criminal Code* (1997), Article 158(1).

²²⁸ Cuba, *Military Criminal Code* (1979), Article 44(1).

²²⁹ Cyprus, *AP I Act* (1979), Section 4(1).

²³⁰ Czech Republic, *Criminal Code as amended* (1961), Article 262(2)(a).

²³¹ El Salvador, *Draft Amendments to the Penal Code* (1998), Article entitled "Ataque a personas protegidas".

²³² Estonia, *Penal Code* (2001), § 95. ²³³ Georgia, *Criminal Code* (1999), Article 411(1)(a).

²³⁴ Germany, *Law Introducing the International Crimes Code* (2002), Article 1, § 11(1)(1).

health...of the civilian population" is guilty, upon conviction, of a war crime.²³⁵

243. Indonesia's Military Penal Code provides for the punishment of military personnel who are found guilty of having committed attacks against civilians.²³⁶

244. Ireland's Geneva Conventions Act as amended provides that grave breaches of AP I are punishable offences.²³⁷ In addition, any "minor breach" of AP I, including violations of Article 51(2) AP I, as well as any "contravention" of AP II, including violations of Article 13(2) AP II, are also punishable offences.²³⁸

245. Italy's Law of War Decree as amended states that "bombardment, the sole purpose of which is to attack the civilian population," is prohibited.²³⁹

246. Under Jordan's Draft Military Criminal Code, "attacks directed against the civilian population or against civilians" in time of armed conflict are war crimes.²⁴⁰

247. Under the Draft Amendments to the Code of Military Justice of Lebanon, "attacks directed against the civilian population or against civilians" constitute war crimes.²⁴¹

248. Under Lithuania's Criminal Code as amended, "an attack, prohibited under international humanitarian law, against civilians" is a war crime.²⁴²

249. Under Mali's Penal Code, "intentionally directing attacks against the civilian population in general or against individual civilians not taking a direct part in hostilities" constitutes a war crime in international armed conflicts.²⁴³

250. Under the International Crimes Act of the Netherlands, it is a crime, during an international armed conflict, to commit "the following acts, when they are committed intentionally and in violation of the relevant provisions of Additional Protocol (I) and cause death or serious injury to body or health: . . . making the civilian population or individual citizens the object of attack".²⁴⁴ Likewise, "intentionally directing attacks against the civilian population as such or against individual civilians not taking direct part in hostilities" is also a crime, whether committed in an international or non-international armed conflict.²⁴⁵

251. New Zealand's Geneva Conventions Act as amended provides that "any person who in New Zealand or elsewhere commits, or aids or abets or procures

²³⁵ Hungary, *Criminal Code as amended* (1978), Section 160(a), see also Section 158 (committing violence in an operational or occupied area against a civilian person).

²³⁶ Indonesia, *Military Penal Code* (1947), Article 103.

²³⁷ Ireland, *Geneva Conventions Act as amended* (1962), Section 3(1).

²³⁸ Ireland, *Geneva Conventions Act as amended* (1962), Section 4(1) and (4).

²³⁹ Italy, *Law of War Decree as amended* (1938), Article 42.

²⁴⁰ Jordan, *Draft Military Criminal Code* (2000), Article 41(A)(9).

²⁴¹ Lebanon, *Draft Amendments to the Code of Military Justice* (1997), Article 146(9).

²⁴² Lithuania, *Criminal Code as amended* (1961), Article 337.

²⁴³ Mali, *Penal Code* (2001), Article 31(i)(1).

²⁴⁴ Netherlands, *International Crimes Act* (2003), Article 5(2)(c)(i).

²⁴⁵ Netherlands, *International Crimes Act* (2003), Articles 5(5)(m) and 6(3)(a).

the commission by another person of, a grave breach . . . of [AP I] is guilty of an indictable offence".²⁴⁶

252. Under New Zealand's International Crimes and ICC Act, war crimes include the crimes defined in Article 8(2)(b)(i) and (e)(i) of the 1998 ICC Statute.²⁴⁷

253. Nicaragua's Draft Penal Code punishes "anyone who, during an international or internal armed conflict, attacks protected persons". Protected persons are defined as including the civilian population and individual civilians.²⁴⁸

254. According to Niger's Penal Code as amended, "directing an attack against the civilian population or against individual civilians" protected under the 1949 Geneva Conventions and their Additional Protocols of 1977 is a war crime.²⁴⁹

255. Under Norway's Military Penal Code as amended, "anyone who contravenes or is accessory to the contravention of provisions relating to the protection of persons or property laid down in . . . the two additional protocols to [the Geneva] Conventions . . . is liable to imprisonment".²⁵⁰

256. Slovakia's Criminal Code as amended punishes a commander who in a military operation intentionally "causes harm to the life, health or property of civilians or the civilian population".²⁵¹

257. Under Slovenia's Penal Code, it is a war crime to commit or order the commission of "an attack on the civilian population . . . [or] on individual civilians".²⁵²

258. Spain's Royal Ordinance for the Armed Forces emphasises the obligation to pay due attention to the protection of the civilian population.²⁵³

259. Spain's Penal Code punishes "anyone who, during an armed conflict, . . . makes the civilian population the object of attack".²⁵⁴

260. Sweden's Penal Code as amended provides that "attacks on civilians" constitute a crime against international law.²⁵⁵

261. Tajikistan's Criminal Code punishes the act of "making the civilian population or individual civilians the object of attack" in an international or internal armed conflict.²⁵⁶

262. Under Trinidad and Tobago's Draft ICC Act, it is a punishable offence to commit a war crime as defined in Article 8(2)(b)(i) and (e)(i) of the 1998 ICC Statute.²⁵⁷

²⁴⁶ New Zealand, *Geneva Conventions Act as amended* (1958), Section 3(1).

²⁴⁷ New Zealand, *International Crimes and ICC Act* (2000), Section 11(2).

²⁴⁸ Nicaragua, *Draft Penal Code* (1999), Article 449.

²⁴⁹ Niger, *Penal Code as amended* (1961), Article 208.3(11).

²⁵⁰ Norway, *Military Penal Code as amended* (1902), § 108(b).

²⁵¹ Slovakia, *Criminal Code as amended* (1961), Article 262(2)(a).

²⁵² Slovenia, *Penal Code* (1994), Article 374(1).

²⁵³ Spain, *Royal Ordinance for the Armed Forces* (1978), Article 137.

²⁵⁴ Spain, *Penal Code* (1995), Article 611(1).

²⁵⁵ Sweden, *Penal Code as amended* (1962), Chapter 22, § 6.

²⁵⁶ Tajikistan, *Criminal Code* (1998), Article 403(1).

²⁵⁷ Trinidad and Tobago, *Draft ICC Act* (1999), Section 5(1)(a).

263. Ukraine's Criminal Code provides that "violence... committed against the civilian population in an area of military action under the pretext of military necessity" is a war crime.²⁵⁸

264. The UK Geneva Conventions Act as amended punishes "any person, whatever his nationality, who, whether in or outside the United Kingdom, commits, or aids, abets or procures the commission by any other person of, a grave breach of... [AP I]".²⁵⁹

265. Under the UK ICC Act, it is a punishable offence to commit a war crime as defined in Article 8(2)(b)(i) and (e)(i) of the 1998 ICC Statute.²⁶⁰

266. Vietnam's Penal Code punishes "anyone who commits acts of violence against the population".²⁶¹

267. Under Yemen's Military Criminal Code, "attacks against the civilian population" are war crimes.²⁶²

268. Under the Penal Code as amended of the SFRY (FRY), it is a war crime to commit or order the commission of "an attack on the civilian population... [or] individual civilians".²⁶³

269. Zimbabwe's Geneva Conventions Act as amended punishes "any person, whatever his nationality, who, whether in or outside Zimbabwe, commits any such grave breach of... [AP I]".²⁶⁴

National Case-law

270. In the *RA. R. case* in 1997, the District Court of Split in Croatia sentenced 39 people, both soldiers and commanders, to prison terms ranging from 5 to 20 years on charges which included attacks on civilians.²⁶⁵

271. In the *Kassem case* in 1969, the Israeli Military Court at Ramallah stated that "immunity of non-combatants from direct attack is one of the basic rules of the international law of war".²⁶⁶

Other National Practice

272. In 1996, during a debate in the UN General Assembly following the shelling of the UN compound at Qana, Australia stated that all attacks against civilians were totally unacceptable and contrary to the norms of international law.²⁶⁷

²⁵⁸ Ukraine, *Criminal Code* (2001), Article 433(1).

²⁵⁹ UK, *Geneva Conventions Act as amended* (1957), Section 1(1).

²⁶⁰ UK, *ICC Act* (2001), Sections 50(1) and 51(1) (England and Wales) and Section 58(1) (Northern Ireland).

²⁶¹ Vietnam, *Penal Code* (1990), Article 273.

²⁶² Yemen, *Military Criminal Code* (1998), Article 21(6).

²⁶³ SFRY (FRY), *Penal Code as amended* (1976), Article 142(1).

²⁶⁴ Zimbabwe, *Geneva Conventions Act as amended* (1981), Section 3(1).

²⁶⁵ Croatia, District Court of Split, *RA. R. case*, Judgement, 26 May 1997.

²⁶⁶ Israel, Military Court at Ramallah, *Kassem case*, Judgement, 13 April 1969.

²⁶⁷ Australia, Statement before the UN General Assembly, UN Doc. A/50/PV.116, 25 April 1996, p. 6.

273. In 1993, the Ministry of the Interior of Azerbaijan ordered that troops “in zones of combat, during military operations . . . must not shoot at children, women and elderly without defence”.²⁶⁸

274. In 1969, during a debate in the UN General Assembly, Belgium referred to the conflict in Nigeria as non-international and, in this context, referred to “the reprobation and prohibition of everything leading to total war where civilian, non-combatant inhabitants, who often have nothing whatever to do with the conflict, become the victims of war through . . . being the victims of attacks”.²⁶⁹

275. In an explanatory memorandum submitted to the Belgian parliament in 1985 in the context of the ratification procedure of the Additional Protocols, the Belgian government stated that “Article 51 [AP I] embodies the first statement in treaty law of the customary law principle of civilian immunity [from attack], whether against individual civilians or against the civilian population as a whole”.²⁷⁰

276. The Report on the Practice of Bosnia and Herzegovina provides the following examples of alleged violations of the prohibition of attacks on civilians which were denounced by the authorities: the artillery shelling in the centre of Srebrenica, which resulted in civilian casualties;²⁷¹ the shelling of Gorazde;²⁷² the attack on the village of Pripecak, in which several civilians were killed or wounded;²⁷³ and the attacks by Yugoslav aircraft in the Tuzla region, in which many residential facilities were destroyed and several civilians killed or wounded.²⁷⁴

277. The Report on the Practice of Botswana states that Article 51 API outlaws all attacks against civilians.²⁷⁵ In addition, on the basis of an interview with a retired army general, the report notes that Botswana’s military personnel would comply with the provisions of Article 13 AP II if an internal armed conflict arose.²⁷⁶

²⁶⁸ Azerbaijan, Ministry of the Interior, Command of the Troops of the Interior, Order No. 42, Baku, 9 January 1993, § 4.

²⁶⁹ Belgium, Statement before the UN General Assembly, UN Doc. A/PV.1765, 25 September 1969, §§ 130–133.

²⁷⁰ Belgium, House of Representatives, Explanatory memorandum on a draft bill for the approval of the Additional Protocols, 1984–1985 Session, Doc. 1096-1, 9 January 1985, p. 10.

²⁷¹ Bosnia and Herzegovina, Appeal of the War Presidency of Srebrenica Municipality, No. 180/93, 25 January 1993, Report on the Practice of Bosnia and Herzegovina, 2000, Chapter 1.3.

²⁷² Bosnia and Herzegovina, Headquarters of the Supreme Command of the Armed Forces, Office of the Commander in Chief, Letter of protest to UNPROFOR, Number 0141/21-219, 29 March 1994, Report on the Practice of Bosnia and Herzegovina, 2000, Chapter 1.3.

²⁷³ Bosnia and Herzegovina, Headquarters of the Supreme Command of the Armed Forces, Office of the Commander in Chief, Letter of protest to UNPROFOR, Number 01-1/21-230, 30 March 1994, Report on the Practice of Bosnia and Herzegovina, 2000, Chapter 1.3.

²⁷⁴ Bosnia and Herzegovina, Ministry of Defence, Letter to the Headquarters of the Yugoslav Army in Belgrade, Number 02/333-232, 1 June 1992, Report on the Practice of Bosnia and Herzegovina, 2000, Chapter 1.3.

²⁷⁵ Report on the Practice of Botswana, 1998, Chapter 1.4.

²⁷⁶ Report on the Practice of Botswana, 1998, Interview with a retired army general, Answers to additional questions on Chapter 1.4.

278. On the basis of Chile's Code of Military Justice and in the absence of any contrary practice, the Report on the Practice of Chile states that it is Chile's *opinio juris* that the prohibition of attacks on the civilian population is an integral part of customary international law.²⁷⁷

279. During the Korean War, China confirmed that it was against the bombing of Korean cities and the civilian population by US air forces. China supported North Korea's solemn protest to the UN Security Council, and requested that the Security Council take immediate measures to stop the "atrocities" committed by the US armed forces, which were "violating international law and against normal standards of human ethics".²⁷⁸

280. On the basis of an opinion of the First Deputy Attorney-General in a case before the Council of State in 1994, the Report on the Practice of Colombia defines direct attacks against civilians as any operation that corresponds to one of the following three situations: a) it does not follow plans and strategies that respect the law of nations; b) the necessary staff and resources to save the lives of the victims are lacking; c) the attacks do not cease once the adverse party has been neutralised.²⁷⁹

281. In 1992, in a letter to the President of the UN Security Council, Croatia denounced direct attacks against the civilian population and civilian facilities carried out by "Serbs from Bosnia and Herzegovina and... from the UN Protected Area territories in Croatia". Croatia considered that "the only aim of such an aggression is the destruction of civilian population and destruction of civilian facilities", adding that "such acts are contrary to the provisions of Articles 51 and 52 of Additional Protocol I".²⁸⁰

282. The Report on the Practice of Croatia states that it is Croatia's *opinio juris* that the duty not to attack civilians is part of customary international law.²⁸¹

283. In its written statement submitted to the ICJ in the *Nuclear Weapons case* in 1995, Egypt asserted that the use of nuclear weapons would violate basic principles of the international law of armed conflict, including "the prohibition to attack civilians".²⁸²

284. In 1983, in reply to a question in parliament, the French Minister of Foreign Affairs declared that the bombardment of civilian populations in Afghanistan was "just one of the cruel aspects of the war".²⁸³

285. In 1989, in reply to a question in parliament, the French Prime Minister stated that the civilian population had been the target of repeated bombardment

²⁷⁷ Report on the Practice of Chile, 1997, Chapter 1.4, referring to *Code of Military Justice* (1925), Article 262.

²⁷⁸ China, Telegraph of the Minister of Foreign Affairs to the UN, *Documents on Foreign Affairs of the People's Republic of China*, 1950, Vol. 1, p. 134.

²⁷⁹ Report on the Practice of Colombia, 1998, Chapter 1.4, referring to Council of State, *Case No. 9276*, Opinion of the First Deputy Attorney-General, 19 August 1994.

²⁸⁰ Croatia, Letter dated 24 August 1992 to the President of the UN Security Council, UN Doc. S/24481, 25 August 1992, p. 3.

²⁸¹ Report on the Practice of Croatia, 1997, Chapter 1.1.

²⁸² Egypt, Written statement submitted to the ICJ, *Nuclear Weapons case*, 20 June 1995, § 35(B)(1).

²⁸³ France, Reply by the Minister of Foreign Affairs to a question in parliament regarding Afghanistan, 25 July 1983, *Politique étrangère de la France*, July 1983, p. 72.

and made a solemn appeal to Syria, General Aoun and Doctor Hoss to “stop the deliberate bombardment of the civilian population”.²⁸⁴

286. In a communiqué regarding Rwanda issued in 1994, the French Ministry of Foreign Affairs condemned “the bombardments against civilian populations who have fled to Goma in Zaire . . . These attacks on the security of populations are unacceptable.”²⁸⁵

287. The instructions given to the French armed forces for the conduct of Opération Mistral, simulating a military operation under the right of self-defence or a mandate of the UN Security Council, state that “neither the civilian population as such nor individual civilians . . . shall be made the object of attack”.²⁸⁶

288. In a communiqué issued in 1995, the French Minister of Foreign Affairs expressed his distress at “the bombardment of the centre of Sarajevo, which once again had caused numerous casualties among the civilian population of the Bosnian capital”. He further stated that “this barbarous act calls for the most severe condemnation”.²⁸⁷

289. In 1999, in reply to a question in parliament, a French Minister stated that:

We are all under the shock of the immense emotion caused by the massacre of 45 civilians in Racak, on 16 January, by the Serbian police. These atrocities have been unanimously condemned by the international community. France has expressed its revolt and distaste, the Prime Minister has denounced this “barbarous act”.²⁸⁸

290. In 1987, all parties in the German parliament condemned the Soviet “attacks against the civilian population, in particular against women and children” in Afghanistan.²⁸⁹

291. In an explanatory memorandum submitted to the German parliament in 1990 in the context of the ratification procedure of the Additional Protocols, the German government stated, with reference to Article 51(2) AP I, that the prohibition of direct attacks on individual civilians or the civilian population was an integral part of customary international law.²⁹⁰

292. In 1991, in reply to a question in parliament, the German Minister of Foreign Affairs condemned “the continued military engagements of Turkish

²⁸⁴ France, Reply by Prime Minister Michel Rocard to a question in parliament, 19 April 1989, *Politique étrangère de la France*, April 1989, p. 72.

²⁸⁵ France, Communiqué of the Ministry of Foreign Affairs regarding Rwanda, 17 July 1994, *Politique étrangère de la France*, July 1994, p. 101.

²⁸⁶ France, Etat-major de la Force d'Action Rapide, Ordres pour l'Opération Mistral, 1995, Section 6, § 66.

²⁸⁷ France, Communiqué by the Minister of Foreign Affairs, Hervé de Charette, 28 August 1995, *Politique étrangère de la France*, August 1995, p. 169.

²⁸⁸ France, Reply by Pierre Moscovici, Ministre Délégué for European Affairs, to a question in parliament, 19 January 1999, *Politique étrangère de la France*, January 1999, p. 82.

²⁸⁹ Germany, Lower House of Parliament, Proposal by the CDU/CSU, SPD, FDP and the Greens, 8 Jahre Krieg in Afghanistan, *BT-Drucksache* 11/1500, 9 December 1987, p. 1.

²⁹⁰ Germany, Lower House of Parliament, Explanatory memorandum on the Additional Protocols to the Geneva Conventions, *BT-Drucksache* 11/6770, 22 March 1990, p. 112.

troops against the civilian population in Kurdish areas as a serious violation of international law".²⁹¹

293. In 1991, the German Chancellor described the missile attack carried out by Iraq against populated areas as a "brutal act of terror".²⁹² A few days later, the German President denounced Iraq's continued attacks against the civilian population of Israel as "particularly abhorrent".²⁹³

294. In 1995, the German Minister of Foreign Affairs denounced the attack on the marketplace in Sarajevo in Bosnia and Herzegovina and stated that "the authors of this barbaric attack must be brought to account for their actions with all due consequences".²⁹⁴

295. In 1995, the German Minister of Foreign Affairs stated that the restoration of Russian territorial integrity in Chechnya did not justify the conduct of the Russian army in Grozny, namely "the bombardment of civilians and the killing of so many innocent persons".²⁹⁵

296. In 1977, during a debate in the Sixth Committee of the UN General Assembly, Iran noted that until the adoption of the two Additional Protocols, the prohibition on inflicting violence on civilians was not explicitly established. However, it concluded that the protection of non-combatants in armed conflicts was not a new phenomenon: "as early as 1621, the Code of Articles of King Gustavus Adolphus of Sweden had included principles on that subject which had since developed into a customary prohibition of violence against non-combatants".²⁹⁶

297. In 1996, during a debate in the UN Security Council on the situation in Lebanon, the representative of Iran condemned what he called the "cowardly, though savage, attacks against defenceless civilians".²⁹⁷

298. The Report on the Practice of Iraq refers to several military communiqués issued by the General Command of the Iraqi armed forces during the Iran–Iraq War, one of which states that "our Armed Forces have strictly adhered to the decision of the leadership by not shelling the purely civilian centers, and in accordance with the agreement made through the UN Secretary-General".²⁹⁸

²⁹¹ Germany, Reply by the Government to a question in the Lower House of Parliament, Mißachtung der Menschenrechte in der Türkei, *BT-Drucksache* 12/1918, 14 January 1992, p. 3, see also p. 5; see also Reply by the Government to a question in the Lower House of Parliament, Demokratisierungsprozeß in Irakisch-Kurdistan, *BT-Drucksache* 12/3028, 13 July 1992, p. 2.

²⁹² Germany, Statement by the Chancellor, Helmut Kohl, 23 January 1991, *Bulletin*, No. 7, Presse- und Informationsamt der Bundesregierung, Bonn, 24 January 1991, p. 37.

²⁹³ Germany, Statement by the President, Richard von Weizsäcker, 29 January 1991, *Bulletin*, No. 10, Presse- und Informationsamt der Bundesregierung, Bonn, 30 January 1991, p. 57.

²⁹⁴ Michael Dynes and Ian Brodie, Sarajevo attack. Germany leads the condemnation of market massacre, *Times Newspapers*, 29 August 1995.

²⁹⁵ Germany, Statement by the Minister of Foreign Affairs, Klaus Kinkel, 19 January 1995, *Bulletin*, No. 5, Presse- und Informationsamt der Bundesregierung, Bonn, 23 January 1995, p. 38.

²⁹⁶ Iran, Statement before the Sixth Committee of the UN General Assembly, UN Doc. A/C.6/32/SR.18, 14 October 1977, § 20.

²⁹⁷ Iran, Statement before the UN Security Council, UN Doc. S/PV.3653, 15 April 1996, p. 25.

²⁹⁸ Report on the Practice of Iraq, 1998, Chapter 1.8, referring to Military Communiqué No. 1632, 27 October 1983, Military Communiqué No. 1502, 20 June 1984, Military Communiqué No. 1705, 18 January 1985 and Military Communiqué No. 1723, 26 January 1985.

299. In 1996, during a debate in the UN Security Council on the situation in Lebanon, Jordan considered that, while the use of force and violence as a means to solve political problems should always be condemned, this proved particularly true when force was employed against innocent civilians and civilian installations.²⁹⁹

300. The Report on the Practice of Jordan states that there are no reported incidents of Jordanian troops resorting to direct attacks on civilians. It refers to Islam's prohibition of direct attacks on civilians, that is, in the event of the use of force and in case of armed conflicts, it is not permissible to kill non-combatants, such as old men, women and children.³⁰⁰

301. In 1996, in a statement concerning military operations in Lebanon, Kazakhstan condemned the "use of armed force with a view to killing the civilian population and destroying civilian facilities".³⁰¹

302. In 1996, during a debate in the UN Security Council on the situation in Lebanon, South Korea called upon both parties to respect immediately the non-combatant status of civilians.³⁰²

303. The Report on the Practice of South Korea states that it is South Korea's *opinio juris* that the prohibition of direct attacks against civilians is part of customary international law.³⁰³

304. The Report on the Practice of Lebanon refers to a 1996 report by the Lebanese Ministry of Justice which stated that Israel had committed serious violations of the Geneva Conventions by "engaging civilians".³⁰⁴

305. The Report on the Practice of Lebanon refers to a statement by the Director General of the Ministry of Justice in 1997 in which he stated that he considered the bombardment of civilians a war crime.³⁰⁵

306. On the basis of interviews with members of the Malaysian armed forces and the Ministry of Home Affairs, the Report on the Practice of Malaysia notes that during the communist insurgency, the security forces were barred from directly attacking civilians.³⁰⁶

307. At the CDDH, Mexico stated that it believed draft Article 46 AP I (now Article 51) to be so essential that it "cannot be the subject of any reservations

²⁹⁹ Jordan, Statement before the UN Security Council, UN Doc. S/PV.3653, 15 April 1996, p. 27.

³⁰⁰ Report on the Practice of Jordan, 1997, Chapter 1.4 and Answers to additional questions on Chapter 1.1.

³⁰¹ Kazakhstan, Statement by Kazakhstan, annexed to Letter dated 19 April 1996 to the UN Secretary-General, UN Doc. S/1996/308, 19 April 1996.

³⁰² South Korea, Statement before the UN Security Council, UN Doc. S/PV.3653, 15 April 1996, p. 11.

³⁰³ Report on the Practice of South Korea, 1997, Chapter 1.4.

³⁰⁴ Report on the Practice of Lebanon, 1998, Chapter 1.4, referring to Report by the Lebanese Ministry of Justice on possibilities for legal action against Israel, 12 April 1996.

³⁰⁵ Report on the Practice of Lebanon, 1998, Chapter 6.5, referring to Statement by the General Director of the Lebanese Ministry of Justice, *al Raii al ordonia*, 23 December 1997.

³⁰⁶ Report on the Practice of Malaysia, 1997, Interviews with members of the Malaysian armed forces and Ministry of Home Affairs, Chapter 1.4.

whatsoever since these would be inconsistent with the aim and purpose of Protocol I and undermine its basis".³⁰⁷

308. In 1994, the Minister of Foreign Affairs of the Netherlands described the attack on the marketplace in Sarajevo as a "horrific act" and stated that the civilian population in the safe areas of the former Yugoslavia should be granted more protection against attacks that served no military purpose and which could only be qualified as terror tactics. The Minister of Defence also vigorously condemned the attacks on the safe areas in Bosnia and Herzegovina as a very serious violation of fundamental human rights.³⁰⁸

309. In its written statement submitted to the ICJ in the *Nuclear Weapons case* in 1995, the Netherlands stated that "the general principles of international humanitarian law in armed conflict also apply to the use of nuclear weapons . . . in particular . . . the prohibition on making the civilian population as such the target of an attack".³⁰⁹

310. The Report on the Practice of Nigeria confirms the existence of a norm of a customary nature prohibiting direct attacks against civilians and cites Nigeria's Operational Code of Conduct in this respect. The report also states that, according to Nigeria's *opinio juris*, the prohibition of direct attacks against civilians is part of customary international law.³¹⁰

311. In 1996, during a debate in the UN Security Council on the situation in Lebanon, Pakistan condemned "the targeting and killing of civilian populations".³¹¹

312. The Report on the Practice of Pakistan states that it is Pakistan's *opinio juris* that direct attacks on civilians are prohibited.³¹² The report adds that the Pakistani government has regularly denounced attacks against civilians in conflict situations and cites as an example the strong condemnation of the Israeli attacks on the camps of Sabra and Shatila in Lebanon in 1982.³¹³

313. The Report on the Practice of Rwanda states that attacks against civilians are prohibited according to the practice and the *opinio juris* of Rwanda and considers that this prohibition is a norm of customary international law binding on all States.³¹⁴

³⁰⁷ Mexico, Statement at the CDDH, *Official Records*, Vol. VI, CDDH/SR.41, 26 May 1977, p. 193.

³⁰⁸ Netherlands, Letter from the Minister of Foreign Affairs, 11 February 1994, *Handelingen der Tweede Kamer*, 1993–1994, 22.181, No. 72; Letter from the Minister of Defence, 27 July 1995, *Handelingen der Tweede Kamer*, 1994–1995, 22.181, No. 109.

³⁰⁹ Netherlands, Written statement submitted to the ICJ, *Nuclear Weapons case*, 16 June 1995, § 32; see also Written statement submitted to the ICJ, *Nuclear Weapons (WHO) case*, 6 June 1994, § 39.

³¹⁰ Report on the Practice of Nigeria, 1997, Chapter 1.4.

³¹¹ Pakistan, Statement before the UN Security Council, UN Doc. S/PV.3653, 15 April 1996, p. 29.

³¹² Report on the Practice of Pakistan, 1998, Chapter 1.4.

³¹³ Report on the Practice of Pakistan, 1998, Chapter 1.4, referring to Statement by the Pakistani government, 19 September 1982.

³¹⁴ Report on the Practice of Rwanda, 1997, Chapter 1.4.

314. In 1992, in a note verbale addressed to the UN Secretary-General, Slovenia expressed its readiness to provide information concerning violations of IHL committed by members of the Yugoslav army during the 10-day conflict with Slovenia, including “violences concerning killings and injuries of civilians”.³¹⁵

315. In 1988, Spain protested against direct attacks on the civilian population during the Iran–Iraq War.³¹⁶ The Report on the Practice of Spain considers that, in general,

the Spanish Government has tended to condemn all attacks directed against the civilian population . . . whether the armed conflict was internal or international. This was its position in the civil war in Liberia, the Gulf War, the conflict in the former Yugoslavia, the civil war in Sudan, the war in Chechnya, and the Turkish attacks against the Kurds in northern Iraq.³¹⁷

316. In its written statement submitted to the ICJ in the *Nuclear Weapons case* in 1995, Sweden stated that “under the principle of distinction, an attack on a civilian population or civilian property is prohibited”.³¹⁸

317. In 1996, during a debate in the UN Security Council regarding the conflict in Burundi, Uganda condemned “in the strongest terms the killing of innocent and unarmed civilians” and demanded that “both parties to the conflict halt immediately the killings and massacres of innocent civilians”.³¹⁹

318. In 1938, during a debate in the House of Commons, the UK Prime Minister listed among rules of international law applicable to warfare on land, at sea and from the air the rule that “it is against international law to bomb civilians as such and to make deliberate attacks upon civilian populations”.³²⁰

319. At the CDDH, the UK voted in favour of draft Article 46 AP I (now Article 51), describing its first three paragraphs as containing a “valuable reaffirmation of existing customary rules of international law designed to protect civilians”.³²¹

320. A training video on IHL produced by the UK Ministry of Defence illustrates the rule that military operations must not be directed against civilians.³²²

³¹⁵ Slovenia, Note verbale dated 5 November 1992 to the UN Secretary-General, UN Doc. S/24789, 9 November 1992, p. 2.

³¹⁶ Spain, Comunicado del Gobierno expresando su preocupación por el conflicto bélico entre Irán e Irak, 15 March 1988, *Actividades, Textos y Documentos de la Política Exterior Española*, Ministerio de Asuntos Exteriores, Oficina de Información Diplomática, Madrid, 1988, p. 669.

³¹⁷ Report on the Practice of Spain, 1998, Chapter 1.4.

³¹⁸ Sweden, Written statement submitted to the ICJ, *Nuclear Weapons case*, 20 June 1995, p. 3; see also Written statement submitted to the ICJ, *Nuclear Weapons (WHO) case*, 2 June 1994, p. 3.

³¹⁹ Uganda, Statement before the UN Security Council, UN Doc. S/PV.3692, 28 August 1996, p. 13.

³²⁰ UK, House of Commons, Statement by the Prime Minister, Sir Neville Chamberlain, 21 June 1938, *Hansard*, Vol. 337, col. 937.

³²¹ UK, Statement at the CDDH, *Official Records*, Vol. VI, CDDH/SR.41, 26 May 1977, p. 164, § 119.

³²² UK, Ministry of Defence, Training Video: The Geneva Conventions, 1986, Report on UK Practice, 1997, Chapter 1.3.

321. In its written statement submitted to the ICJ in the *Nuclear Weapons case* in 1995, the UK stated that “it is a well established principle of customary international law that the civilian population and individual civilians are not a legitimate target in their own right”.³²³

322. On 1 September 1939, the US President wrote to the governments of France, Germany, Italy, Poland and UK asking “every government which may be engaged in hostilities publicly to affirm its determination that its armed forces shall in no event, and under no circumstances, undertake the bombardment from the air of civilian populations”.³²⁴

323. In 1972, the General Counsel of the US Department of Defense considered that the prohibition on launching attacks against the civilian population was a general principle of the LOAC which was declaratory of existing customary international law.³²⁵

324. In 1974, at the Lucerne Conference of Government Experts on Weapons which may Cause Unnecessary Suffering or have Indiscriminate Effects, the head of the US delegation stated that “the law of war also prohibits attacks on civilians and civilian objects as such. This unchallenged principle is that civilians (and persons *hors de combat*) whether in occupied territory or elsewhere must not be made the object of attack.”³²⁶

325. In 1991, in a diplomatic note to Iraq concerning operations in the Gulf War, the US stated that “the civilian population, as such, as well as individual civilians, should not be the object of attack”.³²⁷ In another such diplomatic note, the US reiterated that “the civilian population, as such, is not the object of attack”.³²⁸

326. In 1991, in a report submitted to the UN Security Council on operations in the Gulf War, the US stated that “over 52,000 coalition air sorties have been carried out since hostilities began on 16 January. These sorties were

³²³ UK, Written statement submitted to the ICJ, *Nuclear Weapons case*, 16 June 1995, § 3.67.

³²⁴ US, Letter from Franklin D. Roosevelt to the governments of France, Germany, Italy, Poland and UK, 1 September 1939, reprinted in Eugene M. Emme (ed.), *The Impact of Airpower: National Security and World Politics*, Van Nostrand, Princeton, 1959, p. 68.

³²⁵ US, Letter from J. Fred Buzhardt, General Counsel of the Department of Defense, to Senator Edward Kennedy, Chairman of the Subcommittee on Refugees of the Committee on the Judiciary, 22 September 1972, *AJIL*, Vol. 67, 1973, pp. 122–124.

³²⁶ US, Statement of 25 September 1974 at the Conference of Government Experts on Weapons which may Cause Unnecessary Suffering or have Indiscriminate Effects, Lucerne, 24 September–18 October 1974, reprinted in Arthur W. Rovine, *Digest of United States Practice in International Law, 1974*, Department of State Publication 8809, Washington, D.C., 1975, p. 713.

³²⁷ US, Department of State, Diplomatic Note to Iraq, Washington, 19 January 1991, annexed to Letter dated 21 January 1991 to the President of the UN Security Council, UN Doc. S/22122, 21 January 1991, p. 2.

³²⁸ US, Department of State, Diplomatic Note to Iraq, Washington, 21 January 1991, annexed to Letter dated 22 January 1991 to the President of the UN Security Council, UN Doc. S/22130, 22 January 1991, p. 4.

not flown against any civilian or religious targets or against the Iraqi civilian population."³²⁹

327. In 1992, in its final report to Congress on the conduct of the Gulf War, the US Department of Defense stated that "as a general principle, the law of war prohibits . . . the direct, intentional attack of civilians not taking part in hostilities".³³⁰

328. In several reports submitted in 1992 to the UN Security Council pursuant to paragraph 5 of Security Council Resolution 771 (1992) on grave breaches of GC IV committed in the former Yugoslavia, the US described "deliberate attacks on non-combatants" perpetrated by the parties to the conflict.³³¹

329. In its written statement submitted to the ICJ in the *Nuclear Weapons case* in 1995, the US stated that "the law of armed conflict precludes making civilians the object of attack as such".³³²

330. According to the Report on US Practice, "it is the *opinio juris* of the United States that it is prohibited to launch attacks against the civilian population as such".³³³

331. The Report on the Practice of the SFRY (FRY) states that:

There are many examples of direct attacks on civilians . . . which both parties to the conflict in Croatia in 1991 and 1992 pointed at. The mixed nature of the conflict, being both internal and international, contributed to this as well. Both parties referred to these incidents as violations of international humanitarian law. The fact that the parties did not question this norm [prohibiting attacks against civilians] when speaking about the behaviour of the opposite side is a clear indication of their *opinio juris* and a confirmation that such attacks were considered prohibited.³³⁴

332. In 1974, a State criticised the army of another State for attacks on civilians located outside the zones of military operations.³³⁵

333. In 1992, a State denounced attacks on civilians committed by separatist forces, including acts aimed at displacing the population, such as the burning of homes.³³⁶

³²⁹ US, Letter dated 8 February 1991 to the President of the UN Security Council, UN Doc. S/22216, 13 February 1991, p. 1.

³³⁰ US, Department of Defense, Final Report to Congress on the Conduct of the Persian Gulf War, 10 April 1992, Appendix O, The Role of the Law of War, *ILM*, Vol. 31, 1992, p. 622.

³³¹ US, Former Yugoslavia: Grave Breaches of the Fourth Geneva Convention, annexed to Letter dated 22 September 1992 to the UN Secretary-General, UN Doc. S/24583, 23 September 1992, p. 8; Former Yugoslavia: Grave Breaches of the Fourth Geneva Convention (Third Submission), annexed to Letter dated 5 November to the UN Secretary-General, UN Doc. S/24791, 10 November 1992, p. 19; Former Yugoslavia: Grave Breaches of the Fourth Geneva Convention (Fourth Submission), annexed to Letter dated 7 December 1992 to the UN Secretary-General, UN Doc. S/24918, 8 December 1992, p. 14.

³³² US, Written statement submitted to the ICJ, *Nuclear Weapons case*, 20 June 1995, p. 22.

³³³ Report on US Practice, 1997, Chapter 1.4.

³³⁴ Report on the Practice of the SFRY (FRY), 1997, Chapter 1.4, referring to Vesna Bosanac, The Tragedy of the Civilian Population of the Commune of Vukovar during 1991 – A Testimony, in Zvonimir Šeparović (ed.), *Documenta Croatica, Croatian History and Identity and the War against Croatia*, p. 114, and Miodrag Starčević and Nikola Petković (eds.), *Croatia '91 – Violence and Crime against the Law*, pp. 67–69.

³³⁵ ICRC archive document. ³³⁶ ICRC archive document.

334. In 1994, a State blamed the bombing of a civilian area by its forces on bad atmospheric conditions and on the enemy's use of the civilian population as a cover for military objectives.³³⁷

335. In 1996, in a meeting with the ICRC, the head of the armed forces of a State confirmed that specific instructions had been given to soldiers concerning respect for non-combatants.³³⁸

III. Practice of International Organisations and Conferences

United Nations

336. In a resolution adopted in 1985, the UN Security Council called on "all concerned to end acts of violence against the civilian population in Lebanon and, in particular, in and around Palestinian refugee camps".³³⁹

337. In a resolution adopted in 1992, the UN Security Council expressed grave alarm at continuing reports of widespread violations of IHL in the former Yugoslavia and especially in Bosnia and Herzegovina, including reports of "deliberate attacks on non-combatants".³⁴⁰

338. In a resolution adopted in 1992, the UN Security Council expressed grave alarm at continuing reports of widespread violations of IHL in Somalia, including reports of "deliberate attacks on non-combatants".³⁴¹

339. In a resolution adopted in 1993, the UN Security Council stated that it was deeply alarmed by the continued armed attacks and deliberate bombing of innocent civilians by Serb paramilitary units in Bosnia and Herzegovina.³⁴²

340. In a resolution adopted in 1993 on the seizure of the district of Agdam in Azerbaijan, the UN Security Council condemned "all hostile actions in the region, in particular attacks on civilians and bombardments of inhabited areas".³⁴³

341. In a resolution adopted in 1994, the UN Security Council strongly condemned a "massacre" in Hebron in which more than 50 Palestinian civilians died and several hundred others were injured. The Security Council called for measures to be taken to guarantee the safety and protection of Palestinian civilians throughout the occupied territories.³⁴⁴

342. In a resolution adopted in 1994, the UN Security Council stated that it was "appalled at the . . . large-scale violence in Rwanda, which has resulted in the death of thousands of innocent civilians, including women and children,"

³³⁷ ICRC archive document. ³³⁸ ICRC archive document.

³³⁹ UN Security Council, Res. 564, 31 May 1985, § 1.

³⁴⁰ UN Security Council, Res. 771, 13 August 1992, preamble.

³⁴¹ UN Security Council, Res. 794, 3 December 1992, preamble.

³⁴² UN Security Council, Res. 819, 16 April 1993, preamble.

³⁴³ UN Security Council, Res. 853, 29 July 1993, § 2.

³⁴⁴ UN Security Council, Res. 904, 18 March 1994, preamble and § 3.

and condemned “the ongoing violence in Rwanda, particularly in Kigali, which endangers the lives and safety of the civilian population”.³⁴⁵

343. In a resolution adopted in 1994, the UN Security Council condemned all attacks directed against the civilian population in Bosnia and Herzegovina.³⁴⁶

344. In a resolution adopted on 17 May 1994, the UN Security Council vigorously condemned the violence that had exploded in Rwanda and in particular the reported killings of numerous civilians.³⁴⁷ On 8 June 1994, the Security Council once again denounced the violence in Rwanda and referred to the systematic murder of thousands of civilians.³⁴⁸ On 22 June 1994, the Security Council expressed its grave concern at the systematic wide-scale killings of civilians in Rwanda and insisted that all parties to the conflict put an end to all massacres of the civilian population in areas under their control.³⁴⁹ On 1 July 1994, the Security Council recalled the statement by its President of 30 April 1994 in which it condemned all breaches of IHL in Rwanda and in particular those perpetrated against the civilian population.³⁵⁰

345. In a resolution adopted in 1994, the UN Security Council specifically condemned, among other violations of IHL, the widespread killings of civilians by the factions in Liberia.³⁵¹

346. In a resolution adopted in 1995, the UN Security Council condemned all attacks against persons in the refugee camps near the Rwandan borders. It referred to these acts as “violations of international humanitarian law” and stated that effective measures had to be taken to bring to justice those responsible for such crimes.³⁵²

347. In a resolution adopted in 1995, the UN Security Council expressed its concern about attacks against civilians in the Gali region of Georgia.³⁵³

348. In a resolution adopted in 1995, the UN Security Council condemned the “increasing attacks on the civilian population by Bosnian Serb forces”.³⁵⁴

349. In a resolution adopted in 1995, the UN Security Council expressed its deep concern at the continuing inter- and intra-factional fighting in parts of Liberia, which had further worsened the plight of the civilian population, and called upon combatants to respect the human rights of the civilian population and to respect IHL.³⁵⁵

³⁴⁵ UN Security Council, Res. 912, 21 April 1994, preamble and § 4.

³⁴⁶ UN Security Council, Res. 913, 22 April 1994, preamble.

³⁴⁷ UN Security Council, Res. 918, 17 May 1994, preamble.

³⁴⁸ UN Security Council, Res. 925, 8 June 1994, preamble.

³⁴⁹ UN Security Council, Res. 929, 22 June 1994, preamble and § 9.

³⁵⁰ UN Security Council, Res. 935, 1 July 1994, preamble.

³⁵¹ UN Security Council, Res. 950, 21 October 1994, § 7.

³⁵² UN Security Council, Res. 978, 27 February 1995, preamble and § 4.

³⁵³ UN Security Council, Res. 993, 12 May 1995, preamble.

³⁵⁴ UN Security Council, Res. 998, 16 June 1995, preamble.

³⁵⁵ UN Security Council, Res. 1001, 30 June 1995, preamble.

350. In a resolution adopted in 1995, the UN Security Council expressed its deep concern at reports of serious violations of IHL and human rights in Croatia and mentioned, *inter alia*, the killings of civilians.³⁵⁶

351. In a resolution adopted in 1996, the UN Security Council condemned the armed attacks against civilians in Liberia and demanded that such hostile acts cease forthwith.³⁵⁷

352. In a resolution adopted in 1996, the UN Security Council condemned in the strongest terms all acts of violence perpetrated against civilians and refugees during the conflict in Burundi.³⁵⁸ The Security Council later requested that the leaders of the parties to the conflict in Burundi ensure basic conditions of security and commit to abstaining from attacking civilians.³⁵⁹

353. In a resolution adopted in 1996, following the shelling of a UNIFIL site in Lebanon, which resulted in heavy losses among civilians, the UN Security Council stressed the need for all concerned to respect fully the rules of IHL regarding the protection of civilians and to respect the safety and security of civilians.³⁶⁰

354. In a resolution adopted in 1996, the UN Security Council expressed its "deep concern about the tragic events . . . which resulted in a high number of deaths and injuries among the Palestinian civilians" and asked that both the security and the "safety and protection" of this population be ensured.³⁶¹

355. In a resolution adopted in 1996, the UN Security Council expressed its deep concern at the intensification of the conflict in Afghanistan, which had caused numerous victims among the civilian population, and emphasised the need to stop a new rise in civilian casualties.³⁶²

356. In a resolution adopted in 1996, the UN Security Council condemned "the terrorist acts and other acts of violence" causing the deaths of civilians in Tajikistan.³⁶³

357. In a resolution adopted in 1998, the UN Security Council condemned "the continuing violence in Rwanda, including the massacre of civilians".³⁶⁴

358. In two resolutions adopted in 1998, the UN Security Council demanded that UNITA put an immediate end to attacks against the civilian population.³⁶⁵

359. In a resolution adopted in 1998, the UN Security Council condemned "the continued resistance of remnants of the ousted junta and members of the Revolutionary United Front (RUF) to the authority of the legitimate government

³⁵⁶ UN Security Council, Res. 1019, 9 November 1995, preamble and § 1.

³⁵⁷ UN Security Council, Res. 1041, 29 January 1996, § 4.

³⁵⁸ UN Security Council, Res. 1049, 5 March 1996, § 2.

³⁵⁹ UN Security Council, Res. 1072, 30 August 1996, § 5.

³⁶⁰ UN Security Council, Res. 1052, 18 April 1996, preamble and § 4.

³⁶¹ UN Security Council, Res. 1073, 28 September 1996, preamble.

³⁶² UN Security Council, Res. 1076, 22 October 1996, preamble.

³⁶³ UN Security Council, Res. 1089, 13 December 1996, § 4.

³⁶⁴ UN Security Council, Res. 1161, 9 April 1998, preamble.

³⁶⁵ UN Security Council, Res. 1173, 12 June 1998, § 5; Res. 1180, 29 June 1998, § 5.

and the violence they are perpetrating against the civilian population of Sierra Leone".³⁶⁶

360. In a resolution adopted in 1999 on the protection of civilians in armed conflicts, the UN Security Council strongly condemned "the deliberate targeting of civilians in situations of armed conflict" and called on all parties "to put an end to such practices".³⁶⁷

361. In a resolution adopted in 2000 on the protection of civilians in armed conflicts, the UN Security Council reaffirmed "its strong condemnation of the deliberate targeting of civilians or other protected persons in situations of armed conflict" and called upon all parties to put an end to such practices.³⁶⁸

362. In 1992, in a statement by its President on the situation in Bosnia and Herzegovina, the UN Security Council condemned reported attacks by Serb militia against civilians fleeing from the city of Jajce "which constitute grave violations of international humanitarian law" and demanded that "all such attacks cease immediately".³⁶⁹

363. In 1993, in a statement by its President on the situation in Bosnia and Herzegovina, the UN Security Council deplored the "killing of innocent civilians" by Serb paramilitary units and required that all acts of violence directed against civilians cease.³⁷⁰

364. In 1993, in a statement by its President, the UN Security Council voiced its shock and sadness at and strong condemnation of the senseless killing of innocent civilians near Harbel in Liberia.³⁷¹

365. In 1993, in a statement by its President regarding the massacre perpetrated by Croatian soldiers in the village of Stupni Do, the UN Security Council reiterated its unmitigated condemnation of acts of violence against the civilian population.³⁷²

366. On 7 April 1994, in a statement by its President on the situation in Rwanda, the UN Security Council condemned the killing of many civilians as "horrific attacks" and urged "respect for the safety and security of the civilian population and of the foreign communities living in Rwanda".³⁷³

367. On 30 April 1994, in a statement by its President concerning the massacres in Rwanda, the UN Security Council stated that:

The Security Council is appalled at continuing reports of the slaughter of innocent civilians in Kigali and other parts of Rwanda, and reported preparations for further massacres... The Security Council condemns all these breaches of international

³⁶⁶ UN Security Council, Res. 1181, 13 July 1998, § 1.

³⁶⁷ UN Security Council, Res. 1265, 17 September 1999, § 2.

³⁶⁸ UN Security Council, Res. 1296, 19 April 2000, § 2.

³⁶⁹ UN Security Council, Statement by the President, UN Doc. S/24744, 30 October 1992.

³⁷⁰ UN Security Council, Statement by the President, UN Doc. S/25361, 3 March 1993, p. 1.

³⁷¹ UN Security Council, Statement by the President, UN Doc. S/25918, 9 June 1993.

³⁷² UN Security Council, Statement by the President, UN Doc. S/26661, 18 October 1993.

³⁷³ UN Security Council, Statement by the President, UN Doc. S/PRST/1994/16, 7 April 1994, p. 1.

humanitarian law in Rwanda, particularly those perpetrated against the civilian population, and recalls that persons who instigate or participate in such acts are individually responsible.³⁷⁴

368. In 1995, in a statement by its President, the UN Security Council condemned “any shelling of civilian targets” in and around the Republic of Croatia and requested that “no military action be taken against civilians”.³⁷⁵

369. In 1997, in a statement by its President regarding the DRC, the UN Security Council expressed its particular concern at “reports that refugees in the east of the country are being systematically killed” and called for “an immediate end to all violence against refugees in the country”.³⁷⁶

370. In 1997, in a statement by its President on the protection of humanitarian assistance to refugees and others in conflict situations, the UN Security Council expressed its “grave concern at the recent increase in attacks or use of force in conflict situations against refugees and other civilians, in violation of . . . international humanitarian law” and reiterated its “condemnation of such acts”.³⁷⁷

371. In 1997, in a statement by its President following the military coup d’état in Sierra Leone, the UN Security Council strongly condemned “the violence which has been inflicted on both local and expatriate communities”.³⁷⁸ In another statement by its President a few weeks later, the Security Council expressed its deep concern about “the continuing crisis in Sierra Leone and its negative humanitarian consequences on the civilian population including refugees and internally displaced persons and in particular, the atrocities committed against Sierra Leone’s citizens [and] foreign nationals”.³⁷⁹ In a further statement by its President on the same issue, the Security Council condemned “the continuing violence and threats of violence by the junta towards the civilian population [and] foreign nationals” and called for “an end to such acts of violence”.³⁸⁰

372. In 1997, in a statement by its President, the UN Security Council stated that “the Security Council notes with deep concern the reports about mass killings of prisoners of war and civilians in Afghanistan and

³⁷⁴ UN Security Council, Statement by the President, UN Doc. S/PRST/1994/21, 30 April 1994, p. 1.

³⁷⁵ UN Security Council, Statement by the President, UN Doc. S/PRST/1995/38, 4 August 1995, p. 1.

³⁷⁶ UN Security Council, Statement by the President, UN Doc. S/PRST/1997/31, 29 May 1997, p. 2.

³⁷⁷ UN Security Council, Statement by the President, UN Doc. S/PRST/1997/34, 19 June 1997, p. 1.

³⁷⁸ UN Security Council, Statement by the President, UN Doc. S/PRST/1997/29, 27 May 1997.

³⁷⁹ UN Security Council, Statement by the President, UN Doc. S/PRST/1997/36, 11 July 1997, p. 1.

³⁸⁰ UN Security Council, Statement by the President, UN Doc. S/PRST/1997/42, 6 August 1997, p. 2.

supports the Secretary-General's intention to continue to investigate fully such reports".³⁸¹

373. In 1998, in a statement by its President on the situation in Sierra Leone, the UN Security Council condemned "as gross violations of international humanitarian law the recent atrocities carried out against the civilian population" and called for "an immediate end to all violence against civilians".³⁸²

374. In 1998, in a statement by its President, the UN Security Council expressed its deep concern at "reports of mass killings of civilians in northern Afghanistan" and demanded that "the Taliban fully respect international humanitarian law and human rights".³⁸³

375. In 1998, in a statement by its President, the UN Security Council condemned "the attacks or use of force in conflict situations against refugees and other civilians, in violation of the relevant rules of international law, including those of international humanitarian law".³⁸⁴

376. In 1999, in a statement by its President, the UN Security Council strongly condemned "the deliberate targeting by combatants of civilians in armed conflict" and demanded that all concerned "put an end to such violations of international humanitarian and human rights law".³⁸⁵

377. In 2001, in a statement by its President on the situation in Burundi, the UN Security Council condemned "the deliberate targeting of the civilian population by the armed groups" and called upon all parties "to abide by international humanitarian law and in particular to refrain from any further attacks or any military action that endangers the civilian population".³⁸⁶

378. In a resolution adopted in 1938 on the protection of civilian populations against air bombardment in case of war, the Assembly of the League of Nations stated that "the intentional bombing of civilian populations is illegal".³⁸⁷

379. In Resolution 2444 (XXIII), adopted in 1968, the UN General Assembly affirmed Resolution XXVIII of the 20th International Conference of the Red Cross and the basic humanitarian principle applicable in all armed conflicts laid down therein that "it is prohibited to launch attacks against the civilian population as such".³⁸⁸

³⁸¹ UN Security Council, Statement by the President, UN Doc. S/PRST/1997/55, 16 December 1997, p. 2.

³⁸² UN Security Council, Statement by the President, UN Doc. S/PRST/1998/13, 20 May 1998, p. 1.

³⁸³ UN Security Council, Statement by the President, UN Doc. S/PRST/1998/27, 15 September 1998, p. 1.

³⁸⁴ UN Security Council, Statement by the President, UN Doc. S/PRST/1998/30, 29 September 1998, p. 1.

³⁸⁵ UN Security Council, Statement by the President, UN Doc. S/PRST/1999/6, 12 February 1999, p. 2.

³⁸⁶ UN Security Council, Statement by the President, UN Doc. S/PRST/2001/6, 2 March 2001, p. 1.

³⁸⁷ League of Nations, Assembly, Resolution adopted on 30 September 1938, § I(1), *Official Journal*, Special Supplement No. 182, Records of the XIXth Ordinary Session of the Assembly, pp. 15–17.

³⁸⁸ UN General Assembly, Res. 2444 (XXIII), 19 December 1968, § 1(b).

380. In Resolution 2675 (XXV), adopted in 1970, the UN General Assembly reiterated that “civilian populations as such should not be the object of military operations”.³⁸⁹

381. In Resolution 3318 (XXIX), adopted in 1974, the UN General Assembly issued a declaration on the protection of women and children in emergency and armed conflict which stated that “attacks and bombings on the civilian population, inflicting incalculable suffering, especially on women and children, who are the most vulnerable members of the population, shall be prohibited, and such acts shall be condemned”.³⁹⁰

382. In a resolution adopted in 1994, the UN General Assembly condemned “the use of military force against civilian populations” in Bosnia and Herzegovina.³⁹¹

383. In a resolution adopted in 1996 on the situation of human rights in Sudan, the UN General Assembly called upon the parties to the hostilities “to halt the use of weapons against the civilian population”.³⁹²

384. In a resolution adopted in 1998 on the situation of human rights in Kosovo, the UN General Assembly strongly condemned “indiscriminate and widespread attacks on civilians”.³⁹³

385. In three resolutions adopted between 1987 and 1989 concerning the situation of human rights in southern Lebanon, the UN Commission on Human Rights condemned Israel for repeated violations of human rights and mentioned, *inter alia*, bombardments of the civilian population.³⁹⁴

386. In numerous resolutions adopted between 1990 and 1996, the UN Commission on Human Rights asked all parties to the Afghan conflict to implement the relevant norms of IHL found in the Geneva Conventions and the two Additional Protocols and to cease all use of weaponry against the civilian population.³⁹⁵ In another resolution in 1998, the Commission noted with deep concern the reports of mass killings and atrocities committed by combatants against the civilian population. It urged the Afghan parties to respect IHL fully and in particular to protect civilians and to halt the use of weapons against the civilian population.³⁹⁶

387. In three resolutions adopted between 1992 and 1995 concerning the situation of human rights in the territory of the former Yugoslavia, the UN

³⁸⁹ UN General Assembly, Res. 2675 (XXV), 9 December 1970, § 4.

³⁹⁰ UN General Assembly, Res. 3318 (XXIX), 14 December 1974, § 1.

³⁹¹ UN General Assembly, Res. 49/196, 23 December 1994, § 7.

³⁹² UN General Assembly, Res. 51/112, 12 December 1996, § 9.

³⁹³ UN General Assembly, Res. 53/164, 9 December 1998, § 8.

³⁹⁴ UN Commission on Human Rights, Res. 1987/54, 11 March 1987, § 1; Res. 1988/66, 10 March 1988, § 1; Res. 1989/65, 8 March 1989, § 1.

³⁹⁵ UN Commission on Human Rights, Res. 1990/53, 6 March 1990, § 5; Res. 1991/78, 6 March 1991, § 6; Res. 1992/68, 4 March 1992, § 6; Res. 1993/66, 10 March 1993, § 6; Res. 1994/84, 9 March 1994, § 8; Res. 1995/74, 8 March 1995, § 6; Res. 1996/75, 23 April 1996, § 4.

³⁹⁶ UN Commission on Human Rights, Res. 1998/70, 21 April 1998, §§ 2(d) and 5(c).

Commission on Human Rights condemned “the use of military force against civilian populations”.³⁹⁷

388. In a resolution adopted in 1992, the UN Commission on Human Rights declared itself shattered by reports describing the violations of human rights in the former Yugoslavia and particularly in Bosnia and Herzegovina, including “deliberate attacks against non-combatants”.³⁹⁸

389. In a resolution adopted in 1994 concerning the situation of human rights in Bosnia and Herzegovina, the UN Commission on Human Rights condemned the use of force against defenceless civilians.³⁹⁹

390. In two resolutions adopted in 1994 and 1995 concerning the situation of human rights in the former Yugoslavia, the UN Commission on Human Rights denounced “continued deliberate and unlawful attacks and use of military force against civilians and other protected persons by all sides”.⁴⁰⁰

391. In several resolutions adopted between 1993 and 1998 concerning the situation of human rights in Sudan, the UN Commission on Human Rights called upon the parties to the hostilities “to halt the use of weapons . . . against the civilian population”.⁴⁰¹

392. In two resolutions adopted in 1994 and 1995 concerning the situation of human rights in Zaire, the UN Commission on Human Rights noted with indignation the use of force against unarmed civilians by the army and the security services.⁴⁰²

393. In a resolution adopted in 1995 concerning the conflict in Guatemala, the UN Commission on Human Rights asked all parties to enforce the norms of IHL applicable in internal armed conflicts and to avoid all acts which placed the personal security or possessions of the civilian population at risk.⁴⁰³

394. In a resolution adopted in 1996 concerning the situation of human rights in Burundi, the UN Commission on Human Rights strongly condemned “the continued violence against the civilian population, including refugees [and] displaced persons”. It also strongly condemned “the massacres of civilians that have taken place in Burundi for the past several years”.⁴⁰⁴

³⁹⁷ UN Commission on Human Rights, Res. 1992/S-2/1, 1 December 1992, § 7; Res. 1993/7, 23 February 1993, § 12; Res. 1995/89, 8 March 1995, § 5.

³⁹⁸ UN Commission on Human Rights, Res. 1992/S-1/1, 14 August 1992, preamble.

³⁹⁹ UN Commission on Human Rights, Res. 1994/75, 9 March 1994, § 1.

⁴⁰⁰ UN Commission on Human Rights, Res. 1994/72, 9 March 1994, § 7; Res. 1995/89, 8 March 1995, § 6.

⁴⁰¹ UN Commission on Human Rights, Res. 1993/60, 10 March 1993, § 9; Res. 1994/79, 9 March 1994, § 10; Res. 1995/77, 8 March 1995, § 15; Res. 1996/73, 23 April 1996, § 15; Res. 1998/67, 21 April 1998, § 6.

⁴⁰² UN Commission on Human Rights, Res. 1994/87, 9 March 1994, § 2; Res. 1995/69, 8 March 1995, § 3.

⁴⁰³ UN Commission of Human Rights, Res. 1995/51, 3 March 1995, § 5.

⁴⁰⁴ UN Commission on Human Rights, Res. 1996/1, 27 March 1996, preamble and § 7.

395. In a resolution adopted in 1998 concerning the question of the violation of human rights in the occupied Arab territories, the UN Commission on Human Rights condemned, in particular:

the continuation of acts of wounding and killing such as that which took place on 10 March 1998 when Israeli occupation soldiers shot dead three Palestinian workers and wounded nine others, one of them seriously, and the subsequent opening of fire on Palestinian civilians after the incidents of the following days.⁴⁰⁵

396. In a resolution adopted in 1998 concerning the situation of human rights in Myanmar, the UN Commission on Human Rights called upon the government and all other parties to the hostilities “to halt the use of weapons against the civilian population”.⁴⁰⁶

397. In a resolution adopted in 1998, the UN Commission on Human Rights censured “the repeated Israeli aggressions” in southern Lebanon and western Bekaa, which had caused a large number of deaths and injuries among civilians.⁴⁰⁷

398. In a resolution adopted in 1998, the UN Commission on Human Rights requested that the LRA, operating in northern Uganda, cease immediately all abductions of and attacks against the civilian population, in particular women and children.⁴⁰⁸

399. In a resolution adopted in 1984, the UN Sub-Commission on Human Rights recalled the internal character of the conflict in El Salvador and held that government forces violated the Geneva Conventions by launching systematic attacks on the rural population, a non-military objective.⁴⁰⁹

400. In resolutions adopted in 1984 and 1985, the UN Sub-Commission on Human Rights expressed its deep concern at the increasingly serious and systematic violations of human rights in Guatemala, mentioning in particular acts of violence against civilians and non-combatants.⁴¹⁰

401. In a resolution adopted in 1993, the UN Sub-Commission on Human Rights deplored the continued victimisation of civilians as a result of military actions in Iraq.⁴¹¹ In a later resolution in 1996, the Sub-Commission also mentioned its concern over Iraqi military attacks on civilians in the marshland areas, which had resulted in many casualties.⁴¹²

402. In a resolution adopted in 1995, the UN Sub-Commission on Human Rights called upon the parties to the conflict in the former Yugoslavia to halt

⁴⁰⁵ UN Commission on Human Rights, Res. 1998/1, 27 March 1998, § 1.

⁴⁰⁶ UN Commission on Human Rights, Res. 1998/63, 21 April 1998, § 4(i).

⁴⁰⁷ UN Commission on Human Rights, Res. 1998/62, 21 April 1998, preamble.

⁴⁰⁸ UN Commission on Human Rights, Res. 1998/75, 22 April 1998, § 4.

⁴⁰⁹ UN Sub-Commission on Human Rights, Res. 1984/26, 30 August 1984, preamble.

⁴¹⁰ UN Sub-Commission on Human Rights, Res. 1984/23, 29 August 1984, § 1; Res. 1985/28, 30 August 1985, § 1.

⁴¹¹ UN Sub-Commission on Human Rights, Res. 1993/20, 20 August 1993, preamble.

⁴¹² UN Sub-Commission on Human Rights, Res. 1996/4, 19 August 1996, preamble.

all acts of violence directed against the civilian population, including those against fleeing refugees.⁴¹³

403. In a resolution adopted in 1996, the UN Sub-Commission on Human Rights stated that it was alarmed by the multiple attacks on and massacres of innocent civilians in Burundi committed by the militia and armed bands of extremist groups in defiance of the principles of IHL.⁴¹⁴

404. In 1992, in a report on UNIFIL in Lebanon, the UN Secretary-General appealed to all the parties to the conflict to show proper regard for the lives of non-combatant men, women and children.⁴¹⁵

405. In 1996, in reports on UNOMIL in Liberia, the UN Secretary-General included among alleged violations of IHL an attack launched by ULIMO-J forces on ECOMOG positions in the town of Kle on 2 January 1996, in which various sources reported that the fighters intentionally fired upon local and displaced civilians.⁴¹⁶

406. In 1998, in a report on protection for humanitarian assistance to refugees and others in conflict situations, the UN Secretary-General noted that the changing pattern of conflicts in recent years had dramatically worsened the problem of compliance with international law and listed as an example that “civilian populations are being specifically targeted”.⁴¹⁷

407. In 1998, in a report on MONUA in Angola, the UN Secretary-General pointed out that the increase in military operations had resulted in a rise in the number of reported human rights violations, including “numerous attacks against the civilian population and local officials”.⁴¹⁸ In a subsequent report on the same subject, the UN Secretary-General noted that:

The civilian population has continued to bear the brunt of military operations by both sides... At such times, principles of international humanitarian law are especially important as they seek to protect the most vulnerable groups – those who are not involved in military operations – from direct or indiscriminate attack or being forced to flee.⁴¹⁹

408. In 1998, in a report on the situation in Sierra Leone, the UN Secretary-General noted that:

The main focus of human rights concerns... has been the attacks on civilians by armed, uniformed groups, which are consistently reported to be members of

⁴¹³ UN Sub-Commission on Human Rights, Res. 1995/8, 18 August 1995, § 1.

⁴¹⁴ UN Sub-Commission on Human Rights, Res. 1996/5, 19 August 1996, preamble.

⁴¹⁵ UN Secretary-General, Report on UNIFIL, UN Doc. S/23452, 21 January 1992, § 27; Report on UNIFIL, UN Doc. S/24341, 21 July 1992, § 30.

⁴¹⁶ UN Secretary-General, Fifteenth progress report on UNOMIL, UN Doc. S/1996/47, 23 January 1996, § 25; Sixteenth progress report on UNOMIL, UN Doc. S/1996/232, 1 April 1996, § 6.

⁴¹⁷ UN Secretary-General, Report on protection for humanitarian assistance to refugees and others in conflict situations, UN Doc. S/1998/883, 22 September 1998, § 12.

⁴¹⁸ UN Secretary-General, Report on MONUA, UN Doc. S/1998/838, 7 September 1998, § 16.

⁴¹⁹ UN Secretary-General, Report on MONUA, UN Doc. S/1998/931, 8 October 1998, § 17.

the rebel forces. They have systematically mutilated or severed the limbs of non-combatants around the towns of Koidu and Kabala.⁴²⁰

409. In 1998, in a report on UNOMSIL in Sierra Leone, the UN Secretary-General provided a list of human rights abuses committed in Sierra Leone and observed that there was strong evidence of systematic and widespread human rights violations against the civilian population. He referred to a survey carried out in certain areas of Sierra Leone, which indicated a large number of war-related civilian deaths and injuries, a significant percentage of which were women and children. The Secretary-General added that the killing of some 44 of the 144 paramount chiefs indicated a deliberate attempt to target them. He stated that he was “deeply concerned about the plight of innocent civilians in the country, who may still be at risk from future attacks”.⁴²¹

410. In 1998, in a report concerning the situation in Kosovo, the UN Secretary-General maintained that he was distressed by the desperate situation of the civilian population and especially by the fact that civilians had become the main targets in the conflict.⁴²²

411. In a press release issued in February 2000, the UN Secretary-General stated that he deplored the Israeli air attacks against civilian targets in Lebanon. He expressed his deep concern at the escalation of the hostilities, which had resulted in loss of life.⁴²³

412. In 2000, in a report on the establishment of a Special Court for Sierra Leone, the UN Secretary-General stated that:

Other serious violations of international humanitarian law falling within the jurisdiction of the Court include: (a) Attacks against the civilian population as such, or against individual civilians not taking direct part in hostilities . . . The prohibition on attacks against civilians is based on the most fundamental distinction drawn in international humanitarian law between the civilian and the military and the absolute prohibition on directing attacks against the former. Its customary international law nature is, therefore, firmly established.⁴²⁴

413. In 1992, in an interim report on the situation of human rights in Iraq, the Special Rapporteur of the UN Commission on Human Rights stated that “the most blatant violations of human rights being perpetrated by the Government are constituted by the military attacks against the civilian population”.⁴²⁵

⁴²⁰ UN Secretary-General, Fifth report on the situation in Sierra Leone, UN Doc. S/1998/486, 9 June 1998, §§ 35 and 81.

⁴²¹ UN Secretary-General, First progress report on UNOMSIL, UN Doc. S/1998/750, 12 August 1998, §§ 33, 35 and 58.

⁴²² UN Secretary-General, Report on the situation in Kosovo, UN Doc. S/1998/912, 3 October 1998, § 7.

⁴²³ UN Secretary-General, Press Release, Secretary-General deplores Israeli air attacks in Lebanon, UN Doc. SG/SM/7296, 8 February 2000.

⁴²⁴ UN Secretary-General, Report on the establishment of a Special Court for Sierra Leone, UN Doc. S/2000/915, 4 October 2000, §§ 15(a) and 16.

⁴²⁵ UN Commission on Human Rights, Special Rapporteur on the Situation of Human Rights in Iraq, Interim report, UN Doc. S/24386, 5 August 1992, § 11.

414. In various reports on the situation of human rights in the former Yugoslavia, the Special Rapporteur of the UN Commission on Human Rights condemned direct attacks against civilians. For example, in his third report submitted in August 1993, he denounced the various violations of laws related to the conduct of war committed against the civilian population of Sarajevo. Providing examples of these violations, he particularly condemned the arbitrary killing of civilians by sniper fire. In his conclusion, the Special Rapporteur described as a fundamental breach of the laws of war the use of the civilian population as military targets and their deliberate killing and wounding.⁴²⁶ His fifth periodic report, submitted in November 1993, also dealt with military attacks on civilians. In various sections of the report, the Special Rapporteur stated that these attacks were committed by all the parties to the conflict.⁴²⁷ In his sixth periodic report, submitted in February 1994, the Special Rapporteur reiterated his deep concern over the repeated instances of military attacks launched against civilians and particularly against the civilian populations of Sarajevo, Mostar and Tuzla.⁴²⁸ The tenth periodic report, submitted in January 1995, contained a section describing military attacks against civilians and other non-combatants and a conclusion in which the Special Rapporteur underlined that the Serb forces in Bosnia and Herzegovina were targeting civilians with alarmingly increasing frequency. He condemned these practices, requested their immediate termination and reminded those who were responsible for such acts of their culpability under international law.⁴²⁹

415. In 1993, the UN Commission on the Truth for El Salvador established that, during the internal conflict in El Salvador, the governmental armed forces viewed the civilian population in disputed areas as a "legitimate target of attack". This policy, implemented in order to deprive the guerrillas of all means of survival, resulted in massacres and the destruction of entire communities. According to the Commission, such a tactic was a clear violation of human rights. The Commission pointed out that "following much international criticism, the armed forces cut back on the use of air attacks against the civilian population".⁴³⁰ Concerning the activities of the death squads, the Commission found that:

⁴²⁶ UN Commission on Human Rights, Special Rapporteur on the Situation of Human Rights in the Former Yugoslavia, Third periodic report, UN Doc. E/CN.4/1994/6, 26 August 1993, §§ 36 and 45.

⁴²⁷ UN Commission on Human Rights, Special Rapporteur on the Situation of Human Rights in the Former Yugoslavia, Fifth periodic report, UN Doc. E/CN.4/1994/47, 17 November 1993, §§ 10, 45, 65–67, 92–96, 161–164 and 235.

⁴²⁸ UN Commission on Human Rights, Special Rapporteur on the Situation of Human Rights in the Former Yugoslavia, Sixth periodic report, UN Doc. E/CN.4/1994/110, 21 February 1994, § 5.

⁴²⁹ UN Commission on Human Rights, Special Rapporteur on the Situation of Human Rights in the Former Yugoslavia, Tenth periodic report, UN Doc. E/CN.4/1995/57, 16 January 1995, § 48.

⁴³⁰ UN Commission on the Truth for El Salvador, Report, UN Doc. S/25500, 1 April 1993, p. 32.

The State of El Salvador, through the activities of members of the armed forces and/or civilian officials, is responsible for having taken part in, encouraged and tolerated the operations of the death squads which illegally attacked members of the civilian population.⁴³¹

The FMLN argued that mayors were legitimate targets, but the Commission pointed out that "there is nothing to support the claim that the executed mayors were combatants according to the provisions of humanitarian law" and concluded that "the execution of mayors by FMLN was a violation of the rules of international humanitarian law and international human rights law".⁴³²

Other International Organisations

416. In a statement on Lebanon issued in September 1982, the Committee of Ministers of the Council of Europe expressed "profound shock at the massacre perpetrated in West Beirut against Palestinian civilians" and condemned "with revulsion this crime which constitutes a flagrant violation of human rights, the respect and protection of which are fundamental to the Council of Europe".⁴³³

417. In a recommendation adopted in 1991, the Parliamentary Assembly of the Council of Europe condemned the "brutal repression, of genocidal proportions" carried out by the Iraqi forces against the civilian population and in particular against Iraqi Kurds, following "large scale armed insurrection".⁴³⁴

418. In a declaration on the bombardments of Dubrovnik in 1991, the Committee of Ministers of the Council of Europe condemned the use of force against the civilian population.⁴³⁵ A few days later, in the Final Communiqué of its 89th Session, the Committee of Ministers denounced the use of force against the civilian population in the former Yugoslavia.⁴³⁶

419. In a declaration on Nagorno-Karabakh in 1992, the Committee of Ministers of the Council of Europe condemned the violence and attacks directed against the civilian population in the region.⁴³⁷

420. In a resolution adopted in 1993, the Parliamentary Assembly of the Council of Europe stated that the conflict in the former Yugoslavia was marked by "barbarous violence against civilians, in particular women and children". Such violence was held to constitute a violation of "the elementary rules and principles of the laws of war and [of] the protective provisions of humanitarian law". The Assembly urged the governments of member and non-member States

⁴³¹ UN Commission on the Truth for El Salvador, Report, UN Doc. S/25500, 1 April 1993, p. 137.

⁴³² UN Commission on the Truth for El Salvador, Report, UN Doc. S/25500, 1 April 1993, pp. 151 and 153.

⁴³³ Council of Europe, Committee of Ministers, Statement on Lebanon, 23 September 1982.

⁴³⁴ Council of Europe, Parliamentary Assembly, Rec. 1150, 24 April 1991, § 3.

⁴³⁵ Council of Europe, Committee of Ministers, Declaration on the bombardments of Dubrovnik, 13 November 1991.

⁴³⁶ Council of Europe, Committee of Ministers, Final Communiqué of the 89th Session, 26 November 1991, § 13.

⁴³⁷ Council of Europe, Committee of Ministers, Declaration on Nagorno-Karabakh, 11 March 1992.

“to undertake to protect children from the scourge of war and to condemn the barbaric practice in recent armed conflicts of using women and children as targets”.⁴³⁸

421. In a declaration on Bosnia and Herzegovina in 1994, the Committee of Ministers of the Council of Europe vigorously condemned the “massacres of civilians” in Sarajevo.⁴³⁹

422. In 1995, during a debate in the Parliamentary Assembly of the Council of Europe on the situation in Chechnya (in relation to Russia’s application for membership of the Council of Europe), a German member, speaking on behalf of the Committee on Legal Affairs and Human Rights, stated that:

The action taken by the military forces of the Russian Federation, with blanket bombing and the use of heavy weapons against the civilian population, is an extremely serious breach of human rights and a violation of [established standards of IHL] . . . The United Nations General Assembly has also adopted important documents that demand respect for, and protection of, the civilian population in military conflicts. None of these documents differentiates between international and internal military conflicts. The brutal action taken by the Russian military can, therefore, never be justified, whatever warped arguments are put forward.⁴⁴⁰

423. In a press release on Liberia issued in 1990, the EC voiced strong protest at the killing of civilians.⁴⁴¹

424. In a statement on Sudan in 1994, the EU condemned attacks on the civilian population.⁴⁴²

425. In a declaration on the situation in Angola in 1993, the OAU Assembly of Heads of State and Government strongly condemned UNITA for its repeated massacres of civilian populations and the destruction of social infrastructure.⁴⁴³

426. In a resolution on Burundi adopted in 1996, the OAU Council of Ministers deplored and strongly condemned “the brutal and bastardly murder of innocent people” and called upon the authorities of Burundi to ensure the safety of the people of Burundi.⁴⁴⁴

427. In a resolution adopted in 1996, the OAU Council of Ministers condemned “the constant aggression against civilians in armed conflict situations”.⁴⁴⁵ In 1998, during a debate in the Sixth Committee of the UN General Assembly, South Africa stated on behalf of the SADC that the 1998 ICC Statute “would

⁴³⁸ Council of Europe, Parliamentary Assembly, Res. 1011, 28 September 1993, §§ 2 and 7(iii).

⁴³⁹ Council of Europe, Committee of Ministers, Declaration on Bosnia and Herzegovina, 14 February 1994, § 3.

⁴⁴⁰ Council of Europe, Parliamentary Assembly, Statement by a Member from Germany, *Official Report of Debates*, 1995 Session, 7th Sitting, 2 February 1995, pp. 222–223.

⁴⁴¹ EC, Press Release on Liberia, Dublin, 26 April 1990.

⁴⁴² EU, Statement on Sudan, Brussels, 21 February 1994.

⁴⁴³ OAU, Assembly of Heads of State and Government, Declaration 2 (XXIX), 28–30 June 1993, § 5.

⁴⁴⁴ OAU, Council of Ministers, Res. 1649 (LXIV), 1–5 July 1996.

⁴⁴⁵ OAU, Council of Ministers, Res. 1662 (LXIV), 1–5 July 1996.

also serve as a reminder that even during armed conflict the rule of law must be upheld. For example, it was unlawful...for attacks to be directed at...individuals not taking a direct part in hostilities... [This act] was a war crime and would be punished."⁴⁴⁶

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International Conferences

429. The 20th International Conference of the Red Cross in 1965 solemnly declared that "all Governments and other authorities responsible for action in armed conflicts should conform at least to the following principles:... that it is prohibited to launch attacks against the civilian populations as such".⁴⁴⁸

430. In a public statement issued on 31 October 1992, the Co-Chairmen of the International Conference on the Former Yugoslavia condemned "the continuing assaults on innocent civilians fleeing from the fighting in and around Jajce" and called upon all parties "to cease and desist from further attacks on persons displaced by the fighting".⁴⁴⁹

431. In the Final Declaration adopted by the International Conference for the Protection of War Victims in 1993, the participants stated that they refused to accept that "civilian populations should become more and more frequently the principal victims of hostilities and acts of violence perpetrated in the course of armed conflicts, for example where they are intentionally targeted".⁴⁵⁰

432. The 26th International Conference of the Red Cross and Red Crescent in 1995 adopted a resolution on protection of the civilian population in period of armed conflict in which it expressed deep alarm at "acts of violence or of terror making civilians the object of attack" and strongly condemned "the systematic and massive killing of civilians in armed conflicts".⁴⁵¹

433. The Plan of Action for the years 2000-2003 adopted in 1999 by the 27th International Conference of the Red Cross and Red Crescent requested that all

⁴⁴⁶ SADC, Statement by South Africa on behalf of the SADC before the Sixth Committee of the UN General Assembly, UN Doc. A/C.6/53/SR.9, 21 October 1998, § 13.

⁴⁴⁷ SADC, Statement by South Africa on behalf of the SADC before the Sixth Committee of the UN General Assembly, UN Doc. A/C.6/53/SR.9, 21 October 1998, § 13.

⁴⁴⁸ 20th International Conference of the Red Cross, Vienna, 2-9 October 1965, Res. XXVIII.

⁴⁴⁹ International Conference on the Former Yugoslavia, Statement of 31 October 1992, Report of the UN Secretary-General on the International Conference on the Former Yugoslavia, UN Doc. S/24795, 11 November 1992, § 13.

⁴⁵⁰ International Conference for the Protection of War Victims, Geneva, 30 August-1 September 1993, Final Declaration, § I(3), *ILM*, Vol. 33, 1994, p. 298.

⁴⁵¹ 26th International Conference of the Red Cross and Red Crescent, Geneva, 3-7 December 1995, Res. II, preamble and § A(b).

the parties to an armed conflict take effective measures to ensure that “in the conduct of hostilities, every effort is made – in addition to the total ban on directing attacks against the civilian population as such or against civilians not taking a direct part in hostilities . . . – to spare the life, protect and respect the civilian population”.⁴⁵²

IV. Practice of International Judicial and Quasi-judicial Bodies

434. In its advisory opinion in the *Nuclear Weapons case* in 1996, the ICJ considered the prohibition on making civilians the object of attack to be one of the “cardinal principles contained in the texts constituting the fabric of humanitarian law” and also one of the “intransgressible principles of international customary law”.⁴⁵³

435. In its decision on the defence motion for interlocutory appeal on jurisdiction in the *Tadić case* in 1995, the ICTY Appeals Chamber held that customary rules had developed to govern non-international armed conflicts. On the basis of various sources, including the behaviour of belligerent States, governments and insurgents (in the contexts of the internal conflicts in Spain, DRC, Nigeria and El Salvador), military manuals, ICRC action, UN General Assembly Resolutions 2444 (XXIII) and 2675 (XXV) and various declarations issued by regional organisations, the Appeals Chamber concluded that a customary norm existed protecting civilians from hostilities in internal conflicts, in particular the prohibition on attacks against civilians in the theatre of hostilities.⁴⁵⁴

436. In the *Karadžić and Mladić case* before the ICTY in 1995, the accused were charged with “deliberate attack on the civilian population and individual civilians” in violation of the laws or customs of war for their role in the shelling of civilian gatherings and the sniping campaign against the civilian population of Sarajevo.⁴⁵⁵ In its review of the indictment in 1996, the ICTY Trial Chamber confirmed all counts.⁴⁵⁶

437. In the *Martić case* before the ICTY in 1995, the accused was charged with “an unlawful attack against the civilian population and individual civilians of Zagreb” in violation of the laws or customs of war.⁴⁵⁷ In its review of the indictment in 1996, the ICTY Trial Chamber stated that “as regards customary law, the rule that the civilian population, as well as individuals civilians, shall

⁴⁵² 27th International Conference of the Red Cross and Red Crescent, Geneva, 31 October–6 November 1999, Res. I, Annex 2, Plan of Action for the years 2000–2003, Actions proposed for final goal 1.1, § 1(a).

⁴⁵³ ICJ, *Nuclear Weapons case*, Advisory Opinion, 8 July 1996, §§ 78–79.

⁴⁵⁴ ICTY, *Tadić case*, Interlocutory Appeal, 2 October 1995, §§ 100–127.

⁴⁵⁵ ICTY, *Karadžić and Mladić case*, First Indictment, 24 July 1995, § 36, Count 5 and § 45, Count 10.

⁴⁵⁶ ICTY, *Karadžić and Mladić case*, Review of the Indictments, 11 July 1996, Section VII, Disposition.

⁴⁵⁷ ICTY, *Martić case*, Initial Indictment, 25 July 1995, §§ 15 and 17, Counts I and III.

not be the object of attack, is a fundamental rule of international humanitarian law applicable to all armed conflicts".⁴⁵⁸ The Trial Chamber upheld all counts of the indictment.⁴⁵⁹

438. In the *Blaškić case* before the ICTY in 1997, the accused was charged with "unlawful attack on civilians" in violation of the laws or customs of war.⁴⁶⁰ In its judgement in 2000, the ICTY Trial Chamber considered that "the specific provisions of Common Article 3 [of the 1949 Geneva Conventions] also satisfactorily cover the prohibition on attacks against civilians as provided for by Protocols I and II".⁴⁶¹ The Trial Chamber further stated that "the parties to the conflict are obliged to attempt to distinguish between military targets and civilian persons or property. Targeting civilians or civilian property is an offence when not justified by military necessity."⁴⁶² The Trial Chamber found the accused guilty of "a violation of the laws or customs of war under Article 3 of the Statute and recognised by Article 51(2) of AP I: unlawful attacks on civilians".⁴⁶³

439. In the *Galić case* before the ICTY in 1998, the accused was charged with "attacks on civilians as set forth in Article 51 of Additional Protocol I and Article 13 of Additional Protocol II to the Geneva Conventions of 1949" in violation of the laws or customs of war for having conducted "a coordinated and protracted campaign of sniper attacks upon the civilian population of Sarajevo" and "a coordinated and protracted campaign of artillery and mortar shelling onto civilian areas of Sarajevo and upon its civilian population".⁴⁶⁴

440. In the *Kordić and Čerkez case* before the ICTY in 1998, the accused were charged with "unlawful attack on civilians" in violation of the laws or customs of war.⁴⁶⁵ In the decision on the joint defence motion in 1999, the ICTY Trial Chamber held that it was "indisputable" that the general prohibition of attacks against the civilian population was a generally accepted obligation and that as a consequence, "there is no possible doubt as to the customary status" of Articles 51(2) AP I and 13(2) AP II "as they reflect core principles of humanitarian law that can be considered as applying to all armed conflicts, whether intended to apply to international or non-international conflicts".⁴⁶⁶ In its judgement in 2001, the ICTY Trial Chamber stated that:

Prohibited attacks are those launched deliberately against civilians . . . in the course of an armed conflict and are not justified by military necessity. They must have

⁴⁵⁸ ICTY, *Martić case*, Review of the Indictment, 8 March 1996, § 10, see also §§ 11–14.

⁴⁵⁹ ICTY, *Martić case*, Review of the Indictment, 8 March 1996, Section III, Disposition.

⁴⁶⁰ ICTY, *Blaškić case*, Second Amended Indictment, 25 April 1997, § 8, Count 3.

⁴⁶¹ ICTY, *Blaškić case*, Judgement, 3 March 2000, § 170.

⁴⁶² ICTY, *Blaškić case*, Judgement, 3 March 2000, § 180.

⁴⁶³ ICTY, *Blaškić case*, Judgement, 3 March 2000, Section VI, Disposition.

⁴⁶⁴ ICTY, *Galić case*, Initial Indictment, 24 April 1998, Counts 4 and 7.

⁴⁶⁵ ICTY, *Kordić and Čerkez case*, First Amended Indictment, 30 September 1998, §§ 40 and 41, Counts 3 and 5.

⁴⁶⁶ ICTY, *Kordić and Čerkez case*, Decision on the Joint Defence Motion, 2 March 1999, § 31.

caused deaths and/or serious bodily injuries within the civilian population . . . Such attacks are in direct contravention of the prohibitions expressly recognised in international law including the relevant provisions of Additional Protocol I.⁴⁶⁷

The Tribunal found the accused guilty of “a violation of the laws or customs of war, as recognised by Article 3 [of the ICTY Statute] (unlawful attack on civilians)”⁴⁶⁸.

441. In its judgement in the *Kupreškić case* in 2000, the ICTY Trial Chamber stated that:

The protection of civilians in time of armed conflict, whether international or internal, is the bedrock of modern humanitarian law . . . Indeed, it is now a universally recognised principle, recently restated by the International Court of Justice [in the *Nuclear Weapons case*], that deliberate attacks on civilians or civilian objects are absolutely prohibited by international humanitarian law.⁴⁶⁹

442. In its final report to the ICTY Prosecutor in 2000, the Committee Established to Review the 1999 NATO Bombing Campaign Against the Federal Republic of Yugoslavia stated that:

Attacks which are not directed against military objectives (particularly attacks directed against the civilian population) . . . may constitute the *actus reus* for the offense of unlawful attack [as a violation of the laws and customs of war]. The *mens rea* for the offense is intention or recklessness, not simple negligence.⁴⁷⁰

443. In 1997, in the case concerning the events at La Tablada in Argentina, the IACiHR reaffirmed the obligation of the contending parties, on the basis of common Article 3 of the 1949 Geneva Conventions and customary principles applicable to all armed conflicts, not to engage in direct attacks against the civilian population or individual civilians.⁴⁷¹

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

444. To fulfil its task of disseminating IHL, the ICRC has delegates around the world teaching armed and security forces that “civilian persons may not be attacked unless they participate directly in hostilities” and that an “attack on the civilian population or individual civilian persons” constitutes a grave breach of the law of war.⁴⁷²

⁴⁶⁷ ICTY, *Kordić and Čerkez case*, Judgement, 26 February 2001, § 328.

⁴⁶⁸ ICTY, *Kordić and Čerkez case*, Judgement, 26 February 2001, Section V, Disposition.

⁴⁶⁹ ICTY, *Kupreškić case*, Judgement, 14 January 2000, § 521.

⁴⁷⁰ ICTY, Final Report to the Prosecutor by the Committee Established to Review the NATO Bombing Campaign Against the Federal Republic of Yugoslavia, The Hague, 14 June 2000, § 28.

⁴⁷¹ IACiHR, *Case 11.137 (Argentina)*, Report, 18 November 1997, § 177.

⁴⁷² Frédéric de Mulinen, *Handbook on the Law of War for Armed Forces*, ICRC, Geneva, 1987, §§ 208 and 778(b).

445. In an appeal issued in October 1973, the ICRC urged all the belligerents in the conflict in the Middle East (Egypt, Iraq, Israel and Syria) to observe forthwith, in particular, the provisions of, *inter alia*, Article 46(1) of draft API which stated that “the civilian population as such, as well as individual civilians, shall not be made the object of attack”. All governments concerned replied favourably.⁴⁷³

446. In an appeal issued in 1979 with respect to the conflict in Rhodesia/Zimbabwe, the ICRC called on all the parties to the conflict to “cease all attacks against the civilian population in the war-affected areas”. It also specifically requested that the Transitional Government in Salisbury “abstain from attacking civilians in the course of military operations in neighbouring countries”.⁴⁷⁴

447. In a press release issued in 1985 concerning the bombardment of civilians in the Iran–Iraq War, the President of the ICRC stated that “the bombardment of civilians is one of the very gravest violations of international humanitarian law”.⁴⁷⁵

448. In a press release issued in 1987, the ICRC made a solemn appeal to the Iranian and Iraqi governments “once again strongly urging them to put an end to the bombing and attacks on civilians”. The press release described the appeal as “the latest in a series of attempts by the ICRC to remind Iran and Iraq that the bombing and attacks on civilians constitute a grave violation of international humanitarian law and of customary law, which totally prohibit such practices”.⁴⁷⁶

449. In a Memorandum on the Applicability of International Humanitarian Law sent in 1990 to all States party to the Geneva Conventions in the context of the Gulf War, the ICRC stated that “the following general rules are recognized as binding on any party to an armed conflict: . . . It is forbidden to attack civilian persons.”⁴⁷⁷

450. In 1991, the ICRC appealed to the parties to the conflict in the former Yugoslavia “not to direct any attack against the civilian population”.⁴⁷⁸

451. On several occasions in 1992, the ICRC called on the parties to the conflict in Afghanistan not to target civilians and facilities used only by the civilian population and to spare civilian persons and objects.⁴⁷⁹

⁴⁷³ ICRC, The International Committee’s Action in the Middle East, *IRRC*, No. 152, 1973, pp. 584–585.

⁴⁷⁴ ICRC, Conflict in Southern Africa: ICRC appeal, 19 March 1979, §§ 5 and 6, *IRRC*, No. 209, 1979, pp. 88–89.

⁴⁷⁵ ICRC, Press Release No. 1506, Bombardment of civilians in the Iran–Iraq conflict: An appeal by the President of the ICRC, 28 May 1985.

⁴⁷⁶ ICRC, Press Release No. 1532, Iran–Iraq Conflict: The ICRC Solemnly Appeals, 13 February 1987.

⁴⁷⁷ ICRC, Memorandum on the Applicability of International Humanitarian Law, 14 December 1990, § II, *IRRC*, No. 280, 1991, p. 24.

⁴⁷⁸ ICRC, Appeal in behalf of civilians in Yugoslavia, Geneva, 4 October 1991.

⁴⁷⁹ ICRC, Press Release No. 1712, Afghanistan: ICRC appeal for compliance with humanitarian rules, 5 May 1992; Press Release No. 1724, Kabul: ICRC urges respect for civilians as medical facilities struggle to cope, 20 July 1992; Press Release No. 1726, Afghanistan: New ICRC appeal for compliance with humanitarian rules, 14 August 1992.

452. In a press release in 1992, the ICRC enjoined the parties to the conflict in Bosnia and Herzegovina “not to direct any attack against the civilian population”.⁴⁸⁰

453. In a communication to the press in 1993, the ICRC stated that its delegates in Bosnia and Herzegovina were once more witnessing “blatant violations of the basic principles of international humanitarian law”, citing the targeting of the civilian population as an example.⁴⁸¹

454. In a communication to the press in 1993, the ICRC enjoined the parties to the conflict in Somalia not to “attack civilians or facilities used by the civilian population”.⁴⁸²

455. In a communication to the press in 1993, the ICRC reminded the parties to the conflict in Nagorno-Karabakh of their obligation “to refrain from attacking civilians”.⁴⁸³

456. In a communication to the press in 1993, the ICRC reminded the parties to the conflict in Georgia of their obligation “to refrain from attacking civilians”.⁴⁸⁴

457. In 1994, in a Memorandum on Respect for International Humanitarian Law in Angola, the ICRC stated that “attacks on civilians or civilian objects are prohibited”.⁴⁸⁵

458. In 1994, in a Memorandum on Compliance with International Humanitarian Law by the Forces Participating in Opération Turquoise in the Great Lakes region, the ICRC stated that “it is prohibited to direct attacks against civilian persons”.⁴⁸⁶

459. In a press release issued in 1994 in the context of the conflict in Yemen, the ICRC stated that “attacks against civilians and civilian property are prohibited”.⁴⁸⁷

460. In a working paper on war crimes submitted in 1997 to the Preparatory Committee for the Establishment of an International Criminal Court, the ICRC proposed that the war crime of “making the civilian population or individual civilians the object of attack” be subject to the jurisdiction of the Court with

⁴⁸⁰ ICRC, Press Release No. 1705, Bosnia-Herzegovina: ICRC calls for protection of civilians, 10 April 1992.

⁴⁸¹ ICRC, Communication to the Press No. 93/16, Bosnia-Herzegovina: The ICRC appeals for humanity, 16 June 1993.

⁴⁸² ICRC, Communication to the Press No. 93/17, Somalia: ICRC appeals for compliance with international humanitarian law, 17 June 1993.

⁴⁸³ ICRC, Communication to the Press No. 93/25, Nagorno-Karabakh conflict: 60,000 civilians flee fighting in south-western Azerbaijan, 19 August 1993.

⁴⁸⁴ ICRC, Communication to the Press No. 93/31, Georgia: ICRC Activities in Abkhazia, 20 September 1993.

⁴⁸⁵ ICRC, Memorandum on Respect for International Humanitarian Law in Angola, 8 June 1994, § II, *IRRC*, No. 320, 1997, p. 503.

⁴⁸⁶ ICRC, Memorandum on Compliance with International Humanitarian Law by the Forces Participating in Opération Turquoise, 23 June 1994, § II, reprinted in Marco Sassòli and Antoine A. Bouvier, *How Does Law Protect in War?*, ICRC, Geneva, 1999, p. 1308.

⁴⁸⁷ ICRC, Press Release No. 1773, Fighting in Yemen, 9 May 1994; see also Press Release No. 1775, Yemen: ICRC active on both sides appeals to belligerents, 12 May 1994.

respect to international armed conflicts and that the war crime of “attacks directed against the civilian population as such, or individual civilians” be subject to the jurisdiction of the Court with respect to non-international armed conflicts.⁴⁸⁸

461. In a communication to the press in 2000, the ICRC reminded both the Sri Lankan security forces and the LTTE of their obligation to comply with IHL, which provided for the protection of the civilian population against the effects of the hostilities. The ICRC called on both parties to ensure that the civilian population and civilian property were protected and respected at all times.⁴⁸⁹

462. In a communication to the press in 2000 in connection with the hostilities in the Near East, the ICRC stated that attacks directed against the civilian population were “absolutely and unconditionally prohibited” and that “the use of weapons of war against unarmed civilians cannot be authorized”.⁴⁹⁰

463. In a communication to the press in 2001 in connection with the conflict in Afghanistan, the ICRC stated that “attacks directed at civilians are prohibited”.⁴⁹¹

VI. Other Practice

464. Oppenheim states that “the immunity of non-combatants from direct attack is one of the fundamental rules of the International Law of War. It is a rule which applies with absolute cogency alike to warfare on land, at sea, and in the air.”⁴⁹²

465. In a resolution adopted at its Edinburgh Session in 1969, the Institute of International Law recalled that “existing international law prohibits all armed attacks on the civilian populations as such, as well as on non-military objects, notably dwellings or other buildings sheltering the civilian population”.⁴⁹³

466. In 1979, an armed group wrote to the ICRC to confirm its commitment to IHL and to denounce the killing and injuring of some 150,000 persons as a

⁴⁸⁸ ICRC, Working paper on war crimes submitted to the Preparatory Committee for the Establishment of an International Criminal Court, New York, 14 February 1997, §§ 1(b)(i) and 3(vi).

⁴⁸⁹ ICRC, Communication to the Press No. 00/13, Sri Lanka: ICRC urges both parties to respect civilians, 11 May 2000.

⁴⁹⁰ ICRC, Communication to the Press No. 00/42, ICRC appeal to all involved in violence in the Near East, 21 November 2000.

⁴⁹¹ ICRC, Communication to the Press No. 01/47, Afghanistan: ICRC calls on all parties to the conflict to respect international humanitarian law, 24 October 2001.

⁴⁹² Lassa Oppenheim, *International Law. A Treatise*, Vol. II, *Disputes, War and Neutrality*, Sixth edition, revised, Hersch Lauterpacht (ed.), Longmans, Green and Co., London/New York/Toronto, 1944, p. 413, § 214*ea*.

⁴⁹³ Institute of International Law, Edinburgh Session, Resolution on the Distinction between Military Objectives and Non-military Objects in General and Particularly the Problems Associated with Weapons of Mass Destruction, 9 September 1969, § 4.

result of attacks on civilian objectives allegedly carried out by one of the parties to the conflict.⁴⁹⁴

467. In 1980, an armed opposition group expressed its acceptance of the fundamental principles of IHL as formulated by the ICRC, including the principle that “neither the civilian population as such nor civilian persons shall be the object of attack”.⁴⁹⁵

468. In 1985, in a report on violations of the laws of war in Nicaragua, Americas Watch stated that:

However, although [common] Article 3 [of the 1949 Geneva Conventions] contains no provision providing explicit protection for the civilian population against attacks or their effects, Article 3’s prohibition of “violence to life and person” against “persons taking no active part in the hostilities” is broad enough to include attacks against civilians in territory controlled by an adverse party in an internal armed conflict. . . . Certain general principles of the customary law of armed conflict were recognized in U.N. General Assembly Resolution 2444 (XXIII), 13 January 1969, which was adopted by unanimous vote. This resolution affirms . . . that it is prohibited to launch attacks against the civilian population as such. . . . Further, the U.S. Government has expressly recognized these general principles “as declaratory of existing customary international law.” The ICRC also lists these principles among the fundamental rules of international humanitarian law applicable in *all* armed conflicts. Thus, attacks by Nicaraguan government or *contra* forces directed against *unarmed* civilians undertaken with the knowledge that no military objective was present would constitute a violation of the customary international law of armed conflict. Under this circumstance, such deaths would be regarded as civilian murders and not as unavoidable collateral civilian casualties.⁴⁹⁶ [emphasis in original]

469. In 1989, in a report on violations of the laws of war in Angola, Africa Watch stated that:

Although [common] Article 3 [of the 1949 Geneva Conventions] does not, by its terms, prohibit attacks against the civilian population in non-international armed conflicts, such attacks are prohibited by the customary laws of armed conflict. United Nations General Assembly Resolution 2444, *Respect for Human Rights in Armed Conflicts* . . . adopted by unanimous vote on December 19, 1969, expressly recognized this customary principle of civilian immunity and its complementary principle requiring the warring parties to distinguish civilians from combatants at all times. . . . Furthermore, the International Committee of the Red Cross has long regarded these principles as basic rules of the laws of war that apply in all armed conflicts. The United States government also has expressly recognized these principles as declaratory of existing customary international law.⁴⁹⁷

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

⁴⁹⁴ ICRC archive document. ⁴⁹⁵ ICRC archive document.

⁴⁹⁶ Americas Watch, *Violations of the Laws of War by Both Sides in Nicaragua: 1981–1985*, New York, March 1985, pp. 18–21.

⁴⁹⁷ Africa Watch, *Angola: Violations of the Laws of War by Both Sides*, New York, April 1989, p. 126.

University in Turku/Åbo, Finland in 1990, states that “attacks against persons not taking part in acts of violence shall be prohibited in all circumstances”.⁴⁹⁸

471. Rule A2 of the Rules of International Humanitarian Law Governing the Conduct of Hostilities in Non-international Armed Conflicts, adopted in 1990 by the Council of the IHL, provides that “the prohibition of attacks against the civilian population as such or against individual civilians is a general rule applicable in non-international armed conflicts”. The commentary on this rule notes that it is based on Article 25 HR, UN General Assembly Resolutions 2444 (XXIII) and 2675 (XXV) and Article 13(2) AP II. It adds that attacks against civilians are also incompatible with the rule on the protection of the life and person of those taking no active part in hostilities as set out in common Article 3 of the 1949 Geneva Conventions.⁴⁹⁹

472. In 1992, in a report on war crimes committed in the conflict in Bosnia and Herzegovina, Helsinki Watch stated that:

United Nations General Assembly Resolution 2444, adopted by unanimous vote on December 19, 1969, expressly recognized the customary law principle of civilian immunity and its complementary principle requiring the warring parties to distinguish civilians from combatants at all times.⁵⁰⁰

473. In 1994, officials of a separatist entity qualified the bombing of the civilian population as an isolated case and emphasised that the persons involved had been punished.⁵⁰¹

474. In 2000, in a report on the NATO bombings in the FRY, Amnesty International dealt with some cases that were selected because there was “evidence that civilians were victims of either direct or indiscriminate attacks, in violation of international humanitarian law”.⁵⁰²

475. In 2001, in a report on Israel and the occupied territories, Amnesty International stated that:

It is a basic rule of customary international law that civilians and civilian objects must never be made the targets of an attack. This rule applies in all circumstances including in the midst of full-scale armed conflict. Due to its customary nature it is binding on all parties. Israel is prohibited from attacking civilians and civilian objects. Palestinians are also prohibited from targeting Israeli civilians, including settlers who are not bearing arms, and civilian objects.⁵⁰³

⁴⁹⁸ Declaration of Minimum Humanitarian Standards, adopted by an expert meeting convened by the Institute for Human Rights, Åbo Akademi University, Turku/Åbo, 30 November–2 December 1990, Article 5(1), *IRRC*, No. 282, 1991, p. 332.

⁴⁹⁹ IHL, Rules of International Humanitarian Law Governing the Conduct of Hostilities in Non-international Armed Conflicts, Rule A2 and Commentary, *IRRC*, No. 278, 1990, pp. 388–389. Helsinki Watch, *War Crimes in Bosnia-Herzegovina*, Vol. I, New York, August 1992, p. 203.

⁵⁰⁰ ICRC archive document.

⁵⁰¹ Amnesty International, *NATO/Federal Republic of Yugoslavia: “Collateral Damage” or Unlawful Killings? Violations of the Laws of War by NATO during Operation Allied Force*, AI Index EUR 70/18/00, London, June 2000, p. 30.

⁵⁰² Amnesty International, *Israel and the Occupied Territories: State Assassinations and Other Unlawful Killings*, AI Index MDE 15/005/2001, London, 21 February 2001, p. 2, see also p. 29.

B. Violence Aimed at Spreading Terror among the Civilian Population

I. Treaties and Other Instruments

Treaties

476. Article 33 GC IV provides that “all measures of intimidation or of terrorism are prohibited”.

477. Article 51(2) AP I prohibits “acts or threats of violence the primary purpose of which is to spread terror among the civilian population”. Article 51 AP I was adopted by 77 votes in favour, one against and 16 abstentions.⁵⁰⁴

478. Article 4(2)(d) AP II prohibits “acts of terrorism” against all persons who do not take a direct part or who have ceased to take part in hostilities. Article 4 AP II was adopted by consensus.⁵⁰⁵

479. Article 13(2) AP II prohibits “acts or threats of violence the primary purpose of which is to spread terror among the civilian population”. Article 13 AP II was adopted by consensus.⁵⁰⁶

480. Article 3(d) of the 2002 Statute of the Special Court for Sierra Leone provides that “the Special Court shall have the power to prosecute persons who committed or ordered the commission of serious violations . . . of [AP II]. The violations shall include: . . . (d) Acts of terrorism.” Threats to commit acts of terrorism are covered by Article 3(h).

Other Instruments

481. Based on several documents supplying evidence of outrages committed during the First World War, the 1919 Report of the Commission on Responsibility lists violations of the laws and customs of war which should be subject to criminal prosecution, including “systematic terror”.

482. Article 22 of the 1923 Hague Rules of Air Warfare prohibits “any air bombardment for the purpose of terrorizing the civil population or destroying or damaging private property without military character or injuring non-combatants”.

483. Article 4 of the 1938 ILA Draft Convention for the Protection of Civilian Populations against New Engines of War provides that “aerial bombardment for the purpose of terrorising the civilian population is expressly prohibited”.

484. Article 6 of the 1956 New Delhi Draft Rules states that “attacks directed against the civilian population, as such, whether with the object of terrorizing it or for any other reason, are prohibited”.

485. Paragraph 6 of the 1991 Memorandum of Understanding on the Application of IHL between Croatia and the SFRY requires that hostilities be conducted in accordance with Article 51(2) AP I.

⁵⁰⁴ CDDH, *Official Records*, Vol. VI, CDDH/SR.41, 26 May 1977, p. 163.

⁵⁰⁵ CDDH, *Official Records*, Vol. VII, CDDH/SR.50, 3 June 1977, p. 90.

⁵⁰⁶ CDDH, *Official Records*, Vol. VII, CDDH/SR.52, 6 June 1977, p. 134.

486. Paragraph 2.5 of the 1992 Agreement on the Application of IHL between the Parties to the Conflict in Bosnia and Herzegovina requires that hostilities be conducted in accordance with Article 51(2) AP I.

487. Article 4(d) of the 1994 ICTR Statute provides that the Tribunal shall have jurisdiction over violations of AP II, including acts of terrorism.

488. Pursuant to Article 20(f)(iv) of the 1996 ILC Draft Code of Crimes against the Peace and Security of Mankind, “acts of terrorism” committed in non-international armed conflict constitute war crimes. The commentary states that this Article covers violations of Article 4(2)(d) AP II and should be understood as having the same meaning and scope of application.

II. National Practice

Military Manuals

489. Argentina’s Law of War Manual states that “acts which aim to terrorise the [civilian] population” are prohibited.⁵⁰⁷

490. Australia’s Defence Force Manual states that “acts or threats of violence primarily intended to spread terror among the civilian population are prohibited”.⁵⁰⁸ The manual adds that “offensive support or strike operations against the civilian population for the sole purpose of terrorising the civilian population [are] prohibited”.⁵⁰⁹

491. Belgium’s Teaching Manual for Soldiers states that it is prohibited to intimidate or terrorise the civilian population.⁵¹⁰

492. Belgium’s Law of War Manual states that aerial bombardment aimed at terrorising the civilian population is prohibited.⁵¹¹

493. Benin’s Military Manual includes a prohibition to “terrorise the civilian population through acts or threats of violence”.⁵¹²

494. Cameroon’s Instructors’ Manual prohibits terrorising the civilian population.⁵¹³

495. Canada’s LOAC Manual states that “acts or threats of violence, the primary purpose of which is to spread terror among the civilian population, are prohibited”.⁵¹⁴ The manual repeats this prohibition with respect to non-international armed conflicts in particular.⁵¹⁵

⁵⁰⁷ Argentina, *Law of War Manual* (1989), § 7.08.

⁵⁰⁸ Australia, *Defence Force Manual* (1994), § 531; see also *Commanders’ Guide* (1994), § 955(b).

⁵⁰⁹ Australia, *Defence Force Manual* (1994), § 554.

⁵¹⁰ Belgium, *Teaching Manual for Soldiers* (undated), p. 14.

⁵¹¹ Belgium, *Law of War Manual* (1983), p. 31.

⁵¹² Benin, *Military Manual* (1995), Fascicule III, p. 12.

⁵¹³ Cameroon, *Instructors’ Manual* (1992), p. 150.

⁵¹⁴ Canada, *LOAC Manual* (1999), p. 4-4, § 32, see also p. 6-4, § 40.

⁵¹⁵ Canada, *LOAC Manual* (1999), p. 17-5, § 37.

- 496.** Colombia's Basic Military Manual provides that the civilian population shall not be terrorised.⁵¹⁶
- 497.** Croatia's LOAC Compendium lists terror among the prohibited methods of warfare.⁵¹⁷
- 498.** Ecuador's Naval Manual states that "the civilian population as such, as well as individual civilians, may not be the object of attack or of threats or acts of intentional terrorization".⁵¹⁸ The manual also states that "bombardment for the sole purpose of attacking and terrorising the civilian population" constitutes a war crime.⁵¹⁹
- 499.** France's LOAC Summary Note prohibits the use of acts or threats of violence in order to spread terror among the civilian population.⁵²⁰
- 500.** Germany's Military Manual states that "measures of intimidation or of terrorism" are prohibited.⁵²¹
- 501.** Hungary's Military Manual lists "terror" among the prohibited methods of warfare.⁵²²
- 502.** Kenya's LOAC Manual states that it is forbidden "to spread terror among the civilian population through acts or threats of violence".⁵²³
- 503.** The Military Manual of the Netherlands states that "acts or threats of violence whose primary aim is to terrorise the civilian population are prohibited. As a result, so-called terror bombardment as well as any other form of terror attack is prohibited. Threatening therewith is also prohibited."⁵²⁴ The manual repeats this rule with respect to non-international armed conflicts in particular.⁵²⁵
- 504.** New Zealand's Military Manual prohibits "acts or threats of violence the primary purpose of which is to spread terror among the civilian population".⁵²⁶ The manual repeats this prohibition with respect to non-international armed conflicts in particular.⁵²⁷
- 505.** Nigeria's Manual on the Laws of War states that "terror attacks directed mainly against the civilian population are forbidden".⁵²⁸
- 506.** Russia's Military Manual considers that "the use of terror against the local population" is a prohibited method of warfare.⁵²⁹

⁵¹⁶ Colombia, *Basic Military Manual* (1995), p. 30.

⁵¹⁷ Croatia, *LOAC Compendium* (1991), p. 40. ⁵¹⁸ Ecuador, *Naval Manual* (1989), § 11.3.

⁵¹⁹ Ecuador, *Naval Manual* (1989), § 6.2.5.

⁵²⁰ France, *LOAC Summary Note* (1992), § 4.1; see also *LOAC Teaching Note* (2000), p. 2.

⁵²¹ Germany, *Military Manual* (1992), § 507; see also *IHL Manual* (1996), § 403.

⁵²² Hungary, *Military Manual* (1992), p. 64.

⁵²³ Kenya, *LOAC Manual* (1997), Précis No. 4, p. 2, § g.

⁵²⁴ Netherlands, *Military Manual* (1993), p. V-4, § 4.

⁵²⁵ Netherlands, *Military Manual* (1993), p. XI-6.

⁵²⁶ New Zealand, *Military Manual* (1992), § 517(1).

⁵²⁷ New Zealand, *Military Manual* (1992), § 1819.

⁵²⁸ Nigeria, *Manual on the Laws of War* (undated), § 20.

⁵²⁹ Russia, *Military Manual* (1990), § 5(n).

- 507.** Spain's LOAC Manual prohibits acts or threats of violence which have as a primary objective the spreading of terror among the civilian population.⁵³⁰
- 508.** Sweden's IHL Manual states that terror attacks are prohibited, that is, "attacks deliberately aimed at causing heavy losses and creating fear among the civilian population".⁵³¹
- 509.** Switzerland's Basic Military Manual states that "it is prohibited to commit acts of violence or to threaten violence with the primary aim of spreading terror among the civilian population. The threat of nuclear attack against urban centres is contrary to the Additional Protocols."⁵³²
- 510.** Togo's Military Manual prohibits acts or threats of violence which aim to terrorise the civilian population.⁵³³
- 511.** The US Air Force Pamphlet states that "acts or threats of violence which have the primary object of spreading terror among the civilian population are prohibited".⁵³⁴
- 512.** The US Naval Handbook states that "the civilian population as such, as well as individual civilians, may not be the object of attack or of threats or acts of intentional terrorization".⁵³⁵ The Handbook also states that carrying out a "bombardment, the sole purpose of which is to attack and terrorize the civilian population" is an example of a war crime.⁵³⁶
- 513.** The YPA Military Manual of the SFRY (FRY) states that "it is particularly prohibited to attack the civilian population with the aim of terrorising it".⁵³⁷

National Legislation

- 514.** Argentina's Draft Code of Military Justice punishes any soldier who carries out or orders the commission of "acts or threats of violence whose primary aim is to terrorise" the civilian population.⁵³⁸
- 515.** Australia's War Crimes Act considers "any war crime within the meaning of the instrument of appointment of the Board of Inquiry [set up to investigate war crimes committed by enemy subjects]" as a war crime, including "murder and massacres – systematic terrorism".⁵³⁹
- 516.** Under Bangladesh's International Crimes (Tribunal) Act, the "violation of any humanitarian rules applicable in armed conflicts laid down in the Geneva Conventions of 1949" is a crime.⁵⁴⁰

⁵³⁰ Spain, *LOAC Manual* (1996), Vol. I, §§ 2.3.b.(3) and 3.3.b.(7).

⁵³¹ Sweden, *IHL Manual* (1991), Section 3.2.1.5, p. 44.

⁵³² Switzerland, *Basic Military Manual* (1987), Article 27(2) and commentary.

⁵³³ Togo, *Military Manual* (1996), Fascicule III, p. 12.

⁵³⁴ US, *Air Force Pamphlet* (1976), § 5-3(a)(1)(a).

⁵³⁵ US, *Naval Handbook* (1995), § 11.3. ⁵³⁶ US, *Naval Handbook* (1995), § 6.2.5

⁵³⁷ SFRY (FRY), *YPA Military Manual* (1988), § 67(2).

⁵³⁸ Argentina, *Draft Code of Military Justice* (1998), Article 291, introducing a new Article 875(1) in the *Code of Military Justice as amended* (1951).

⁵³⁹ Australia, *War Crimes Act* (1945), Section 3.

⁵⁴⁰ Bangladesh, *International Crimes (Tribunal) Act* (1973), Section 3(2)(e).

517. Under the Criminal Code of the Federation of Bosnia and Herzegovina, “the application of measures of intimidation and terror” against civilians is a war crime.⁵⁴¹ The Criminal Code of the Republika Srpska contains the same provision.⁵⁴²

518. China’s Law Governing the Trial of War Criminals provides that “planned slaughter, murder or other terrorist action” constitutes a war crime.⁵⁴³

519. Colombia’s Penal Code imposes a criminal sanction on “anyone who, during an armed conflict, carries out or orders the carrying out of . . . acts or threats of violence whose primary purpose is to terrorise the civilian population”.⁵⁴⁴

520. Under Côte d’Ivoire’s Penal Code as amended, organising, ordering or carrying out, in time of war or occupation, “measures of terror” against the civilian population constitutes a “crime against the civilian population”.⁵⁴⁵

521. Under Croatia’s Criminal Code, “the imposition of measures of intimidation and terror” against the civilian population is a war crime.⁵⁴⁶

522. The Criminal Code as amended of the Czech Republic punishes anyone who during war “terrorises defenceless civilians with violence or the threat of violence”.⁵⁴⁷

523. Under Ethiopia’s Penal Code, it is a punishable offence to organise, order or engage in “measures of intimidation or terror” against the civilian population, in time of war, armed conflict or occupation.⁵⁴⁸

524. Ireland’s Geneva Conventions Act as amended provides that any “minor breach” of the Geneva Conventions, including violations of Article 33 GC IV, and any “minor breach” of AP I, including violations of Article 51(2) AP I, as well as any “contravention” of AP II, including violations of Articles 4(2)(d) and 13(2) AP II, are punishable offences.⁵⁴⁹

525. Under Lithuania’s Criminal Code as amended, “the use of intimidation and terror” in time of war, armed conflict or occupation is a war crime.⁵⁵⁰

526. The Definition of War Crimes Decree of the Netherlands includes “systematic terrorism” in its list of war crimes.⁵⁵¹

527. Under Norway’s Military Penal Code as amended, “anyone who contravenes or is accessory to the contravention of provisions relating to the protection of persons or property laid down in . . . the Geneva Conventions of 12 August 1949 . . . [and in] the two additional protocols to these Conventions . . . is liable to imprisonment”.⁵⁵²

⁵⁴¹ Bosnia and Herzegovina, Federation, *Criminal Code* (1998), Article 154(1).

⁵⁴² Bosnia and Herzegovina, Republika Srpska, *Criminal Code* (2000), Article 433(1).

⁵⁴³ China, *Law Governing the Trial of War Criminals* (1946), Article 3(1).

⁵⁴⁴ Colombia, *Penal Code* (2000), Article 144.

⁵⁴⁵ Côte d’Ivoire, *Penal Code as amended* (1981), Article 138(5).

⁵⁴⁶ Croatia, *Criminal Code* (1997), Article 158(1).

⁵⁴⁷ Czech Republic, *Criminal Code as amended* (1961), Article 263(a)(1).

⁵⁴⁸ Ethiopia, *Penal Code* (1957), Article 282(g).

⁵⁴⁹ Ireland, *Geneva Conventions Act as amended* (1962), Section 4(1) and (4).

⁵⁵⁰ Lithuania, *Criminal Code as amended* (1961), Article 336.

⁵⁵¹ Netherlands, *Definition of War Crimes Decree* (1946), Article 1.

⁵⁵² Norway, *Military Penal Code as amended* (1902), § 108.

528. Slovakia's Criminal Code as amended punishes anyone who during war "terrorises defenceless civilians with violence or the threat of violence".⁵⁵³

529. Under Slovenia's Penal Code, the imposition of measures of "intimidation [and] terrorism" against the civilian population is a war crime.⁵⁵⁴

530. Spain's Penal Code punishes anyone who, during an armed conflict, makes the civilian population the object of "acts or threats of violence whose primary purpose is to terrorise them".⁵⁵⁵

531. Under the Penal Code as amended of the SFRY (FRY), "the taking of measures of intimidation and terror" against civilians is a war crime.⁵⁵⁶

National Case-law

532. No practice was found.

Other National Practice

533. On the basis of an interview with a retired army general, the Report on the Practice of Botswana states that the armed forces of Botswana would apply Article 13 AP II in the event of a non-international armed conflict.⁵⁵⁷

534. In a letter to the UN Secretary-General in 1991, Israel pointed out that SCUD missiles had been directed at civilians and that this method of "terror" by "intentional and unprovoked bombings" was a "flagrant breach of the norms of international law".⁵⁵⁸

535. The Report on the Practice of Lebanon refers to a 1996 report by the Ministry of Justice which stated that Israel had committed serious violations of the Geneva Conventions by terrorising civilians.⁵⁵⁹

536. At the CDDH, Mexico stated that it believed draft Article 46 AP I (now Article 51) to be so essential that it "cannot be the subject of any reservations whatsoever since these would be inconsistent with the aim and purpose of Protocol I and undermine its basis".⁵⁶⁰

537. At the CDDH, the UK voted in favour of draft Article 46 AP I (now Article 51), describing its first three paragraphs as containing a "valuable reaffirmation of existing customary rules of international law designed to protect civilians".⁵⁶¹

⁵⁵³ Slovakia, *Criminal Code as amended* (1961), Article 263(a)(1).

⁵⁵⁴ Slovenia, *Penal Code* (1994), Article 374(1).

⁵⁵⁵ Spain, *Penal Code* (1995), Article 611(1).

⁵⁵⁶ SFRY (FRY), *Penal Code as amended* (1976), Article 142(1).

⁵⁵⁷ Report on the Practice of Botswana, 1998, Interview with a retired army general, Answers to additional questions on Chapter 1.4.

⁵⁵⁸ Israel, Letter dated 28 January 1991 to the UN Secretary-General, UN Doc. S/22160, 29 January 1991, p. 2.

⁵⁵⁹ Report on the Practice of Lebanon, 1998, Chapter 1.4, referring to Report by the Lebanese Ministry of Justice on possibilities for legal action against Israel, 12 April 1996.

⁵⁶⁰ Mexico, Statement at the CDDH, *Official Records*, Vol. VI, CDDH/SR.41, 26 May 1977, p. 193.

⁵⁶¹ UK, Statement at the CDDH, *Official Records*, Vol. VI, CDDH/SR. 41, 26 May 1977, p. 164, § 119.

538. In 1987, the Deputy Legal Adviser of the US Department of State stated that “we support the principle that the civilian population as such, as well as individual citizens, not be the object of acts or threats of violence the primary purpose of which is to spread terror among them”.⁵⁶²

539. In 1991, in response to an ICRC memorandum on the applicability of IHL in the Gulf region, the US Department of the Army pointed out that US practice was consistent with the prohibition on acts or threats of violence the main purpose of which was to spread terror among the civilian population.⁵⁶³

540. In 1994, in a document concerning human rights practices in Bosnia and Herzegovina, the US Department of State noted that the Bosnian Serb armed militia employed rape as a tool of war to terrorise and uproot populations.⁵⁶⁴

III. Practice of International Organisations and Conferences

United Nations

541. In a resolution adopted in 1994 on the situation of human rights in the former Yugoslavia, the UN General Assembly condemned the “systematic terrorization and murder of non-combatants”.⁵⁶⁵

542. In a resolution adopted in 1998 on the situation of human rights in Kosovo, the UN General Assembly stated that it was:

gravely concerned about the systematic terrorization of ethnic Albanians, as demonstrated in the many reports, *inter alia*, of torture of ethnic Albanians, through indiscriminate and widespread shelling, mass forced displacement of civilians, summary executions and illegal detention of ethnic Albanian citizens of the Federal Republic of Yugoslavia (Serbia and Montenegro) by the police and the military.⁵⁶⁶

543. In several resolutions adopted between 1992 and 1995 on the situation of human rights in the territory of the former Yugoslavia, the UN Commission on Human Rights condemned the “systematic terrorization and murder of non-combatants”.⁵⁶⁷

⁵⁶² US, Remarks of Michael J. Matheson, Deputy Legal Adviser, US Department of State, The Sixth Annual American Red Cross-Washington College of Law Conference on International Humanitarian Law: A Workshop on Customary International Law and the 1977 Protocols Additional to the 1949 Geneva Conventions, *American University Journal of International Law and Policy*, Vol. 2, 1987, p. 426.

⁵⁶³ US, Letter from the Department of the Army to the legal adviser of the US Army forces deployed in the Gulf region, 11 January 1991, § 8(F), Report on US Practice, 1997, Chapter 1.4.

⁵⁶⁴ US, Department of State, *Bosnia-Herzegovina Human Rights Practice*, 1993, 31 January 1994, p. 2.

⁵⁶⁵ UN General Assembly, Res. 49/196, 23 December 1994, § 7.

⁵⁶⁶ UN General Assembly, Res. 53/164, 9 December 1998, preamble.

⁵⁶⁷ UN Commission on Human Rights, Res. 1992/S-2/1, 1 December 1992, § 7; Res. 1993/7, 23 February 1993, § 12; Res. 1994/72, 9 March 1994, § 7(b) (“murder of civilians and non-combatants”); Res. 1995/89, 8 March 1995, § 5.

544. In a resolution adopted in 1989 on the situation of human rights in El Salvador, the UN Sub-Commission on Human Rights stated that it was “alarmed by the intensification of activities to terrorize the population that are being carried out by the death squads composed of police and armed forces personnel operating in civilian clothing under the orders of senior officers”.⁵⁶⁸

545. In 2000, in a report on the establishment of a Special Court for Sierra Leone, the UN Secretary-General stated that “violations of . . . article 4 [AP II] committed in an armed conflict not of an international character have long been considered customary international law”.⁵⁶⁹

546. In 1992, in a report on the situation of human rights in the former Yugoslavia, the Special Rapporteur of the UN Commission on Human Rights noted that the regular bombardment of cities such as Sarajevo or Bihac by Serb forces in Bosnia and Herzegovina was part of a tactic to terrorise the civilian population.⁵⁷⁰

547. In 2000, in a report on systematic rape, sexual slavery and slavery-like practices during armed conflict, the Special Rapporteur of the UN Sub-Commission on Human Rights stated that “the use of sexual violence is seen as an effective way to terrorize and demoralize members of the opposition, thereby forcing them to flee”.⁵⁷¹ In a subsequent report on the same subject, the UN High Commissioner for Human Rights stated that “all kinds of sexual violence, including assault, rape, abuse and torture of women and children, have been used in a more or less systematic manner to terrorize civilians and destroy the social structure, family structure and pride of the enemy”.⁵⁷²

548. In 1995, in a report on the conflict in Guatemala, the Director of MINUGUA appealed to the URNG “to desist from all acts of intimidation against individuals, since such acts contribute to feelings of defencelessness and to impunity”.⁵⁷³

Other International Organisations

549. In a report on the Kosovo conflict, covering the period from October 1998 to June 1999, the OSCE noted that:

⁵⁶⁸ UN Sub-Commission on Human Rights, Res. 1989/9, 31 August 1989, preamble.

⁵⁶⁹ UN Secretary-General, Report on the establishment of a Special Court for Sierra Leone, UN Doc. S/2000/915, 4 October 2000, § 14.

⁵⁷⁰ UN Commission on Human Rights, Special Rapporteur on the Situation of Human Rights in the Former Yugoslavia, Report, UN Doc. A/47/418 – S/24516, 3 September 1992, §§ 17 and 20.

⁵⁷¹ UN Sub-Commission on Human Rights, Special Rapporteur on Systematic Rape, Sexual Slavery and Slavery-like Practices during Wartime, Update to the final report, UN Doc. E/CN.4/Sub.2/2000/21, 6 June 2000, § 20.

⁵⁷² UN High Commissioner for Human Rights, Report on systematic rape, sexual slavery and slavery-like practices during armed conflicts, UN Doc. E/CN.4/Sub.2/2000/20, 27 June 2000, p. 2, § 9.

⁵⁷³ MINUGUA, Director, First report, UN Doc. A/49/856, 1 March 1995, Annex, § 195.

On the part of the Yugoslav and Serbian forces, their intent to apply mass killing as an instrument of terror, coercion or punishment against Kosovo Albanians was already in evidence in 1998, and was shockingly demonstrated by incidents in January 1999 (including the Racak mass killing) and beyond. Arbitrary killing of civilians was both a tactic in the campaign to expel Kosovo Albanians, and an objective in itself.⁵⁷⁴

International Conferences

550. No practice was found.

IV. Practice of International Judicial and Quasi-judicial Bodies

551. In the *Dukić case* before the ICTY in 1996, the accused was charged with “shelling of civilian targets” in violation of the laws or customs of war for his role in the following acts:

From about May 1992 to about December 1995, in Sarajevo, Bosnian Serb military forces, on a widespread and systematic basis, deliberately or indiscriminately fired on civilian targets that were of no military significance in order to kill, injure, terrorise and demoralise the civilian population of Sarajevo.⁵⁷⁵

552. In the *Martić case* before the ICTY in 1995, the accused was charged with “the unlawful rocket attack against the civilian population and individual civilians of Zagreb” in violation of the laws or customs of war.⁵⁷⁶ In its review of the indictment in 1996, the ICTY Trial Chamber held that the attacks with Orkan rockets on the city of Zagreb in May 1995 were not designed to hit military targets but to terrorise the civilian population, stating that “these attacks were therefore contrary to the rules of customary and conventional international humanitarian law”.⁵⁷⁷ The Trial Chamber upheld all counts of the indictment.⁵⁷⁸

553. In the *Karadžić and Mladić case* before the ICTY in 1995, the indictment alleged that forces under the direction and control of the accused “unlawfully fired on civilian gatherings that were of no military significance in order to kill, terrorise and demoralise the Bosnian Muslim and Bosnian Croat civilian population”.⁵⁷⁹ It further alleged that throughout the siege of Sarajevo, “there has been a systematic campaign of deliberate targeting of civilians by snipers of the Bosnian Serb military and their agents. The sniping campaign has terrorised the civilian population of Sarajevo.”⁵⁸⁰ The accused were charged with “deliberate

⁵⁷⁴ OSCE, *Kosovo/Kosova, as seen as told, An analysis of the human rights findings of the OSCE Kosovo Verification Mission, October 1998 to June 1999*, OSCE, ODIHR, Warsaw, 1999, executive summary.

⁵⁷⁵ ICTY, *Dukić case*, Initial Indictment, 29 February 1996, § 7, Count 2.

⁵⁷⁶ ICTY, *Martić case*, Initial Indictment, 25 July 1995, §§ 16 and 18, Counts II and IV.

⁵⁷⁷ ICTY, *Martić case*, Review of the Indictment, 8 March 1996, § 31.

⁵⁷⁸ ICTY, *Martić case*, Review of the Indictment, 8 March 1996, Section III, Disposition.

⁵⁷⁹ ICTY, *Karadžić and Mladić case*, First Indictment, 24 July 1995, § 26.

⁵⁸⁰ ICTY, *Karadžić and Mladić case*, First Indictment, 24 July 1995, § 44.

attack on the civilian population and individual civilians" in violation of the laws or customs of war for their role in these events.⁵⁸¹ In its review of the indictment in 1996, the ICTY Trial Chamber confirmed all counts.⁵⁸²

554. In the *Galić case* before the ICTY in 1998, the accused was charged with "unlawfully inflicting terror upon civilians as set forth in Article 51 of Additional Protocol I and Article 13 of Additional Protocol II to the Geneva Conventions of 1949" in violation of the laws or customs of war for having conducted "a protracted campaign of shelling and sniping upon civilian areas of Sarajevo and upon the civilian population, thereby inflicting terror and mental suffering upon its civilian population".⁵⁸³

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

555. To fulfil its task of disseminating IHL, the ICRC has delegates around the world teaching armed and security forces that "acts or threats of violence with a primary purpose to spread terror among the civilian population are prohibited".⁵⁸⁴

556. In an appeal issued in October 1973, the ICRC urged all the belligerents in the conflict in the Middle East (Egypt, Iraq, Israel and Syria) to observe forthwith, in particular, the provisions of, *inter alia*, Article 46(1) of draft API, which stated that "methods intended to spread terror among the civilian population are prohibited". All governments concerned replied favourably.⁵⁸⁵

557. In a communication to the press in 1993, the ICRC reminded the parties to the conflict in Nagorno-Karabakh that "acts of violence intended to spread terror among the civilian population are also prohibited".⁵⁸⁶

558. In 1994, in a Memorandum on Respect for International Humanitarian Law in Angola, the ICRC stated that "all acts or threats of violence the main purpose of which is to spread terror among the civilian population are also prohibited".⁵⁸⁷

559. The 26th International Conference of the Red Cross and Red Crescent in 1995 adopted a resolution on protection of the civilian population in period of armed conflict in which it expressed deep alarm at "the serious violations

⁵⁸¹ ICTY, *Karadžić and Mladić case*, First Indictment, 24 July 1995, § 36, Count 5 and § 45, Count 10.

⁵⁸² ICTY, *Karadžić and Mladić case*, Review of the Indictments, 11 July 1996, Section VII, Disposition.

⁵⁸³ ICTY, *Galić case*, Initial Indictment, 24 April 1998, Count 1.

⁵⁸⁴ Frédéric de Mulinen, *Handbook on the Law of War for Armed Forces*, ICRC, Geneva, 1987, § 398.

⁵⁸⁵ ICRC, The International Committee's Action in the Middle East, *IRRC*, No. 152, 1973, pp. 584–585.

⁵⁸⁶ ICRC, Communication to the Press No. 93/25, Nagorno-Karabakh conflict: 60,000 civilians flee fighting in south-western Azerbaijan, 19 August 1993.

⁵⁸⁷ ICRC, Memorandum on Respect for International Humanitarian Law in Angola, 8 June 1994, § II, *IRRC*, No. 320, 1997, p. 503.

of international humanitarian law in internal as well as international armed conflicts constituted by acts or threats of violence the primary purpose of which is to spread terror among the civilian population".⁵⁸⁸

560. In a joint statement issued in 1991, the Yugoslav Red Cross and the Hungarian Red Cross expressed their deep concern about "the protracting internal conflict in Yugoslavia" and urged the parties to the conflict "to refrain from endangering and menacing the civilian population".⁵⁸⁹

561. In a communication to the press in 2000 concerning the violence in the Near East, the ICRC stressed that "terrorist acts are absolutely and unconditionally prohibited".⁵⁹⁰

VI. Other Practice

562. Oppenheim states that:

In the War of 1914–1918 the illegality, except by way of reprisals, of aerial bombardment directed exclusively against the civilian population for the purpose of terrorisation or otherwise seems to have been generally admitted by the belligerents, – although this fact did not actually prevent attacks on centres of civilian population in the form either of reprisals or of attack against military objectives situated therein.⁵⁹¹

563. In a resolution adopted at its Edinburgh Session in 1969, the Institute of International Law recalled that "existing international law prohibits, irrespective of the type of weapon used, any action whatsoever designed to terrorize the civilian population".⁵⁹²

564. In 1979, an armed group wrote to the ICRC to confirm its commitment to IHL and to denounce the rounding up of civilians in order to terrorise them "by methods which exclude all humanitarian principle" allegedly carried out by one of the parties to the conflict.⁵⁹³

565. The Declaration of Minimum Humanitarian Standards, adopted by an expert meeting convened by the Institute for Human Rights of Åbo Akademi University in Turku/Åbo, Finland in 1990, states that "acts or threats of violence

⁵⁸⁸ 26th International Conference of the Red Cross and Red Crescent, Geneva, 3–7 December 1995, Res. II, preamble.

⁵⁸⁹ Yugoslav Red Cross and Hungarian Red Cross, Joint Statement, Subotica, 25 October 1991.

⁵⁹⁰ ICRC, Communication to the Press No. 00/42, ICRC appeal to all involved in violence in the Near East, 21 November 2000.

⁵⁹¹ Lassa Oppenheim, *International Law. A Treatise*, Vol. II, *Disputes, War and Neutrality*, Sixth edition, revised, Hersch Lauterpacht (ed.), Longmans, Green and Co., London/New York/Toronto, 1944, p. 414, § 214*ea*.

⁵⁹² Institute of International Law, Edinburgh Session, Resolution on the Distinction between Military Objectives and Non-military Objects in General and Particularly the Problems Associated with Weapons of Mass Destruction, 9 September 1969, § 6.

⁵⁹³ ICRC archive document.

the primary purpose or foreseeable effect of which is to spread terror among the population are prohibited".⁵⁹⁴

566. Rule A2 of the Rules of International Humanitarian Law Governing the Conduct of Hostilities in Non-international Armed Conflicts, adopted in 1990 by the Council of the IHL, provides that "acts of violence intended primarily to spread terror among the civilian population are also prohibited".⁵⁹⁵

567. In 1993, in a report on war crimes in Bosnia and Herzegovina, Helsinki Watch denounced attacks by light and heavy artillery,

which often is used indiscriminately and disproportionately in order to terrorize the local population and force it to flee from the besieged area. Even in cases where there is no armed resistance to Serbian attacks, the area is besieged solely for the purpose of displacing or terrorizing the population.⁵⁹⁶

568. In 1994, in the context of the conflict in Yemen, Human Rights Watch stated that "attacks launched with intent to spread terror among the civilian population are also forbidden. We note that the rules of war apply equally to government and rebel troops."⁵⁹⁷

569. In 1995, in its Global Report on Women's Human Rights, Human Rights Watch stated that its "investigations in the former Yugoslavia, Peru, Kashmir and Somalia reveal that rape and sexual assault of women are an integral part of conflicts, whether international or internal in scope" and found that "rape of women civilians has been deployed as a tactical weapon to terrorize civilian communities".⁵⁹⁸

C. Definition of Combatants

I. Treaties and Other Instruments

Treaties

570. Article 3 of the 1899 HR provides that "the armed forces of the belligerent parties may consist of combatants and non-combatants".

571. Article 3 of the 1907 HR provides that "the armed forces of the belligerent parties may consist of combatants and non-combatants".

572. Article 43(2) AP I provides that "members of the armed forces of a Party to a conflict (other than medical personnel and chaplains covered by Article 33

⁵⁹⁴ Declaration of Minimum Humanitarian Standards, adopted by an expert meeting convened by the Institute for Human Rights, Åbo Akademi University, Turku/Åbo, 30 November–2 December 1990, Article 6, *IRRC*, No. 282, 1991, p. 332.

⁵⁹⁵ IHL, Rules of International Humanitarian Law Governing the Conduct of Hostilities in Non-international Armed Conflicts, Rule A2, *IRRC*, No. 278, 1990, p. 388.

⁵⁹⁶ Helsinki Watch, *War Crimes in Bosnia-Herzegovina*, Vol. II, New York, April 1993, p. 11.

⁵⁹⁷ Human Rights Watch, Letter to the Government of Yemen, New York, 19 May 1994.

⁵⁹⁸ Human Rights Watch, *The Human Rights Watch Global Report on Women's Human Rights*, New York, August 1995, p. 1.

of the Third Convention) are combatants, that is to say, they have the right to participate directly in hostilities". Article 43 API was adopted by consensus.⁵⁹⁹

Other Instruments

573. No practice was found.

II. National Practice

Military Manuals

574. Argentina's Law of War Manual states that all members of the armed forces are combatants, except for medical and religious personnel.⁶⁰⁰

575. Australia's Defence Force Manual provides that "combatants comprise all organised armed forces, groups and units (except medical service and religious personnel)".⁶⁰¹

576. Belgium's Law of War Manual defines combatants as all members of organised armed forces, except medical and religious personnel.⁶⁰²

577. According to Benin's Military Manual, "members of the armed forces (except medical and religious personnel) are combatants".⁶⁰³

578. According to Cameroon's Instructors' Manual, "each member of the armed forces, except religious and medical personnel, is a combatant".⁶⁰⁴ The manual further states that outside members of the armed forces, "members of militias, volunteer corps, resistance movements... members of regular armed forces who profess allegiance to a government or an authority not recognized by the Power to which they belong" are also recognised as combatants.⁶⁰⁵

579. Canada's LOAC Manual states that "as a general rule, the term 'combatant' includes any member of the armed forces, except medical and religious personnel".⁶⁰⁶

580. Colombia's Instructors' Manual defines the term combatant as "any member of the Armed Forces, except medical and religious personnel. As members of Armed Forces, the law of war allows combatants to participate directly in an armed conflict on behalf of a belligerent State or of one of the parties to the conflict."⁶⁰⁷

⁵⁹⁹ CDDH, *Official Records*, Vol. VI, CDDH/SR.39, 25 May 1977, p. 111.

⁶⁰⁰ Argentina, *Law of War Manual* (1989), § 1.07(2).

⁶⁰¹ Australia, *Defence Force Manual* (1994), § 512; see also *Commanders' Guide* (1994), Glossary, p. xxi.

⁶⁰² Belgium, *Law of War Manual* (1983), pp. 20–21.

⁶⁰³ Benin, *Military Manual* (1995), Fascicule I, p. 12.

⁶⁰⁴ Cameroon, *Instructors' Manual* (1992), p. 17, see also p. 77.

⁶⁰⁵ Cameroon, *Instructors' Manual* (1992), p. 35, see also p. 143.

⁶⁰⁶ Canada, *LOAC Manual* (1999), p. 3-1, § 6.

⁶⁰⁷ Colombia, *Instructors' Manual* (1999), p. 16.

581. Croatia's LOAC Compendium considers that all members of the armed forces are combatants, except permanent medical or religious personnel.⁶⁰⁸

582. Croatia's Commanders' Manual states that "members of the armed forces (other than medical and religious personnel) are combatants".⁶⁰⁹

583. The Military Manual of the Dominican Republic states that:

All persons participating in military operations or activities are considered combatants [and proper targets for attack]. Those who do not participate in such actions are non-combatants. In addition to civilians, medical personnel, chaplains... are included in the category of non-combatants.⁶¹⁰

584. According to Ecuador's Naval Manual, members of the armed forces are combatants, except medical personnel and chaplains.⁶¹¹

585. France's LOAC Summary Note and LOAC Teaching Note provide that all members of the armed forces, other than medical and religious personnel, are combatants.⁶¹²

586. France's LOAC Manual defines combatants with reference to Article 4(A) GC III.⁶¹³

587. Germany's Military Manual states that:

The armed forces of a party to a conflict consist of combatants and non-combatants. Combatants are persons who may take a direct part in hostilities, i.e. participate in the use of a weapon or a weapon-system in an indispensable function. The other members of the armed forces are non-combatants.⁶¹⁴

The manual specifies that "persons who are members of the armed forces but... do not have any combat mission, such as judges, government officials and blue-collar workers, are non-combatants... Members of the medical service and religious personnel (chaplains) attached to the armed forces are also non-combatants."⁶¹⁵

588. According to Hungary's Military Manual, combatants are "any member of the armed forces except permanent medical and religious personnel".⁶¹⁶

589. Indonesia's Air Force Manual states that combatants are:

- a. Regular troops, i.e. members of the armed forces, consisting of:
 1. voluntary troops;
 2. compulsory military; and
 3. foreigners, including citizens of neutral States, who belong to a belligerent's armed forces.

⁶⁰⁸ Croatia, *LOAC Compendium* (1991), p. 6.

⁶⁰⁹ Italy, *LOAC Elementary Rules Manual* (1991), § 2.

⁶¹⁰ Dominican Republic, *Military Manual* (1980), p. 3.

⁶¹¹ Ecuador, *Naval Manual* (1989), §§ 5.3 and 11.1.

⁶¹² France, *LOAC Summary Note* (1992), § 1.2; *LOAC Teaching Note* (2000), p. 2.

⁶¹³ France, *LOAC Manual* (2001), p. 39, see also pp. 70–71.

⁶¹⁴ Germany, *Military Manual* (1992), § 301.

⁶¹⁵ Germany, *Military Manual* (1992), §§ 313–314.

⁶¹⁶ Hungary, *Military Manual* (1992), p. 17.

- b. Militias, i.e. volunteer groups or persons who, being a part of the armed forces, should be considered as regular troops with the status of legal combatant.⁶¹⁷

590. According to Israel's Manual on the Laws of War, legal combatants are "soldiers serving in the army (regular and reserve) or in well-ordered militia forces (e.g. the SLA or the State National Guards in the United States)".⁶¹⁸

591. Italy's IHL Manual defines "lawful combatants" as:

- a. members of the Armed Forces;
- b. members of militia, of volunteer corps, of resistance movements, who belong to a Party to the conflict, operating outside or inside their own territory, even if this territory is occupied, provided they fulfil the following conditions:
 1. being under a Head responsible for his own subordinates;
 2. wear a uniform or a fixed distinctive sign recognisable from a distance;
 3. carry arms openly;
 4. abide by the laws and customs of war.⁶¹⁹

592. Italy's LOAC Elementary Rules Manual states that "all members of the Armed Forces (except medical and religious personnel) are combatants".⁶²⁰

593. Kenya's LOAC Manual states that the term combatant means "any member of the armed forces except medical personnel and religious personnel. As a member of the armed forces, he is permitted by the law of war to take a direct part in an armed conflict on behalf of a belligerent State or Party to the conflict."⁶²¹ The manual further specifies that:

Medical and religious personnel have a special status and are classified as non-combatants... Civilians accompanying the armed forces such as war correspondents, supply contractors and members of the labour units or of welfare services are not combatants.⁶²²

594. South Korea's Operational Law Manual states that members of the regular army, reserve forces, militia corps and combatant police are considered combatants, including persons who are not participating in combat but supporting military operations, except medical personnel and chaplains.⁶²³

595. Madagascar's Military Manual defines combatants as "members of the Armed Forces (other than medical and religious personnel)".⁶²⁴

596. The Military Manual of the Netherlands states that "the members of the armed forces have the status of combatant, except medical and religious personnel".⁶²⁵ The manual specifies that personnel of the burial service of the

⁶¹⁷ Indonesia, *Air Force Manual* (1990), § 21.

⁶¹⁸ Israel, *Manual on the Laws of War* (1998), p. 47. ⁶¹⁹ Italy, *IHL Manual* (1991), Vol. I, § 4.

⁶²⁰ Italy, *LOAC Elementary Rules Manual* (1991), § 2.

⁶²¹ Kenya, *LOAC Manual* (1997), Précis No. 2, p. 8.

⁶²² Kenya, *LOAC Manual* (1997), Précis No. 2, p. 9.

⁶²³ South Korea, *Operational Law Manual* (1996), p. 43.

⁶²⁴ Madagascar, *Military Manual* (1994), Fiche No. 2-O, § 2, see also Fiche No. 2-SO, § A.

⁶²⁵ Netherlands, *Military Manual* (1993), p. III-1; see also *Military Handbook* (1995), pp. 7-36 and 7-39.

armed forces are not considered medical personnel (they have regular combatant status) and that humanist counsellors are considered religious personnel.⁶²⁶

597. New Zealand's Military Manual states that "normally only members of a belligerent State's armed forces enjoy the status of combatants".⁶²⁷

598. Russia's Military Manual defines combatants with reference to Article 43(2) AP I.⁶²⁸

599. South Africa's LOAC Manual defines combatants as "any member of the armed forces, except medical personnel and religious personnel".⁶²⁹

600. Spain's LOAC Manual defines "lawful combatants" as:

- Members of the Armed Forces of the parties to the conflict, except medical and religious personnel.
- Members of the armed forces of a party not recognised by the other party.
- Members of other militias and other units subject to military discipline, like the Guardia Civil.
- Resistance movements.⁶³⁰

601. Sweden's IHL Manual defines combatants with reference to Article 43(2) AP I.⁶³¹

602. Togo's Military Manual states that "according to international law, the members of the armed forces of a Party to the conflict, except medical and religious personnel, are combatants".⁶³²

603. The UK LOAC Manual states that:

A combatant is one who is permitted by the law of armed conflict to take a direct part in an armed conflict on behalf of a belligerent State. Combatant status is very closely related to entitlement to PW status. The following are entitled to combatant status:

- a. Members of the organized armed forces.
- b. Members of any other militias, volunteer corps or organised resistance movements.⁶³³

604. The US Air Force Pamphlet defines a combatant as "a direct participant in an armed conflict, traditionally a member of an armed force as specified in Article 4A(1) (2) and (3) [GC III]".⁶³⁴

605. The US Naval Handbook states that the term "combatants"

embraces those persons who have the right under international law to participate directly in armed conflict during hostilities. Combatants, therefore, include all

⁶²⁶ Netherlands, *Military Manual* (1993), p. VI-4.

⁶²⁷ New Zealand, *Military Manual* (1992), § 802(1).

⁶²⁸ Russia, *Military Manual* (1990), §§ 12-13.

⁶²⁹ South Africa, *LOAC Manual* (1996), § 24(a).

⁶³⁰ Spain, *LOAC Manual* (1996), Vol. I, § 1.3.a.(1).

⁶³¹ Sweden, *IHL Manual* (1991), Section 3.2.1.3, pp. 34-35.

⁶³² Togo, *Military Manual* (1996), Fascicule I, p. 13.

⁶³³ UK, *LOAC Manual* (1981), Section 3, p. 8, § 1.

⁶³⁴ US, *Air Force Pamphlet* (1976), § 1-2(b).

members of the regularly organized armed forces of a party to the conflict (except medical personnel, chaplains, civil defense personnel and members of the armed forces who have acquired civil defense status), as well as irregular forces who [fulfil the conditions for being considered armed forces].⁶³⁵

606. The Report on US Practice states that the discussion on the status of combatant in the US military manuals is generally consistent with Article 43 AP I.⁶³⁶

National Legislation

607. The Report on the Practice of Rwanda refers to a statement by Rwanda's Minister of Defence on 18 August 1997 in which he stated that government troops may only target enemies who carry arms and/or kill people. Hence, the report concludes that in an internal armed conflict combatants are defined as persons who carry arms and/or commit inhumane acts against the population in relation to the hostilities and that the wearing or not of a uniform has no significance in this respect.⁶³⁷

608. The Report on the Practice of Zimbabwe asserts that the incorporation of Article 43 AP I into national legislation by the 1981 Geneva Conventions Act as amended "is evidence of [Zimbabwe's] view that [it represents] customary international law".⁶³⁸

National Case-law

609. No practice was found.

Other National Practice

610. During the War in the South Atlantic, the legal adviser to the combined staff of Argentina's armed forces reportedly pointed out that due protection had to be granted to combatants "because they were members of the regular forces and, having fallen into enemy hands, were recognized as prisoners of war and were treated accordingly".⁶³⁹

611. The Report on the Practice of Argentina refers to a definition of combatants taken from a dictionary approved by the Ministry of Defence whereby all members of the armed forces who have the right to participate directly in hostilities are combatants. Medical and religious personnel are not to be considered combatants.⁶⁴⁰

612. In 1975, the Supreme Court of India held that civilian employees of the armed forces are "integral to the armed forces as it is their duty to follow or

⁶³⁵ US, *Naval Handbook* (1995), § 5.3. ⁶³⁶ Report on US Practice, 1997, Chapter 1.1.

⁶³⁷ Report on the Practice of Rwanda, 1997, Chapter 1.1, referring to Statement by the Rwandan Minister of Defence, Kigali, 18 August 1997.

⁶³⁸ Report on the Practice of Zimbabwe, 1998, Chapter 1.1.

⁶³⁹ Carlos Horacio Cerdá, *El respeto del derecho humanitario durante el desarrollo del conflicto Armado del Atlántico Sud*, Report on the Practice of Argentina, 1997, Chapter 1.1.

⁶⁴⁰ Report on the Practice of Argentina, 1997, Chapter 1.1.

accompany the armed personnel on active service or in camp or on the march". They are however "non-combatants". The Court further stated that "all persons not being members of the armed forces, but attached to or employed with or following the regular army shall be subject to the military law".⁶⁴¹

613. On the basis of a reply by Iraq's Ministry of Defence to a questionnaire, the Report on the Practice of Iraq considers that whoever joins the armed forces of a belligerent State is a combatant. It adds that this covers individuals of voluntary units, including members of organised resistance movements, who follow a belligerent party, whether their activities take place inside or outside their territory. The report recalls the four conditions laid down in Article 4(A)(2) GC III and holds them to be explicit and specific criteria defining a combatant.⁶⁴²

614. The Report on the Practice of Japan states that the Japanese government understands that Japanese Self-Defence Forces (*Jieitai*) are categorised as armed forces as referred to in Article 4 GC III. Therefore, in the event that a member of the Self-Defence Forces becomes a prisoner, he/she should be treated as a POW under international law. The report specifies that only self-defence officials (*Jieikan*) who perform duties in the three Self-Defence Forces (ground, marine and air) and hold ranks possess the status of combatants.⁶⁴³

615. On the basis of an interview with a high-ranking officer, the Report on the Practice of Jordan states that:

Any soldier in the armed forces [of] a State is considered a combatant. The medical personnel and chaplains are exempted from this rule. These two categories do not have combatant status and they are not entitled to take part themselves in hostilities even if they are members [of] the armed forces.⁶⁴⁴

616. The Report on the Practice of Malaysia states that members of the armed forces may be considered as combatants. It adds that religious and medical personnel are not considered combatants even though they remain members of the armed forces.⁶⁴⁵

617. Without expressly mentioning their non-combatant status, the Report on the Practice of Russia states that members of the armed forces and military units assigned to civil defence organisations should be respected and protected if their activities comply with the relevant provisions of IHL.⁶⁴⁶

618. On the basis of replies by Rwandan army officers to a questionnaire, the Report on the Practice of Rwanda states that religious and medical military

⁶⁴¹ India, Supreme Court, *Nair case*, Judgement, 20 November 1975, §§ (b) and (c).

⁶⁴² Report on the Practice of Iraq, 1998, Reply by the Iraqi Ministry of Defence to a questionnaire, July 1997, Chapter 1.1.

⁶⁴³ Report on the Practice of Japan, 1998, Chapter 1.1, referring to Statement by a member of the Japanese government in the House of Representatives Cabinet Committee, 30 October 1986.

⁶⁴⁴ Report on the Practice of Jordan, 1997, Interview with a high-ranking officer of the Jordanian army, Chapter 1.1.

⁶⁴⁵ Report on the Practice of Malaysia, 1997, Answers to additional questions on Chapter 1.1.

⁶⁴⁶ Report on the Practice of Russia, 1997, Chapter 4.2.

personnel can neither be considered as combatants, nor as civilians. In case of detention among POWs, they must be afforded special treatment.⁶⁴⁷

619. On the basis of a statement by the Syrian Minister of Foreign Affairs before the UN General Assembly in 1997, the Report on the Practice of Syria asserts that Syria considers that the definition of combatants contained in Article 43(2) AP I is part of customary international law.⁶⁴⁸

620. The Report on the Practice of Uruguay interprets the definition of military personnel contained in Article 63 of the 1943 Military Penal Code as amended, i.e. all persons possessing the legal status governed by the Military or Naval Organisational Laws, as implying that military personnel are combatants.⁶⁴⁹

621. The Report on the Practice of Zimbabwe considers that the definition of combatants in Article 43(2) AP I is regarded as customary by Zimbabwe in the context of an international armed conflict.⁶⁵⁰

III. Practice of International Organisations and Conferences

United Nations

622. In 1985, in a report on the situation of human rights in Afghanistan, the Special Rapporteur of the UN Commission on Human Rights recommended that “members of all forces engaged in the conflict, those of Governments as well as of the opposition, should be recognized as combatants within the framework of international humanitarian law”.⁶⁵¹

Other International Organisations

623. No practice was found.

International Conferences

624. No practice was found.

IV. Practice of International Judicial and Quasi-judicial Bodies

625. In its judgement on appeal in the *Tadić case* in 1999, the ICTY Appeals Chamber recalled Article 4(A)(1) and (2) GC III and noted that this provision “is primarily directed toward establishing the requirements for the status of lawful combatants”.⁶⁵²

⁶⁴⁷ Report on the Practice of Rwanda, 1997, Replies by Rwandan army officers to a questionnaire, Chapter 2.7.

⁶⁴⁸ Report on the Practice of Syria, 1997, Chapter 1.1, referring to Statement by the Syrian Minister of Foreign Affairs before the UN General Assembly, 1 October 1997.

⁶⁴⁹ Report on the Practice of Uruguay, 1997, Chapter 1.1.

⁶⁵⁰ Report on the Practice of Zimbabwe, 1998, Chapter 1.1.

⁶⁵¹ UN Commission on Human Rights, Special Rapporteur on the Situation of Human Rights in Afghanistan, Report, UN Doc. E/CN.4/1985/21, 19 February 1985, § 192.

⁶⁵² ICTY, *Tadić case*, Judgement on Appeal, 15 July 1999, § 92.

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

626. To fulfil its task of disseminating IHL, the ICRC has delegates around the world teaching armed and security forces that “combatant” means any member of the armed forces, except medical personnel and religious personnel.⁶⁵³

VI. Other Practice

627. No practice was found.

D. Definition of Armed Forces

General

I. Treaties and Other Instruments

Treaties

628. Article 1 of the 1899 HR provides that:

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

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

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

629. Article 1 of the 1907 HR provides that:

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

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

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

630. According to Article 4(A) GC III, persons belonging to one of the following categories who have fallen into the power of the enemy are prisoners of war:

⁶⁵³ Frédéric de Mulinen, *Handbook on the Law of War for Armed Forces*, ICRC, Geneva, 1987, § 47.

- 1) Members of the armed forces of a Party to the conflict as well as members of militias or volunteer corps forming part of such armed forces.
- 2) Members of other militias and members of other volunteer corps, including those of organized resistance movements, belonging to a Party to the conflict and operating in or outside their own territory, even if this territory is occupied, provided that such militias or volunteer corps, including such organized resistance movements, fulfil the following conditions:
 - a) that of being commanded by a person responsible for his subordinates;
 - b) that of having a fixed distinctive sign recognizable at a distance;
 - c) that of carrying arms openly;
 - d) that of conducting their operations in accordance with the laws and customs of war.
- 3) Members of regular armed forces who profess allegiance to a government or an authority not recognized by the Detaining Power.

631. Article 43(1) AP I provides that:

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

Article 43 AP I was adopted by consensus.⁶⁵⁴

632. Upon accession to AP I, Argentina declared that it interpreted Articles 43(1) and 44(1) AP I

as not implying any derogation of: a) the concept of permanent regular armed forces of a Sovereign State; b) the conceptual distinction between regular armed forces, understood as being permanent army units under the authority of Governments of Sovereign States, and the resistance movements which are referred to in Article 4 of the Third Geneva Convention of 1949.⁶⁵⁵

633. Article 1(1) AP II provides that the Protocol

shall apply to all armed conflicts... which take place in the territory of a High Contracting Party between its armed forces and dissident armed forces or other organized armed groups which, under responsible command, exercise such control over a part of its territory as to enable them to carry out sustained and concerted military operations and to implement this Protocol.

Article 1 AP II was adopted by 58 votes in favour, 5 against and 29 abstentions.⁶⁵⁶

634. Upon accession to AP II, Argentina declared, with reference to Article 1 AP II, that "the term 'organized armed groups' is not to be understood as

⁶⁵⁴ CDDH, *Official Records*, Vol. VI, CDDH/SR.39, 25 May 1977, p. 111.

⁶⁵⁵ Argentina, Interpretative declarations made upon accession to AP I and AP II, 26 November 1986, § 1.

⁶⁵⁶ CDDH, *Official Records*, Vol. VII, CDDH/SR.49, 2 June 1977, pp. 69–70.

equivalent to that used in Article 43, Protocol I, to define the concept of armed forces, even if the aforementioned groups meet all the requirements set forth in the said Article 43".⁶⁵⁷

Other Instruments

635. Article 9 of the 1874 Brussels Declaration states that:

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

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

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

636. Article 2 of the 1880 Oxford Manual provides that:

The armed force of a State includes:

1. The army properly so called, including the militia;
2. The national guards, landsturm, free corps, and other bodies which fulfil the three following conditions:
 - (a) That they are under the direction of a responsible chief;
 - (b) That they must have a uniform, or a fixed distinctive emblem recognizable at a distance, and worn by individuals composing such corps;
 - (c) That they carry arms openly.
3. The crews of men-of-war and other military boats.

II. National Practice

Military Manuals

637. Argentina's Law of War Manual defines the armed forces of a party to the conflict as all organised armed forces, groups and units which are under a command responsible to that party for the conduct of its subordinates, even if that party is represented by a government or an authority not recognised by an adverse party. Such armed forces shall be subject to an internal disciplinary system which, *inter alia*, shall enforce compliance with the rules of international law applicable in armed conflict.⁶⁵⁸

638. Australia's Defence Force Manual defines the armed forces of a party to the conflict as "all organised armed forces, groups and units . . . which are under

⁶⁵⁷ Argentina, Interpretative declarations made upon accession to AP I and AP II, 26 November 1986, § 3.

⁶⁵⁸ Argentina, *Law of War Manual* (1989), § 1.07(1).

the command of a party to a conflict and are subject to an internal disciplinary system which enforces compliance with LOAC".⁶⁵⁹

639. Belgium's Law of War Manual defines armed forces as comprising:

all members of organised armed forces, under a responsible command and an internal disciplinary system which ensures compliance with the laws and customs of war. Members of organised resistance movements are also considered to be combatants provided they:

- a) are subject to internal discipline;
- b) wear a fixed distinctive sign recognisable from a distance;
- c) carry arms openly;
- d) comply with the laws and customs of war.⁶⁶⁰

640. Burkina Faso's Disciplinary Regulations states that:

It is prohibited to consider members of the armed forces or volunteer militias, including organised resistance movements, as "regular combatants" unless they are under a responsible command, wear a distinctive sign, carry arms openly and respect the laws and customs of war.⁶⁶¹

641. Cameroon's Disciplinary Regulations states that:

Members of the Armed Forces in organised units, *francs-tireurs* detached from their regular units, commando detachments and isolated *saboteurs*, as well as voluntary militias, self-defence groups and organised resistance formations are lawful combatants on condition that those units, organisations or formations have a designated commander, that their members wear a distinctive sign, notably on their clothing, that they carry arms openly and that they respect the laws and customs of war.⁶⁶²

642. Canada's LOAC Manual states that:

Armed forces of a party to the conflict consist of all organized armed forces, groups and units that are under a command responsible to that party for the conduct of its subordinates . . . Armed forces shall be subject to an internal disciplinary system, one purpose of which is to enforce compliance with the LOAC.⁶⁶³

With respect to militias, volunteer groups and organised resistance movements, the manual states that:

10. In some cases, a party to a conflict may have armed groups fighting on its behalf that are not part of its armed forces. Such groups may be fighting behind enemy lines or in occupied territory. Partisans and resistance fighters who fought in occupied

⁶⁵⁹ Australia, *Defence Force Manual* (1994), § 512; see also *Commanders' Guide* (1994), Glossary, p. xxi.

⁶⁶⁰ Belgium, *Law of War Manual* (1983), p. 20.

⁶⁶¹ Burkina Faso, *Disciplinary Regulations* (1994), Article 35(1).

⁶⁶² Cameroon, *Disciplinary Regulations* (1975), Article 30.

⁶⁶³ Canada, *LOAC Manual* (1999), p. 3-1, §§ 7-8.

territory in the Soviet Union and France during World War II are examples of such groups.

11. Members of militias, volunteer corps and organized resistance movements, belonging to a party to the conflict and operating in or outside their own territory, even if this territory is occupied, are combatants provided they:

- a. are commanded by a person responsible for his subordinates;
- b. wear a fixed distinctive sign recognizable at a distance;
- c. carry arms openly; and
- d. conduct their operations in accordance with the LOAC.

12. Militias, volunteer corps and organized resistance movements must “belong” to a party to the conflict in the sense that they are acknowledged by that party as fighting on its behalf or in its support.⁶⁶⁴

643. Congo’s Disciplinary Regulations states that:

Soldiers in combat must not consider members of the armed forces or volunteer militias, including organised resistance movements, as “combatants” unless they are under a responsible command, wear a distinctive sign, carry arms openly and respect the laws and customs of war.⁶⁶⁵

644. Croatia’s LOAC Compendium defines armed forces as “all organized units and personnel under [a] responsible command . . . [and] subject to [an] internal disciplinary system”.⁶⁶⁶

645. France’s LOAC Teaching Note states that “every member of a paramilitary force or a partisan recognisable by a fixed distinctive sign and carrying arms openly is considered as a combatant”.⁶⁶⁷

646. France’s Disciplinary Regulations as amended states that:

Soldiers in combat must not consider members of the armed forces or volunteer militias, including organised resistance movements, as combatants unless they are under a responsible command, wear a distinctive sign, carry arms openly and respect the laws and customs of war.⁶⁶⁸

647. Germany’s Military Manual states that:

The armed forces of a party to a conflict consist of all its organized armed forces, groups and units. They also include militias and voluntary corps integrated in the armed forces. The armed forces shall be:

- under a command responsible to that party for the conduct of its subordinates, and
- subject to an internal disciplinary system which, inter alia, shall enforce compliance with the rules of international law applicable in armed conflict.⁶⁶⁹

⁶⁶⁴ Canada, *LOAC Manual* (1999), p. 3-2, §§ 10–12.

⁶⁶⁵ Congo, *Disciplinary Regulations* (1986), Article 32(1).

⁶⁶⁶ Croatia, *LOAC Compendium* (1991), p. 5, see also p. 6.

⁶⁶⁷ France, *LOAC Teaching Note* (2000), p. 2.

⁶⁶⁸ France, *Disciplinary Regulations as amended* (1975), Article 9 bis (1); see also *LOAC Manual* (2001), pp. 39 and 70–71.

⁶⁶⁹ Germany, *Military Manual* (1992), § 304.

648. Hungary's Military Manual defines armed forces as "all organized units and personnel under [a] responsible command . . . [and] subject to [an] internal disciplinary system".⁶⁷⁰

649. Indonesia's Air Force Manual states that combatants are:

- a. Regular troops, i.e. members of the armed forces, consisting of:
 1. voluntary troops;
 2. compulsory military; and
 3. foreigners, including citizens of neutral States, who belong to a belligerent's armed forces.
- b. Militias, i.e. volunteer groups or persons who, being a part of the armed forces, should be considered as regular troops with the status of legal combatant.⁶⁷¹

650. According to Israel's Manual on the Laws of War, "soldiers serving in the army (regular and reserve) or in well-ordered militia forces (e.g. the SLA or the State National Guards in the United States)" must fulfil four conditions:

1. The combatants must be led by a commander and be part of an organization with a chain of command.
2. The combatants must bear a fixed recognizable distinctive sign that can be recognized from afar.
3. The combatants must bear arms openly.
4. It is incumbent on combatants to behave in compliance with the rules and customs of war.⁶⁷²

651. Italy's IHL Manual defines armed forces with reference to Article 43(1) AP I.⁶⁷³

652. Kenya's LOAC Manual defines the armed forces of a State or of a party to the conflict as consisting of:

all organised units and personnel which are under a command responsible for the behaviour of its subordinates. The command of the armed forces must be responsible to the belligerent Party to which it belongs. The armed forces shall be subject to an internal disciplinary system which enforces compliance with the law of armed conflict. In the case of non-international armed conflict, in the sense of [AP II], the non-governmental forces or opposition forces have to fulfil two additional conditions in order to be considered "armed forces", namely:

- a. they must exercise control over a part of the State's territory;
- b. they must be able to carry out sustained and concerted military operations.⁶⁷⁴

653. According to Mali's Army Regulations,

Soldiers in combat must not consider members of the armed forces or volunteer militias, including organised resistance movements, as regular combatants unless

⁶⁷⁰ Hungary, *Military Manual* (1992), p. 16, see also p. 17.

⁶⁷¹ Indonesia, *Air Force Manual* (1990), § 21.

⁶⁷² Israel, *Manual on the Laws of War* (1998), pp. 47–48.

⁶⁷³ Italy, *IHL Manual* (1991), Vol. I, § 3.

⁶⁷⁴ Kenya, *LOAC Manual* (1997), Précis No. 2, pp. 7–8.

they are under a responsible command, wear a distinctive sign, carry arms openly and respect the laws and customs of war.⁶⁷⁵

654. The Military Manual of the Netherlands defines armed forces with reference to Article 43(1) AP I and states that all armed forces, whether regular or irregular, have to be “organised, under a responsible command, and subject to an internal disciplinary system”.⁶⁷⁶

655. New Zealand’s Military Manual states that:

The armed forces of a party to the conflict comprise all organized armed forces, groups and units which are under a command responsible to that party, even if the latter is represented by a government or authority not recognized by the adverse Party. This requirement of organization and responsibility extends to national liberation movements and their forces. All such forces must be subject to an internal disciplinary system which is required to enforce adherence to the rules of international law relating to armed conflict.⁶⁷⁷

656. Nigeria’s Military Manual states that:

In general, the armed forces of a state and of a party to a conflict consist of all organised units and personnel which are under a command responsible for the behaviour of its subordinates and each state and belligerent party must determine the categories of persons and objects belonging to its armed forces . . . Furthermore, the armed forces shall be subject to an internal disciplinary system in order to uphold and enforce the law of war.⁶⁷⁸

657. Russia’s Military Manual defines armed forces with reference to Article 43(1) AP I.⁶⁷⁹

658. Senegal’s Disciplinary Regulations states that:

Soldiers in combat must not consider members of the armed forces or volunteer militias, including organised resistance movements, as combatants unless they are under a responsible command, wear a distinctive sign, carry arms openly and respect the rules of international law applicable in armed conflict.⁶⁸⁰

659. Spain’s LOAC Manual states that all armed forces have to be organised, have a commander responsible for the conduct of his or her subordinates and an internal disciplinary system which ensures compliance with IHL.⁶⁸¹

660. Sweden’s IHL Manual defines armed forces with reference to Article 43(1) AP I.⁶⁸²

661. Switzerland’s Basic Military Manual lists four conditions which have to be fulfilled in order for a person to enjoy POW status:

⁶⁷⁵ Mali, *Army Regulations* (1979), Article 36(1).

⁶⁷⁶ Netherlands, *Military Manual* (1993), p. III-1; see also *Military Handbook* (1995), p. 7-39.

⁶⁷⁷ New Zealand, *Military Manual* (1992), § 805(2).

⁶⁷⁸ Nigeria, *Military Manual* (1994), p. 38, § 4. ⁶⁷⁹ Russia, *Military Manual* (1990), §§ 12–13.

⁶⁸⁰ Senegal, *Basic Military Manual de Discipline* (1990), Article 34(1).

⁶⁸¹ Spain, *LOAC Manual* (1996), Vol. I, § 1.3.a.(1).

⁶⁸² Sweden, *IHL Manual* (1991), Section 3.2.1.3, pp. 34–35.

1. Combatants must be headed by a responsible person forming part of an organisation.
2. This organisation must have an internal disciplinary system to which the combatants are subjected and which guarantees respect for international law applicable in armed conflict.
3. During an attack or a military deployment visible to the adversary, combatants must carry their arms openly.
4. In their operations, they must abide by the laws and customs of war.⁶⁸³

662. The UK LOAC Manual defines armed forces as:

- a. Members of the organised armed forces, even if they belong to a government or authority not recognised by the adversary, if those forces:
 1. are under a commander who is responsible for the conduct of his subordinates to one of the Parties in conflict; and
 2. are subject to an internal disciplinary system which enforces compliance with the law of armed conflict.

It is customary for members of organised armed forces to wear uniform. The definition is wide enough to cover auxiliary and reserve forces.
- b. Members of any other militias, volunteer corps or organised resistance movements if:
 - (1) they are subject to a system of internal discipline; and
 - (2) they have a fixed distinctive sign; and
 - (3) they carry their arms openly; and
 - (4) they comply with the law of armed conflict.⁶⁸⁴

663. The UK Military Manual defines armed forces with reference to Article 4(A) GC III.⁶⁸⁵

664. The US Field Manual and Air Force Pamphlet define armed forces with reference to Article 4(A) GC III.⁶⁸⁶

665. The US Naval Handbook states that combatants

include all members of the regularly organized armed forces of a party to the conflict . . . as well as irregular forces who are under responsible command and subject to internal military discipline, carry their arms openly, and otherwise distinguish themselves clearly from the civilian population.⁶⁸⁷

666. The YPA Military Manual of the SFRY (FRY) states that "under the international law of war, the armed forces are bodies authorised to conduct military operations and against whom force is used in armed conflict". The manual then lists the components of the armed forces, including the categories mentioned in Article 4(A)(1) and (2) GC III.⁶⁸⁸

⁶⁸³ Switzerland, *Basic Military Manual* (1987), Article 64.

⁶⁸⁴ UK, *LOAC Manual* (1981), Section 3, p. 8, § 1. ⁶⁸⁵ UK, *Military Manual* (1958), § 89.

⁶⁸⁶ US, *Field Manual* (1956), § 61; *Air Force Pamphlet* (1976), § 3-2.

⁶⁸⁷ US, *Naval Handbook* (1995), § 5.3.

⁶⁸⁸ SFRY (FRY), *YPA Military Manual* (1988), § 48(1) and (2).

National Legislation

667. India's Army Act defines the term "the Forces" as meaning "the regular Army, Navy and Air Force or any part of any one or more them".⁶⁸⁹

668. The Report on the Practice of Zimbabwe asserts that the incorporation of Article 43 AP I into national legislation by the 1981 Geneva Conventions Act as amended "is evidence of [Zimbabwe's] view that [it represents] customary international law".⁶⁹⁰

National Case-law

669. No practice was found.

Other National Practice

670. A report submitted to the Belgian Senate in 1991 noted that two elements were essential in the definition of armed forces: first, they must be integrated into a military organisation (that is, a hierarchical structure) subject to an internal disciplinary system; second, this organisation must operate under a command structure responsible to a party for the conduct of its subordinates. If these two conditions were fulfilled, the concept of armed forces could be extended to groups of combatants who were left behind in an occupied territory to perform acts of sabotage, to gather intelligence or to take part in guerrilla warfare. The report recalled that this was the position of the Belgian government in exile during the Second World War. From its base in London, the government adopted legislation authorising the executive power to nominate agents in charge of action or intelligence missions in a foreign country, occupied area or zone evacuated by the enemy. These agents had the status of combatants and were allowed to carry arms. The government in exile, however, was very reticent about resistance cells or individuals over whom it had no direct control.⁶⁹¹ Resistance networks operating behind enemy lines would not be protected, according to the report, if composed of civilians that were neither part of a hierarchical structure nor subject to an internal disciplinary system.⁶⁹² On the basis of the report, the Report on the Practice of Belgium concludes that the definition given in Article 43 AP I is recognised by Belgium and that the central criterion is State control over the combatants.⁶⁹³

671. The instructions given to the French armed forces for the conduct of Opération Mistral, simulating a military operation under the right of self-defence or a mandate of the UN Security Council, state that "armed forces that

⁶⁸⁹ India, *Army Act* (1950), Section 3(xi).

⁶⁹⁰ Report on the Practice of Zimbabwe, 1998, Chapter 1.1.

⁶⁹¹ Belgium, Senate, Report, *Enquête parlementaire sur l'existence en Belgique d'un réseau de renseignements clandestin international*, 1990–1991 Session, Doc. 1117-4, 1 October 1991, §§ 19 and 20.

⁶⁹² Belgium, Senate, Report, *Enquête parlementaire sur l'existence en Belgique d'un réseau de renseignements clandestin international*, 1990–1991 Session, Doc. 1117-4, 1 October 1991, § 25.

⁶⁹³ Report on the Practice of Belgium, 1997, Chapter 1.1.

are subject to the law of war consist of all organised units and their personnel, under a command which is responsible for the conduct of its subordinates".⁶⁹⁴

672. In an explanatory memorandum submitted to the German parliament in 1990 in the context of the ratification procedure of the Additional Protocols, the German government stated that AP I contained the first treaty definition of the term "armed forces" and acknowledged that armed forces must be organised, under responsible leadership and have an internal disciplinary system.⁶⁹⁵

673. According to the Report on the Practice of Iran, military communiqués issued during the Iran–Iraq War referred to armed forces as "Combatants of Islam" or "Devoters of Armed Forces". In three of these communiqués, the armed forces are defined as personnel of the army and air force, *Gendarmerie*, Revolutionary Guards (*Sepah-e-Pasdaran*), armed tribesmen, Basseej and Jihad forces, volunteers and also the Kurdish commandos (*Kurd Pihmerg*). Some other military communiqués also thanked tribesmen and ordinary people who had taken up arms against the "Iraqi aggressors". The report specifies that, since all the military staff and armed forces were under a single command responsible to Iran, the practice and *opinio juris* of Iran are consistent with Article 43 AP I.⁶⁹⁶

674. The Report on the Practice of Japan states that the Japanese government understands that Japanese Self-Defence Forces (*Jieitai*) are categorised as armed forces as referred to in Article 4 GC III.⁶⁹⁷

675. The Report on the Practice of South Korea affirms the customary nature of Article 43 AP I.⁶⁹⁸

676. In an explanatory memorandum submitted to the Dutch parliament in the context of the ratification procedure of the Additional Protocols, the government of the Netherlands stated that armed forces consisted of regular as well as irregular troops, provided they fulfilled the conditions set forth in Article 43 AP I.⁶⁹⁹

677. On the basis of a statement by the Syrian Minister of Foreign Affairs before the UN General Assembly in 1997, the Report on the Practice of Syria asserts that Syria considers that the definition of armed forces contained in Article 43(1) AP I is part of customary international law.⁷⁰⁰

⁶⁹⁴ France, Etat-major de la Force d'Action Rapide, Ordres pour l'Opération Mistral, 1995, Section 5.

⁶⁹⁵ Germany, Lower House of Parliament, Explanatory memorandum on the Additional Protocols to the Geneva Conventions, *BT-Drucksache* 11/6770, 22 March 1990, p. 110.

⁶⁹⁶ Report on the Practice of Iran, 1997, Chapter 1.1, referring to Military Communiqué No. 35, 24 September 1980, Military Communiqué No. 36, 24 September 1980, Military Communiqué No. 109, 4 October 1980, Military Communiqué No. 354, 1 January 1981 and Military Communiqué No. 477, 13 May 1981.

⁶⁹⁷ Report on the Practice of Japan, 1998, Chapter 1.1, referring to Statement by a member of the Japanese government in the House of Representatives Cabinet Committee, 30 October 1986.

⁶⁹⁸ Report on the Practice of South Korea, 1997, Chapter 1.1.

⁶⁹⁹ Netherlands, Lower House of Parliament, Explanatory memorandum on the ratification of the Additional Protocols, 1983–1984 Session, Doc. 18 277 [R 1247], No. 3, pp. 18–20.

⁷⁰⁰ Report on the Practice of Syria, 1997, Chapter 1.1, referring to Statement by the Syrian Minister of Foreign Affairs before the UN General Assembly, 1 October 1997.

678. The Report on the Practice of Zimbabwe considers that the definitions given in Article 43 AP I apply only in the context of an international armed conflict. It states that, for non-international armed conflicts, an attempt at a definition is found in Article 1 AP II, which refers to dissident armed forces or other organised armed groups which are under a responsible command. It adds, however, that:

This definition is subjective and difficult to implement, given that States are generally unwilling to recognize rebel groups and their structures . . . preferring to deal with them as mere “criminals or bandits”. In Zimbabwe this issue is yet to be addressed in terms of policy and military instruction. It is by no means settled and cannot be regarded as being part of customary law.⁷⁰¹

III. Practice of International Organisations and Conferences

679. No practice was found.

IV. Practice of International Judicial and Quasi-judicial Bodies

680. No practice was found.

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

681. To fulfil its task of disseminating IHL, the ICRC has delegates around the world teaching armed and security forces that:

The “armed forces” of a State and of a Party to the conflict consist of all organized units and personnel which are under a command responsible for the behaviour of its subordinates . . . The command of the armed forces must be responsible to the belligerent Party to which it belongs. The armed forces shall be subject to an internal disciplinary system which enforces compliance with the law of war.⁷⁰²

682. In a note on respect for IHL in an internal armed conflict between January 1995 and February 1996, the ICRC stated that:

Whereas the ICRC recognizes that the use of auxiliary groups operating alongside the security forces is in no way contrary to international humanitarian law, it reminds the military authorities that they bear the entire responsibility for acts committed by the said groups.⁷⁰³

⁷⁰¹ Report on the Practice of Zimbabwe, 1998, Chapter 1.1.

⁷⁰² Frédéric de Mulinen, *Handbook on the Law of War for Armed Forces*, ICRC, Geneva, 1987, §§ 36, 40 and 41.

⁷⁰³ ICRC archive document.

VI. Other Practice

683. No practice was found.

Incorporation of paramilitary or armed law enforcement agencies into armed forces

I. Treaties and Other Instruments

Treaties

684. According to Article 43(3) AP I, “whenever a Party to a conflict incorporates a paramilitary or armed law enforcement agency into its armed forces, it shall so notify the other Parties to the conflict”. Article 43 AP I was adopted by consensus.⁷⁰⁴

685. Upon ratification of AP I, Belgium notified the High Contracting Parties of the duties assigned to the Belgian *Gendarmerie* (constabulary) in time of armed conflict. Belgium considered that this notification fully satisfied any and all requirements of Article 43 pertaining to the *Gendarmerie*. It informed the High Contracting Parties that the *Gendarmerie* was formed to maintain law and order and was, according to national legislation, a police force which was part of the armed forces within the meaning of Article 43 AP I. Consequently, members of the *Gendarmerie* had the status of combatant in time of international armed conflict.⁷⁰⁵ An Act of Parliament of 18 July 1991 has, however, put an end to this situation as it has disconnected the *Gendarmerie* from the armed forces.⁷⁰⁶

686. Upon ratification of AP I, France informed the States party to AP I that its armed forces permanently include the *Gendarmerie*.⁷⁰⁷

Other Instruments

687. No practice was found.

II. National Practice

Military Manuals

688. Argentina’s Law of War Manual provides that “whenever a Party to a conflict incorporates a paramilitary or armed law enforcement agency into its armed forces, it shall so notify the other Parties to the conflict”.⁷⁰⁸

689. Canada’s LOAC Manual states that “if a party to a conflict incorporates paramilitary or armed law enforcement agencies into its armed forces, it must

⁷⁰⁴ CDDH, *Official Records*, Vol. VI, CDDH/SR.39, 25 May 1977, p. 111.

⁷⁰⁵ Belgium, Interpretative declarations made upon ratification of AP I, 20 May 1986, § 2.

⁷⁰⁶ Belgium, *Law on Demilitarisation of the Gendarmerie* (1991).

⁷⁰⁷ France, Reservations and declarations made upon ratification of AP I, 11 April 2001, § 7.

⁷⁰⁸ Argentina, *Law of War Manual* (1989), § 1.07(3).

inform other parties to the conflict of this fact. These forces are then considered lawful combatants."⁷⁰⁹

690. Germany's Military Manual states that:

Whenever a party to a conflict incorporates a paramilitary or armed law enforcement agency into its armed forces it shall notify the other parties to the conflict. In the Federal Republic of Germany the Federal Border Commands including their Border Guard formations and units as well as the Federal Border Guard School shall become part of the armed forces upon the outbreak of an armed conflict.⁷¹⁰

691. The Military Manual of the Netherlands states that "a State may incorporate a paramilitary organisation or armed agency charged with police functions into its armed forces. The other parties to a conflict have to be notified thereof."⁷¹¹

692. New Zealand's Military Manual states that "if a Party to a conflict incorporates paramilitary or armed law enforcement agencies into its armed forces it must inform other parties to the conflict of this fact, so that such forces may be acknowledged as lawful combatants".⁷¹² The manual provides two examples of paramilitary agencies incorporated into the armed forces of a State, namely "the Special Auxiliary Force attached to Bishop Muzorewa's United African National Congress in Zimbabwe and which was embodied into the national army after the Bishop became Prime Minister [and] India's Border Security Force in Assam".⁷¹³ The manual also provides an example of an armed law enforcement agency incorporated into the armed forces of a State, namely:

At the time of the outbreak of World War II, the Burma Frontier Force was serving as a police force under authority of the Burma Frontier Force Act; after the fall of Burma, the Burmese Government in exile in Simla, India, passed legislation making the Force part of the Burmese Army and subject to the Burma Army Act.⁷¹⁴

693. Spain's LOAC Manual states that members of the Guardia Civil are lawful combatants.⁷¹⁵

National Legislation

694. The Report on the Practice of Germany notes that from 1965 to 1994, German border guards were granted the status of combatants. In 1994, the German parliament adopted a law that changed the status of the border guards. The reason for this change was that, as combatants, these guards could become legitimate enemy targets and they could involve local police forces as targets

⁷⁰⁹ Canada, *LOAC Manual* (1999), p. 3-2, § 14. ⁷¹⁰ Germany, *Military Manual* (1992), § 307.

⁷¹¹ Netherlands, *Military Manual* (1993), p. III-3, § 2.

⁷¹² New Zealand, *Military Manual* (1992), § 806(1).

⁷¹³ New Zealand, *Military Manual* (1992), § 806(1), footnote 25.

⁷¹⁴ New Zealand, *Military Manual* (1992), § 806(1), footnote 26.

⁷¹⁵ Spain, *LOAC Manual* (1996), Vol. I, § 1.3.a.(1).

when operating in joint action. In addition, even civilian objects protected by the police might become targets.⁷¹⁶

695. The Decree on the Constitution of the Integrated National Police of the Philippines provides that the Philippine Constabulary, responsible as the nucleus of the Integrated National Police for police, jail and fire services, “shall remain and continue to be a major service of the Armed Forces”. Within this framework, the Integrated National Police “shall function directly under the Department of National Defense”.⁷¹⁷

696. Pursuant to Spain’s Military Criminal Code, the Guardia Civil is an armed military body that exclusively falls under the responsibility of the Ministry of Defence, in times of siege warfare or when called upon to carry out missions of a military nature.⁷¹⁸

697. The Report on the Practice of Zimbabwe asserts that the incorporation of Article 43 AP I into national legislation by the 1981 Geneva Conventions Act as amended “is evidence of [Zimbabwe’s] view that [it represents] customary international law”.⁷¹⁹

National Case-law

698. The Report on the Practice of India refers to a decision of the Supreme Court which did not consider, for administrative purposes, civilian clerks of a special police unit (the Indo-Tibetan Border Force, which is itself part of the armed forces of India) as members of the armed forces. According to the report, however, members of this force might be treated as combatants for the purpose of the application of IHL.⁷²⁰

Other National Practice

699. The Report on the Practice of South Korea affirms the customary nature of Article 43 AP I.⁷²¹

700. On the basis of a statement by the Syrian Minister of Foreign Affairs before the UN General Assembly in 1997, the Report on the Practice of Syria asserts that Syria considers that the rule contained in Article 43(3) AP I is part of customary international law.⁷²²

⁷¹⁶ Report on the Practice of Germany, 1997, Chapter 1.1, referring to *Federal Border Police Law* (1994), Article 4.

⁷¹⁷ Philippines, *Decree on the Constitution of the Integrated National Police* (1975), Sections 5 and 7.

⁷¹⁸ Spain, *Military Criminal Code* (1985), Article 9.

⁷¹⁹ Report on the Practice of Zimbabwe, 1998, Chapter 1.1.

⁷²⁰ Report on the Practice of India, 1997, Chapter 1.1, referring to Supreme Court, *Dobhal case*, Judgement, 16 August 1994, §§ 1–8.

⁷²¹ Report on the Practice of South Korea, 1997, Chapter 1.1.

⁷²² Report on the Practice of Syria, 1997, Chapter 1.1, referring to Statement by the Syrian Minister of Foreign Affairs before the UN General Assembly, 1 October 1997.

III. Practice of International Organisations and Conferences

701. No practice was found.

IV. Practice of International Judicial and Quasi-judicial Bodies

702. No practice was found.

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

703. No practice was found.

VI. Other Practice

704. No practice was found.

E. Definition of Civilians*I. Treaties and Other Instruments**Treaties*

705. Article 50 AP I states that:

1. A civilian is any person who does not belong to one of the categories of persons referred to in Article 4 A (1), (2), (3) and (6) of the Third Convention and in Article 43 of this Protocol.
2. The civilian population comprises all persons who are civilians.

Article 50 AP I was adopted by consensus.⁷²³

706. Article 25(1) and (2) of draft AP II submitted by the ICRC to the CDDH provided that “any person who is not a member of armed forces is considered to be a civilian” and “the civilian population comprises all persons who are civilians”.⁷²⁴ Paragraph 1 of Article 25 was amended and both paragraphs were adopted by consensus in Committee III of the CDDH.⁷²⁵ The approved proposals provided that “a civilian is anyone who is not a member of the armed forces or of an organized armed group” and “the civilian population comprises all persons who are civilians”.⁷²⁶ Eventually, however, these draft provisions were deleted in the plenary by consensus.⁷²⁷

⁷²³ CDDH, *Official Records*, Vol. VI, CDDH/SR.41, 26 May 1977, p. 161.

⁷²⁴ CDDH, *Official Records*, Vol. I, Part Three, Draft Additional Protocols, June 1973, p. 40.

⁷²⁵ CDDH, *Official Records*, Vol. XV, CDDH/215/Rev.1, 3 February–18 April 1975, p. 290, § 121.

⁷²⁶ CDDH, *Official Records*, Vol. XV, CDDH/215/Rev.1, 3 February–18 April 1975, p. 320.

⁷²⁷ CDDH, *Official Records*, Vol. VII, CDDH/SR.52, 6 June 1977, p. 135.

707. Upon ratification of the CCW, the UK made a declaration stating, *inter alia*, that the terms “civilian” and “civilian population” used in this Convention had the same meaning as in Article 50 AP I.⁷²⁸

Other Instruments

708. Article 1 of the 1938 ILA Draft Convention for the Protection of Civilian Populations against New Engines of War provides that “the phrase ‘civilian population’ within the meaning of this Convention shall include all those not enlisted in any branch of the combatant services nor for the time being employed or occupied in any belligerent establishment as defined in Article 2”. The term “belligerent establishment” is defined in Article 2 as “military, naval or air establishment, or barracks, arsenal, munition stores or factories, aerodromes or aeroplane workshops or ships of war, naval dockyards, forts, or fortifications for defensive or offensive purposes, or entrenchments”.

709. Article 4 of the 1956 New Delhi Draft Rules states that:

For the purpose of the present rules, the civilian population consists of all persons not belonging to one or other of the following categories:

- (a) Members of the armed forces, or of their auxiliary or complementary organizations.
- (b) Persons who do not belong to the forces referred to above, but nevertheless take part in the fighting.

710. Paragraph 6 of the 1991 Memorandum of Understanding on the Application of IHL between Croatia and the SFRY requires that hostilities be conducted in accordance with Article 50 AP I.

711. Paragraph 2.5 of the 1992 Agreement on the Application of IHL between the Parties to the Conflict in Bosnia and Herzegovina requires that hostilities be conducted in accordance with Article 50 AP I.

II. National Practice

Military Manuals

712. Argentina’s Law of War Manual defines a civilian as “any person who does not belong to the Armed Forces”.⁷²⁹

713. Australia’s Defence Force Manual states that a civilian is defined “in a negative fashion, namely, any person not belonging to the armed forces. The definition covers civilians collectively as well, when they are referred to as the ‘civilian population’”.⁷³⁰

⁷²⁸ UK, Declaration made upon ratification of the CCW, 13 February 1995, § a(iii).

⁷²⁹ Argentina, *Law of War Manual* (1989), § 4.02(1).

⁷³⁰ Australia, *Defence Force Manual* (1994), § 914.

714. Benin's Military Manual defines civilians as "persons who do not belong to the Armed Forces [nor] take part in a *levée en masse* (civilian populations, men, women, children, journalists, journalists on a dangerous mission)".⁷³¹

715. Cameroon's Instructors' Manual defines civilians as "persons who are neither part of the armed forces nor participating in a *levée en masse*".⁷³²

716. Canada's LOAC Manual provides that "in general, a 'civilian' is any person who is not a combatant . . . The civilian population comprises all persons who are civilians."⁷³³

717. Colombia's Instructors' Manual defines the term civilian as "any person who does not belong to the Armed Forces and who does not participate in a *levée en masse*".⁷³⁴ The manual adds that "civilians must be understood as those who do not participate directly in military hostilities (internal conflict, international conflict)".⁷³⁵

718. Croatia's LOAC Compendium states that "civilians or persons not belonging to the armed forces" are non-combatants.⁷³⁶

719. Croatia's Commanders' Manual defines civilians as those persons "who do not belong to the armed forces".⁷³⁷

720. The Military Manual of the Dominican Republic states that "all persons participating in military operations or activities are considered combatants. Those who do not participate in such actions are non-combatants . . . Civilians . . . are included in the category of non-combatants."⁷³⁸

721. Ecuador's Naval Manual provides that the notion of non-combatant applies "primarily to all individuals who are not part of the armed forces and who . . . abstain from committing hostile acts and from giving direct support to such acts. In this context, non-combatants and the civilian population, are, generally, synonymous."⁷³⁹ The manual further specifies that "the civilian population consists of all persons not serving in the armed forces, militia, or paramilitary forces and not otherwise taking a direct part in the hostilities".⁷⁴⁰

722. France's LOAC Summary Note defines civilians as "those persons who do not belong to the armed forces".⁷⁴¹

723. France's LOAC Teaching Note defines civilians as "those persons who do not belong to the armed forces or who do not participate in hostilities".⁷⁴²

724. Hungary's Military Manual states that "civilians or persons not belonging to the armed forces" are non-combatants.⁷⁴³

⁷³¹ Benin, *Military Manual* (1995), Fascicule I, p. 12.

⁷³² Cameroon, *Instructors' Manual* (1992), p. 17.

⁷³³ Canada, *LOAC Manual* (1999), p. 4-4, §§ 33 and 35.

⁷³⁴ Colombia, *Instructors' Manual* (1999), p. 16, see also p. 28.

⁷³⁵ Colombia, *Instructors' Manual* (1999), p. 16.

⁷³⁶ Croatia, *LOAC Compendium* (1991), p. 6. ⁷³⁷ Croatia, *Commanders' Manual* (1992), § 5.

⁷³⁸ Dominican Republic, *Military Manual* (1980), p. 3.

⁷³⁹ Ecuador, *Naval Manual* (1989), § 5.3, see also §§ 11.1 and 11.3.

⁷⁴⁰ Ecuador, *Naval Manual* (1989), § 11.3. ⁷⁴¹ France, *LOAC Summary Note* (1992), § 1.1.

⁷⁴² France, *LOAC Teaching Note* (2000), p. 4. ⁷⁴³ Hungary, *Military Manual* (1992), p. 17.

725. Indonesia's Air Force Manual states that "unlawful combatants are persons who participate in hostilities without authorization of the belligerent authority, including persons who are neither members of the armed forces nor of a militia".⁷⁴⁴ The Report on the Practice of Indonesia considers that this definition is compatible with the definition provided in Article 50(1) AP I.⁷⁴⁵

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

The IDF (Israel Defence Forces) accepts and applies the principle of distinction, in accordance with the accepted definition of "civilian" under customary international law, which is understood to mean any individual who is not a member of an organized army of a State, and who is not involved in hostilities.⁷⁴⁶

727. Italy's LOAC Elementary Rules Manual defines civilians as those persons "who do not belong to the armed forces".⁷⁴⁷

728. Kenya's LOAC Manual defines a civilian as "any person who does not belong to the armed forces and does not take any part in a *levée en masse*".⁷⁴⁸

729. Madagascar's Military Manual states that the term "civilian person" means "any person who does not belong to the armed forces and who does not take part in a *levée en masse*".⁷⁴⁹

730. The Military Manual of the Netherlands defines a civilian as "every person who is not a combatant" and specifies that "the civilian population comprises all civilians".⁷⁵⁰

731. South Africa's LOAC Manual defines civilians as "any person who does not belong to the armed forces and does not take part in a *levée en masse*".⁷⁵¹

732. Spain's LOAC Manual states that "the civilian population is defined by exclusion. This means that civilians are those persons who are not combatants."⁷⁵²

733. Sweden's IHL Manual states that "in international humanitarian law, civilians (non-combatants) are those who are not entitled to use weapons in defence or to injure an adversary. Persons who cannot be classified as combatants are thus to be considered as civilians."⁷⁵³

734. Togo's Military Manual defines civilians as "persons who are not members of the armed forces, volunteer corps or resistance movements, and who do not

⁷⁴⁴ Indonesia, *Air Force Manual* (1990), p. 18, § 22.

⁷⁴⁵ Report on the Practice of Indonesia, 1997, Chapter 1.1.

⁷⁴⁶ Report on the Practice of Israel, 1997, Chapter 1.1, referring to *Law of War Booklet* (1986), Chapter 1.

⁷⁴⁷ Italy, *LOAC Elementary Rules Manual* (1991), § 5.

⁷⁴⁸ Kenya, *LOAC Manual* (1997), Précis No. 2, pp. 9–10.

⁷⁴⁹ Madagascar, *Military Manual* (1994), Fiche No. 2-SO, § B, see also Fiche No. 2-O, § 5.

⁷⁵⁰ Netherlands, *Military Manual* (1993), p. V-2.

⁷⁵¹ South Africa, *LOAC Manual* (1996), § 24(c).

⁷⁵² Spain, *LOAC Manual* (1996), Vol. I, § 1.3.a.(2).

⁷⁵³ Sweden, *IHL Manual* (1991), Section 3.2.1.5, p. 42.

take part in a *levée en masse*; that is to say the civilian population: men, women and children, journalists on a dangerous mission".⁷⁵⁴

735. The UK LOAC Manual states that "civilians are all persons other than those defined in paragraphs 1 to 8 above [combatants, guerrillas and commandos, spies, mercenaries, military non-combatants]".⁷⁵⁵

736. The US Air Force Pamphlet states that "civilians are all persons other than those mentioned as combatants in [Article 4(A) GC III]".⁷⁵⁶

737. The US Naval Handbook refers first to the notion of non-combatants as primarily applying to "those individuals who do not form part of the armed forces and who otherwise refrain from the commission or direct support of hostile acts. In this context, noncombatants and, generally, the civilian population, are synonymous."⁷⁵⁷ The manual further specifies that "the civilian population consists of all persons not serving in the armed forces, militia, or paramilitary forces and not otherwise taking a direct part in the hostilities".⁷⁵⁸

738. The YPA Military Manual of the SFRY (FRY) defines a civilian as "any person who does not belong to one of the categories of persons specified in [the provisions concerning armed forces, commandos, saboteurs and parachuters]".⁷⁵⁹ The manual defines a civilian population as "the entire population of a party to the conflict which does not belong to any of the categories of armed forces".⁷⁶⁰

National Legislation

739. Spain's Penal Code contains a chapter on crimes against protected persons who are defined as "the civilian population and individual civilians protected by the Fourth Geneva Convention of 12 August 1949 or Additional Protocol I of 8 June 1977".⁷⁶¹

National Case-law

740. No practice was found.

Other National Practice

741. The Report on the Practice of Iran found no specific legal definition of civilian, but states that anyone who is not included in the category of combatant should be considered a civilian.⁷⁶²

742. The Report on the Practice of Iraq notes that the definition of civilian includes everyone who does not join the armed forces nor carry arms against one of the belligerents.⁷⁶³

⁷⁵⁴ Togo, *Military Manual* (1996), Fascicule I, p. 13.

⁷⁵⁵ UK, *LOAC Manual* (1981), Section 9, p. 10, § 9.

⁷⁵⁶ US, *Air Force Pamphlet* (1976), § 5-3, see also § 1-2.

⁷⁵⁷ US, *Naval Handbook* (1995), § 5.3, see also § 11.1.

⁷⁵⁸ US, *Naval Handbook* (1995), § 11.3.

⁷⁵⁹ SFRY (FRY), *YPA Military Manual* (1988), § 67(3).

⁷⁶⁰ SFRY (FRY), *YPA Military Manual* (1988), § 52.

⁷⁶¹ Spain, *Penal Code* (1995), Article 608(3).

⁷⁶² Report on the Practice of Iran, 1997, Chapter 1.1.

⁷⁶³ Report on the Practice of Iraq, 1998, Chapter 1.1.

743. On the basis of an interview with a high-ranking army officer, the Report on the Practice of Jordan states that “civilians are all those who do not belong to the armed forces”.⁷⁶⁴

744. The Report on the Practice of Malaysia states that there is no definition of the concept of civilian under any of Malaysia’s written laws. However, on the basis of the practice during the insurgency period as gleaned from interviews with members of the armed forces, the report claims that persons who neither carry arms nor wear a uniform can be considered civilians.⁷⁶⁵

745. The Report on the Practice of Russia notes that although there is no standard definition of civilians, a definition can be inferred *a contrario* from the definition of combatant, i.e. civilians are those who do not fall within the definition of combatant.⁷⁶⁶

746. The Report on the Practice of Rwanda refers to a declaration by Rwanda’s Minister of Defence on 18 August 1997 in which he stated that government troops may only target enemies who carry arms and/or kill people. The report thus concludes, *a contrario*, that in an internal armed conflict civilians are defined as those persons who do not carry arms nor commit inhumane acts against the population in relation to the hostilities.⁷⁶⁷

747. On the basis of a statement by the Syrian Minister of Foreign Affairs before the UN General Assembly in 1997, the Report on the Practice of Syria asserts that Syria considers that the definition provided in Article 50 AP I is part of customary international law.⁷⁶⁸

748. The Report on the Practice of Zimbabwe considers that the definition of civilians in Article 50 AP I is regarded as customary by Zimbabwe in the context of an international armed conflict.⁷⁶⁹

III. Practice of International Organisations and Conferences

749. No practice was found.

IV. Practice of International Judicial and Quasi-judicial Bodies

750. In the pre-trial brief in the *Tadić case* in 1996, the ICTY Prosecutor argued that the term civilian in Article 5 of the ICTY Statute (crimes against humanity) covered all non-combatants within the meaning of common Article 3 of

⁷⁶⁴ Report on the Practice of Jordan, 1997, Interview with a high-ranking officer of the Jordanian army, Chapter 1.1.

⁷⁶⁵ Report on the Practice of Malaysia, 1997, Interviews with members of the Malaysian armed forces, Chapter 1.1.

⁷⁶⁶ Report on the Practice of Russia, 1997, Chapter 1.1.

⁷⁶⁷ Report on the Practice of Rwanda, 1997, Chapter 1.1, referring to Statement by the Rwandan Minister of Defence, Kigali, 18 August 1997.

⁷⁶⁸ Report on the Practice of Syria, 1997, Chapter 1.1, referring Statement by the Syrian Minister of Foreign Affairs before the UN General Assembly, 1 October 1997.

⁷⁶⁹ Report on the Practice of Zimbabwe, 1998, Chapter 1.1.

the 1949 Geneva Conventions. Reaffirming the customary nature of common Article 3, the Prosecutor specified that “it provides an authoritative definition of noncombatants or ‘protected persons’ in the broad sense of international humanitarian law”.⁷⁷⁰ In its response, the Defence agreed that the term “civilian” under Article 5 did cover all non-combatants, but argued that the concept of non-combatant was not always easy to delineate, especially when groups were not under the direct control of a central government (as was allegedly the case in Bosnia and Herzegovina).⁷⁷¹ In its judgement in 1997, the ICTY Trial Chamber stated that “determining which individuals of the targeted population qualify as civilians for purposes of crimes against humanity” was not as clear as other concepts. The Trial Chamber ruled that:

Common Article 3, the language of which reflects “elementary considerations of humanity” which are “applicable under customary international law to any armed conflict”, provides that in an armed conflict “not of an international character” Contracting States are obliged “as a minimum” to comply with the following: “persons taking no active part in the hostilities, including members of armed forces who have laid down their arms and those placed *hors de combat* by sickness, wounds, detention, or any other cause, shall in all circumstances be treated humanely.” AP I defines civilians by the exclusion of prisoners of war and armed forces, considering a person a civilian in case of doubt. However, this definition of civilians contained in common Article 3 is not immediately applicable to crimes against humanity because it is a part of the laws or customs of war and can only be applied by analogy. The same applies to the definition contained in AP I and the Commentary, GC IV on the treatment of civilians, both of which advocate a broad interpretation of the term “civilian”. They, and in particular common Article 3, do, however, provide guidance in answering the most difficult question: specifically, whether acts taken against an individual who cannot be considered a traditional “non-combatant” because he is actively involved in the conduct of hostilities by membership in some form of resistance group can nevertheless constitute crimes against humanity if they are committed in furtherance or as part of an attack directed against a civilian population.⁷⁷²

751. In its judgement in the *Blaškić case* in 2000, the ICTY Trial Chamber stated that “civilians . . . are persons who are not, or no longer, members of the armed forces”.⁷⁷³

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

752. To fulfil its task of disseminating IHL, the ICRC has delegates around the world teaching armed and security forces that a civilian is “any person who does not belong to the armed forces and does not take part in a *levée en masse*”.⁷⁷⁴

⁷⁷⁰ ICTY, *Tadić case*, Prosecutor’s Pre-Trial Brief, 10 April 1996, p. 45.

⁷⁷¹ ICTY, *Tadić case*, Response to Prosecutor’s Pre-Trial Brief, 23 April 1996, pp. 19–20.

⁷⁷² ICTY, *Tadić case*, Judgement, 7 May 1997, § 639.

⁷⁷³ ICTY, *Blaškić case*, Judgement, 3 March 2000, § 180.

⁷⁷⁴ Frédéric de Mulinen, *Handbook on the Law of War for Armed Forces*, ICRC, Geneva, 1987, § 51.

VI. Other Practice

753. No practice was found.

F. Loss of Protection from Attack

Direct participation in hostilities

I. Treaties and Other Instruments

Treaties

754. Common Article 3 of the 1949 Geneva Conventions protects “persons taking no active part in the hostilities”, including members of armed forces who have laid down their arms and those placed *hors de combat* by sickness, wounds, detention, or any other cause” against “violence to life and person, in particular murder of all kinds”.

755. Articles 51(3) AP I provides that civilians shall enjoy protection against the dangers arising from military operations “unless and for such time as they take a direct part in hostilities”. Article 51 AP I was adopted by 77 votes in favour, one against and 16 abstentions.⁷⁷⁵

756. Article 13(3) AP II provides that civilians shall enjoy protection against the dangers arising from military operations “unless and for such time as they take a direct part in hostilities”. Article 13 AP II was adopted by consensus.⁷⁷⁶

757. Upon ratification of the CCW, the UK issued a declaration stating that “civilians shall enjoy the protection afforded by this Convention unless and for such time as they take a direct part in hostilities”.⁷⁷⁷

Other Instruments

758. Article 4 of the 1956 New Delhi Draft Rules states that:

The civilian population consists of all persons not belonging to one or other of the following categories:

- (a) Members of the armed forces, or of their auxiliary or complementary organizations.
- (b) Persons who do not belong to the forces referred to above, but nevertheless take part in the fighting.

759. Paragraph 6 of the 1991 Memorandum of Understanding on the Application of IHL between Croatia and the SFRY requires that hostilities be conducted in accordance with Article 51(3) AP I.

⁷⁷⁵ CDDH, *Official Records*, Vol. VI, CDDH/SR.41, 26 May 1977, p. 16.

⁷⁷⁶ CDDH, *Official Records*, Vol. VII, CDDH/SR.52, 6 June 1977, p. 134.

⁷⁷⁷ UK, Declaration upon ratification of the CCW, 13 February 1995, § a(iii).

760. Paragraph 2.5 of the 1992 Agreement on the Application of IHL between the Parties to the Conflict in Bosnia and Herzegovina requires that hostilities be conducted in accordance with Article 51(3) AP I.

761. Section 5.2 of the 1999 UN Secretary-General's Bulletin provides that civilians shall enjoy protection against the dangers arising from military operations, "unless and for such time as they take a direct part in hostilities".

II. National Practice

Military Manuals

762. Australia's Defence Force Manual states that "civilians are only protected as long as they refrain from taking a direct part in hostilities".⁷⁷⁸

763. Benin's Military Manual states that "civilian persons may only be attacked when they participate directly in hostilities".⁷⁷⁹

764. Canada's LOAC Manual states that "civilians who take a direct part in hostilities (other than a *levée en masse*) are unlawful combatants. They lose their protection as civilians and become legitimate targets for such time as they take a direct part in hostilities."⁷⁸⁰ The manual further states that "participation in hostilities by non-combatants" is a violation of customary law and recognised as a war crime by the LOAC.⁷⁸¹

765. Colombia's Instructors' Manual states that civilians lose their protection against attack "when they participate directly in the hostilities".⁷⁸² The manual adds that "civilians must be understood as those who do not participate directly in military hostilities (internal conflict, international conflict)".⁷⁸³

766. Croatia's Commanders' Manual states that "civilians may not be attacked, unless they participate directly in hostilities".⁷⁸⁴

767. The Military Manual of the Dominican Republic considers that "all persons who participate in military operations or activities are considered combatants" and thus liable to attack.⁷⁸⁵

768. Ecuador's Naval Manual states that "civilians who participate directly in hostilities . . . lose their immunity and may be attacked".⁷⁸⁶

769. France's LOAC Summary Note states that "civilians may not be attacked, unless they participate directly in hostilities".⁷⁸⁷

⁷⁷⁸ Australia, *Defence Force Manual* (1994), § 532, see also §§ 527 and 918.

⁷⁷⁹ Benin, *Military Manual* (1995), Fascicule III, p. 4.

⁷⁸⁰ Canada, *LOAC Manual* (1999), p. 3-4, § 28, see also p. 7-5, § 46 (air to land operations).

⁷⁸¹ Canada, *LOAC Manual* (1999), p. 16-4, § 21(g).

⁷⁸² Colombia, *Instructors' Manual* (1999), p. 16, see also p. 28.

⁷⁸³ Colombia, *Instructors' Manual* (1999), p. 16.

⁷⁸⁴ Croatia, *Commanders' Manual* (1992), § 10.

⁷⁸⁵ Dominican Republic, *Military Manual* (1980), p. 3.

⁷⁸⁶ Ecuador, *Naval Manual* (1989), § 11.3.

⁷⁸⁷ France, *LOAC Summary Note* (1992), § 1.3; see also *LOAC Teaching Note* (2000), p. 5.

770. Germany's Military Manual states that "civilians who do not take part in hostilities shall be respected and protected".⁷⁸⁸ The manual adds that "persons taking a direct part in hostilities are not entitled to claim the rights accorded to civilians by international humanitarian law".⁷⁸⁹

771. India's Army Training Note states that:

War is an act of extreme violence between two nations and not between people individually. The implications, therefore, are that, so long as an individual, may it be a soldier or a civilian, is directly contributing towards furtherance of the war effort, he is deemed to be at war. However, when he is not so employed, he is to be treated as a normal human being and must be afforded all protection and care due to.⁷⁹⁰

772. Indonesia's Air Force Manual states that a person who is not a member of the armed forces nor a member of a militia but participates in the hostilities is an unlawful combatant and is considered a military objective.⁷⁹¹

773. Italy's LOAC Elementary Rules Manual provides that "civilians may not participate directly in hostilities and may not be attacked, unless they take a direct part in hostilities".⁷⁹²

774. Kenya's LOAC Manual states that civilians lose their protection from attack "when they take a direct part in hostilities".⁷⁹³

775. Madagascar's Military Manual states that "civilian persons may not be attacked, unless they participate directly in hostilities".⁷⁹⁴

776. The Military Manual of the Netherlands states that "civilians enjoy no protection [against attack] if they participate directly in hostilities".⁷⁹⁵ With respect to non-international armed conflicts in particular, the manual states that "the protection of civilians ends when and for as long as they participate directly in hostilities".⁷⁹⁶

777. The Military Handbook of the Netherlands states that "it is prohibited to attack civilians who are not involved in combat".⁷⁹⁷

778. New Zealand's Military Manual provides that "civilians shall enjoy... protection [against attack] unless and for such time as they take a direct part in hostilities".⁷⁹⁸ The manual further states that "participation in hostilities by non-combatants" is a war crime recognised by the customary law of armed conflict.⁷⁹⁹

⁷⁸⁸ Germany, *Military Manual* (1992), § 502.

⁷⁸⁹ Germany, *Military Manual* (1992), § 517.

⁷⁹⁰ India, *Army Training Note* (1995), p. 3/7, § 14.

⁷⁹¹ Indonesia, *Air Force Manual* (1990), §§ 22–23.

⁷⁹² Italy, *LOAC Elementary Rules Manual* (1991), § 10.

⁷⁹³ Kenya, *LOAC Manual* (1997), Précis No. 2, p. 10.

⁷⁹⁴ Madagascar, *Military Manual* (1994), Fiche 3-O, § 10.

⁷⁹⁵ Netherlands, *Military Manual* (1993), p. V-5.

⁷⁹⁶ Netherlands, *Military Manual* (1993), p. XI-6.

⁷⁹⁷ Netherlands, *Military Handbook* (1995), p. 7-36.

⁷⁹⁸ New Zealand, *Military Manual* (1992), § 517.

⁷⁹⁹ New Zealand, *Military Manual* (1992), § 1704(5).

779. Nigeria's Operational Code of Conduct states that "youths and school children must not be attacked unless they are engaged in open hostilities against Federal Government Forces". It further states that "male civilians who are hostile to the Federal Forces are to be dealt with firmly but fairly".⁸⁰⁰

780. According to Nigeria's Manual on the Laws of War, "participation in hostilities by civilians" is an example of a war crime.⁸⁰¹

781. South Africa's LOAC Manual states that "if persons identified as civilians engage the armed forces, then they are regarded as unlawful combatants and may be treated under law as criminals".⁸⁰²

782. Spain's LOAC Manual states that "civilians must not take a direct part in hostilities nor be the object of attack, unless they take a direct part in hostilities".⁸⁰³

783. Sweden's IHL Manual states that "protection for civilians does not apply under all circumstances – exceptions are made for the time when civilians take direct part in hostilities".⁸⁰⁴

784. Togo's Military Manual states that "civilian persons may only be attacked when they participate directly in hostilities".⁸⁰⁵

785. According to the UK Military Manual, "participation in hostilities by civilians" is an example of a punishable violation of the laws of war, or war crime, beyond the grave breaches of the Geneva Conventions.⁸⁰⁶

786. The UK LOAC Manual states that civilians "lose their protection [from attack] when they take part in hostilities".⁸⁰⁷ The manual further states that soldiers "must not attack civilians who are not actually engaged in combat".⁸⁰⁸

787. The US Air Force Pamphlet states that "civilians enjoy the protection afforded by law unless and for such time as they take a direct part in hostilities".⁸⁰⁹

788. The US Naval Handbook states that "civilians who take a direct part in hostilities . . . lose their immunity and may be attacked".⁸¹⁰

789. The YPA Military Manual of the SFRY (FRY) states that "it is permitted to directly attack only members of the armed forces and other persons – only if they directly participate in military operations".⁸¹¹

National Legislation

790. No practice was found.

⁸⁰⁰ Nigeria, *Operational Code of Conduct* (1967), § 4(b) and (j).

⁸⁰¹ Nigeria, *Manual on the Laws of War* (undated), § 6.

⁸⁰² South Africa, *LOAC Manual* (1996), § 28(b).

⁸⁰³ Spain, *LOAC Manual* (1996), Vol. I, § 5.2.a.(2).

⁸⁰⁴ Sweden, *IHL Manual* (1991), Section 3.2.1.5, p. 43.

⁸⁰⁵ Togo, *Military Manual* (1996), Fascicule III, p. 4.

⁸⁰⁶ UK, *Military Manual* (1958), § 626(p).

⁸⁰⁷ UK, *LOAC Manual* (1981), Section 3, p. 10, § 9.

⁸⁰⁸ UK, *LOAC Manual* (1981), Annex A, p. 44, § 8.

⁸⁰⁹ US, *Air Force Pamphlet* (1976), § 5-3. ⁸¹⁰ US, *Naval Handbook* (1995), § 11.3.

⁸¹¹ SFRY (FRY), *YPA Military Manual* (1988), § 67.

National Case-law

791. No practice was found.

Other National Practice

792. In an explanatory memorandum submitted to the Belgian parliament in 1985 in the context of the ratification procedure of the Additional Protocols, the Belgian government stated that “the condition [for civilian immunity from attack], however, is that they do not participate directly in hostilities, which is of course a question of fact”.⁸¹²

793. With reference to Articles 248(2) and 251 of Chile’s 1925 Code of Military Justice, the Report on the Practice of Chile states that Chile takes a very broad view of what acts are considered to constitute support to military action, and as a result, lead to the loss of civilian status and protection.⁸¹³

794. In spite of the absence of Chinese regulation on this matter, the Report on the Practice of China concludes that in practice civilians lose their civilian status and protection when carrying out military missions. The report adds that the term “innocent civilian” is often used in Chinese practice, and that a civilian who participates in hostilities, being no longer “innocent”, will lose protection. In this context, the report also gives a definition of the terms “spy” and “secret service”. A spy, under Chinese practice, is a civilian or a combatant who works for the enemy during an international armed conflict. “Secret service” refers to civilians or combatants who work for the enemy in the context of an internal armed conflict. The report concludes that it can be deduced from these two terms that civilians who take part in the hostilities, including those acting as spies or in the secret service, lose their protection.⁸¹⁴

795. The Report on the Practice of Egypt notes that the immunity from attack granted to the civilian population – provided that civilians do not participate in military operations – is justified by the “dictates of humanity and the cultural and civilian heritage of all nations and peoples”.⁸¹⁵

796. On the basis of an interview with a high-ranking army officer, the Report on the Practice of Jordan states that “civilians who take [a] direct part in hostilities are no longer considered civilians and cannot claim the privileges of combatant status”.⁸¹⁶

797. According to the Report on the Practice of Kuwait, it is the *opinio juris* of Kuwait that direct participation in military operations results in the loss of the protection normally granted to civilians.⁸¹⁷

⁸¹² Belgium, House of Representatives, Explanatory memorandum on a draft bill for the approval of the Additional Protocols, 1984–1985 Session, Doc. 1096-1, 9 January 1985, p. 10.

⁸¹³ Report on the Practice of Chile, 1997, Chapter 1.2.

⁸¹⁴ Report on the Practice of China, 1997, Chapter 1.2.

⁸¹⁵ Report on the Practice of Egypt, 1997, Chapter 1.2.

⁸¹⁶ Report on the Practice of Jordan, 1997, Interview with a high-ranking officer of the Jordanian army, Chapter 1.2.

⁸¹⁷ Report on the Practice of Kuwait, 1997, Chapter 1.2.

798. The Report on the Practice of Lebanon states that “the Commission on Human Rights of the Lebanese parliament is of the opinion that civilians lose their civilian status when they take part in military actions”.⁸¹⁸

799. On the basis of interviews with members of the armed forces, the Report on the Practice of Malaysia states that during the communist insurgency, civilians were not deprived of their protected status unless they actively participated in the insurgency.⁸¹⁹

800. At the CDDH, Mexico stated that it believed draft Article 46 AP I (now Article 51) to be so essential that it “cannot be the subject of any reservations whatsoever since these would be inconsistent with the aim and purpose of Protocol I and undermine its basis”.⁸²⁰

801. The Report on the Practice of Nigeria states that it is the *opinio juris* of Nigeria that the rule that civilians are deprived of protection when they engage in hostilities against federal forces is part of customary international law.⁸²¹

802. The Report on the Practice of Syria notes that Syria did not make any reservations to Article 51 AP I and thus views the conditions stated in this Article as part of customary international law.⁸²²

803. At the CDDH, the UK voted in favour of draft Article 46 AP I (now Article 51), describing its first three paragraphs as containing a “valuable reaffirmation of existing customary rules of international law designed to protect civilians”.⁸²³

804. In 1987, the Deputy Legal Adviser of the US Department of State stated that “we also support the principle . . . that immunity not be extended to civilians who are taking part in hostilities”.⁸²⁴

805. In 1989, a US memorandum of law concerning the prohibition of assassination stated that “there is general agreement among law-of-war experts that civilians who participate in hostilities may be regarded as combatants”.⁸²⁵

⁸¹⁸ Report on the Practice of Lebanon, 1998, Chapter 1.2, referring to a statement of the Lebanese Parliamentary Commission on Human Rights.

⁸¹⁹ Report on the Practice of Malaysia, 1997, Interviews with members of the Malaysian armed forces, Chapter 1.2.

⁸²⁰ Mexico, Statement at the CDDH, *Official Records*, Vol. VI, CDDH/SR.41, 26 May 1977, p. 193.

⁸²¹ Report on the Practice of Nigeria, 1997, Chapter 1.2.

⁸²² Report on the Practice of Syria, 1997, Chapter 1.2.

⁸²³ UK, Statement at the CDDH, *Official Records*, Vol. VI, CDDH/SR.41, 26 May 1977, p. 164, § 119.

⁸²⁴ US, Remarks of Michael J. Matheson, Deputy Legal Adviser, US Department of State, The Sixth Annual American Red Cross-Washington College of Law Conference on International Humanitarian Law: A Workshop on Customary International Law and the 1977 Protocols Additional to the 1949 Geneva Conventions, *American University Journal of International Law and Policy*, Vol. 2, 1987, p. 426.

⁸²⁵ US, Executive Order 12333 and Assassination, Memorandum prepared by the Chief of the International Law Branch, Office of the Judge Advocate General, Department of the Army, 2 November 1989, reprinted in Marian Nash (Leich), *Cumulative Digest of United States Practice in International Law, 1981–1988*, Department of State Publication 10120, Washington, D.C., 1993–1995, pp. 3415–3416.

806. In 1992, in its final report to Congress on the conduct of the Gulf War, the US Department of Defense stated that “as a general principle, the law of war prohibits . . . the direct, intentional attack of civilians not taking part in hostilities”.⁸²⁶

807. The Report on US Practice states that:

Under the practice of the United States, civilians lose immunity from direct attack if, and for so long as, they are committing hostile acts or otherwise taking a direct part in hostilities. These conditions may be met by bearing arms or by aiding the enemy with arms, ammunition, supplies, money or intelligence information or even by holding unauthorized intercourse with enemy personnel. Other acts might be considered to be taking a direct part in hostilities, depending on the intensity of the conflict and other circumstances.⁸²⁷

808. The Report on the Practice of Zimbabwe asserts that “civilians will lose their protection if they actively assist or actively become engaged in military operations . . . A lot, however, will depend on the degree of involvement.”⁸²⁸

III. Practice of International Organisations and Conferences

809. No practice was found.

IV. Practice of International Judicial and Quasi-judicial Bodies

810. In 1997, the IACiHR considered the events that took place at La Tablada in Argentina on 23 January 1989, when 42 armed individuals launched an attack against an Argentine army barracks. The attackers alleged that the purpose of the attack was to prevent an imminent military coup d'état that was supposedly being planned there. The arrival of Argentine military personnel resulted in a skirmish of approximately 30 hours, which left 29 of the attackers and several State agents dead. The Commission, seized by surviving attackers, concluded that even if the clash was brief in duration, common Article 3 of the 1949 Geneva Conventions and other relevant rules regarding the conduct of internal conflict were applicable. The Commission stated that when civilians, such as those who attacked the base at La Tablada, assumed the role of combatants by directly taking part in fighting, whether singly or as members of a group, they thereby became legitimate military targets, but only for such time as they actively participated in the combat. As soon as they ceased their hostile acts and thus fell under the power of Argentinean State agents, they could no longer be lawfully attacked or subjected to acts of violence.⁸²⁹

⁸²⁶ US, Department of Defense, Final Report to Congress on the Conduct of the Persian Gulf War, 10 April 1992, Appendix O, The Role of the Law of War, *ILM*, Vol. 31, 1992, p. 622.

⁸²⁷ Report on US Practice, 1997, Chapter 1.2.

⁸²⁸ Report on the Practice of Zimbabwe, 1998, Chapter 1.2.

⁸²⁹ IACiHR, *Case 11.137 (Argentina)*, Report, 18 November 1997, §§ 177–178, 189 and 328.

811. In 1999, in a report on human rights in Colombia, the IACiHR stated that it believed that it was necessary to clarify the distinction between “direct” or “active” and “indirect” participation by civilians in hostilities in order to identify those limited situations in which it was not unlawful to attack civilians. It maintained that it was generally understood in IHL that the phrase “direct participation in hostilities” meant acts which, by their nature or purpose, were intended to cause actual harm to enemy personnel and material. The Commission made clear that such participation also suggested a “direct causal relationship between the activity engaged in and harm done to the enemy at the time and place where the activity takes place”. The Commission upheld the view that:

Civilians whose activities merely support the adverse party’s war or military effort or otherwise only indirectly participate in hostilities cannot on these grounds alone be considered combatants. This is because indirect participation, such as selling goods to one or more of the armed parties, expressing sympathy for the cause of one of the parties or, even more clearly, failing to act to prevent an incursion by one of the armed parties, does not involve acts of violence which pose an immediate threat of actual harm to the adverse party.⁸³⁰

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

812. To fulfil its task of disseminating IHL, the ICRC has delegates around the world teaching armed and security forces that “civilian persons may not be attacked unless they participate directly in hostilities”.⁸³¹

813. In an appeal issued in October 1973, the ICRC urged all the belligerents in the conflict in the Middle East (Egypt, Iraq, Israel and Syria) to observe forthwith, in particular, the provisions of, *inter alia*, Article 46(2) of draft API which stated that “civilians enjoy the protection afforded by this Article unless and for such time as they take a direct part in hostilities”. All governments concerned replied favourably.⁸³²

VI. Other Practice

814. In 1985, in a report on violations of the laws of war in Nicaragua, Americas Watch stated that “civilians, however, lose their immunity from attack for such time as they assume a combatant’s role”.⁸³³ It reiterated this view in

⁸³⁰ IACiHR, Third report on human rights in Colombia, Doc. OEA/Ser.L/V/II.102 Doc. 9 rev. 1, 26 February 1999, Chapter IV, §§ 53 and 56.

⁸³¹ Frédéric de Mulinen, *Handbook on the Law of War for Armed Forces*, ICRC, Geneva, 1987, § 208.

⁸³² ICRC, The International Committee’s Action in the Middle East, *IRRC*, No. 152, 1973, pp. 584–585.

⁸³³ Americas Watch, *Violations of the Laws of War by Both Sides in Nicaragua: 1981–1985*, New York, March 1985, p. 32.

1986 in a report on the use of landmines in the conflicts in El Salvador and Nicaragua.⁸³⁴

815. In 1989, in a report on violations of the laws of war in Angola, Africa Watch stated that “civilians, however, temporarily lose their immunity from attack whenever they assume a combatant’s role”.⁸³⁵

816. In 1994, in reply to a report on violations of human rights in Rwanda, the FPR stated that “its combatants had only killed armed civilians engaged in combat who could not be distinguished from the regular soldiers of the Rwandan army”.⁸³⁶

817. In 2001, in a report on Israel and the occupied territories, Amnesty International referred to Article 51(3) AP I, although this instrument had not been ratified by Israel, and stated that:

Palestinians engaged in armed clashes with Israeli forces are not combatants. They are civilians who lose their protected status for the duration of the armed engagement. They cannot be killed at any time other than while they are firing upon or otherwise posing an immediate threat to Israeli troops or civilians. Because they are not combatants, the fact that they participated in an armed attack at an earlier point cannot justify targeting them for death later on.⁸³⁷

Specific examples of direct participation

I. Treaties and Other Instruments

Treaties

818. During the March–April 1998 session of the Preparatory Committee for the Establishment of an International Criminal Court, a proposal was developed which encompassed “recruiting children under the age of fifteen years into armed forces or using them to participate in hostilities”. The words “using” and “participate” were explained in a footnote to provide guidance for the interpretation of the scope of this provision. This footnote read:

The words “using” and “participate” have been adopted in order to cover both direct participation in combat and also active participation in military activities linked to combat such as scouting, spying, sabotage and the use of children as decoys, couriers or at military checkpoints. It would not cover activities clearly unrelated to the hostilities such as food deliveries to an airbase or the use of domestic staff in

⁸³⁴ Americas Watch, *Land Mines in El Salvador and Nicaragua: The Civilian Victims*, New York, December 1986, p. 98.

⁸³⁵ Africa Watch, *Angola: Violations of the Laws of War by Both Sides*, New York, April 1989, p. 139.

⁸³⁶ Association rwandaise pour la défense des droits de la personne et des libertés publiques, *Rapport sur les droits de l’homme au Rwanda, octobre 1992–octobre 1993*, Kigali, December 1993, p. 115.

⁸³⁷ Amnesty International, *Israel and the Occupied Territories: State Assassinations and Other Unlawful Killings*, AI Index MDE 15/005/2001, London, 21 February 2001, p. 29.

an officer's married accommodation. However, use of children in a direct support function such as acting as bearers to take supplies to the front line, or activities at the front line itself, would be included within the terminology.⁸³⁸

Other Instruments

819. No practice was found.

II. National Practice

Military Manuals

820. Australia's Defence Force Manual notes that "whether or not a civilian is involved in hostilities is a difficult question which must be determined by the facts of each individual case. Civilians bearing arms and taking part in military operations are clearly taking part in hostilities."⁸³⁹

821. Belgium's Teaching Manual for Soldiers considers that "a civilian who takes up arms logically loses the protection granted to civilians and may be attacked."⁸⁴⁰

822. Ecuador's Naval Manual states that:

Civilians who take a direct part in hostilities by taking up arms or otherwise trying to kill, injure or capture enemy personnel or destroy enemy property lose their immunity and may be attacked. Similarly, civilians serving as guards, intelligence agents or lookouts on behalf of military forces may be attacked.⁸⁴¹

823. El Salvador's Soldiers' Manual states that combatants must "never attack... women, children, the elderly or any person who does not bear arms".⁸⁴²

824. India's Army Training Note defines the term "terrorist" as:

a person who indulges in wanton killing of persons or involves in violence or in the disruption of services or means of communications essential to the community or in damaging property with a view to putting the public or any section of the public in fear, or affecting adversely the harmony between different religious, social, linguistic groups or the sovereignty and integrity of a nation.⁸⁴³

According to the Report on the Practice of India, this definition is "intended to help the armed forces to identify the 'terrorists' who may be treated as combatants if the situation can be likened to an internal conflict".⁸⁴⁴

825. According to the Military Manual of the Netherlands, taking a direct part in hostilities means that "the person involved engages in hostilities aimed at hitting enemy personnel or materiel. Examples include firing at enemy troops,

⁸³⁸ Roy S. Lee (ed.), *The International Criminal Court. The Making of the Rome Statute: Issues, Negotiations, Results*, Kluwer Law International, The Hague, 1999, p. 118.

⁸³⁹ Australia, *Defence Force Manual* (1994), § 532.

⁸⁴⁰ Belgium, *Teaching Manual for Soldiers* (undated), p. 14.

⁸⁴¹ Ecuador, *Naval Manual* (1989), § 11.3. ⁸⁴² El Salvador, *Soldiers' Manual* (undated), p. 3.

⁸⁴³ India, *Army Training Note* (1995), p. 4/16, § 35.

⁸⁴⁴ Report on the Practice of India, 1998, Chapter 1.1.

throwing molotov cocktails or blowing up a bridge used for the transport of military materiel.”⁸⁴⁵

826. Sweden’s IHL Manual states that “protection for civilians does not apply under all circumstances – exceptions are made for the time when civilians take direct part in hostilities, which is equivalent to their taking part in armed fighting”.⁸⁴⁶

827. The US Field Manual states that “persons who are not members of the armed forces . . . who bear arms or engage in other conduct hostile to the enemy thereby deprive themselves of many of the privileges attaching to the members of the civilian population”.⁸⁴⁷ The manual specifies that persons who are not members of the armed forces, who commit hostile acts such as “sabotage, destruction of communications facilities, intentional misleading of troops by guides [and] liberation of prisoners of war” about or behind enemy lines may be tried and sentenced to execution or imprisonment.⁸⁴⁸

828. The US Air Force Pamphlet states that “taking a direct part in hostilities covers acts of war intended by their nature and purpose to strike at enemy personnel and material. Thus a civilian taking part in fighting, whether singly or as a member of a group, *loses* the immunity given civilians.”⁸⁴⁹ (emphasis in original)

829. The US Air Force Commander’s Handbook states that “anyone who personally tries to kill, injure or capture enemy persons or objects” is liable to attack. The manual adds that:

The same would be true of anyone acting as a guard for military activity, as a member of a weapon crew, or as a crewman on a military aircraft in combat . . . Civilians who collect intelligence information, or otherwise act as part of the enemy’s military intelligence network, are lawful objects of attack. Members of a civilian ground observer corps who report the approach of hostile aircraft would also be taking a direct part in hostilities. The rescue of military airmen downed on land is a combatant activity that is not protected under international law. Civilians engaged in the rescue and return of enemy aircrew members are therefore subject to attack. This would include, for example, members of a civilian air auxiliary, such as the US Civil Air Patrol, who engage in military search and rescue activity in wartime. Note, however, that care of the wounded on land, and the rescue of persons downed at sea or shipwrecked, are protected activities under international law.⁸⁵⁰

830. The US Naval Handbook states that:

Civilians who take a direct part in hostilities by taking up arms or otherwise trying to kill, injure, or capture enemy persons or destroy enemy property lose their immunity and may be attacked. Similarly, civilians serving as lookouts, guards, or intelligence agents for military forces may be attacked. Direct participation may also include civilians serving as guards, intelligence agents, or lookouts on behalf of

⁸⁴⁵ Netherlands, *Military Manual* (1993), p. V-5.

⁸⁴⁶ Sweden, *IHL Manual* (1991), Section 3.2.1.5, p. 43. ⁸⁴⁷ US, *Field Manual* (1956), § 60.

⁸⁴⁸ US, *Field Manual* (1956), § 81. ⁸⁴⁹ US, *Air Force Pamphlet* (1976), § 5-3(a).

⁸⁵⁰ US, *Air Force Commander’s Handbook* (1980), § 2-8.

military forces. Direct participation in hostilities must be judged on a case-by-case basis. Combatants in the field must make an honest determination as to whether a particular civilian is or is not subject to deliberate attack based on the person's behavior, location and attire, and other information available at the time.⁸⁵¹

831. The YPA Military Manual of the SFRY (FRY) states that a civilian is considered a member of the armed forces when carrying arms or "otherwise taking part in resistance to an attacker".⁸⁵² The Report on the Practice of the SFRY (FRY) considers that:

This phrase is not substantiated with examples, but it is obvious that the authors had in mind various forms of participation of civilians in military operations and its preparations. No doubt experiences of the resistance movement during World War II were taken into account.⁸⁵³

National Legislation

832. The Report on the Practice of Egypt states that according to Egypt's Military Criminal Code, "armed gangs and rebels" are considered to be "enemies".⁸⁵⁴

833. Ghana's Armed Forces Act defines "enemy" as any person engaged in armed operations against any part of the armed forces of Ghana, including armed mutineers, armed rebels, armed rioters and pirates.⁸⁵⁵

834. India's Army Act defines the term "enemy" as including "all armed mutineers, armed rebels, armed rioters, pirates and any person in arms against whom it is the duty of any person subject to military law to act".⁸⁵⁶

835. Malaysia's Armed Forces Act defines the "enemy" as "all persons engaged in armed operations against any of His Majesty's armed forces or any force co-operating therewith and also includes armed mutineers, armed rebels, armed rioters and pirates".⁸⁵⁷

836. Pakistan's Army Act defines the "enemy" as including "all armed mutineers, armed rebels, armed rioters, pirates and any person in arms against whom it is the duty of any person subject to the Act to act".⁸⁵⁸

837. Peru's Law on Self-Defence Committees specifies that in internal armed conflicts or in situations of internal violence, certain civilian groups, termed "self-defence committees", are authorised to "develop activities of self-defence of their communities" and to offer temporary support to the armed forces and national police in "pacification" tasks. They have to be accredited by the competent military commanders and may be armed. Although the law does not

⁸⁵¹ US, *Naval Handbook* (1995), § 11.3.

⁸⁵² SFRY (FRY), *YPA Military Manual* (1988), § 48.

⁸⁵³ Report on the Practice of the SFRY (FRY), 1997, Chapter 1.2.

⁸⁵⁴ Report on the Practice of Egypt, 1997, Chapter 1.1, referring to *Military Criminal Code* (1966), Article 85 and its explanatory memorandum.

⁸⁵⁵ Ghana, *Armed Forces Act* (1962), Article 98. ⁸⁵⁶ India, *Army Act* (1950), Section 3(x).

⁸⁵⁷ Malaysia, *Armed Forces Act* (1972), Part I, Section 2.

⁸⁵⁸ Pakistan, *Army Act* (1952), Chapter I, Section 8(8); see also *Air Force Act* (1953), Chapter I, Section 4(xvii) and *Navy Ordinance* (1961), Chapter I, Section 4(x).

specifically address the civilian or combatant status of the members of these committees, it mentions that the participation of draft-aged persons in these committees is equivalent to the accomplishment of the compulsory military service.⁸⁵⁹

National Case-law

838. Colombia's Constitutional Court, reviewing the constitutionality of the Guard and Private Security Statute in 1997, confirmed the view that:

The general protection of the civilian population against the dangers of war also implies that international humanitarian law does not authorise either of the parties to involve this population in the armed conflict, since by doing so it makes the said population into an active participant in that conflict, thereby exposing it to military attacks by the other party.⁸⁶⁰

Other National Practice

839. According to the Report on the Practice of Botswana, "civilians lose their protection when they show resistance and aggression or when there is reason to believe they are involved in hostile activities".⁸⁶¹

840. In reaction to an article in the press, the Office of the Human Rights Adviser in the Office of the President of Colombia stated that:

With respect to the concept of civilian population, there is probably a confusion in the article . . . with the notions of combatant and non-combatant. In principle, the civilian population is always considered non-combatant . . . In a non-international armed conflict, civilians can take up arms and form armed rebel groups, putting themselves outside the laws of the country. They thus become combatants which the State can attack and fight against with perfect legitimacy. As a result, such rebels are criminals and combatants at the same time.⁸⁶²

841. Colombia's Defensoría del Pueblo (Ombudsman's Office), with respect to "*convivir*", considered that:

These organisations, nurtured by the national government itself, contribute nothing to the immunity of the civilian population, since they involve citizens in the armed conflict, divesting them of their protected status and making them into legitimate targets of attack . . . In the view of the Ombudsman's Office, the operation of the *Convivir* cooperatives means that civilians participate directly in the armed conflict, thereby becoming combatants.⁸⁶³

⁸⁵⁹ Peru, *Law on Self-Defence Committees* (1991), Article 1(7).

⁸⁶⁰ Colombia, Constitutional Court, *Constitutional Case No. C-572*, Judgement, 7 November 1997.

⁸⁶¹ Report on the Practice of Botswana, 1998, Answers to additional questions on Chapter 1.2.

⁸⁶² Colombia, Presidencia de la República de Colombia, Consejería para los Derechos Humanos, *Comentarios sobre el artículo publicado en La Prensa por Pablo E. Victoria sobre el Protocolo II*, undated, § 5, reprinted in Congressional record concerning the enactment of Law 171 of 16 December 1994.

⁸⁶³ Colombia, Defensoría del Pueblo, *Cuarto informe anual del defensor del pueblo al congreso de Colombia*, Santafé de Bogotá, September 1997, pp. 48–49.

842. The Report on the Practice of Colombia states that:

In Colombia, communal guard and private security services have been created under the name "*convivir*". These services take the form of rural security cooperatives composed of individuals whom the State has authorised to bear arms, and who collaborate with the authorities by providing information to the public security forces concerning the activities of the guerrilla organisations. There is a public debate over the question of whether the members of these services should be considered civilians or combatants.⁸⁶⁴ (see below)

843. During the conflict in El Salvador, the armed forces reportedly attacked on numerous occasions what the guerrillas called "the masses", i.e. parts of the civilian population who did not use arms or resort to violence but who were believed to sympathise or collaborate with the FMLN and who lived in zones of guerrilla resistance or in conflict zones.⁸⁶⁵

844. According to the Report on the Practice of India, "any person in arms and acting against governmental authority" or "who contributes towards the furtherance of armed conflict" would fall within the definition of enemy and lose protection.⁸⁶⁶

845. According to the Report on the Practice of Iraq, civilians lose their protection from attack if they engage in military acts or in acts that directly serve the armed forces and military operations, even without taking up arms against the other party. The report adds, however, that this exception should be interpreted restrictively in order to avoid abuse.⁸⁶⁷

846. The Report on the Practice of Israel states that:

Civilians would lose their protection . . . in those cases in which they are actively involved in hostile activities against Israeli soldiers, civilians or property. The implementation of this rule in practice is not always straightforward, for a variety of reasons, which include the following:

First – many activities, which undoubtedly assist in the carrying out of hostilities, fall in an undefined "grey area" (civilian truck-drivers, [staff of] vehicle repair workshops, etc.).

Second – the military commander in the field is often required to make decisions on the basis of incomplete information, available at the time of the attack. Therefore, while it may be easier to differentiate between protected civilians and others after the event, when more facts are known, it should be understood that any test which requires perfect knowledge of the facts on the ground would fail to meet the test of reality. As an example of the above, in Lebanon many civilians commonly carry firearms. Therefore, the fact that an individual openly carries a firearm does not, in and of itself, automatically relieve him of his protected status. Nevertheless, when returning fire, it is extremely difficult (and probably unwise from a military

⁸⁶⁴ Report on the Practice of Colombia, 1998, Chapter 1.2.

⁸⁶⁵ "La cuestión de las masas", *Estudios Centroamericanos*, Universidad Centroamericana José Simeón Cañas, Vol. XLII, No. 465, July 1987, pp. 414–434.

⁸⁶⁶ Report on the Practice of India, 1997, Chapter 1.2.

⁸⁶⁷ Report on the Practice of Iraq, 1998, Chapter 1.2.

viewpoint) to differentiate between those individuals actually firing their firearms and those just carrying them.⁸⁶⁸

847. The Report on the Practice of Lebanon states that the Lebanese representative in the Israel-Lebanon Monitoring Group established pursuant to the application of the 1996 Israel-Lebanon Ceasefire Understanding considers that “civilians who co-operate in practice with the enemy in military operations and activities lose their civilian status and become military objectives liable to attack”.⁸⁶⁹

848. On the basis of interviews with members of the armed forces, the Report on the Practice of Malaysia states that during the communist insurgency civilians lost their protection if they actively participated in the insurgency. Persons who merely provided support to the enemy, on the other hand, for example those who supplied it with weapons, food or medicine, or sympathisers, for example journalists who wrote articles supportive of the communist cause, did not lose their civilian status.⁸⁷⁰ The report notes, however, that this did not mean that they were not liable to prosecution under any written laws and refers to specific legislation in this respect.⁸⁷¹

849. The Report on the Practice of the Philippines says that civilians lose their protection when they become hostile elements and contribute militarily to the insurgents' cause. These civilians, who can serve for example as spies, couriers or lookouts, are qualified by the military as “sympathisers” or “communist terrorists” and can be the object of a direct military attack in villages influenced or infiltrated by the Communist Party of the Philippines.⁸⁷²

850. On the basis of replies by army officers to a questionnaire, the Report on the Practice of Rwanda states that unarmed civilians who follow their armed forces during an international armed conflict in order to provide them with food, transport munitions or carry messages, for example, lose their status as civilians. In the context of an internal armed conflict, however, unarmed civilians who collaborate with one of the parties to the conflict always remain civilians. According to the report, this distinction is justified by the fact that in internal armed conflicts, civilians are forced to cooperate with the party that holds them in its power.⁸⁷³

851. In 1989, a US memorandum of law concerning the prohibition of assassination stated that:

⁸⁶⁸ Report on the Practice of Israel, 1997, Chapter 1.2.

⁸⁶⁹ Report on the Practice of Lebanon, 1998, Answers to additional questions on Chapter 1.2.

⁸⁷⁰ Report on the Practice of Malaysia, 1997, Chapter 1.2, Interviews with members of the Malaysian armed forces.

⁸⁷¹ Report on the Practice of Malaysia, 1997, Chapter 1.2, referring to *Revised Penal Code* (1997), Chapter VI, Sections 121–130, *Official Secrets Act* (1972), Section 3 and *Internal Security Act* (1972), Sections 57–62.

⁸⁷² Report on the Practice of the Philippines, 1997, Chapter 1.2.

⁸⁷³ Report on the Practice of Rwanda, 1997, Replies by Rwandan army officers to a questionnaire, Chapter 1.2.

While there is general agreement among law-of-war experts that civilians who participate in hostilities may be regarded as combatants, there is no agreement as to the degree of participation necessary to make an individual civilian a combatant . . . There is a lack of agreement on this matter, and no existing law-of-war treaty provides clarification or assistance. Historically, however, the decision as to the level at which civilians may be regarded as combatants or “quasi-combatants” and thereby subject to attack generally has been policy rather than a legal matter. The technological revolution in warfare that has occurred over the past two centuries has resulted in a joining of segments of the civilian population with each nation’s conduct of military operations and vital support activities . . . Finally, one rule of thumb with regard to the likelihood that an individual may be subject to lawful attack is his (or her) immunity from military service if continued service in his (or her) civilian position is of greater value to a nation’s war effort than that person’s service in the military. A prime example would be civilian scientists occupying key positions in a weapons program regarded as vital to a nation’s national security or war aims. Thus, more than 90% of the World War II Project Manhattan personnel were civilians, and their participation in the U.S. atomic weapons program was of such importance as to have made them liable to legitimate attack. Similarly, the September 1944 Allied bombing raids on the German rocket sites at Peenemunde regarded the death of scientists involved in research and development at that facility to have been as important as destruction of the missiles themselves.⁸⁷⁴

852. According to the Report on the Practice of Zimbabwe, “civilians lose their protection if they actively assist or actively become engaged in military operations. This may include giving logistical and/or intelligence support. A lot, however, will depend on the degree of involvement.”⁸⁷⁵

III. Practice of International Organisations and Conferences

United Nations

853. In 1985, in a report on the situation of human rights in El Salvador, the Special Representative of the UN Commission on Human Rights stated that:

The Special Representative is actually convinced that as a result of or during fighting, the Salvadorian army produces civilian, and thus unwarranted casualties, particularly among the so-called *masas*, or groups of peasants who, while not personally involved in the fighting, coexist with the guerrillas and supply them with means of subsistence. In any event, inasmuch as the so-called *masas* take no part in combat, they must be considered civilians. The reference in article 50 of the 1977 Additional Protocol to the Third Geneva Convention of 12 August 1949, means that any persons who follow armed forces without forming an integral part of them, such as suppliers and members of work units or service units responsible for troop welfare, must be considered civilians. In the view of the Special Representative, if

⁸⁷⁴ US, Executive Order 12333 and Assassination, Memorandum prepared the Chief of the International Law Branch, Office of the Judge Advocate General, Department of the Army, 2 November 1989, reprinted in Marian Nash (Leich), *Cumulative Digest of United States Practice in International Law, 1981–1988*, Department of State Publication 10120, Washington, D.C., 1993–1995, pp. 3415–3416.

⁸⁷⁵ Report on the Practice of Zimbabwe, 1998, Chapter 1.2.

the *masas* who accompany the guerrilla troops meet the conditions established in those international instruments, they cannot be considered combatants; they are civilians.⁸⁷⁶

854. In a resolution adopted in 1985, the UN Sub-Commission on Human Rights ratified the point stated by the Special Representative of the Commission on Human Rights for El Salvador that:

According to the Geneva Conventions as long as the so-called “masses” do not participate directly in combat, although they may sympathize, accompany, supply food and live in zones under the control of the insurgents, they preserve their civilian character, and therefore they must not be subjected to military attacks and forced displacement by Government forces.⁸⁷⁷

This statement was repeated in subsequent years.⁸⁷⁸

855. In 1993, in a report on the situation of human rights in the territory of the former Yugoslavia, the Special Rapporteur of the UN Commission on Human Rights dealt with the subject of loss of civilian status in a section concerning events in the Medak area. On the basis of information gathered by field personnel revealing that civilians, including a number of elderly people, had been arbitrarily killed, the Special Rapporteur pointed out to the government that these acts were in violation of IHL and requested a full investigation to identify the perpetrators and punish them. Following preliminary inquiries, the Deputy Prime Minister and Minister of Foreign Affairs informed the Special Rapporteur that the individuals killed in the action, including the elderly, “were all killed in combat”.⁸⁷⁹ In a subsequent report, the Special Rapporteur cited the findings of the preliminary investigation led by the Vice-President of Croatia, which claimed that all the persons killed were combatants, but commented that he did not consider the Vice-President’s report as conclusive.⁸⁸⁰

856. The report of the UN Commission on the Truth for El Salvador in 1993 described the government’s counter-insurgency policies as part of the pattern of violence employed by agents of the State and their collaborators. According to the report, inhabitants of areas where the guerrillas were active were automatically suspected of belonging to the guerrilla movement or collaborating with it and thus risked being executed. The report also depicted the pattern of violence employed by the FMLN, which considered it legitimate to physically eliminate people who were labelled military targets, such as traitors or

⁸⁷⁶ UN Commission on Human Rights, Special Representative on the Situation of Human Rights in El Salvador, Final report, UN Doc. E/CN.4/1985/18, 1 February 1985, § 140.

⁸⁷⁷ UN Sub-Commission on Human Rights, Res. 1985/18, 29 August 1985, § 3.

⁸⁷⁸ UN Sub-Commission on Human Rights, Res. 1987/18, 2 September 1987, § 3; Res. 1988/13, 1 September 1988, § 3; Res. 1989/9, 31 August 1989, § 3.

⁸⁷⁹ UN Commission on Human Rights, Special Rapporteur on the Situation of Human Rights in the Former Yugoslavia, Fifth periodic report, UN Doc. E/CN.4/1994/47, 17 November 1993, § 105.

⁸⁸⁰ UN Commission on Human Rights, Special Rapporteur on the Situation of Human Rights in the Former Yugoslavia, Sixth periodic report, UN Doc. E/CN.4/1994/110, 21 February 1994, § 83.

informers, and even political opponents. Examples of such practices included the murder of mayors, right-wing intellectuals, public officials and judges. The report added that instructions given by the FMLN General Command concerning the execution of mayors were broadly interpreted and extensively applied, in particular between 1985 and 1989, when the Ejército Revolucionario del pueblo repeatedly carried out extrajudicial executions of political leaders, which the report called “non-combatant civilians”. The Commission expressly rejected the arguments of the FMLN, which tried to justify the executions on the grounds that the mayors and their officers were actively engaged in counter-insurgency activities, such as creating paramilitary forces, leading direct repressive activities against the civilian population or developing spy networks to detect FMLN members and their supporters. The movement further argued that the mayors had been listed as legitimate military targets since 1980. The Commission noted that by calling the mayors “military targets”, the FMLN was trying to say that they were combatants. It held that whether the mayors might or might not be considered as “military targets” was irrelevant since “there is no evidence that any of them lost their lives as a result of any combat operation by the FMLN”. The Commission emphasised that there was “no concept under international humanitarian law whereby such people could have been considered military targets”.⁸⁸¹ The Commission added that “the execution of an individual, whether a combatant or a non-combatant, who is in the power of a guerrilla force and does not put up any resistance is not a combat operation”.⁸⁸² The Commission considered the execution of mayors as a violation of the rules of IHL and international human rights law.⁸⁸³

857. In its report in 1993, the UN Commission on the Truth for El Salvador considered the legality of an attack by members of the Partido Revolucionario de Trabajadores centroamericanos (one of the FMLN components) on a group of US marines then serving as security guards at the US Embassy in San Salvador. The attack took place as the victims, who were off duty, in civilian clothing and unarmed, were sitting at a table outside a restaurant. Following the attack, a communiqué issued by the FMLN General Command asserted that the four marines were legitimate military targets. The Commission noted, however, that it had full evidence that the US marines were not combatants. It emphasised that:

Their function was to guard the United States Embassy and there is no indication whatsoever that they took part in combat action in El Salvador. Furthermore, international humanitarian law defines the category of “combatant” restrictively. The allegation that they were performing “intelligence functions” has not been

⁸⁸¹ UN Commission on the Truth for El Salvador, Report, UN Doc. S/25500, 1 April 1993, pp. 44–45.

⁸⁸² UN Commission on the Truth for El Salvador, Report, UN Doc. S/25500, 1 April 1993, p. 151.

⁸⁸³ UN Commission on the Truth for El Salvador, Report, UN Doc. S/25500, 1 April 1993, pp. 149 and 153.

substantiated. In any event, carrying out intelligence functions does not, in itself, automatically place an individual in the category of combatant.⁸⁸⁴

Other International Organisations

858. No practice was found.

International Conferences

859. No practice was found.

IV. Practice of International Judicial and Quasi-judicial Bodies

860. No practice was found.

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

861. No practice was found.

VI. Other Practice

862. In 1985, in a report on violations of the laws of war in Nicaragua, Americas Watch stated that:

With respect to the internal conflict in Nicaragua, the following persons should be regarded as civilians:

1. The peaceful population not directly participating in hostilities;
2. Persons providing only indirect support to the Nicaraguan army by, *inter alia*, working in defense plants, distributing or storing military supplies in rear areas, supplying labor and food, or serving as messengers or disseminating propaganda. These persons may *not* be subject to direct individualized attack or execution since they pose no immediate threat to the adversary. However, they assume the risk of incidental death or injury arising from attacks against legitimate military targets.

Persons providing such indirect support to the *contras* are clearly subject to prosecution under domestic law for giving aid and comfort to the insurgents.

3. Persons (not members of the parties' armed forces) who do not actually take a direct part in the hostilities by trying to kill, injure or capture enemy combatants or to damage material. These civilians, however, lose their immunity from attack for such time as they assume a combatant's role. Included in this category would be armed civilian members of the self-defense groups who guard rural cooperatives, farms and plants against *contra* attack.⁸⁸⁵ [emphasis in original]

⁸⁸⁴ UN Commission on the Truth for El Salvador, Report, UN Doc. S/25500, 1 April 1993, p. 155.

⁸⁸⁵ Americas Watch, *Violations of the Laws of War by Both Sides in Nicaragua: 1981–1985*, New York, March 1985, pp. 31–32.

Americas Watch reiterated this view in 1986 in its report on the use of landmines in the conflicts in El Salvador and Nicaragua.⁸⁸⁶

863. In 1989, in a report on violations of the laws of war in Angola, Africa Watch stated that:

The following persons should be considered civilians and thus not subjected to direct attack by combatants or by land mines:

- A. The peaceful population not directly participating in hostilities.
- B. i. Persons providing only indirect support to the Angolan, Cuban, or South African armed forces or UNITA by, *inter alia*, working in defense plants, distributing or storing military supplies behind conflict areas, supplying labor and food, serving as messengers, or disseminating propaganda. These persons may not be subject to direct individualized attack because they pose no immediate threat to the adversary. They assume, however, the risk of incidental death or injury arising from attacks and the use of weapons against legitimate military targets.
- ii. Persons providing indirect support to UNITA or its South African ally are clearly subject to prosecution under the domestic laws of Angola for giving aid and comfort to the enemy.
- C. Persons, other than members of the parties' armed forces, who do not actually take a direct part in the hostilities by trying to kill, injure, or capture enemy combatants or to damage material. These civilians, however, temporarily lose their immunity from attack whenever they assume a combatant's role.⁸⁸⁷

864. The Penal and Disciplinary Laws of the SPLM/A state that the following are "declared enemies of the people and therefore target of the SPLA/SPLM":

- a) The incumbent administration of Jaafer Mohammed Nimeiri, its appendages and supporting institutions.
- b) Any subsequent reactionary administration that may emerge while the revolutionary war is still being waged.
- c) Any individual or group of individuals directly or indirectly cooperating with the autocratic regime in Khartoum in order to sustain or consolidate its rule and to undermine the objectives and efforts of the People's Revolution.
- d) Any individual or group of individuals who wage counter-revolutionary war against the SPLA/SPLM or who circulate any subversive literature, verbally or in written form against the SPLA/SPLM with the intent to discredit it or turn public opinion against it.
- e) Persons acting as agents or spies for the Sudan Government.
- f) Armed bandits that operate to rob ordinary citizens, rape their women or commit any other crime against them, their movable or immovable properties or any other property of the People's revolution.
- g) Individuals or groups of people who propagate or advocate ideas, ideologies or philosophies or organize societies and organizations inside the country

⁸⁸⁶ Americas Watch, *Land Mines in El Salvador and Nicaragua: The Civilian Victims*, New York, December 1986, pp. 97–98.

⁸⁸⁷ Africa Watch, *Angola: Violations of the Laws of War by Both Sides*, New York, April 1989, pp. 138–139.

or abroad, that tend to uphold or perpetuate the oppression of the people or their exploitation by the Khartoum regime or by any other system of similar nature.⁸⁸⁸

Presence of combatants among the civilian population

I. Treaties and Other Instruments

Treaties

865. Article 50(3) AP I provides that “the presence within the civilian population of individuals who do not come within the definition of civilians does not deprive the population of its civilian character”. Article 50 AP I was adopted by consensus.⁸⁸⁹

866. Article 25(3) of draft AP II submitted by the ICRC to the CDDH provided that “the presence, within the civilian population, of individuals who do not fall within the definition of civilians does not deprive the population of its civilian character”.⁸⁹⁰ This draft provision was adopted by consensus in Committee III of the CDDH.⁸⁹¹ Eventually, however, it was deleted in the plenary by consensus.⁸⁹²

Other Instruments

867. Paragraph 6 of the 1991 Memorandum of Understanding on the Application of IHL between Croatia and the SFRY requires that hostilities be conducted in accordance with Article 50(3) AP I.

868. Paragraph 2.5 of the 1992 Agreement on the Application of IHL between the Parties to the Conflict in Bosnia and Herzegovina requires that hostilities be conducted in accordance with Article 50(3) AP I.

II. National Practice

Military Manuals

869. Argentina’s Law of War Manual states that “the presence within the civilian population of individuals who do not come within the definition of civilians does not deprive the population of its civilian character”.⁸⁹³

870. Canada’s LOAC Manual states that “the presence within the civilian population of individuals who do not come within the definition of civilians does not deprive the population of its civilian character”.⁸⁹⁴

⁸⁸⁸ SPLM/A, Penal and Disciplinary Laws, 4 July 1984, Section 29, § 1c, Report on SPLM/A Practice, 1998, Chapter 1.2.

⁸⁸⁹ CDDH, *Official Records*, Vol. VI, CDDH/SR.41, 26 May 1977, p. 161.

⁸⁹⁰ CDDH, *Official Records*, Vol. I, Part Three, Draft Additional Protocols, June 1973, p. 40.

⁸⁹¹ CDDH, *Official Records*, Vol. XV, CDDH/215/Rev.1, 3 February–18 April 1975, p. 290, § 121.

⁸⁹² CDDH, *Official Records*, Vol. VII, CDDH/SR.52, 6 June 1977, p. 135.

⁸⁹³ Argentina, *Law of War Manual* (1989), § 4.02(1).

⁸⁹⁴ Canada, *LOAC Manual* (1999), p. 4-4, § 35.

871. Kenya's LOAC Manual states that "the presence within the civilian population of individual combatants does not deprive the population of its civilian character and of the protection accorded to it".⁸⁹⁵

872. The Military Manual of the Netherlands contains a rule identical to Article 50(3) AP I.⁸⁹⁶

873. Spain's LOAC Manual specifies that "the civilian population does not lose its civilian character by the fact that persons who are not civilians are present among the civilian population".⁸⁹⁷

874. Sweden's IHL Manual states that:

The presence of individual combatants, for example among gatherings of people, has sometimes entailed a belligerent considering himself entitled to launch an attack on the gathering, with particularly serious consequences. It is therefore laid down in Article 50 [AP I] that the presence of individual combatants within the civilian population may not deprive this population of its civilian character and thus its protection.⁸⁹⁸

875. The YPA Military Manual of the SFRY (FRY) states that "the presence among the civilian population of persons who are not civilians does not deprive that population of its civilian character".⁸⁹⁹

National Legislation

876. On the basis of Croatia's Constitution and Defence Law, the Report on the Practice of Croatia states that Article 50 AP I is directly applicable in Croatia's internal legal order.⁹⁰⁰

877. Under Ireland's Geneva Conventions Act as amended, any "minor breach" of AP I, including violations of Article 50(3) AP I, is a punishable offence.⁹⁰¹

878. Under Norway's Military Penal Code as amended, "anyone who contravenes or is accessory to the contravention of provisions relating to the protection of persons or property laid down in . . . the two additional protocols to [the Geneva] Conventions . . . is liable to imprisonment".⁹⁰²

National Case-law

879. No practice was found.

⁸⁹⁵ Kenya, *LOAC Manual* (1997), Précis No. 2, p. 10.

⁸⁹⁶ Netherlands, *Military Manual* (1993), p. V-2.

⁸⁹⁷ Spain, *LOAC Manual* (1996), Vol. I, § 4.5.b.(1).

⁸⁹⁸ Sweden, *IHL Manual* (1991), Section 3.2.1.5, pp. 42–43.

⁸⁹⁹ SFRY (FRY), *YPA Military Manual* (1988), § 67(3).

⁹⁰⁰ Report on the Practice of Croatia, 1998, Answers to additional questions on Chapter 1, referring to *Constitution* (1990), Article 134 and *Defence Law* (1993), Article 39.

⁹⁰¹ Ireland, *Geneva Conventions Act as amended* (1962), Section 4(1) and (4).

⁹⁰² Norway, *Military Penal Code as amended* (1902), § 108(b).

Other National Practice

880. No practice was found.

III. Practice of International Organisations and Conferences

881. No practice was found.

IV. Practice of International Judicial and Quasi-judicial Bodies

882. In its judgement in the *Tadić case* in 1997, the ICTY Trial Chamber stated that “it is clear that the targeted population [of a crime against humanity] must be of predominantly civilian nature. The presence of certain non-civilians in their midst does not change the character of the population.”⁹⁰³

883. In its judgement in the *Kupreškić case* in 2000, the ICTY Trial Chamber stated that:

Even if it can be proved that the Muslim population of Ahmici was not entirely civilian but comprised some armed elements, still no justification would exist for widespread and indiscriminate attacks against civilians. Indeed, even in a situation of full-scale armed conflict, certain fundamental norms still serve to unambiguously outlaw such conduct, such as rules pertaining to proportionality.⁹⁰⁴

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

884. To fulfil its task of disseminating IHL, the ICRC has delegates around the world teaching armed and security forces that “the presence within the civilian population of individuals other than civilian persons does not deprive the population of its civilian character”.⁹⁰⁵

885. In a press release issued in 1983 concerning the conflict in Lebanon, the ICRC stated that “the presence of armed elements among the civilian population does not justify the indiscriminate shelling of women, children and old people”.⁹⁰⁶

VI. Other Practice

886. No practice was found.

⁹⁰³ ICTY, *Tadić case*, Judgement, 7 May 1997, § 638, see also § 643 and *Mrkšić case*, Review of the Indictment, 3 April 1996, § 29.

⁹⁰⁴ ICTY, *Kupreškić case*, Judgement, 14 January 2000, § 513.

⁹⁰⁵ Frédéric de Mulinen, *Handbook on the Law of War for Armed Forces*, ICRC, Geneva, 1987, § 53.

⁹⁰⁶ ICRC, Press Release No. 1474, Fighting in Tripoli: Appeal from the ICRC, Geneva, 4 November 1983.

Situations of doubt as to the character of a person

I. Treaties and Other Instruments

Treaties

887. Article 50(1) AP I provides that “in case of doubt whether a person is a civilian, that person shall be considered to be a civilian”. Article 50 AP I was adopted by consensus.⁹⁰⁷

888. Upon ratification of AP I, France stated that:

The rule set out in the second sentence of the first paragraph of Article 50 [AP I] cannot be interpreted as requiring a commander to take a decision which, according to the circumstances and information available to him, might not be compatible with his duty to ensure the safety of the troops under his command or to preserve his military situation, in conformity with other provisions of [AP I].⁹⁰⁸

889. Upon ratification of AP I, the UK expressed its understanding of the presumption of civilian character as only applicable

in cases of substantial doubt still remaining after the assessment [of the information from all sources which is reasonably available to military commanders at the relevant time] has been made, and not as overriding a commander’s duty to protect the safety of troops under his command or to preserve his military situation, in conformity with other provisions of [AP I].⁹⁰⁹

890. Article 25(4) of draft AP II, adopted by Committee III of the CDDH provided that “in case of doubt as to whether a person is a civilian, he or she shall be considered to be a civilian”.⁹¹⁰ This draft provision was adopted by consensus by Committee III.⁹¹¹ Eventually, however, it was deleted in the plenary by consensus.⁹¹²

Other Instruments

891. Paragraph 6 of the 1991 Memorandum of Understanding on the Application of IHL between Croatia and the SFRY requires that hostilities be conducted in accordance with Article 50(1) AP I.

892. Paragraph 2.5 of the 1992 Agreement on the Application of IHL between the Parties to the Conflict in Bosnia and Herzegovina requires that hostilities be conducted in accordance with Article 50(1) AP I.

⁹⁰⁷ CDDH, *Official Records*, Vol. VI, CDDH/SR.41, 26 May 1977, p. 161.

⁹⁰⁸ France, Declarations and reservations made upon ratification of AP I, 11 April 2001, § 9.

⁹⁰⁹ UK, Declarations and reservations made upon ratification of AP I, 28 January 1998, § h.

⁹¹⁰ CDDH, *Official Records*, Vol. XV, CDDH/215/Rev.1, 3 February–18 April 1975, p. 320.

⁹¹¹ CDDH, *Official Records*, Vol. XV, CDDH/215/Rev.1, 3 February–18 April 1975, p. 290, § 121.

⁹¹² CDDH, *Official Records*, Vol. VII, CDDH/SR.52, 6 June 1977, p. 135.

II. National Practice

Military Manuals

893. Argentina's Law of War Manual states that "in case of doubt about the qualification of a person, that person must be considered to be civilian".⁹¹³

894. Australia's Defence Force Manual states that "in cases of doubt about civilian status, the benefit of the doubt is given to the person concerned".⁹¹⁴

895. Cameroon's Instructors' Manual states that "the benefit of the doubt confers upon a person the status of civilian".⁹¹⁵

896. Canada's LOAC Manual states that "in case of doubt whether a person is a civilian, that person shall be considered to be a civilian".⁹¹⁶

897. Colombia's Instructors' Manual states that "in case of doubt whether a person is civilian or not, that person must be considered to be civilian".⁹¹⁷

898. Croatia's LOAC Compendium states that, in case of doubt, persons have to be considered as civilians.⁹¹⁸

899. The Military Manual of the Dominican Republic states that:

All persons participating in military operations or activities are considered combatants [and proper targets for attack]. Those who do not participate in such actions are non-combatants. This distinction is not always easy to make. Uniformed, armed soldiers are easily recognisable. However, guerrillas often mix with the civilians, perform undercover operations, and dress in civilian clothes. Alertness and caution must guide you in deciding who is a combatant.⁹¹⁹

900. Hungary's Military Manual states that, in case of doubt, persons have to be considered as civilians.⁹²⁰

901. Kenya's LOAC Manual states that "in case of doubt whether a person is a civilian or not, that person shall be considered a civilian".⁹²¹

902. Madagascar's Military Manual states that "in case of doubt about the status of a person, that person shall be considered to be civilian".⁹²²

903. The Military Manual of the Netherlands states that "in case of doubt whether a person is civilian, that person is considered to be a civilian".⁹²³

904. South Africa's LOAC Manual contains a rule identical to that in Article 50(1) AP I.⁹²⁴

⁹¹³ Argentina, *Law of War Manual* (1989), § 4.02(1).

⁹¹⁴ Australia, *Defence Force Manual* (1994), § 914.

⁹¹⁵ Cameroon, *Instructors' Manual* (1992), p. 17.

⁹¹⁶ Canada, *LOAC Manual* (1999), p. 4-5, § 38.

⁹¹⁷ Colombia, *Instructors' Manual* (1999), p. 16.

⁹¹⁸ Croatia, *LOAC Compendium* (1991), p. 6.

⁹¹⁹ Dominican Republic, *Military Manual* (1980), p. 3.

⁹²⁰ Hungary, *Military Manual* (1992), p. 17.

⁹²¹ Kenya, *LOAC Manual* (1997), Précis No. 2, p. 10.

⁹²² Madagascar, *Military Manual* (1994), Fiche No. 2-SO, § B.

⁹²³ Netherlands, *Military Manual* (1993), p. V-2.

⁹²⁴ South Africa, *LOAC Manual* (1996), § 24(c).

905. Spain's LOAC Manual contains a rule identical to that in Article 50(1) AP I.⁹²⁵

906. Sweden's IHL Manual states that "where there is doubt whether a person is to be considered as a combatant or as a civilian, the person shall be considered as a civilian".⁹²⁶

907. According to the Report on US Practice, the US military manuals do not adopt the position that in case of doubt a person shall be considered as civilian.⁹²⁷

908. The YPA Military Manual of the SFRY (FRY) states that "in case of doubt a person shall be considered as a civilian until proven otherwise".⁹²⁸

National Legislation

909. On the basis of Croatia's Constitution and Defence Law, the Report on the Practice of Croatia states that Article 50 AP I is directly applicable in Croatia's internal legal order.⁹²⁹

910. Under Ireland's Geneva Conventions Act as amended, any "minor breach" of AP I, including violations of Article 50(1) AP I, is a punishable offence.⁹³⁰

911. Under Norway's Military Penal Code as amended, "anyone who contravenes or is accessory to the contravention of provisions relating to the protection of persons or property laid down in . . . the two additional protocols to [the Geneva] Conventions . . . is liable to imprisonment".⁹³¹

National Case-law

912. No practice was found.

Other National Practice

913. On the basis of a proposal submitted by Egypt during the CDDH, the Report on the Practice of Egypt states that "to ensure more protection for civilians, Egypt is of the opinion that in case of doubt as to whether a person is a civilian, he or she shall be deemed to be so".⁹³²

914. The Report on the Practice of Malaysia refers to the presumption of civilian character, adding that it governed the behaviour of the armed forces during the campaign against the communist insurgency.⁹³³

⁹²⁵ Spain, *LOAC Manual* (1996), Vol. I, § 4.5.b.(1).

⁹²⁶ Sweden, *IHL Manual* (1991), Section 3.2.1.5, p. 42.

⁹²⁷ Report on US Practice, 1997, Chapter 1.1, referring to *Field Manual* (1956), § 60, *Air Force Pamphlet* (1976), § 5-3 and *Naval Handbook* (1995), § 11.3.

⁹²⁸ SFRY (FRY), *YPA Military Manual* (1988), § 67(3).

⁹²⁹ Report on Croatian Practice, 1998, Answers to additional questions on Chapter 1, referring to *Constitution* (1990), Article 134 and *Defence Law* (1993), Article 39.

⁹³⁰ Ireland, *Geneva Conventions Act as amended* (1962), Section 4(1) and (4).

⁹³¹ Norway, *Military Penal Code as amended* (1902), § 108(b).

⁹³² Report on the Practice of Egypt, 1997, Chapter 1.1, referring to Statement by Egypt at the CDDH, *Official Records*, Vol. IV, CDDH/III/33, 15 March 1974, p. 73.

⁹³³ Report on the Practice of Malaysia, 1997, Answers to additional questions on Chapter 1.1.

915. The Report on the Practice of Nigeria states that a presumption of civilian character is held in case of doubt. It adds that during the Nigerian civil war, “the Federal Forces in situations of such doubt did not off-handedly indict or take away individuals of such doubtful civilian character”. They subjected such individuals to a test, in order to determine

the degree of hardness of . . . their fingers used in handling the trigger. Those found with hardened fingers were presumed to be soldiers (combatants). Although this is an unscientific method of identification, it nonetheless shows that Nigerian practice does not *prima facie* attribute the status of combatant to individuals of doubtful civilian character.⁹³⁴

III. Practice of International Organisations and Conferences

916. No practice was found.

IV. Practice of International Judicial and Quasi-judicial Bodies

917. No practice was found.

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

918. To fulfil its task of disseminating IHL, the ICRC has delegates around the world teaching armed and security forces that “in case of doubt whether a person is a civilian or not, that person shall be considered as a civilian”.⁹³⁵

VI. Other Practice

919. No practice was found.

⁹³⁴ Report on the Practice of Nigeria, 1997, Answers to additional questions on Chapter 1.1.

⁹³⁵ Frédéric de Mulinen, *Handbook on the Law of War for Armed Forces*, ICRC, Geneva, 1987, § 52.

**DISTINCTION BETWEEN CIVILIAN
OBJECTS AND MILITARY OBJECTIVES**

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A. General

The principle of distinction

I. Treaties and Other Instruments

Treaties

1. Article 48 AP I provides that “in order to ensure respect for and protection of the civilian population and civilian objects, the Parties to the conflict shall at all times distinguish between . . . civilian objects and military objectives”. Article 48 AP I was adopted by consensus.¹

¹ CDDH, *Official Records*, Vol. VI, CDDH/SR.41, 26 May 1977, p. 161.

2. Article 24(1) of draft AP II submitted by the ICRC to the CDDH provided that “in order to ensure respect for the civilian population, the Parties to the conflict... shall make a distinction... between civilian objects and military objectives”.² This proposal was amended and adopted by consensus in Committee III of the CDDH.³ The approved text provided that “in order to ensure respect and protection for... civilian objects, the Parties to the conflict shall at all times distinguish... between civilian objects and military objectives”.⁴ Eventually, however, it was deleted in the plenary because it failed to obtain the necessary two-thirds majority (36 in favour, 19 against and 36 abstentions).⁵

Other Instruments

3. Paragraph 6 of the 1991 Memorandum of Understanding on the Application of IHL between Croatia and the SFRY requires that hostilities be conducted in accordance with Article 48 AP I.

4. Paragraph 2.5 of the 1992 Agreement on the Application of IHL between the Parties to the Conflict in Bosnia and Herzegovina requires that hostilities be conducted in accordance with Article 48 AP I.

5. Paragraph 39 of the 1994 San Remo Manual provides that “Parties to the conflict shall at all times distinguish between... civilian or exempt objects and military objectives”.

6. Section 5.1 of the 1999 UN Secretary-General’s Bulletin states that “the United Nations force shall make a clear distinction at all times... between civilian objects and military objectives”.

II. National Practice

Military Manuals

7. Military manuals of Argentina, Australia, Belgium, Benin, Cameroon, Canada, Croatia, France, Germany, Hungary, Israel, Netherlands, New Zealand, Nigeria, Philippines, Spain, Sweden, Switzerland, Togo and US require that a distinction be made between military objectives and civilian objects.⁶

² CDDH, *Official Records*, Vol. I, Part Three, Draft Additional Protocols, June 1973, p. 40.

³ CDDH, *Official Records*, Vol. XV, CDDH/215/Rev.1, 3 February–18 April 1975, p. 288, § 113.

⁴ CDDH, *Official Records*, Vol. XV, CDDH/215/Rev.1, 3 February–18 April 1975, p. 319.

⁵ CDDH, *Official Records*, Vol. VII, CDDH/SR.52, 6 June 1977, p. 135.

⁶ Argentina, *Law of War Manual* (1989), § 4.01; Australia, *Defence Force Manual* (1994), §§ 210, 504 and 913; Belgium, *Law of War Manual* (1983), p. 26; Benin, *Military Manual* (1995), Fascicule III, p. 11; Cameroon, *Instructors’ Manual* (1992), p. 86; Canada, *LOAC Manual* (1999), p. 4-1, § 4, see also p. 2-2, § 12; Croatia, *LOAC Compendium* (1991), p. 37; France, *LOAC Summary Note* (1992), Part I, preamble; France, *LOAC Teaching Note* (1999), p. 2; France, *LOAC Manual* (2001), p. 13; Germany, *Military Manual* (1992), §§ 401 and 454; Hungary, *Military Manual* (1992), p. 60; Israel, *Law of War Booklet* (1986), Chapter 1; Israel, *Manual on the Laws of War* (1998), pp. 38 and 42; Netherlands, *Military Manual* (1993), p. V-1, § 2; New Zealand, *Military Manual* (1992), § 205; Nigeria, *Military Manual* (1994), p. 41, § 9 and p. 42, § 11; Philippines, *Soldier’s Rules* (1989), p. 20; Spain, *LOAC Manual* (1996), Vol. I, § 4.1; Sweden, *IHL Manual* (1991), Section 3.2.1.5, p. 41; Switzerland, *Basic Military Manual* (1987), Article 25(1); Togo, *Military Manual* (1996), Fascicule III, p. 11; US, *Air Force Pamphlet* (1976), § 5-3(b).

8. Indonesia's Military Manual provides that "the targets of every military operation should be distinguished at all times".⁷
9. Sweden's IHL Manual considers that the principle of distinction as stated in Article 48 AP I is part of customary international law.⁸

National Legislation

10. The Report on the Practice of India states that India's laws and regulations applicable to internal conflicts do not explicitly mention the distinction between civilian objects and military objectives. The report indicates, however, that domestic legislation concerning terrorist activities

confer certain powers on armed forces as well as police personnel which enable them to destroy arms dumps, prepared or fortified positions or shelters from which attacks are made as well as structures used as training camps for armed volunteers or utilized as a hide-out by armed gangs or absconders, etc.⁹

11. Under Ireland's Geneva Conventions Act as amended, any "minor breach" of AP I, including violations of Article 48 AP I, is a punishable offence.¹⁰

12. Under Norway's Military Penal Code as amended, "anyone who contravenes or is accessory to the contravention of provisions relating to the protection of persons or property laid down in . . . the two additional protocols to [the Geneva] Conventions . . . is liable to imprisonment".¹¹

National Case-law

13. No practice was found.

Other National Practice

14. The Report on the Practice of Bosnia and Herzegovina provides several examples of alleged respect for and violations of the distinction between civilian and military targets.¹²

15. The Report on the Practice of Botswana asserts that the government of Botswana endorses the principle of distinction as found in Article 48 AP I.¹³

16. In its written statement submitted to the ICJ in the *Nuclear Weapons case* in 1995, Egypt invoked the requirement to "distinguish between . . . civilian objects and military objectives".¹⁴

⁷ Indonesia, *Military Manual* (1982), § 91.

⁸ Sweden, *IHL Manual* (1991), Section 2.2.3, p. 19.

⁹ Report on the Practice of India, 1997, Chapter 1.3, referring to *Armed Forces (Special Powers) Act* (1958), *Armed Forces (Punjab and Chandigarh) Special Powers Act* (1983), Section 4(b), *Punjab Disturbed Areas Act* (1983), Section 5 and *Armed Forces (Jammu and Kashmir) Special Powers Act* (1990).

¹⁰ Ireland, *Geneva Conventions Act as amended* (1962), Section 4(1) and (4).

¹¹ Norway, *Military Penal Code as amended* (1902), § 108(b).

¹² Report on the Practice of Bosnia and Herzegovina, 2000, Chapter 1.3.

¹³ Report on the Practice of Botswana, 1998, Answers to additional questions on Chapter 1.3.

¹⁴ Egypt, Written statement submitted to the ICJ, *Nuclear Weapons case*, 20 June 1995, § 17.

17. The Report on the Practice of Egypt states that Egypt recognises the obligation to distinguish between civilian objects and military objectives. It further notes that the principle of distinction between civilian objects and military objectives is said to be well established in Egypt's practice and *opinio juris* and is thus considered to be a customary rule of IHL.¹⁵

18. The instructions given to the French armed forces for the conduct of Opération Mistral, simulating a military operation under the right of self-defence or a mandate of the UN Security Council, state that "all parties must at all times make a distinction between the civilian population and military objectives in order to spare the civilian population".¹⁶

19. In 1983, in a statement before the lower house of parliament, a German Minister of State pointed out that the principle of distinction between civilian objects and military objectives was one of the five basic principles of the LOAC and that it applied equally to the attacker and the attacked.¹⁷

20. In an explanatory memorandum submitted to the German parliament in 1990 in the context of the ratification procedure of the Additional Protocols, the German government expressed the opinion that the principle of distinction between civilian objects and military targets enshrined in Article 48 AP I was a well-established rule of customary law, binding on all States.¹⁸

21. The Report on the Practice of India states that "when [the armed forces] are called upon to deal with an internal conflict, they are bound to follow the principles regarding distinction between military objects and civilian objects so as to avoid indiscriminate attacks".¹⁹

22. The Report on the Practice of Indonesia states that "according to the practices of the Indonesian armed forces, the distinction between civilian and military objects is compatible with the provisions stipulated in Article 52 of Protocol I".²⁰

23. In its written statement submitted to the ICJ in the *Nuclear Weapons case* in 1995, Iran stated that "some of the principles of humanitarian international law from which one can deduce the illegitimacy of the use of nuclear weapons are: ... Distinguishing between military and civilian targets."²¹

24. The Report on the Practice of Iran states that "the *opinio juris* of Iran recognizes the distinction between military objectives and civilian objects".²²

¹⁵ Report on the Practice of Egypt, 1997, Chapter 1.3.

¹⁶ France, Etat-major de la Force d'Action Rapide, Ordres pour l'Opération Mistral, 1995, Section 6, § 66.

¹⁷ Germany, Lower House of Parliament, Statement by Dr Mertes, Minister of State, 14 October 1983, *Plenarprotokoll* 10/29, p. 1927.

¹⁸ Germany, Lower House of Parliament, Explanatory memorandum on the Additional Protocols to the Geneva Conventions, *BT-Drucksache* 11/6770, 22 March 1990, p. 111.

¹⁹ Report on the Practice of India, 1997, Chapter 1.4.

²⁰ Report on the Practice of Indonesia, 1997, Chapter 1.3.

²¹ Iran, Written statement submitted to the ICJ, *Nuclear Weapons case*, 19 June 1995, p. 2; see also Written statement submitted to the ICJ, *Nuclear Weapons (WHO) case*, undated, p. 1.

²² Report on the Practice of Iran, 1997, Chapter 1.3.

25. In its oral pleadings before the ICJ in the *Nuclear Weapons case* in 1995, Japan stated that “with their colossal power and capacity for slaughter and destruction, nuclear weapons make no distinction . . . between military installations and civilian communities”.²³

26. According to the Report on the Practice of South Korea, it is South Korea’s *opinio juris* that the distinction between civilian objects and military objectives is part of customary international law.²⁴

27. The Report on the Practice of Kuwait asserts that the Iraqi army did not respect the principle of distinction between civilian objects and military targets during its withdrawal from Kuwait.²⁵

28. According to the Report on the Practice of Nigeria, it is Nigeria’s *opinio juris* that the distinction between civilian objects and military objectives is part of customary international law.²⁶

29. The Report on the Practice of Pakistan states that the distinction between civilian objects and military objectives seems to be well respected in Pakistan.²⁷

30. The Report on the Practice of Spain considers that the principle of distinction between military and non-military objectives is a fundamental principle which should be taken into consideration when planning, directing and executing a military attack.²⁸

31. In reply to a question in the House of Lords concerning the Gulf War, the UK Parliamentary Under-Secretary of State of the Ministry of Defence stated that:

The Geneva Conventions contain no provisions expressly regulating targeting in armed conflict. The Hague Regulations of 1907 and customary international law do, however, incorporate the twin principles of distinction between military and civilian objects, and of proportionality so far as the risk of collateral civilian damage from an attack on a military objective is concerned. These principles and associated rules of international law were observed at all times by coalition forces in the planning and execution of attacks against Iraq.²⁹

32. In its written statement submitted to the ICJ in the *Nuclear Weapons case* in 1995, the UK stated that “the parties to an armed conflict are required to discriminate between civilians and civilian objects on the one hand and combatants and military objectives on the other and to direct their attacks only against the latter”.³⁰

²³ Japan, Oral pleadings before the ICJ, *Nuclear Weapons case*, 7 November 1995, Verbatim Record CR 95/27, p. 36.

²⁴ Report on the Practice of South Korea, 1997, Chapter 1.3.

²⁵ Report on the Practice of Kuwait, 1997, Chapter 1.3.

²⁶ Report on the Practice of Nigeria, 1997, Chapter 1.3.

²⁷ Report on the Practice of Pakistan, 1998, Chapter 1.3.

²⁸ Report on the Practice of Spain, 1998, Chapter 1.3.

²⁹ UK, House of Lords, Statement by the Parliamentary Under-Secretary of State for Defence, 22 July 1991, *Hansard*, Vol. 531, Written Answers, col. 43.

³⁰ UK, Written statement submitted to the ICJ, *Nuclear Weapons case*, 16 June 1995, § 3.67.

33. In 1991, in response to an ICRC memorandum on the applicability of IHL in the Gulf region, the US Department of the Army pointed out that “the obligation of distinguishing combatants and military objectives from civilians and civilian objects is a shared responsibility of the attacker, defender, and the civilian population as such”.³¹

34. In 1992, in its final report to Congress on the conduct of the Gulf War, the US Department of Defense stated that Article 48 AP I “is generally regarded as a codification of the customary practice of nations, and therefore binding on all”.³² The report further stated that “the law of war with respect to targeting, collateral damage and collateral civilian casualties is derived from the principle of discrimination; that is, the necessity for distinguishing . . . between legitimate military targets and civilian objects”.³³

35. The Report on the Practice of the SFRY (FRY) states that the “armed conflict in Croatia in which [the] YPA participated was particularly characterized by the disregard of the obligation to respect the distinction between civilian objects and military objectives”. The report considers, however, that:

In evaluating the official position of [the] FRY, it is important to point out that during October 1991 [the] Chief of General Staff of the YPA issued two orders instructing troops to strictly comply with rules of humanitarian law . . . The fact that the YPA had sent a commission of inquiry to Dubrovnik to establish the effects of [the] shelling indicates the awareness of the need to respect the distinction between civilian objects and military objectives. *Opinio juris* existed, however, the relevant rule was not respected in practice.³⁴

36. The Report on the Practice of Zimbabwe refers to the principle of distinction as set forth in Article 52 AP I and states that this principle can undoubtedly be regarded as a customary rule of IHL. The report also points out that the distinction between civilian and military objectives is more problematic in non-international armed conflicts, as guerrillas tend to mingle with the civilian population and civilian facilities, rendering the principle difficult to implement.³⁵

III. Practice of International Organisations and Conferences

37. No practice was found.

³¹ US, Letter from the Department of the Army to the legal adviser of the US armed forces deployed in the Gulf region, 11 January 1991, § 8(E), Report on US Practice, 1997, Chapter 1.4.

³² US, Department of Defense, Final Report to Congress on the Conduct of the Persian Gulf War, Appendix O, The Role of the Law of War, 10 April 1992, *ILM*, Vol. 31, 1992, p. 625.

³³ US, Department of Defense, Final Report to Congress on the Conduct of the Persian Gulf War, 10 April 1992, Appendix O, The Role of the Law of War, *ILM*, Vol. 31, 1992, p. 621.

³⁴ Report on the Practice of the SFRY (FRY), 1997, Chapter 1.3.

³⁵ Report on the Practice of Zimbabwe, 1998, Chapter 1.3.

IV. Practice of International Judicial and Quasi-judicial Bodies

38. In its judgement in the *Blaškić case* in 2000, the ICTY Trial Chamber held that “the parties to the conflict are obliged to attempt to distinguish between military targets and civilian . . . property”.³⁶

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

39. To fulfil its task of disseminating IHL, the ICRC has delegates around the world teaching armed and security forces that there is a duty to distinguish between civilian objects and military objectives.³⁷

40. In an appeal issued in 1984 in the context of the Iran–Iraq War, the ICRC stated that “in violation of the laws and customs of war, and in particular of the essential principle that military targets must be distinguished from civilian persons and objects, the Iraqi armed forces have continued to bomb Iranian civilian zones”.³⁸

41. In a Memorandum on the Applicability of International Humanitarian Law sent in 1990 to all States party to the Geneva Conventions in the context of the Gulf War, the ICRC stated that “the following general rules are recognized as binding on any party to an armed conflict: . . . a distinction must be made in all circumstances between combatants and military objectives on the one hand, and civilians and civilian objects on the other”.³⁹

42. In a communication to the press in 1993, the ICRC reminded the parties to the conflict in Nagorno-Karabakh of their obligation “to distinguish at all times between combatants and military objectives on the one hand and civilians and civilian property on the other”.⁴⁰

43. In a communication to the press in 1993, the ICRC reminded the parties to the conflict in Georgia of their obligation “to distinguish at all times between combatants and military objectives on the one hand and civilians and civilian objects on the other”.⁴¹

44. In 1994, in a Memorandum on Respect for International Humanitarian Law in Angola, the ICRC stated that “a clear distinction must be made in all circumstances between civilians and civilian objects on the one hand and combatants and military objectives on the other”.⁴²

³⁶ ICTY, *Blaškić case*, Judgement, 3 March 2000, § 180.

³⁷ Frédéric de Mulinen, *Handbook on the Law of War for Armed Forces*, ICRC, Geneva, 1987, § 387.

³⁸ ICRC, Press Release No. 1480, Conflict between Iran and Iraq and breaches of international humanitarian law: a renewed ICRC appeal, 15 February 1984, *IRRC*, No. 239, 1984, pp. 113–115.

³⁹ ICRC, Memorandum on the Applicability of International Humanitarian Law, 14 December 1990, § II, *IRRC*, No. 280, 1991, p. 24.

⁴⁰ ICRC, Communication to the Press No. 93/25, Nagorno-Karabakh conflict: 60,000 civilians flee fighting in south-western Azerbaijan, 19 August 1993.

⁴¹ ICRC, Communication to the Press No. 93/31, Georgia: ICRC Activities in Abkhazia, 20 September 1993.

⁴² ICRC, Memorandum on Respect for International Humanitarian Law in Angola, 8 June 1994, § II, *IRRC*, No. 320, 1997, p. 503.

45. In 1994, in a Memorandum on Compliance with International Humanitarian Law by the Forces Participating in Opération Turquoise in the Great Lakes region, the ICRC stated that “a clear distinction must be made, in all circumstances, between civilian persons who do not participate in confrontations and refrain from acts of violence and civilian objects on the one hand, and combatants and military objectives on the other”.⁴³

VI. Other Practice

46. No practice was found.

Attacks against military objectives

Note: For practice concerning the destruction of enemy property, see Chapter 16.

I. Treaties and Other Instruments

Treaties

47. The preamble to the 1868 St. Petersburg Declaration states that “the only legitimate object which States should endeavour to accomplish during war is to weaken the military forces of the enemy”.

48. Article 2 of 1907 Hague Convention (IX) allows the bombardment of “military works, military or naval establishments, depots of arms or war *matériel*, workshops or plant which could be utilized for the needs of the hostile fleet or army, and the ships of war in the harbour”.

49. Article 48 AP I provides that “in order to ensure respect for and protection of the civilian population and civilian objects, the Parties to the conflict . . . shall direct their operations only against military objectives”. Article 48 AP I was adopted by consensus.⁴⁴

50. Article 52(2) AP I provides that “attacks shall be limited strictly to military objectives”. Article 52 AP I was adopted by 79 votes in favour, none against and 7 abstentions.⁴⁵

51. Upon ratification of AP I, Australia declared that “it is the understanding of Australia that the first sentence of paragraph 2 of Article 52 is not intended to, nor does it, deal with the question of incidental or collateral damage resulting from an attack directed against a military objective”.⁴⁶

52. Upon ratification of AP I, Canada stated that:

It is the understanding of the Government of Canada in relation to Article 52 that . . . the first sentence of paragraph 2 of the Article is not intended to, nor does it,

⁴³ ICRC, Memorandum on Compliance with International Humanitarian Law by the Forces Participating in Opération Turquoise, 23 June 1994, § II, reprinted in Marco Sassòli and Antoine A. Bouvier, *How Does Law Protect in War?*, ICRC, Geneva, 1999, p. 1308.

⁴⁴ CDDH, *Official Records*, Vol. VI, CDDH/SR.41, 26 May 1977, p. 161.

⁴⁵ CDDH, *Official Records*, Vol. VI, CDDH/SR.41, 26 May 1977, p. 168.

⁴⁶ Australia, Declarations made upon ratification of AP I, 21 June 1991, § 5.

deal with the question of incidental or collateral damage resulting from an attack directed against a military objective.⁴⁷

53. Upon ratification of AP I, France stated that “the Government of the French Republic considers that the first sentence of paragraph 2 of Article 52 does not deal with the question of collateral damage resulting from attacks directed against military objectives”.⁴⁸

54. Upon ratification of AP I, Italy declared that “the first sentence of paragraph 2 of [Article 52] prohibits only such attacks as may be directed against non-military objectives. Such a sentence does not deal with the question of collateral damage caused by attacks directed against military objectives.”⁴⁹

55. Upon ratification of AP I, New Zealand stated that “the first sentence of paragraph 2 of [Article 52] is not intended to, nor does it, deal with the question of incidental or collateral damage resulting from an attack directed against a military objective”.⁵⁰

56. Upon ratification of AP I, the UK stated that:

It is the understanding of the United Kingdom that . . . the first sentence of paragraph 2 [of Article 52] prohibits only such attacks as may be directed against non-military objectives; it does not deal with the question of collateral damage resulting from attacks directed against military objectives.⁵¹

57. Article 24(1) of draft AP II submitted by the ICRC to the CDDH provided that “in order to ensure respect for the civilian population, the parties to the conflict shall confine their operations to the destruction or weakening of the military resources of the adversary”.⁵² This proposal was amended and adopted by consensus in Committee III of the CDDH.⁵³ The approved text provided that “in order to ensure respect and protection for . . . civilian objects, the Parties to the conflict . . . shall direct their operations only against military objectives”.⁵⁴ Eventually, however, it was deleted in the plenary, because it failed to obtain the necessary two-thirds majority (36 in favour, 19 against and 36 abstentions).⁵⁵

Other Instruments

58. Article 24(1) of the 1923 Hague Rules of Air Warfare provides that “aerial bombardment is legitimate only when directed at a military objective”.

⁴⁷ Canada, Reservations and statements of understanding made upon ratification of AP I, 20 November 1990, § 8(b).

⁴⁸ France, Declarations and reservations made upon ratification of AP I, 11 April 2001, § 12.

⁴⁹ Italy, Declarations made upon ratification of AP I, 27 February 1986, § 8.

⁵⁰ New Zealand, Declarations made upon ratification of AP I, 8 February 1988, § 4.

⁵¹ UK, Reservations and declarations made upon ratification of AP I, 28 January 1998, § j.

⁵² CDDH, *Official Records*, Vol. I, Part Three, Draft Additional Protocols, June 1973, p. 40.

⁵³ CDDH, *Official Records*, Vol. XV, CDDH/215/Rev.1, 3 February–18 April 1975, p. 288, § 113.

⁵⁴ CDDH, *Official Records*, Vol. XV, CDDH/215/Rev.1, 3 February–18 April 1975, p. 319.

⁵⁵ CDDH, *Official Records*, Vol. VII, CDDH/SR.52, 6 June 1977, p. 135.

59. Article 7 of the 1956 New Delhi Draft Rules provides that “in order to limit the dangers incurred by the civilian population, attacks may only be directed against military objectives”.
60. Paragraph 6 of the 1991 Memorandum of Understanding on the Application of IHL between Croatia and the SFRY requires that hostilities be conducted in accordance with Article 52(2) AP I.
61. Paragraph 2.5 of the 1992 Agreement on the Application of IHL between the Parties to the Conflict in Bosnia and Herzegovina requires that hostilities be conducted in accordance with Article 52(2) AP I.
62. Paragraph 41 of the 1994 San Remo Manual states that “attacks shall be strictly limited to military objectives”.
63. Section 5.1 of the 1999 UN Secretary-General’s Bulletin states that “military operations shall be directed only against combatants and military objectives”.

II. National Practice

Military Manuals

64. The principle that attacks must be strictly limited to military objectives is set forth in the military manuals of Australia, Belgium, Benin, Cameroon, Canada, Colombia, Croatia, Ecuador, France, Germany, Indonesia, Italy, Kenya, South Korea, Lebanon, Madagascar, Netherlands, New Zealand, Nigeria, Philippines, Romania, South Africa, Spain, Sweden, Switzerland, Togo, UK and US.⁵⁶
65. The US Air Force Pamphlet explains that:

⁵⁶ Australia, *Defence Force Manual* (1994), §§ 210, 524, 531 and 913; Belgium, *Teaching Manual for Soldiers* (undated), pp. 10 and 20; Belgium, *Law of War Manual* (1983), p. 26; Benin, *Military Manual* (1995), Fascicule I, p. 17, Fascicule II, pp. 5 and 18 and Fascicule III, p. 14; Cameroon, *Instructors’ Manual* (1992), p. 111; Canada, *LOAC Manual* (1999), p. 4-1, § 5; Canada, *Code of Conduct* (2001), Rule 1; Colombia, *Circular on Fundamental Rules of IHL* (1992), § 7; Colombia, *Instructors’ Manual* (1999), p. 17; Croatia, *Basic Rules Manual* (1993), § 7; Croatia, *Commanders’ Manual* (1992), § 9; Ecuador, *Naval Manual* (1989), § 8.1.1; France, *LOAC Manual* (2001), p. 13; Germany, *Military Manual* (1992), § 441; Indonesia, *Military Manual* (undated), § 91; Italy, *IHL Manual* (1991), Vol. I, § 12; Italy, *LOAC Elementary Rules Manual* (1991), § 9; Kenya, *LOAC Manual* (1997), Précis No. 2, p. 15, Précis No. 3, p. 14, and Précis No. 4, p. 1; South Korea, *Military Law Manual* (1996), p. 86; Lebanon, *Teaching Manual* (undated), Article 7; Madagascar, *Military Manual* (1994), Fiche No. 3-O, § 9, see also Fiche 4-T, § 2; Netherlands, *Military Manual* (1993), p. V-1, § 2 and p. V-5; Netherlands, *Military Handbook* (1995), pp. 7-36, 7-39 and 7-43; New Zealand, *Military Manual* (1992), §§ 515(1), 524(1)(c), 622(1) and 624(1)(c); Nigeria, *Military Manual* (1994), p. 39, § 5(b); Nigeria, *Soldiers’ Code of Conduct* (undated), § 2; Philippines, *Soldier’s Rules* (1989), § 2; Romania, *Soldiers’ Manual* (1991), p. 4; South Africa, *LOAC Manual* (1996), § 25(b); Spain, *LOAC Manual* (1996), Vol. I, §§ 2.3.(b).1, 4.1 and 4.5.(b)2; Sweden, *IHL Manual* (1991), Section 3.2.1.5, pp. 41 and 52; Switzerland, *Basic Military Manual* (1987), Articles 25(1) and 28; Togo, *Military Manual* (1996), Fascicule I, p. 18, Fascicule II, pp. 5 and 18 and Fascicule III, p. 14; UK, *Military Manual* (1958), Articles 283 and 288; UK, *LOAC Manual* (1981), Section 4, p. 13, § 4(a); US, *Air Force Pamphlet* (1976), § 5-3(b); US, *Rules of Engagement for Operation Desert Storm* (1991), § 2; US, *Naval Handbook* (1995), § 8.1.1.

The requirement that attacks be limited to military objectives results from several requirements of international law. The mass annihilation of enemy people is neither humane, permissible, nor militarily necessary. The Hague Regulations prohibit destruction or seizure of enemy property "unless such destruction or seizure be imperatively demanded by the necessities of war." Destruction as an end in itself is a violation of international law, and there must be some reasonable connection between the destruction of property and the overcoming of enemy military forces. Various other prohibitions and the Hague Regulations and Hague Convention IX further support the requirement that attacks be directed only at military objectives.⁵⁷

National Legislation

66. Under Ireland's Geneva Conventions Act as amended, any "minor breach" of AP I, including violations of Articles 48 and 52(2) AP I, is a punishable offence.⁵⁸

67. Under Norway's Military Penal Code as amended, "anyone who contravenes or is accessory to the contravention of provisions relating to the protection of persons or property laid down in . . . the two additional protocols to [the Geneva] Conventions . . . is liable to imprisonment".⁵⁹

National Case-law

68. No practice was found.

Other National Practice

69. The Report on the Practice of Angola asserts that military objectives were the only targets of attack during the war of independence, but that the civil war that followed independence was characterised by confusion between military objectives and civilian objects. The report provides a list of examples of alleged attacks against civilian objects.⁶⁰

70. It is reported that, during the War in the South Atlantic, both parties directed their hostile acts only against military objectives.⁶¹

71. At the CDDH, Canada stated that the first sentence of draft Article 47(2) AP I (now Article 52(2)) "prohibits only attacks that could be directed against non-military objectives. It does not deal with the result of a legitimate attack on military objectives and incidental damage that such attack may cause."⁶²

72. In a military communiqué issued during the 1973 Middle East conflict, Egypt emphasised that only military objectives could be attacked.⁶³

⁵⁷ US, *Air Force Pamphlet* (1976), § 5-3(b)(2); see also *Field Manual* (1956), § 56.

⁵⁸ Ireland, *Geneva Conventions Act as amended* (1962), Section 4(1) and (4).

⁵⁹ Norway, *Military Penal Code as amended* (1902), § 108(b).

⁶⁰ Report on the Practice of Angola, 1998, Chapter 1.3.

⁶¹ Carlos Horacio Cerdá, *El respeto del Derecho Internacional Humanitario durante el Desarrollo del Conflicto Armado del Atlántico Sud*, Report on the Practice of Argentina, 1997, Chapter 1.3.

⁶² Canada, Statement at the CDDH, *Official Records*, Vol. VI, CDDH/SR.41, 26 May 1977, p. 179.

⁶³ Egypt, Military Communiqué No. 2, 6 October 1973.

73. In its written statement submitted to the ICJ in the *Nuclear Weapons case* in 1995, Egypt invoked the requirement to “direct operations only against military objectives”.⁶⁴

74. The instructions given to the French armed forces for the conduct of Opération Mistral, simulating a military operation under the right of self-defence or a mandate of the UN Security Council, state that “attacks may only be directed against military objectives”.⁶⁵

75. At the CDDH, the FRG stated that the first sentence of draft Article 47(2) AP I (now Article 52(2)) “is a restatement of the basic rule contained in Article 43 [now Article 48], namely that the Parties to a conflict shall direct their operations only against military objectives. It does not deal with the question of collateral damage caused by attacks directed against military objectives.”⁶⁶

76. According to the Report on the Practice of Iran, “Iran always insisted that war must be limited to battlefronts . . . and that all targets were military objectives”.⁶⁷

77. The Report on the Practice of Kuwait notes that the choice of targets is strictly limited to military objectives. An attack on a military objective should be allowed only in case of possible gain in the field of operation.⁶⁸

78. The Report on the Practice of Malaysia notes that in practice the security forces direct their attacks only against military targets or targets of military importance.⁶⁹

79. At the CDDH, Mexico stated that it believed Article 47 AP I (now Article 52) to be so essential that it “cannot be the subject of any reservations whatsoever since these would be inconsistent with the aim and purpose of Protocol I and undermine its basis”.⁷⁰

80. At the CDDH, the Netherlands stated that the first sentence of draft Article 47(2) AP I (now Article 52(2)) “prohibits only such attacks as may be directed against non-military objectives and consequently does not deal with the question of collateral damage caused by attacks directed against military objectives”.⁷¹

81. The Report on the Practice of Nigeria states that, during the Nigerian civil war, the Nigerian air force, in its raids against rebel enclaves, distinguished

⁶⁴ Egypt, Written statement submitted to the ICJ, *Nuclear Weapons case*, 20 June 1995, § 17.

⁶⁵ France, Etat-major de la Force d’Action Rapide, Ordres pour l’Opération Mistral, 1995, Section 6, § 66.

⁶⁶ FRG, Statement at the CDDH, *Official Records*, Vol. VI, CDDH/SR.41, 26 May 1977, p. 188.

⁶⁷ Report on the Practice of Iran, 1997, Chapter 1.3.

⁶⁸ Report on the Practice of Kuwait, 1997, Chapter 1.5.

⁶⁹ Report on the Practice of Malaysia, 1997, Answers to additional questions on Chapter 1.3.

⁷⁰ Mexico, Statement at the CDDH, *Official Records*, Vol. VI, CDDH/SR.41, 26 May 1977, p. 193.

⁷¹ Netherlands, Statement at the CDDH, *Official Records*, Vol. VI, CDDH/SR.41, 26 May 1977, p. 195.

between military targets and civilian objects, bombing military targets while assiduously avoiding non-military targets.⁷²

82. In 1991, in reports submitted to the UN Security Council on operations in the Gulf War, Saudi Arabia stated that its air force had carried out numerous sorties against “military targets in Iraq and Kuwait, while avoiding civilian targets”.⁷³

83. In 1993 and 1995, the government of Spain made specific statements in connection with the armed conflicts in the Gulf and Bosnia and Herzegovina, endorsing the principle that attacks must be directed only against military objectives.⁷⁴

84. On the basis of a statement by the Syrian Minister of Foreign Affairs before the UN General Assembly in 1997, the Report on the Practice of Syria asserts that Syria considers Article 52(2) AP I to be part of customary international law.⁷⁵

85. In 1938, during a debate in the House of Commons, the UK Prime Minister Neville Chamberlain listed among rules of international law applicable to warfare on land, at sea and from the air the rule that “targets which are aimed at . . . must be legitimate military targets and must be capable of identification”.⁷⁶

86. At the CDDH, the UK stated that it did not interpret the obligation in the first sentence of Article 47(2) AP I (now Article 52(2)) “as dealing with the question of incidental damage caused by attacks directed against military objectives. In its view, the purpose of the first sentence of the paragraph was to prohibit only such attacks as might be directed against non-military objectives.”⁷⁷

87. A training video on IHL produced by the UK Ministry of Defence emphasises that military operations must be directed only against military objectives.⁷⁸

88. In reply to questions in the House of Lords and House of Commons concerning military operations during the Gulf War in 1991, the UK Under-Secretary of State for Defence and the Minister of State for the Armed Forces stated that

⁷² Report on the Practice of Nigeria, 1997, Chapter 1.3.

⁷³ Saudi Arabia, Report dated 30 January 1991 on the progress of operations for the liberation of Kuwait, annexed to Letter dated 30 January 1991 to the President of the UN Security Council, UN Doc. S/22180, 31 January 1991, p. 2; Letter dated 6 February 1991 to the President of the UN Security Council, UN Doc. S/22200, 6 February 1991, p. 1.

⁷⁴ Spain, Report by the Minister of Foreign Affairs and Minister of Defence to the Congress Commission on Foreign Affairs on Action by the International Community in Iraq and Developments in Bosnia and Herzegovina, 18 January 1993, *Actividades, Textos y Documentos de la Política Exterior Española*, Madrid, 1993, p. 240; Press Conference by the Minister of Foreign Affairs and Minister of Defence, 31 August 1995, *Actividades, Textos y Documentos de la Política Exterior Española*, Madrid, 1995, p. 248.

⁷⁵ Report on the Practice of Syria, 1997, Chapter 1.3, referring to Statement by the Syrian Minister of Foreign Affairs before the UN General Assembly, 1 October 1997.

⁷⁶ UK, House of Commons, Statement by the Prime Minister, Sir Neville Chamberlain, 21 June 1938, *Hansard*, Vol. 337, col. 937.

⁷⁷ UK, Statement at the CDDH, *Official Records*, Vol. VI, CDDH/SR.41, 26 May 1977, p. 169, § 153.

⁷⁸ UK, Ministry of Defence, Training Video: The Geneva Conventions, 1986, Report on UK Practice, 1997, Chapter 1.3.

it was a policy of the allies to attack only military targets and facilities that sustained Iraq's illegal occupation of Kuwait.⁷⁹

89. In 1950, the US Secretary of State stated that "the air activity of the United Nations forces in Korea has been, and is, directed solely at military targets of the invader".⁸⁰

90. At a news briefing in December 1966, the US Deputy Assistant Secretary of State for Public Affairs stated, with reference to inquiries concerning reported incidents resulting from bombing in the vicinity of Hanoi on 13 and 14 December 1966, that "the only targets struck by U.S. aircraft were military ones, well outside the city proper".⁸¹

91. In December 1966, in reply to an inquiry from a member of the US House of Representatives asking for a restatement of US policy on targeting in North Vietnam, a US Deputy Assistant Secretary of Defense wrote that "United States policy is to target military targets only. There has been no deviation from this policy."⁸²

92. At the CDDH, the US stated that the first sentence of draft Article 47(2) AP I (now Article 52(2)) "prohibits only such attacks as may be directed against non-military objectives. It does not deal with the question of collateral damage caused by attacks directed against military objectives."⁸³

93. In 1991, in a report submitted to the UN Security Council on operations in the Gulf War, the US stated that "the military actions initiated by the United States and other States co-operating with the Government of Kuwait... are directed strictly at military and strategic targets".⁸⁴

94. In 1991, in a diplomatic note to Iraq concerning operations in the Gulf War, the US stated that "the United States and other coalition forces are only attacking targets of military value in Iraq".⁸⁵

95. In 1992, in its final report to Congress on the conduct of the Gulf War, the US Department of Defense stated that Article 48 AP I "is generally regarded as a codification of the customary practice of nations, and therefore binding

⁷⁹ UK, House of Lords, Statement by the Parliamentary Under-Secretary of State for Defence, 27 February 1991, *Hansard*, Vol. 526, Written Answers, col. 52; Statement by the Minister of State for the Armed Forces, 28 February 1991, *Hansard*, Vol. 186, Written Answers, col. 611.

⁸⁰ US, Statement by the Secretary of State, Dean Acheson, 6 September 1950, reprinted in Marjorie Whiteman, *Digest of International Law*, Vol. 10, Department of State Publication 8367, Washington, D.C., 1968, p. 140.

⁸¹ US, News briefing by Deputy Assistant Secretary of State for Public Affairs, Robert McCloskey, 22 December 1966, reprinted in Marjorie Whiteman, *Digest of International Law*, Vol. 10, Department of State Publication 8367, Washington, D.C., 1968, p. 426.

⁸² US, Letter from Deputy Assistant Secretary of Defense Goulding to US Representative Ogden Reid from New York, 30 December 1966, reprinted in Marjorie Whiteman, *Digest of International Law*, Vol. 10, Department of State Publication 8367, Washington, D.C., 1968, p. 428.

⁸³ US, Statement at the CDDH, *Official Records*, Vol. VI, CDDH/SR.41, 26 May 1977, p. 204.

⁸⁴ US, Letter dated 17 January 1991 to the President of the UN Security Council, UN Doc. S/22090, 17 January 1991, p. 2.

⁸⁵ US, Department of State, Diplomatic Note to Iraq, Washington, 21 January 1991, annexed to Letter dated 22 January 1991 to the President of the UN Security Council, UN Doc. S/22130, 22 January 1991.

on all".⁸⁶ The report further stated that "CINCCENT [Commander-in-Chief, Central Command] conducted a theater campaign directed solely at military targets".⁸⁷

96. In 1996, in the context of an internal armed conflict, the head of the armed forces of a State confirmed in a meeting with the ICRC that specific instructions had been given to soldiers to limit attacks to military objectives.⁸⁸

III. Practice of International Organisations and Conferences

United Nations

97. In a resolution adopted in 1938 concerning the protection of civilian populations against air bombardment in case of war, the Assembly of the League of Nations stated that "objectives aimed at from the air must be legitimate military targets and must be identifiable".⁸⁹

Other International Organisations

98. No practice was found.

International Conferences

99. No practice was found.

IV. Practice of International Judicial and Quasi-judicial Bodies

100. No practice was found.

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

101. To fulfil its task of disseminating IHL, the ICRC has delegates around the world teaching armed and security forces that they have an obligation to limit attacks strictly to military targets.⁹⁰

102. In an appeal issued in October 1973, the ICRC urged all the belligerents in the conflict in the Middle East (Egypt, Iraq, Israel and Syria) to observe forthwith, in particular, the provisions of, *inter alia*, Article 47(1) of draft AP I which

⁸⁶ US, Department of Defense, Final Report to Congress on the Conduct of the Persian Gulf War, Appendix O, The Role of the Law of War, 10 April 1992, *ILM*, Vol. 31, 1992, p. 625.

⁸⁷ US, Department of Defense, Final Report to Congress on the Conduct of the Persian Gulf War, 10 April 1992, Appendix O, The Role of the Law of War, *ILM*, Vol. 31, 1992, p. 644.

⁸⁸ ICRC archive document.

⁸⁹ League of Nations, Assembly, Resolution adopted on 30 September 1938, § I(2), *Official Journal*, Special Supplement No. 182, Records of the XIXth Ordinary Session of the Assembly, pp. 15–17.

⁹⁰ Frédéric de Mulinen, *Handbook on the Law of War for Armed Forces*, ICRC, Geneva, 1987, § 428.

stated in part that “attacks shall be strictly limited to military objectives”. All governments concerned replied favourably.⁹¹

VI. Other Practice

103. In 1980, an armed opposition group expressed its acceptance of the fundamental principles of IHL as formulated by the ICRC, including the principle that “attacks shall be directed solely against military objectives”.⁹²

104. In 1982, in a meeting with the ICRC, an armed opposition group insisted that it had always limited its attacks to military objectives.⁹³

Attacks against civilian objects in general

Note: *For practice concerning the destruction of enemy property, see Chapter 16.*

I. Treaties and Other Instruments

Treaties

105. Article 52(1) AP I provides that “civilian objects shall not be the object of attack”. Article 52 AP I was adopted by 79 votes in favour, none against and 7 abstentions.⁹⁴

106. Article 2(1) of the 1980 Protocol III to the CCW states that “it is prohibited in all circumstances to make . . . civilian objects the object of attack by incendiary weapons.”

107. Article 3(7) of the 1996 Amended Protocol II to the CCW provides that “it is prohibited in all circumstances to direct [mines, booby-traps and other devices], either in offence, defence or by way of reprisals, against . . . civilian objects”.

108. Pursuant to Article 8(2)(b)(ii) of the 1998 ICC Statute, “intentionally directing attacks against civilian objects, that is, objects which are not military objectives” constitutes a war crime in international armed conflicts.

Other Instruments

109. Pursuant to Article 3(b) of the 1990 Cairo Declaration on Human Rights in Islam, it is prohibited “to destroy the enemy’s civilian buildings and installations by shelling, blasting or any other means”.

110. In the 1991 Hague Statement on Respect for Humanitarian Principles, the Presidents of the six republics of the former Yugoslavia accepted to apply the fundamental principle that “civilian property must not be attacked”.

⁹¹ ICRC, *The International Committee’s Action in the Middle East, IRRIC*, No. 152, 1973, pp. 584–585.

⁹² ICRC archive document. ⁹³ ICRC archive document.

⁹⁴ CDDH, *Official Records*, Vol. VI, CDDH/SR.41, 26 May 1977, p. 168.

111. Paragraph 6 of the 1991 Memorandum of Understanding on the Application of IHL between Croatia and the SFRY requires that hostilities be conducted in accordance with Article 52(1) AP I.

112. Paragraph 2.5 of the 1992 Agreement on the Application of IHL between the Parties to the Conflict in Bosnia and Herzegovina requires that hostilities be conducted in accordance with Article 52(1) AP I.

113. Section 5.1 of the 1999 UN Secretary-General's Bulletin states that "attacks on . . . civilian objects are prohibited".

114. The 2000 UNTAET Regulation No. 2000/15 establishes panels with exclusive jurisdiction over serious criminal offences, including war crimes. According to Section 6(1)(b)(ii), "intentionally directing attacks against civilian objects, that is, objects which are not military objectives" constitutes a war crime in international armed conflicts.

II. National Practice

Military Manuals

115. Military manuals of Argentina, Australia, Belgium, Benin, Cameroon, Canada, Colombia, Croatia, Ecuador, France, Germany, Italy, Kenya, Lebanon, Madagascar, Netherlands, New Zealand, Nigeria, South Africa, Spain, Togo, UK, US and SFRY (FRY) prohibit attacks against civilian objects.⁹⁵

116. Argentina's Law of War Manual provides that intentionally attacking civilian objects is a grave breach.⁹⁶

117. The US Air Force Pamphlet states that:

In addition to the grave breaches of the Geneva Conventions of 1949, the following acts are representative of situations involving individual criminal responsibility: . . . (4) aerial bombardment for the deliberate purpose of . . . destroying protected areas, buildings or objects.⁹⁷

⁹⁵ Argentina, *Law of War Manual* (1989), §§ 4.03 and 4.45; Australia, *Defence Force Manual* (1994), §§ 210, 503(b) and 531; Belgium, *Teaching Manual for Soldiers* (undated), p. 10; Belgium, *Law of War Manual* (1983), pp. 26 and 27; Benin, *Military Manual* (1995), Fascicule III, p. 12; Cameroon, *Instructors' Manual* (1992), p. 150; Canada, *LOAC Manual* (1999), p. 4-4, § 32; Colombia, *Circular on Fundamental Rules of IHL* (1992), § 7; Colombia, *Instructors' Manual* (1999), p. 16; Croatia, *Commanders' Manual* (1992), § 11; Ecuador, *Naval Manual* (1989), § 8.1.2; France, *LOAC Summary Note* (1992), § 1.5; France, *LOAC Manual* (2001), p. 85; Germany, *Military Manual* (1992), § 451; Italy, *IHL Manual* (1991), Vol. I, § 13; Italy, *LOAC Elementary Rules Manual* (1991), § 11; Kenya, *LOAC Manual* (1997), Précis No. 4, p. 2; Lebanon, *Teaching Manual* (undated), Article 7; Madagascar, *Military Manual* (1994), Fiche No. 3-O, § 11; Netherlands, *Military Manual* (1993), p. V-5; Netherlands, *Military Handbook* (1995), p. 7-43; New Zealand, *Military Manual* (1992), §§ 524(2)(b) and 624(2)(b); Nigeria, *Manual on the Laws of War* (undated), § 6; South Africa, *LOAC Manual* (1996), § 28(a); Spain, *LOAC Manual* (1996), Vol. I, § 4.5.b.(2).b; Sweden, *IHL Manual* (1991), Section 3.2.1.5, p. 53; Togo, *Military Manual* (1996), Fascicule III, p. 12; UK, *LOAC Manual* (1981), Section 4, p. 14, § 5(a); UK, *Military Manual* (1958), § 288; US, *Air Force Pamphlet* (1976), § 5-3(a)(1)(a); US, *Rules of Engagement for Operation Desert Storm* (1991), § G; US, *Naval Handbook* (1995), § 8.1.2; SFRY (FRY), *YPA Military Manual* (1988), § 73.

⁹⁶ Argentina, *Law of War Manual* (1989), § 8.03.

⁹⁷ US, *Air Force Pamphlet* (1976), § 15-3(c)(4).

National Legislation

118. Argentina's Draft Code of Military Justice punishes any soldier who

attacks or . . . commits acts of hostilities against civilian objects of the adverse Party, causing their destruction, provided that said acts do not offer a definite military advantage in the circumstances ruling at the time, and that the said objects do not make an effective contribution to the adversary's military action.⁹⁸

119. Australia's ICC (Consequential Amendments) Act incorporates in the Criminal Code the war crimes defined in the 1998 ICC Statute, including "attacking civilian objects" in international armed conflicts.⁹⁹

120. Azerbaijan's Law concerning the Protection of Civilian Persons and the Rights of Prisoners of War provides that, in international and non-international armed conflicts, attacks against civilian objects are prohibited.¹⁰⁰

121. Under Burundi's Draft Law on Genocide, Crimes against Humanity and War Crimes, it is a war crime in international armed conflicts to intentionally direct attacks against "civilian objects, that is, objects which are not military objectives".¹⁰¹

122. Canada's Crimes against Humanity and War Crimes Act provides that the war crimes defined in Article 8(2) of the 1998 ICC Statute are "crimes according to customary international law" and, as such, indictable offences under the Act.¹⁰²

123. Congo's Genocide, War Crimes and Crimes against Humanity Act defines war crimes with reference to the categories of crimes defined in Article 8 of the 1998 ICC Statute.¹⁰³

124. Under Croatia's Criminal Code, it is a war crime to commit or order the commission of "an attack against . . . civilian objects".¹⁰⁴

125. The Draft Amendments to the Penal Code of El Salvador provide a prison sentence for "anyone who, during an international or non-international armed conflict, attacks civilian objects".¹⁰⁵

126. Under Estonia's Penal Code, "an attack against an object not used for military purposes" is a war crime.¹⁰⁶

127. Under Georgia's Criminal Code, any war crime provided for by the 1998 ICC Statute, which is not explicitly mentioned in the Code, such as

⁹⁸ Argentina, *Draft Code of Military Justice* (1998), Article 293, introducing a new Article 877(2) in the *Code of Military Justice as amended* (1951).

⁹⁹ Australia, *ICC (Consequential Amendments) Act* (2002), Schedule 1, § 268.36.

¹⁰⁰ Azerbaijan, *Law concerning the Protection of Civilian Persons and the Rights of Prisoners of War* (1995), Article 15.

¹⁰¹ Burundi, *Draft Law on Genocide, Crimes against Humanity and War Crimes* (2001), Article 4(B)(b) and (D)(l).

¹⁰² Canada, *Crimes against Humanity and War Crimes Act* (2000), Section 4(1) and (4).

¹⁰³ Congo, *Genocide, War Crimes and Crimes against Humanity Act* (1998), Article 4.

¹⁰⁴ Croatia, *Criminal Code* (1997), Article 158(1).

¹⁰⁵ El Salvador, *Draft Amendments to the Penal Code* (1998), Article entitled "Ataque a bienes protegidos".

¹⁰⁶ Estonia, *Penal Code* (2001), § 106.

“intentionally directing attacks against civilian objects, that is, objects which are not military objectives” in international armed conflicts, is a crime.¹⁰⁷

128. Germany’s Law Introducing the International Crimes Code punishes anyone who, in connection with an international or a non-international armed conflict, “directs an attack by military means against civilian objects, so long as these objects are protected as such by international humanitarian law”.¹⁰⁸

129. Under Hungary’s Criminal Code as amended, a military commander who “pursues a war operation which causes serious damage to . . . goods of the civilian population” is guilty, upon conviction, of a war crime.¹⁰⁹

130. Under Ireland’s Geneva Conventions Act as amended, any “minor breach” of AP I, including violations of Article 52(1) AP I, is a punishable offence.¹¹⁰

131. Italy’s Law of War Decree as amended states that “bombardment, the sole purpose of which is . . . to destroy or damage objects which are of no military interest,” is prohibited.¹¹¹

132. Under Mali’s Penal Code, “intentionally directing attacks against . . . civilian [objects] which are not military objectives” constitutes a war crime in international armed conflicts.¹¹²

133. Under the International Crimes Act of the Netherlands, “intentionally directing attacks against civilian objects, that is, objects that are not military objectives” is a crime, when committed in an international armed conflict.¹¹³

134. Under New Zealand’s International Crimes and ICC Act, war crimes include the crime defined in Article 8(2)(b)(ii) of the 1998 ICC Statute.¹¹⁴

135. Nicaragua’s Draft Penal Code punishes “anyone who, in the context of an international or internal armed conflict, attacks civilian objects”.¹¹⁵

136. Under Norway’s Military Penal Code as amended, “anyone who contravenes or is accessory to the contravention of provisions relating to the protection of persons or property laid down in . . . the two additional protocols to [the Geneva] Conventions . . . is liable to imprisonment”.¹¹⁶

137. Slovakia’s Criminal Code as amended punishes a commander who in a military operation intentionally “causes harm to the . . . property of civilians or the civilian population”.¹¹⁷

¹⁰⁷ Georgia, *Criminal Code* (1999), Article 413(d).

¹⁰⁸ Germany, *Law Introducing the International Crimes Code* (2002), Article 1, § 11(1)(1).

¹⁰⁹ Hungary, *Criminal Code as amended* (1978), Section 160(a).

¹¹⁰ Ireland, *Geneva Conventions Act as amended* (1962), Section 4(1) and (4).

¹¹¹ Italy, *Law of War Decree as amended* (1938), Article 42.

¹¹² Mali, *Penal Code* (2001), Article 31(i)(2).

¹¹³ Netherlands, *International Crimes Act* (2003), Article 5(5)(a).

¹¹⁴ New Zealand, *International Crimes and ICC Act* (2000), Section 11(2).

¹¹⁵ Nicaragua, *Draft Penal Code* (1999), Article 464.

¹¹⁶ Norway, *Military Penal Code as amended* (1902), § 108(b).

¹¹⁷ Slovakia, *Criminal Code as amended* (1961), Article 262(2)(a).

138. Spain's Penal Code punishes

anyone who, during an armed conflict, . . . attacks . . . civilian objects of the adverse party causing their destruction, provided the objects do not, in the circumstances ruling at the time, offer a definite military advantage nor make an effective contribution to the military action of the adversary.¹¹⁸

139. Under Trinidad and Tobago's Draft ICC Act, it is a punishable offence to commit a war crime as defined in Article 8(2)(b)(ii) of the 1998 ICC Statute.¹¹⁹

140. Under the UK ICC Act, it is a punishable offence to commit a war crime as defined in Article 8(2)(b)(ii) of the 1998 ICC Statute.¹²⁰

141. Under Yemen's Military Criminal Code, "attacks on public and private civilian installations" are war crimes.¹²¹

National Case-law

142. The Report on the Practice of Colombia refers to a decision of the Council of State in 1994 which considered the guerrilla attack on the Palace of Justice as a terrorist attack directed against a civilian object.¹²²

143. In 1997, a court in Croatia sentenced 39 people, both soldiers and commanders, to prison terms ranging from 5 to 20 years on charges which included attacks on civilian property, churches, schools and a dam.¹²³

Other National Practice

144. The Report on the Practice of Belgium states that Belgium considered itself bound by the prohibition of attacks on civilian objects even before the adoption of API.¹²⁴

145. In a letter to the President of the UN Security Council in 1992, Croatia expressed strong protest over attacks it alleged were carried out against the civilian population and civilian facilities in the wider area of the town of Slavonski Brod launched by Serbs from Bosnia and Herzegovina and the UN Protected Area territories in Croatia and which it considered contrary to Articles 51 and 52 API.¹²⁵

146. On the basis of a military communiqué issued by Egypt during the 1973 Middle East conflict, the Report on the Practice of Egypt states that Egypt considers that civilian objects should be immune from attacks. The report also

¹¹⁸ Spain, *Penal Code* (1995), Article 613(1)(b).

¹¹⁹ Trinidad and Tobago, *Draft ICC Act* (1999), Section 5(1)(a).

¹²⁰ UK, *ICC Act* (2001), Sections 50(1) and 51(1) (England and Wales) and Section 58(1) (Northern Ireland).

¹²¹ Yemen, *Military Criminal Code* (1998), Article 21(7).

¹²² Report on the Practice of Colombia, 1998, Chapter 1.3, referring to Council of State, *Administrative Case No. 9276*, Judgement, 19 August 1994.

¹²³ Croatia, District Court of Split, *RA. R. case*, Judgement, 26 May 1997.

¹²⁴ Report on the Practice of Belgium, 1997, Chapter 1.3.

¹²⁵ Croatia, Letter dated 24 August 1992 to the President of the UN Security Council, UN Doc. S/24481, 25 August 1992, p. 3.

refers to a letter from the Counsel of the Egyptian President to the US Secretary of State condemning Israeli attacks on civilian objects.¹²⁶

147. In a declaration on Yugoslavia adopted in 1991, the EC and its member States, the USSR and the US stated that they were “particularly disturbed by reports of continued attacks on civilian targets by elements of the federal armed forces and by both Serbian and Croat irregular forces”.¹²⁷

148. The instructions given to the French armed forces for the conduct of Opération Mistral, simulating a military operation under the right of self-defence or a mandate of the UN Security Council, state that “civilian property shall not be made the object of attack”.¹²⁸

149. According to the Report on the Practice of Iran, during the Iran–Iraq War, Iranian authorities, including the Ministry of Foreign Affairs and the parliament, condemned Iraqi attacks on civilian objects, which Iran always regarded as war crimes. The report further points out that Iran always insisted that war must be limited to battlefronts and that it had no intention of attacking civilian objects. When Iraq accused Iran of bombarding civilian targets, Iranian military communiqués denied these allegations and claimed that Iranian attacks were limited to military or economic facilities. The report concludes that “in practice, civilian objects were not targeted, except [in] reprisal”.¹²⁹

150. In 1984, in reply to criticism for alleged attacks against civilian objects during the hostilities against Iran, the President of Iraq stated that “our aircraft did not bomb civilian targets in Baneh during their raid of 5 June; they bombed a camp in which a large body of Iranian forces was concentrated”.¹³⁰

151. At the CDDH, Mexico stated that it believed draft Article 47 AP I (now Article 52) to be so essential that it “cannot be the subject of any reservations whatsoever since these would be inconsistent with the aim and purpose of Protocol I and undermine its basis”.¹³¹

152. In a communiqué issued in 1992, the Council of Ministers of Mozambique stated that it considered that:

¹²⁶ Report on the Practice of Egypt, 1997, Chapter 1.3, referring to Military Communiqué No. 63, 26 October 1973 and Letter from Hafez Ismail, Counsel to the Egyptian President, to Henry Kissinger, US Secretary of State, 11 October 1973.

¹²⁷ EC, USSR and US, Declaration on Yugoslavia, The Hague, 18 October 1991, annexed to Letter dated 21 October 1991 from the Netherlands, the USSR and the US to the UN Secretary-General, UN Doc. A/C.1/46/11, 24 October 1991.

¹²⁸ France, Etat-major de la Force d’Action Rapide, Ordres pour l’Opération Mistral, 1995, Section 6, § 66.

¹²⁹ Report on the Practice of Iran, 1997, Chapter 1.3, see also Chapter 6.5 (definition of war crimes).

¹³⁰ Iraq, Message from the President of Iraq, annexed to Letter dated 10 June 1984 to the UN Secretary-General, UN Doc. S/16610, 19 June 1984, p. 2.

¹³¹ Mexico, Statement at the CDDH, *Official Records*, Vol. VI, CDDH/SR.41, 26 May 1977, p. 193.

RENAMO's behaviour, namely . . . launching offensives against civilian targets, in a deliberate strategy of conquest of territories and strategic positions . . . constitutes a grave and systematic violation that seriously jeopardizes the General Peace Agreement.¹³²

153. The Report on the Practice of Russia considers that while there are no clear-cut criteria of distinction between military objectives and civilian objects, the relevant military instructions refer to the prohibition of attacks on civilian objects and the protection of these objects.¹³³

154. The Report on the Practice of Rwanda considers the prohibition on targeting civilian objects as a required precaution in attack.¹³⁴

155. In 1992, in a note verbale addressed to the UN Secretary-General, Slovenia expressed its readiness to provide information concerning violations of IHL committed by members of the Yugoslav Army during the 10-day conflict with Slovenia, including "bombing, shooting and destroying civilian targets and private property".¹³⁵

156. In its written statement submitted to the ICJ in the *Nuclear Weapons case* in 1995, Sweden stated that "under the principle of distinction, an attack on a civilian population or civilian property is prohibited".¹³⁶

157. In 1996, during a debate in the UN Security Council on the situation in Lebanon, the UAE stated that arbitrary bombings of civilian regions were a violation of IHL and of GC IV and referred to an ICRC statement condemning such actions on the part of Israel.¹³⁷

158. At the CDDH, following the adoption of draft Article 47 AP I (now Article 52), the UK stated that it "welcomed the reaffirmation, in paragraph 2, of the customary law rule that civilian objects must not be the direct object of attack".¹³⁸

159. In 1996, during a debate in the UN Security Council on the situation in Lebanon, the UK stated that attacks directed at civilian targets must be put to an end.¹³⁹

160. In 1966, in reply to an inquiry from a member of the US House of Representatives asking for a restatement of US policy on targeting in North Vietnam,

¹³² Mozambique, Communiqué issued by the Council of Ministers, 20 October 1992, annexed to Letter dated 23 October 1992 to the UN Secretary-General, UN Doc. S/24724, 28 October 1992, p. 4.

¹³³ Report on the Practice of Russia, 1997, Chapter 1.3.

¹³⁴ Report on the Practice of Rwanda, 1997, Chapter 1.6.

¹³⁵ Slovenia, Note verbale dated 5 November 1992 to the UN Secretary-General, UN Doc. S/24789, 9 November 1992, p. 2.

¹³⁶ Sweden, Written statement submitted to the ICJ, *Nuclear Weapons case*, 20 June 1995, p. 3; see also Written statement submitted to the ICJ, *Nuclear Weapons (WHO) case*, 2 June 1994, p. 3.

¹³⁷ UAE, Statement before the UN Security Council, UN Doc. S/PV.3653, 15 April 1996, p. 17.

¹³⁸ UK, Statement at the CDDH, *Official Records*, Vol. VI, CDDH/SR.41, 26 May 1977, p. 169, § 153.

¹³⁹ UK, Statement before the UN Security Council, UN Doc. S/PV.3653, 15 April 1996, p. 13.

a US Deputy Assistant Secretary of Defense wrote that “no United States aircraft have been ordered to strike any civilian targets in North Vietnam at any time . . . We have no knowledge that any pilot has disobeyed his orders and deliberately attacked these or any other nonmilitary targets in North Vietnam.”¹⁴⁰

161. In 1974, at the Lucerne Conference of Government Experts on Weapons which may Cause Unnecessary Suffering or have Indiscriminate Effects, the head of the US delegation stated that “the law of war also prohibits attacks on civilians and civilian objects as such”.¹⁴¹

162. In 1991, in a report submitted to the UN Security Council on operations in the Gulf War, the US stated that “over 52,000 coalition air sorties have been carried out since hostilities began on 16 January. These sorties were not flown against any civilian or religious targets.”¹⁴²

163. In 1993, in its report to Congress on the protection of natural and cultural resources during times of war, the US Department of Defense stated that:

The United States considers the obligations to protect natural, civilian, and cultural property to be customary international law . . . Cultural property, civilian objects, and natural resources are protected from intentional attack so long as they are not utilized for military purposes.¹⁴³

III. Practice of International Organisations and Conferences

United Nations

164. In a resolution on Lebanon adopted in 1996, the UN Security Council stated that it was gravely concerned by all attacks on civilian targets.¹⁴⁴

165. In a resolution adopted in 1999 on the protection of civilians in armed conflicts, the UN Security Council strongly condemned “attacks on objects protected under international law” and called on all parties “to put an end to such practices”.¹⁴⁵

166. In 1995, in a statement by its President, the UN Security Council condemned “any shelling of civilian targets” in and around Croatia.¹⁴⁶

¹⁴⁰ US, Letter from Deputy Assistant Secretary of Defense Goulding to US Representative Ogden Reid from New York, 30 December 1966, reprinted in Marjorie Whiteman, *Digest of International Law*, Vol. 10, Department of State Publication 8367, Washington, D.C., 1968, p. 428.

¹⁴¹ US, Statement of 25 September 1974 at the Conference of Government Experts on Weapons which may Cause Unnecessary Suffering or have Indiscriminate Effects, Lucerne, 24 September–18 October 1974, reprinted in Arthur W. Rovine, *Digest of United States Practice in International Law, 1974*, Department of State Publication 8809, Washington, D.C., 1975, p. 713.

¹⁴² US, Letter dated 8 February 1991 to the President of the UN Security Council, UN Doc. S/22216, 13 February 1991, p. 1

¹⁴³ US, Department of Defense, Report to Congress on International Policies and Procedures Regarding the Protection of Natural and Cultural Resources During Times of War, 19 January 1993, p. 202.

¹⁴⁴ UN Security Council, Res. 1052, 18 April 1996, preamble.

¹⁴⁵ UN Security Council, Res. 1265, 17 September 1999, § 2.

¹⁴⁶ UN Security Council, Statement by the President, UN Doc. S/PRST/1995/38, 4 August 1995, p. 1.

167. In a resolution adopted in 1938 concerning the protection of civilian populations against air bombardment in case of war, the Assembly of the League of Nations stated that “objectives aimed at from the air must be legitimate military objectives and must be identifiable”.¹⁴⁷

168. In a resolution adopted in 1995, the UN General Assembly condemned “the use of cluster bombs on civilian targets by Bosnian Serb and Croatian Serb forces”.¹⁴⁸

169. In a resolution adopted in 1996 on the situation of human rights in Sudan, the UN General Assembly urged the government of Sudan “to cease immediately all aerial attacks on civilian targets and other attacks that are in violation of international humanitarian law”.¹⁴⁹

170. In a resolution adopted in 1993 on the situation of human rights in the former Yugoslavia and in Bosnia and Herzegovina, the UN Commission on Human Rights condemned “attacks against non-military targets”.¹⁵⁰

171. In a resolution adopted in 1994 on the situation of human rights in Bosnia and Herzegovina, the UN Commission on Human Rights condemned the “attacks against civilian targets”.¹⁵¹

172. In a resolution adopted in 1994, the UN Commission on Human Rights called upon the government of Sudan “to explain without delay the circumstances of the recent air attacks on civilian targets in southern Sudan”.¹⁵²

173. In a resolution adopted in 1995, the UN Commission on Human Rights condemned “the use of cluster and napalm bombs against civilian targets by Bosnian and Croatian Serb forces”.¹⁵³

174. In 1996, in a report on UNIFIL in Lebanon, the UN Secretary-General noted that in the text of a partial ceasefire concluded on 27 April 1996, Israel agreed not to fire or aim any kind of weapon at civilians or civilian targets in Lebanon.¹⁵⁴

175. The prohibition of direct attacks against civilian objects was a constant preoccupation in the periodic reports on the situation of human rights in the former Yugoslavia submitted by the Special Rapporteur of the UN Commission on Human Rights. For example, in his third report in 1993, the Special Rapporteur considered the shelling of civilian objects as a feature of the situation in Bosnia and Herzegovina, citing the bombing of the central mosque in Sarajevo and of the city of Dobrinja.¹⁵⁵ In the final recommendations of his fifth periodic

¹⁴⁷ League of Nations, Assembly, Resolution adopted on 30 September 1938, § I(2), *Official Journal*, Special Supplement No. 182, Records of the XIXth Ordinary Session of the Assembly, pp. 15–17.

¹⁴⁸ UN General Assembly, Res. 50/193, 22 December 1995, § 5.

¹⁴⁹ UN General Assembly, Res. 51/112, 12 December 1996, § 8.

¹⁵⁰ UN Commission on Human Rights, Res. 1993/7, 23 February 1993, § 10.

¹⁵¹ UN Commission on Human Rights, Res. 1994/75, 9 March 1994, § 1.

¹⁵² UN Commission on Human Rights, Res. 1994/79, 9 March 1994, § 6.

¹⁵³ UN Commission on Human Rights, Res. 1995/89, 8 March 1995, § 5.

¹⁵⁴ UN Secretary-General, Report on UNIFIL, UN Doc. S/1996/575, 20 July 1996, § 24.

¹⁵⁵ UN Commission on Human Rights, Special Rapporteur on the Situation of Human Rights in the Former Yugoslavia, Third periodic report, UN Doc. E/CN.4/1994/6, 26 August 1993, § 37.

report, the Special Rapporteur requested that in the conduct of hostilities in the UN Protected Areas, the parties refrain from all further shelling of civilian objects.¹⁵⁶

176. In 1994, in its final report on grave breaches of the Geneva Conventions and other violations of IHL committed in the former Yugoslavia, the UN Commission of Experts Established pursuant to Security Council Resolution 780 (1992) stated that:

The concealment of Bosnian Government forces among civilian property may have caused the attraction of fire from the Bosnian Serb Army which may have resulted in legitimate collateral damage. There is enough apparent damage to civilian objects in Sarajevo to conclude that either civilian objects have been deliberately targeted or they have been indiscriminately attacked.¹⁵⁷

Other International Organisations

177. Addressing the President of the UN Security Council as members of the Contact Group of the OIC in 1992, Egypt, Iran, Pakistan, Saudi Arabia, Senegal and Turkey protested against “the continued aggression of the Serbian elements who, through artillery and air attacks on civilian targets, continue to violate the principles of the Charter of the United Nations, international humanitarian law and the basic norms of civilized behaviour”.¹⁵⁸

International Conferences

178. The Plan of Action for the years 2000–2003 adopted in 1999 by the 27th International Conference of the Red Cross and Red Crescent requested that all the parties to an armed conflict take effective measures to ensure that:

in the conduct of hostilities, every effort is made – in addition to the total ban on directing attacks against the civilian population as such or against civilians not taking a direct part in hostilities or against civilian objects – . . . to protect civilian objects including cultural property, places of worship and diplomatic facilities.¹⁵⁹

IV. Practice of International Judicial and Quasi-judicial Bodies

179. In its advisory opinion in the *Nuclear Weapons case* in 1996, the ICJ stated that “the cardinal principles contained in the texts constituting the fabric of

¹⁵⁶ UN Commission on Human Rights, Special Rapporteur on the Situation of Human Rights in the Former Yugoslavia, Fifth periodic report, UN Doc. E/CN.4/1994/47, 17 November 1993, §§ 10, 45, 65–67, 92–96, 161–164 and 235.

¹⁵⁷ UN Commission of Experts Established pursuant to Security Council Resolution 780 (1992), Final report, UN Doc. S/1994/674, 27 May 1994, Annex, § 206.

¹⁵⁸ OIC, Contact Group on Bosnia and Herzegovina, Letter dated 5 October 1992 from Egypt, Iran, Pakistan, Saudi Arabia, Senegal and Turkey to the President of the UN Security Council, UN Doc. S/24620, 6 October 1992, p. 1.

¹⁵⁹ 27th International Conference of the Red Cross and Red Crescent, Geneva, 31 October–6 November 1999, Res. I, Annex 2, Plan of Action for the years 2000–2003, Actions proposed for final goal 1.1, § 1(a).

humanitarian law are the following. The first is aimed at the protection of the civilian population and civilian objects.”¹⁶⁰

180. In its judgement in the *Kupreškić case* in 2000, the ICTY Trial Chamber stated that:

The protection of civilians in time of armed conflict, whether international or internal, is the bedrock of modern humanitarian law . . . Indeed, it is now a universally recognised principle, recently restated by the International Court of Justice [in the *Nuclear Weapons case*], that deliberate attacks on civilians or civilian objects are absolutely prohibited by international humanitarian law.¹⁶¹

181. In the *Blaškić case* before the ICTY in 1997, the accused was charged with “unlawful attack on civilian objects” in violation of the laws or customs of war.¹⁶² In its judgement in 2000, the ICTY Trial Chamber held that “the parties to the conflict are obliged to attempt to distinguish between military targets and civilian persons or property. Targeting civilians or civilian property is an offence when not justified by military necessity.”¹⁶³ It found the accused guilty of “a violation of the laws or customs of war under Article 3 of the Statute and recognised by Article 52(1) of Additional Protocol I: unlawful attacks on civilian objects”.¹⁶⁴

182. In the *Kordić and Čerkez case* before the ICTY in 1998, the accused were charged with “unlawful attack on civilian objects” in violation of the laws or customs of war.¹⁶⁵ In an interlocutory decision in this case in 1999, the ICTY Trial Chamber held that it was “indisputable” that the prohibition of attacks on civilian objects was a generally accepted obligation and that as a consequence, “there is no possible doubt as to the customary status” of Article 52(1) AP I as it reflects a core principle of humanitarian law “that can be considered as applying to all armed conflicts, whether intended to apply to international or non-international conflicts”.¹⁶⁶ In its judgement in 2001, the ICTY Trial Chamber stated that:

Prohibited attacks are those launched deliberately against . . . civilian objects in the course of an armed conflict and are not justified by military necessity. They must have caused . . . extensive damage to civilian objects. Such attacks are in direct contravention of the prohibitions expressly recognised in international law including the relevant provisions of Additional Protocol I.¹⁶⁷

¹⁶⁰ ICJ, *Nuclear Weapons case*, Advisory Opinion, 8 July 1996, § 78.

¹⁶¹ ICTY, *Kupreškić case*, Judgement, 14 January 2000, § 521.

¹⁶² ICTY, *Blaškić case*, Second Amended Indictment, 25 April 1997, § 8, Count 4.

¹⁶³ ICTY, *Blaškić case*, Judgement, 3 March 2000, § 180.

¹⁶⁴ ICTY, *Blaškić case*, Judgement, 3 March 2000, Section VI, Disposition.

¹⁶⁵ ICTY, *Kordić and Čerkez case*, First Amended Indictment, 30 September 1998, §§ 40 and 41, Counts 4 and 6.

¹⁶⁶ ICTY, *Kordić and Čerkez case*, Decision on the Joint Defence Motion, 2 March 1999, § 31.

¹⁶⁷ ICTY, *Kordić and Čerkez case*, Judgement, 26 February 2001, § 328.

The Tribunal found the accused guilty of “a violation of the laws or customs of war, as recognised by Article 3 [of the ICTY Statute] (unlawful attack on civilian objects)”.¹⁶⁸

183. In its final report to the ICTY Prosecutor in 2000, the Committee Established to Review the NATO Bombing Campaign Against the Federal Republic of Yugoslavia stated that:

Attacks which are not directed against military objectives (particularly attacks directed against the civilian population) . . . may constitute the *actus reus* for the offence of unlawful attack [as a violation of the laws and customs of war]. The *mens rea* for the offence is intention or recklessness, not simple negligence.¹⁶⁹

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

184. To fulfil its task of disseminating IHL, the ICRC has delegates around the world teaching armed and security forces that “civilian objects may not be attacked, unless they become military objectives”.¹⁷⁰

185. In an appeal issued in October 1973, the ICRC urged all the belligerents in the conflict in the Middle East (Egypt, Iraq, Israel and Syria) to observe forthwith, in particular, the provisions of, *inter alia*, Article 47(2) of draft AP I which stated in part that “objects which are not military objectives shall not be made the object of attack, except if they are used mainly in support of the military effort”. All governments concerned replied favourably.¹⁷¹

186. In a Memorandum on the Applicability of International Humanitarian Law sent in 1990 to all States party to the Geneva Conventions in the context of the Gulf War, the ICRC stated that “the following general rules are recognized as binding on any party to an armed conflict: . . . It is forbidden to attack civilian persons or objects.”¹⁷²

187. In a joint statement issued in 1991, the Yugoslav Red Cross and the Hungarian Red Cross expressed their deep concern about “the protracting internal conflict in Yugoslavia” and urged the parties to the conflict “to save all non-military targets . . . and not to use them for military purposes”.¹⁷³

188. In a communication to the press in 1993, the ICRC reminded the parties to the conflict in Nagorno-Karabakh of their obligation “to refrain from attacking civilians and civilian property”.¹⁷⁴

¹⁶⁸ ICTY, *Kordić and Čerkez case*, Judgement, 26 February 2001, Section V, Disposition.

¹⁶⁹ ICTY, Final Report to the Prosecutor by the Committee Established to Review the NATO Bombing Campaign Against the Federal Republic of Yugoslavia, The Hague, 14 June 2000, § 28.

¹⁷⁰ Frédéric de Mulinen, *Handbook on the Law of War for Armed Forces*, ICRC, Geneva, 1987, § 209.

¹⁷¹ ICRC, The International Committee’s Action in the Middle East, *IRRC*, No. 152, 1973, pp. 584–585.

¹⁷² ICRC, Memorandum on the Applicability of International Humanitarian Law, 14 December 1990, § II, *IRRC*, No. 280, 1991, p. 24.

¹⁷³ Yugoslav Red Cross and Hungarian Red Cross, Joint Statement, Subotica, 25 October 1991.

¹⁷⁴ ICRC, Communication to the Press No. 93/25, Nagorno-Karabakh conflict: 60,000 civilians flee fighting in south-western Azerbaijan, 19 August 1993.

189. In a communication to the press in 1993, the ICRC reminded the parties to the conflict in Georgia of their obligation “to refrain from attacking civilians and civilian property”.¹⁷⁵

190. In a press release issued in 1994 in the context of the conflict in Yemen, the ICRC stated that “attacks against civilians and civilian property are prohibited”.¹⁷⁶

191. In 1994, in a Memorandum on Respect for International Humanitarian Law in Angola, the ICRC stated that “attacks on civilians or civilian objects are prohibited”.¹⁷⁷

192. In 1994, in a Memorandum on Compliance with International Humanitarian Law by the Forces Participating in Opération Turquoise in the Great Lakes region, the ICRC stated that “it is prohibited to direct attacks against civilian persons or objects”.¹⁷⁸

193. In a communication to the press in 2000, the ICRC reminded both the Sri Lankan security forces and the LTTE of their obligation to comply with IHL, which provided for the protection of the civilian population against the effects of the hostilities. The ICRC called on both parties to ensure that the civilian population and civilian property were protected and respected at all times.¹⁷⁹

VI. Other Practice

194. In 1979, an armed group wrote to the ICRC to confirm its commitment to IHL and to denounce attacks against civilian objectives it claimed had been carried out by one of the parties to the conflict.¹⁸⁰

195. In 1980, an armed opposition group expressed its acceptance of the fundamental principles of IHL as formulated by the ICRC, including the principle that “the parties to the conflict shall at all times distinguish between the civilian population and combatants in order to spare the civilian population and civilian objects”.¹⁸¹

196. In their commentary on the 1977 Additional Protocols, Bothe, Partsch and Solf state that:

The concept of general protection [in Article 13(1) AP II], however, is broad enough to cover protections which flow as necessary inferences from other provisions of

¹⁷⁵ ICRC, Communication to the Press No. 93/31, Georgia: ICRC Activities in Abkhazia, 20 September 1993.

¹⁷⁶ ICRC, Press Release No. 1773, Fighting in Yemen, 9 May 1994; see also Press Release No. 1775, Yemen: ICRC active on both sides appeals to belligerents, 12 May 1994.

¹⁷⁷ ICRC, Memorandum on Respect for International Humanitarian Law in Angola, 8 June 1994, § II, *IRRC*, No. 320, 1997, p. 503.

¹⁷⁸ ICRC, Memorandum on Compliance with International Humanitarian Law by the Forces Participating in Opération Turquoise, 23 June 1994, § II, reprinted in Marco Sassòli and Antoine A. Bouvier, *How Does Law Protect in War?*, ICRC, Geneva, 1999, p. 1308.

¹⁷⁹ ICRC, Communication to the Press No. 00/13, Sri Lanka: ICRC urges both parties to respect civilians, 11 May 2000.

¹⁸⁰ ICRC archive document. ¹⁸¹ ICRC archive document.

Protocol II. Thus, while there is no explicit provision affording general protection for civilian objects other than the special objects covered by Arts. 14 to 16, the protection against direct attack of para. 2 also precludes attacks against civilian objects used as dwellings or otherwise occupied by civilians not then supporting the military effort. The definition of civilian objects in Art. 52(2) of Protocol I provides the basis for construing the extent of such protection of civilian objects.¹⁸²

197. In 1992, an armed opposition group requested that the ICRC put pressure on the government to stop the aerial bombardment of civilian objects.¹⁸³

198. In 2001, in a report on Israel and the occupied territories, Amnesty International stated that:

It is a basic rule of customary international law that civilians and civilian objects must never be made the targets of an attack. This rule applies in all circumstances including in the midst of full-scale armed conflict. Due to its customary nature it is binding on all parties. Israel is prohibited from attacking civilians and civilian objects. Palestinians are also prohibited from targeting Israeli civilians, including settlers who are not bearing arms, and civilian objects.¹⁸⁴

Attacks against places of civilian concentration

Note: For practice concerning attacks on open towns and non-defended localities, see Chapter 11, section C. For practice concerning attacks against buildings dedicated to religion, education, art, science or charitable purposes, see Chapter 12, section A.

I. Treaties and Other Instruments

Treaties

199. No practice was found.

Other Instruments

200. Article 6 of the 1956 New Delhi Draft Rules states that "it is also forbidden to attack dwellings, installations . . . which are for the exclusive use of, and occupied by, the civilian population".

II. National Practice

Military Manuals

201. Cameroon's *Instructors' Manual* prohibits the bombardment of residential areas.¹⁸⁵

¹⁸² Michael Bothe, Karl Joseph Partsch, Waldemar A. Solf (eds.), *New Rules for Victims of Armed Conflicts*, Martinus Nijhoff, The Hague, 1982, p. 677.

¹⁸³ ICRC archive document.

¹⁸⁴ Amnesty International, *Israel and the Occupied Territories: State Assassinations and Other Unlawful Killings*, AI Index MDE 15/005/2001, London, 21 February 2001, p. 2, see also p. 29.

¹⁸⁵ Cameroon, *Instructors' Manual* (1992), pp. 111 and 150.

202. The Military Manual of the Dominican Republic states that “under the laws of war, you are not allowed to attack villages, towns, or cities. However, when your mission requires, you are allowed to engage enemy troops, equipment, or supplies in a village, town or city”.¹⁸⁶

203. Ecuador’s Naval Manual states that “the wanton or deliberate destruction of areas of concentrated civilian habitation, including cities, towns, and villages, is prohibited”.¹⁸⁷

204. Indonesia’s Directive on Human Rights in Irian Jaya and Maluku provides that “towns, villages and residences, even if used for food-stuff and equipment stockpile, should not be attacked”.¹⁸⁸

205. Romania’s Soldiers’ Manual states that “attacks of cities [and] villages” are prohibited.¹⁸⁹

206. The US Rules of Engagement for Operation Desert Storm gives the following instruction:

Do not fire into civilian populated areas or buildings which are not defended or being used for military purposes. [S]chools . . . will not be engaged except in self-defense. Do not attack traditional civilian objects, such as houses, unless they are being used by the enemy for military purposes and neutralization assists in mission accomplishment.¹⁹⁰

207. The US Naval Handbook states that “the wanton or deliberate destruction of areas of concentrated civilian habitation, including cities, towns, and villages, is prohibited”.¹⁹¹

National Legislation

208. Azerbaijan’s Criminal Code provides that “directing attacks against . . . living places” constitutes a war crime in international and non-international armed conflicts.¹⁹²

209. Under the Criminal Code of the Federation of Bosnia and Herzegovina, it is a war crime to commit or order the commission of “an attack on . . . a [civilian] settlement”.¹⁹³ The Criminal Code of the Republika Srpska contains the same provision.¹⁹⁴

210. Under Croatia’s Criminal Code, it is a war crime to commit or order the commission of “an attack against . . . [civilian] settlements”.¹⁹⁵

¹⁸⁶ Dominican Republic, *Military Manual* (1980), p. 3.

¹⁸⁷ Ecuador, *Naval Manual* (1989), § 8.5.1.1.

¹⁸⁸ Indonesia, *Directive on Human Rights in Irian Jaya and Maluku* (1995), § 9(b).

¹⁸⁹ Romania, *Soldiers’ Manual* (1991), p. 34.

¹⁹⁰ US, *Rules of Engagement for Operation Desert Storm* (1991), §§ B, C and G.

¹⁹¹ US, *Naval Handbook* (1995), § 8.5.1.1.

¹⁹² Azerbaijan, *Criminal Code* (1999), Article 116(7).

¹⁹³ Bosnia and Herzegovina, Federation, *Criminal Code* (1998), Article 154(1).

¹⁹⁴ Bosnia and Herzegovina, Republika Srpska, *Criminal Code* (2000), Article 433(1).

¹⁹⁵ Croatia, *Criminal Code* (1997), Article 158(1).

211. Under Slovenia's Penal Code, it is a war crime to commit or order the commission of "an attack . . . on built-up areas".¹⁹⁶

212. Uruguay's Military Penal Code as amended punishes anyone who carries out "an unjustified attack against . . . schools".¹⁹⁷

213. Under the Penal Code as amended of the SFRY (FRY), it is a war crime to commit or order the commission of "an attack on . . . a [civilian] settlement".¹⁹⁸

National Case-law

214. No practice was found.

Other National Practice

215. In 1996, during a debate in the UN Security Council, in a brief report of alleged violations of IHL by the Taliban, Afghanistan stated that, during the 1994 failed coup, more than 3,000 rockets had rained down on the innocent civilian population of Kabul and on residential areas of the town.¹⁹⁹

216. In 1992, in letters addressed to the UN Secretary-General and President of the UN Security Council respectively, Azerbaijan referred to data provided to the UN Fact-Finding Mission in the region concerning illegal actions by Armenia, including the destruction of and damage caused to residential buildings.²⁰⁰

217. In 1996, during a debate in the UN Security Council, Botswana commented on the numerous violations of the fundamental human rights of the Afghan civilian population documented by international human rights organisations, listing among such violations the bombing of residential areas.²⁰¹

218. In 1972, in a statement before the UNESCO General Conference, China criticised the US for having "wantonly bombarded Vietnamese cities and villages".²⁰²

219. In 1993, the German Chancellor strongly criticised the "brutal siege and the shelling of the Muslim town of Srebrenica".²⁰³

220. In reply to a message of 9 June 1984 from the UN Secretary-General, the President of Iran stated that:

In the course of more than three and a half years since the beginning of this war, Iraq has repeatedly attacked our residential areas in contravention of all international

¹⁹⁶ Slovenia, *Penal Code* (1994), Article 374(1).

¹⁹⁷ Uruguay, *Military Penal Code as amended* (1943), Article 58(12).

¹⁹⁸ SFRY (FRY), *Penal Code as amended* (1976), Article 142(1).

¹⁹⁹ Afghanistan, Statement before the UN Security Council, UN Doc. S/PV.3648, 9 April 1996, p. 3.

²⁰⁰ Azerbaijan, Identical letters dated 11 June 1992 addressed respectively to the UN Secretary-General and the President of the UN Security Council, UN Doc. S/24103, 16 June 1992, p. 1.

²⁰¹ Botswana, Statement before the UN Security Council, UN Doc. S/PV.3648, 9 April 1996, p. 15.

²⁰² China, Statement before the General Conference of UNESCO, 25 October 1972, *Selected Documents of the Chinese Delegation to the United Nations*, The People's Press, Beijing, 1972, p. 239.

²⁰³ Germany, Statement by the Chancellor, Helmut Kohl, 19 April 1993, *Bulletin*, No. 31, Presse- und Informationsamt der Bundesregierung, Bonn, 21 April 1993, p. 270.

and humanitarian principles . . . The Government of the Islamic Republic of Iran, however, in order to show its good faith, responds positively to your proposal on ending attacks on residential areas . . . I deem it necessary to underline that the good will shown by the Islamic Republic of Iran in response to your proposal to stop attacks on civilian areas is conditional on the total ending of the Iraqi régime's criminal acts of bombarding Iranian cities.²⁰⁴

221. In 1991, in a letter addressed to the UN Secretary-General during the Gulf War, Iran stated that:

In accordance with the same principles governing its foreign policy and consistent with the very strong and clear position adopted against bombardment of civilian areas in Iraq by allied forces, the Islamic Republic of Iran cannot remain but alarmed at numerous reports of horrifying attacks by government forces against innocent civilians.²⁰⁵

222. According to the Report on the Practice of Iran, during the Iran-Iraq War, the Iranian authorities accused Iraq on many occasions of having carried out attacks on civilian objects such as schools, houses, hospitals and refugee camps.²⁰⁶

223. In 1983, Iraq's Deputy Prime Minister and Minister for Foreign Affairs declared the readiness of Iraq "to sign a special peace treaty between Iraq and Iran, under United Nations supervision, wherein the two parties undertake not to attack towns and villages on the two sides, in spite of the continuation of the war".²⁰⁷

224. In reply to a message from the UN Secretary-General of 9 June 1984, the President of Iraq stated that:

I wish to remind you, first of all, that since the armed conflict began the Iranian side has continually resorted to the bombing of our frontier towns and villages and other civilian targets and for a long time persisted in denying it even after the facts had been verified by the United Nations mission . . . I would also like to remind you that, in June 1983, on behalf of Iraq I took the initiative of proposing the conclusion under international auspices of an agreement between Iran and Iraq under which the two parties would refrain from bombing civilian targets . . . I therefore have the pleasure to inform you that the Iraqi Government accepts your proposal on condition that Iran is committed thereby, and that you make effective arrangements as soon as possible to supervise the implementation by the two parties of their commitments.²⁰⁸

²⁰⁴ Iran, Letter dated 10 June 1984 to the UN Secretary-General, UN Doc. S/16609, 10 June 1984, p. 2.

²⁰⁵ Iran, Letter dated 22 March 1991 to the UN Secretary-General, UN Doc. S/22379, 23 March 1991; see also Letter dated 12 March 1992 to the President of the UN Security Council, UN Doc. S/23703, 12 March 1992.

²⁰⁶ Report on the Practice of Iran, 1997, Chapter 1.3.

²⁰⁷ Iraq, Statement by the Deputy Prime Minister and Minister for Foreign Affairs, Tarek Aziz, 25 May 1983, annexed to Letter dated 27 May 1983 to the UN Secretary-General, UN Doc. S/15804, 27 May 1983.

²⁰⁸ Iraq, Message from the President of Iraq, annexed to Letter dated 10 June 1984 to the UN Secretary-General, UN Doc. S/16610, 19 June 1984, p. 2.

225. The Report on the Practice of Jordan states that Islam prohibits attacks against civilians and mentions an order given by Caliph Abu Bakr (632–634 AD) proscribing the destruction of any dwelling. The report adds that, considering the time at which it was issued, this order should be highly esteemed.²⁰⁹

226. In 1996, during a debate in the UN Security Council on the situation in Lebanon, South Korea called upon both parties to the conflict to cease targeting areas populated by civilians.²¹⁰

227. In 1971, during a debate in the Third Committee of the UN General Assembly concerning respect for human rights in armed conflicts, Liberia stated that it “agreed wholeheartedly with the principle that . . . dwellings . . . should not be the object of military operations as affirmed in [principle 5] of General Assembly resolution 2675 (XXV)”.²¹¹

228. In 1993, in a declaration concerning a report on violations of human rights in Rwanda, the Rwandan government asked the FPR to cease all attacks against civilian targets such as camps for displaced persons, hospitals and schools.²¹²

229. On the basis of replies by army officers to a questionnaire, the Report on the Practice of Rwanda states that an attack against civilians can be defined as an attack against purely civilian targets such as a town or a village exclusively inhabited by civilians.²¹³

230. In 1991, in a report submitted to the UN Security Council on operations in the Gulf War, Saudi Arabia stated that “the cities of the Kingdom of Saudi Arabia have been bombarded by 26 missiles, which have landed in purely civilian localities of no military value”.²¹⁴

231. In 1986, during a debate in the UN Security Council concerning the Iran–Iraq War, the UK voiced strong criticism of the recurrent bombing of civilian centres, qualifying it as a violation of international law under the Geneva Conventions.²¹⁵

232. In 1991, in a report submitted to the UN Security Council on operations in the Gulf War, the US denounced Iraq’s firing of surface-to-surface missiles at Saudi Arabia and Israel and stated that “particularly in regard to Israel, Iraq

²⁰⁹ Report on the Practice of Jordan, 1997, Chapter 1.4.

²¹⁰ South Korea, Statement before the UN Security Council, UN Doc. S/PV.3653, 15 April 1996, p. 11.

²¹¹ Liberia, Statement before the Third Committee of the UN General Assembly, UN Doc. A/C.3/SR.1890, 1 December 1971, § 8.

²¹² Association rwandaise pour la défense des droits de la personne et des libertés publiques *Rapport sur les droits de l’homme au Rwanda, octobre 1992–octobre 1993*, Kigali, December 1993, p. 73.

²¹³ Report on the Practice of Rwanda, 1997, Replies by Rwandan army officers to a questionnaire, Chapter 1.4.

²¹⁴ Saudi Arabia, Report dated 30 January 1991 on the progress of operations for the liberation of Kuwait, annexed to Letter dated 30 January 1991 to the President of the UN Security Council, UN Doc. S/22180, 31 January 1991, p. 2.

²¹⁵ UK, Statement before the UN Security Council, UN Doc. S/PV.2666, 24 February 1986, pp. 21–22.

has targeted these missiles against civilian areas in an obvious sign of Iraqi disregard for civilian casualties".²¹⁶

III. Practice of International Organisations and Conferences

United Nations

233. In a resolution adopted in 1983 in the context of the Iran–Iraq War, the UN Security Council condemned "all violations of international humanitarian law, in particular, the provisions of the Geneva Conventions of 1949 in all their aspects, and calls for the immediate cessation of all military operations against civilian targets, including city and residential areas".²¹⁷

234. In a resolution adopted in 1986 in the context of the Iran–Iraq War, the UN Security Council deplored "the bombing of purely civilian population centres".²¹⁸ This statement was repeated in a subsequent resolution adopted in 1987.²¹⁹

235. In a resolution on Lebanon adopted in 1996, the UN Security Council condemned attacks on civilian targets, including residential areas.²²⁰

236. In a resolution on Georgia adopted in 1998, the UN Security Council condemned the deliberate destruction of houses by Abkhaz forces.²²¹

237. In a resolution adopted in 1999 on children in armed conflicts, the UN Security Council strongly condemned "attacks on objects protected under international law, including places that usually have a significant presence of children such as schools and hospitals" and called on all parties concerned "to put an end to such practices".²²²

238. In 1986, in a statement by its President in the context of the Iran–Iraq War, the UN Security Council declared that:

The members of the Security Council continue to deplore the violation of international humanitarian law and other laws of armed conflict. They express their deepening concern over the widening of the conflict through the escalation of attacks on purely civilian targets, on merchant shipping and oil installations of the littoral States.²²³

239. In 1988, in a statement by its President in the context of the Iran–Iraq War, the UN Security Council declared that:

²¹⁶ US, Letter dated 30 January 1991 to the President of the UN Security Council, UN Doc. S/22173, 30 January 1991, p. 2; see also Letter dated 22 January 1991 to the President of the UN Security Council, UN Doc. S/22130, 22 January 1991, pp. 1–2; and Letter dated 8 February 1991 to the President of the UN Security Council, UN Doc. S/22216, 13 February 1991, p. 2.

²¹⁷ UN Security Council, Res. 540, 31 October 1983, § 2.

²¹⁸ UN Security Council, Res. 582, 24 February 1986, § 2.

²¹⁹ UN Security Council, Res. 598, 20 July 1987, preamble.

²²⁰ UN Security Council, Res. 1052, 18 April 1996, preamble, § 5.

²²¹ UN Security Council, Res. 1187, 30 July 1998, § 4.

²²² UN Security Council, Res. 1261, 25 August 1999, § 2, see also § 18.

²²³ UN Security Council, Statement by the President, UN Doc. S/PV.2730, 22 December 1986, p. 3.

The members of the Security Council . . . strongly deplore the escalation of the hostilities between [Iran and Iraq], particularly against civilian targets and cities that have taken a heavy toll in human lives and caused vast material destruction, in spite of the declared readiness of the belligerent parties to cease such attacks.²²⁴

240. In 1998, in a statement by its President, the UN Security Council strongly condemned “the targeting of children in armed conflicts” and expressed its readiness “to consider appropriate responses whenever buildings or sites that usually have a significant presence of children such as, *inter alia*, schools, playgrounds, hospitals, are specifically targeted”.²²⁵

241. In Resolution 2675 (XXV) adopted in 1970, the UN General Assembly stated that:

Dwellings and other installations that are used only by civilian populations should not be the object of military operations. Places or areas designated for the sole protection of civilians, such as hospital zones or similar refuges, should not be the object of military operations.²²⁶

242. In a resolution adopted in 1995 on the situation of human rights in the former Yugoslavia, the UN General Assembly condemned “the shelling of residential areas”.²²⁷

243. The UN Commission on Human Rights has repeatedly condemned attacks against villages in the conflict in southern Lebanon. In 1989, for example, the Commission condemned the bombing of villages and civilian populations and qualified such acts as a violation of human rights.²²⁸ Further resolutions referred to the bombardment of villages and civilian areas in southern Lebanon as a violation of human rights.²²⁹

244. In a resolution adopted in 1994 on the situation of human rights in the former Yugoslavia, the UN Commission on Human Rights condemned “the deliberate, murderous shelling” of cities and other civilian areas.²³⁰

245. In a resolution adopted in 1994 on the human rights situation in Iraq, the UN Commission on Human Rights reiterated its deep concern about the destruction of Iraqi towns and villages.²³¹

246. In a resolution adopted in 1998 concerning the human rights situation in southern Lebanon and western Bekaa, the UN Commission on Human rights deplored “the continued Israeli violations of human rights in the occupied

²²⁴ UN Security Council, Statement by the President, UN Doc. S/PV.2798, 16 March 1988, p. 2.

²²⁵ UN Security Council, Statement by the President, UN Doc. S/PRST/1998/18, 29 June 1998, pp. 1–2.

²²⁶ UN General Assembly, Res. 2675 (XXV), 9 December 1970, §§ 5 and 6.

²²⁷ UN General Assembly, Res. 50/193, 22 December 1995, § 6.

²²⁸ UN Commission on Human Rights, Res. 1989/65, 8 March 1989, § 1.

²²⁹ UN Commission on Human Rights, Res. 1990/54, 6 March 1990, § 1; Res. 1991/66, 6 March 1991, § 1; Res. 1992/70, 4 March 1992, § 1; Res. 1993/67, 10 March 1993, § 1; Res. 1994/83, 9 March 1994, § 1; Res. 1995/67, 7 March 1995, § 1; Res. 1998/62, 21 April 1998, § 1.

²³⁰ UN Commission on Human Rights, Res. 1994/72, 9 March 1994, § 7, see also § 32.

²³¹ UN Commission on Human Rights, Res. 1994/74, 9 March 1994, preamble.

zone, demonstrated in particular by . . . the bombardment of peaceful villages and civilian areas, and other practices violating the most fundamental principles of human rights".²³²

247. In 1995, following consultations, the Chairman of the UN Commission on Human Rights issued a statement indicating the consensus of the Commission concerning the situation of human rights in Chechnya, in which the Commission especially deplored "the serious destruction of installations and infrastructure used by civilians".²³³ In a further statement in 1996, the Chairman of the Commission repeated that such wilful destruction was reprehensible and called upon the parties to desist immediately and permanently from any bombardment of civilian towns and villages.²³⁴

248. In resolutions adopted in 1988 and 1989 in the context of the situation in the Israeli-occupied territories, the UN Sub-Commission on Human Rights reaffirmed that GC IV was applicable and considered that attacking and destroying properties and homes was a war crime under international law.²³⁵

249. On 9 June 1984, in a message addressed to the Presidents of Iran and Iraq, the UN Secretary-General stated that:

Deliberate military attacks on civilian areas cannot be condoned by the international community . . . Therefore, I call upon the Governments of the Republic of Iraq and of the Islamic Republic of Iran to declare to the Secretary-General of the United Nations that each undertakes a solemn commitment to end, and in the future refrain from initiating, deliberate military attacks, by aerial bombardment, missiles, shelling or other means, on purely civilian population centres.²³⁶

250. In a statement to the UN Security Council in 1992, the UN Secretary-General reported that "heavy artillery has been used against the civilian population" during the bombardment of the area of Dobrinja, a suburb of Sarajevo close to the airport, adding that these attacks were occurring "despite an agreement . . . by the Serb side to stop shelling civilian areas".²³⁷

251. In 1996, in a report on UNIFIL in Lebanon, the UN Secretary-General referred to an agreement adopted in the summer of 1993. Although the document was not transmitted to the UN, the Secretary-General stated that, based on public statements by Israeli and Hezbollah officials, "it would appear that the Islamic Resistance agreed to refrain from targeting villages and towns in northern Israel, while IDF agreed to refrain from doing the same in Lebanon;

²³² UN Commission on Human Rights, Res. 1998/62, 21 April 1998, § 1.

²³³ UN Commission on Human Rights, Statement by the Chairman, 27 February 1995, UN Doc. E/CN.4/1995/176-E/1995/23, 7 July 1995, § 594.

²³⁴ UN Commission on Human Rights, Statement by the Chairman, 24 April 1996, UN Doc. E/CN.4/1996/177-E/1996/23, 7 July 1996, § 371.

²³⁵ UN Sub-Commission on Human Rights, Res. 1988/10, 31 August 1988, § 3; Res. 1989/4, 31 August 1989, § 3.

²³⁶ UN Secretary-General, Message dated 9 June 1984 to the Presidents of Iran and Iraq, UN Doc. S/16611, 11 June 1984.

²³⁷ UN Secretary-General, Statement to the UN Security Council, 26 June 1992, UN Doc. S/24201, 29 June 1992, p. 1.

there has been no mention of limitations concerning attacks on military targets".²³⁸

252. In 1998, in a report on the situation in Sierra Leone, the UN Secretary-General noted that the office of his Special Envoy continued to receive information about the "destruction of residential and commercial premises and property."²³⁹

253. In 1998, in a report on UNOMSIL in Sierra Leone, the UN Secretary-General mentioned that elements of the former junta continued to shell population centres such as Koidu and Daru.²⁴⁰

254. In 1993, in a report on the situation of human rights in the former Yugoslavia, the Special Rapporteur of the UN Commission on Human Rights condemned the parties to the conflict for the shelling of civilian objects, including residential areas, houses, apartments and schools.²⁴¹

Other International Organisations

255. In 1982, during a debate in the UN General Assembly, Denmark condemned, on behalf of the EC, the invasion of Lebanon by Israeli forces and in particular the bombardment of residential areas in Beirut.²⁴²

256. In a resolution adopted in 1992 on the crisis in the former Yugoslavia, the Parliamentary Assembly of the Council of Europe severely criticised the YPA for the repeated shelling of Dubrovnik and other Croatian cities.²⁴³

257. In a resolution adopted in 1992 on the situation in Bosnia and Herzegovina, the OIC Conference of Ministers of Foreign Affairs expressed its strong condemnation of the deliberate destruction of cities.²⁴⁴

International Conferences

258. In 1993, in a report submitted to the President of the UN Security Council, the Chairman of the Minsk Conference of the CSCE on Nagorno-Karabakh suggested that an official Security Council denunciation should be made of all bombardments and shelling of inhabited areas and population centres in the area of conflict.²⁴⁵

²³⁸ UN Secretary-General, Report on UNIFIL, UN Doc. S/1996/575, 20 July 1996, § 5.

²³⁹ UN Secretary-General, Fifth report on the situation in Sierra Leone, UN Doc. S/1998/486, 9 June 1998, § 37.

²⁴⁰ UN Secretary-General, First progress report on UNOMSIL, UN Doc. S/1998/750, 12 August 1998, § 33.

²⁴¹ UN Commission on Human Rights, Special Rapporteur on the Situation of Human Rights in the Former Yugoslavia, Fifth periodic report, UN Doc. E/CN.4/1994/47, 17 November 1993, §§ 162–164.

²⁴² EC, Statement before the UN General Assembly by Denmark on behalf of the EC, UN Doc. A/ES-7/PV.26, 19 August 1982, p. 13.

²⁴³ Council of Europe, Parliamentary Assembly, Res. 984, 30 June 1992, § 9.

²⁴⁴ OIC, Conference of Ministers of Foreign Affairs, Res. 1/5-EX, 17–18 June 1992, § 89.

²⁴⁵ CSCE, Minsk Conference on Nagorno Karabakh, Report by the Chairman to the President of the UN Security Council, UN Doc. S/26184, 28 July 1993, Annex, § 16(b).

IV. Practice of International Judicial and Quasi-judicial Bodies

259. No practice was found.

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

260. In an appeal issued in October 1973, the ICRC urged all the belligerents in the conflict in the Middle East (Egypt, Iraq, Israel and Syria) to observe forthwith, in particular, the provisions of, *inter alia*, Article 47(2) of draft AP I which stated in part that “objects designed for civilian use, such as houses, dwellings, installations . . . shall not be made the object of attack, except if they are used mainly in support of the military effort”. All governments concerned replied favourably.²⁴⁶

261. In a press release issued in 1984 in the context of the Iran–Iraq War, the ICRC stated that:

In violation of the laws and customs of war, and in particular of the essential principle that military targets must be distinguished from civilian persons and objects, the Iraqi armed forces have continued to bomb Iranian civilian zones. The result was loss of human life on a large scale, and widespread destruction of strictly civilian objects.²⁴⁷

262. In a letter to the Ministry of Defence of a State in 1994, the ICRC pointed out that “the deliberate bombardment of a residential area is a serious violation of the law”.²⁴⁸

VI. Other Practice

263. In 1979, an armed opposition group wrote to the ICRC to confirm its commitment to IHL and stated in particular that it would “avoid attacks on urban areas”.²⁴⁹

264. Rule A6 of the Rules of International Humanitarian Law Governing the Conduct of Hostilities in Non-international Armed Conflicts, adopted in 1990 by the Council of the IIHL, provides that “the general rule prohibiting attacks against the civilian population implies, as a corollary, the prohibition of attacks on dwellings and other installations which are used only by the civilian population”.²⁵⁰

²⁴⁶ ICRC, The International Committee's Action in the Middle East, *IRRC*, No. 152, 1973, pp. 584–585.

²⁴⁷ ICRC, Press Release No. 1480, Conflict between Iran and Iraq and breaches of international humanitarian law: a renewed ICRC appeal, 15 February 1984, *IRRC*, No. 239, 1984, pp. 113–115.

²⁴⁸ ICRC archive document. ²⁴⁹ ICRC archive document.

²⁵⁰ IIHL, Rules of International Humanitarian Law Governing the Conduct of Hostilities in Non-international Armed Conflicts, Rule A6, *IRRC*, No. 278, 1990, p. 393.

Attacks against civilian means of transportation

I. Treaties and Other Instruments

Treaties

265. Article 3 *bis* of the 1944 Chicago Convention provides that “all States must abstain from using force against a civilian plane in flight”.

Other Instruments

266. Based on several documents supplying evidence of outrages committed during the First World War, the 1919 Report of the Commission on Responsibility lists violations of the laws and customs of war which should be subject to criminal prosecution, including the destruction of merchant ships and passenger vessels without warning and without provision for the safety of passengers or crew and the destruction of fishing boats.

267. Article 33 of the 1923 Hague Rules of Air Warfare provides that “belligerent non-military aircraft, whether public or private, flying within the jurisdiction of their own state, are liable to be fired upon unless they make the nearest available landing on the approach of enemy military aircraft”.

268. Article 34 of the 1923 Hague Rules of Air Warfare provides that:

Belligerent non-military aircraft, whether public or private, are liable to be fired upon, if they fly (1) within the jurisdiction of the enemy, or (2) in the immediate vicinity thereof and outside the jurisdiction of their own state or (3) in the immediate vicinity of the military operations of the enemy by land or sea.

269. Article 6 of the 1956 New Delhi Draft Rules prohibits attacks against “installations or means of transport, which are for the exclusive use of, and occupied by, the civilian population”.

270. Paragraph 41 of the 1994 San Remo Manual states that “merchant vessels and civil aircraft are civilian objects unless they are military objectives in accordance with the principles and rules set forth in this manual”.

271. Paragraph 62 of the 1994 San Remo Manual provides that “enemy civil aircraft may only be attacked if they meet the definition of a military objective”.

272. Paragraph 63 of the 1994 San Remo Manual states that the following activities may render enemy civil aircraft military objectives:

- (a) engaging in acts of war on behalf of the enemy, e.g., laying mines, minesweeping, laying or monitoring acoustic sensors, engaging in electronic warfare, intercepting or attacking other civil aircraft, or providing targeting information to enemy forces;
- (b) acting as an auxiliary aircraft to an enemy's armed forces, e.g., transporting troops or military cargo, or refuelling military aircraft;
- (c) being incorporated into or assisting the enemy's intelligence-gathering system, e.g., engaging in reconnaissance, early warning, surveillance, or command, control and communications missions;

- (d) flying under the protection of accompanying enemy warships or military aircraft;
- (e) refusing an order to identify itself, divert from its track, or proceed for visit and search to a belligerent airfield that is safe for the type of aircraft involved and reasonably accessible, or operating fire control equipment that could reasonably be construed to be part of an aircraft weapon system, or on being intercepted clearly manoeuvring to attack the intercepting belligerent military aircraft;
- (f) being armed with air-to-air or air-to-surface weapons; or
- (g) otherwise making an effective contribution to military action.

II. National Practice

Military Manuals

273. Australia's *Commanders' Guide* states that "civilian vessels, aircraft, vehicles and buildings may be lawfully attacked if they contain combatant personnel, military equipment, supplies or are otherwise associated with combat activity inconsistent with their civilian status".²⁵¹

274. Australia's *Defence Force Manual* states that:

Civil aircraft in flight (including state aircraft which are not military aircraft) should not be attacked. They are presumed to be carrying civilians who may not be made the object of direct attack. If there is doubt as to the status of a civil aircraft, it should be called upon to clarify that status. If it fails to do so, or is engaged in non civil activities, such as ferrying troops, it may be attacked. Civil aircraft should avoid entering areas which have been declared combat zones by the belligerents.

Civil aircraft which have been absorbed into a belligerent's air force and are being ferried from the manufacturer to a belligerent for this purpose, may be attacked.²⁵²

275. Benin's *Military Manual* states that:

Foreign civilian aircraft may be attacked when escorted by enemy military aircraft. When flying alone they can be ordered to modify their route or to land or alight on water for inspection . . . If a foreign civilian aircraft refuses to modify its route or to land or alight on water, it may be attacked after due warning.²⁵³

276. According to Burkina Faso's *Disciplinary Regulations*, it is prohibited to attack "the crew and passengers of civil aircraft".²⁵⁴

277. According to Cameroon's *Disciplinary Regulations*, it is prohibited to attack "the crew and passengers of civil aircraft".²⁵⁵

278. Cameroon's *Instructors' Manual* states that "belligerents must . . . distinguish between military and civilian aircraft . . . As a result, only enemy

²⁵¹ Australia, *Commanders' Guide* (1994), § 951.

²⁵² Australia, *Defence Force Manual* (1994), §§ 852 and 853.

²⁵³ Benin, *Military Manual* (1995), Fascicule II, p. 8.

²⁵⁴ Burkina Faso, *Disciplinary Regulations* (1994), Article 35(2).

²⁵⁵ Cameroon, *Disciplinary Regulations* (1975), Article 32.

military aircraft may be attacked; civilian, private or commercial aircraft may only be intercepted."²⁵⁶

279. Canada's LOAC Manual states that civilian aircraft and vehicles are military objectives "if they contain combatants, military equipment or supplies".²⁵⁷ With respect to civil aircraft, the manual specifies that:

Civil aircraft (including state aircraft which are not military aircraft) in flight should not be attacked. They are presumed to be carrying civilians who may not be made the object of direct attack. If there is doubt as to the status of civil aircraft, it should be called upon to clarify that status. If it fails to do so, or is engaged in support of military activities, such as ferrying troops, it may be attacked. Civil aircraft should avoid entering areas which have been declared combat zones by the belligerents, since this increases the risk of their being attacked.²⁵⁸

280. According to Congo's Disciplinary Regulations, it is prohibited to attack "the crew and passengers of civil aircraft".²⁵⁹

281. Croatia's LOAC Compendium provides that "civilian aircraft escorted by enemy military aircraft" and "civilian aircraft that refuse to modify their routes, land or alight on water if so ordered and after warning" are proper targets in the air. The manual adds that "civilian aircraft that do not violate the airspace of a belligerent" are protected aircraft.²⁶⁰

282. Ecuador's Naval Manual provides that:

Civil passenger vessels at sea and civil airliners in flight are subject to capture but are exempt from destruction. Although enemy lines of communication are generally legitimate military targets in modern warfare, civilian passenger vessels at sea, and civil airliners in flight, are exempt from destruction, unless at the time of the encounter they are being utilized by the enemy for a military purpose (e.g., transporting troops or military cargo) or refuse to respond to the directions of the intercepting warship or military aircraft. Such passenger vessels in port and airliners on the ground are not protected from destruction.²⁶¹

283. According to France's Disciplinary Regulations as amended, it is prohibited to attack "the crew and passengers of civil aircraft".²⁶²

284. Germany's Military Manual provides that enemy aircraft used exclusively for the transport of civilians may neither be attacked nor seized. Their protection ends

if such [aircraft] do not comply with conditions lawfully imposed upon them, if they abuse their mission or are engaged in any other activity bringing them under

²⁵⁶ Cameroon, *Instructors' Manual* (1992), p. 113.

²⁵⁷ Canada, *LOAC Manual* (1999), p. 4-2, § 10.

²⁵⁸ Canada, *LOAC Manual* (1999), p. 7-4, § 38.

²⁵⁹ Congo, *Disciplinary Regulations* (1986), Article 32(2).

²⁶⁰ Croatia, *LOAC Compendium* (1991), p. 44.

²⁶¹ Ecuador, *Naval Manual* (1989), § 8.2.3(6).

²⁶² France, *Disciplinary Regulations as amended* (1975), Article 9 bis (2).

the definition of a military objective . . . Such aircraft may be requested to land on ground or water to be searched.²⁶³

285. Hungary's Military Manual provides that "civilian aircraft escorted by enemy military aircraft" and "civilian aircraft that refuse to modify their routes, land or alight on water if so ordered and after warning" are proper targets in the air. The manual adds that "civilian aircraft that do not violate the airspace of a belligerent" are protected aircraft.²⁶⁴

286. Kenya's LOAC Manual provides that "specifically protected transport shall be allowed to pursue their assignment as long as needed. Their mission, contents and effective use may be verified by inspection (e.g. aircraft may be ordered to land for such inspection)."²⁶⁵ The manual further states that:

Subject to prohibitions and restrictions on access to national air space, foreign aircraft except enemy military aircraft may not be attacked. Foreign civilian aircraft may be attacked:

- (a) when escorted by enemy military aircraft, or
- (b) when flying alone under the conditions stated below.

Foreign civilian aircraft can be ordered to modify their route or to land or alight on water for inspection . . . If a foreign civilian aircraft refuses to modify its route or to land or alight on water, it may be attacked after due warning. The provisions of this part governing foreign civilian aircraft can be applied by analogy to neutral military aircraft.²⁶⁶

287. According to Morocco's Disciplinary Regulations, it is prohibited to attack "the crew and passengers of civil aircraft".²⁶⁷

288. New Zealand's Military Manual states that:

Civilian vessels, aircraft, vehicles and buildings may be lawfully attacked if they contain combatant personnel or military equipment or supplies or are otherwise associated with combat activity inconsistent with their civilian status and if collateral damage would not be excessive under the circumstances.²⁶⁸

The manual further states that:

Civil aircraft (including State aircraft which are not military aircraft) in flight should not be attacked. They are presumed to be carrying civilians who may not be made the object of direct attack. If there is doubt as to the status of a civil aircraft, it should be called upon to clarify that status. If it fails to do so, or is engaged in non-civil activities, such as ferrying troops, it may be attacked. Civil aircraft should avoid entering areas which have been declared combat zones by the belligerents, since this increases the risk of their being attacked.²⁶⁹

²⁶³ Germany, *Military Manual* (1992), §§ 1034–1036, see also § 463.

²⁶⁴ Hungary, *Military Manual* (1992), p. 71.

²⁶⁵ Kenya, *LOAC Manual* (1997), Précis No. 3, p. 12.

²⁶⁶ Kenya, *LOAC Manual* (1997), Précis No. 4, pp. 10–11.

²⁶⁷ Morocco, *Disciplinary Regulations* (1974), Article 25(2).

²⁶⁸ New Zealand, *Military Manual* (1992), § 516(3), see also § 623(3).

²⁶⁹ New Zealand, *Military Manual* (1992), § 628(1).

289. Nigeria's Military Manual states that "the military character of the objectives and targets must be verified and precaution taken not to attack non-military objectives like merchant ships, civilian aircraft, etc."²⁷⁰ The manual further states that foreign aircraft "of no military importance shall not be captured or attacked except [when] they are of a dubious status, i.e., when it is uncertain whether it is a military objective or not. In that case, it may be stopped and searched so as to establish its status."²⁷¹ The manual also states that "specifically protected . . . transports recognised as such must be respected . . . though they could be inspected to ascertain their contents and effective use"²⁷²

290. According to Nigeria's Manual on the Laws of War, "civilian aircraft belong[ing] to the enemy flying outside their own territory, in a zone controlled by the state or close to it, or near the battle zone can be shot down only when they do not comply with landing orders".²⁷³

291. According to Senegal's Disciplinary Regulations, it is prohibited to attack "the crew and passengers of civil aircraft".²⁷⁴

292. Togo's Military Manual states that:

Foreign civilian aircraft may be attacked when escorted by enemy military aircraft. When flying alone they can be ordered to modify their route or to land or alight on water for inspection . . . If a foreign civilian aircraft refuses to modify its route or to land or alight on water, it may be attacked after due warning.²⁷⁵

293. With respect to civil aircraft, the US Air Force Pamphlet states that:

If identified as a civil aircraft, air transport in flight should not be the object of attack, unless at the time it represents a valid military objective such as when there is an immediate military threat or use. An unauthorized entry into a flight restriction zone might in some conflicts be deemed an immediate military threat. Wherever encountered, enemy civil aircraft are subject to instruction in order to verify status and preclude their involvement . . . Civil aircraft on the ground, as objects of attack, are governed by the rules of what constitutes a legitimate military objective as well as the rules and principles relative to aerial bombardment. As sources of airlift they may, under the circumstances ruling at the time, qualify as important military objectives. Civil aircraft entitled to protection include nonmilitary state aircraft and a state owned airline. The principle of law and humanity protecting civilians and civilian objects from being objects of attack as such, protects civil aircraft in flight, because civil aircraft are presumed to transport civilians. Such an aircraft is not subject to attack in the absence of a determination that it constitutes a valid military objective.²⁷⁶

294. The US Air Force Commander's Handbook states that "civilian vehicles, aircraft, vessels . . . may be the object of attack if they have combatant personnel

²⁷⁰ Nigeria, *Military Manual* (1994), p. 45, § 16(a).

²⁷¹ Nigeria, *Military Manual* (1994), p. 45, § 16(d).

²⁷² Nigeria, *Military Manual* (1994), p. 45, § 16(f).

²⁷³ Nigeria, *Manual on the Laws of War* (undated), § 20(d).

²⁷⁴ Senegal, *Disciplinary Regulations* (1990), Article 34(2).

²⁷⁵ Togo, *Military Manual* (1996), Fascicule II, p. 8.

²⁷⁶ US, *Air Force Pamphlet* (1976), § 4-3.

in them and if collateral damage would not be excessive under the circumstances".²⁷⁷

295. The US Naval Handbook provides that:

Civil passenger vessels at sea and civil airliners in flight are subject to capture but are exempt from destruction. Although enemy lines of communication are generally legitimate military targets in modern warfare, civilian passenger vessels at sea, and civil airliners in flight, are exempt from destruction, unless at the time of the encounter they are being utilized by the enemy for a military purpose (e.g., transporting troops or military cargo) or refuse to respond to the directions of the intercepting warship or military aircraft. Such passenger vessels in port and airliners on the ground are not protected from destruction.²⁷⁸

National Legislation

296. Argentina's Draft Code of Military Justice punishes any soldier who

destroys or damages, in violation of the rules of international law applicable in armed conflict, non-military vessels or aircraft of the adverse Party or of a neutral State, without military necessity and without giving time or adopting measures to provide for the safety of the passengers and the preservation of the documentation on board.²⁷⁹

National Case-law

297. No practice was found.

Other National Practice

298. In a communiqué issued in 1973, the Belgian government condemned the deliberate destruction of a Libyan Boeing by Israeli air force units because it "condemns all violence of which innocent civilians are the victims".²⁸⁰

299. The Report on the Practice of Iran states that during the Iran–Iraq War, the Iranian authorities accused Iraq on many occasions of having carried out attacks against civilian objects, including civilian aircraft, trains and merchant ships.²⁸¹

300. The Report on the Practice of Malaysia states that no civilian aircraft may be attacked.²⁸²

301. The Report on the Practice of Peru refers to a scholar who wrote that in 1879, during a conflict against Chile, a Peruvian admiral refused, on

²⁷⁷ US, *Air Force Commander's Handbook* (1980), § 2-2.

²⁷⁸ US, *Naval Handbook* (1995), § 8.2.3(6).

²⁷⁹ Argentina, *Draft Code of Military Justice* (1998), Article 291, introducing a new Article 875(2) in the *Code of Military Justice as amended* (1951).

²⁸⁰ Belgium, Government communiqué, 22 February 1973, *RBDI*, Vol. XI, 1975, p. 375.

²⁸¹ Report on the Practice of Iran, 1997, Chapter 1.3.

²⁸² Report on the Practice of Malaysia, 1997, Answers to additional questions on Chapter 1.4.

humanitarian grounds, to attack an enemy vessel that he believed to be a transport ship.²⁸³

302. Following investigations by the ICAO Secretary-General into the shooting down of two civil aircraft by the Cuban air force on 24 February 1996, a debate took place on 26 July 1996 in the UN Security Council, during which Poland asserted that the principle that States must refrain from resorting to the use of weapons against civil aircraft in flight was well established in customary international law and codified in Article 3 *bis* of the 1944 Chicago Convention. According to Poland, an attack against a civilian aircraft in flight violates elementary considerations of humanity.²⁸⁴

303. Following investigations by the ICAO Secretary-General into the shooting down of two civil aircraft by the Cuban air force on 24 February 1996, a debate took place on 26 July 1996 in the UN Security Council, during which the US claimed that "Cuba violated the principle of customary law that States must refrain from resorting to the use of weapons against civil aircraft in flight – a principle that applies whether the aircraft are in national or international airspace". According to the US, an attack against a civilian aircraft in flight violates elementary considerations of humanity.²⁸⁵

III. Practice of International Organisations and Conferences

United Nations

304. In resolutions adopted in 1986 and 1987 in the context of the Iran–Iraq War, the UN Security Council deplored attacks against civilian aircraft.²⁸⁶

305. In a report on Angola in 1993, the UN Secretary-General described an incident which took place on 27 May 1993 whereby "UNITA ambushed a train . . . as a result of which up to 300 people, including women and children, died and hundreds of others were wounded. UNITA alleged that the train was ferrying troops and weapons and not civilians, as claimed." Noting that UNAVEM helicopters evacuated 57 seriously injured civilians, mostly women and children, from the site, the Secretary-General supported "the statement made by the President of the Security Council to the press on 8 June 1993 in which the Council strongly condemned the 27 May train attack and urged UNITA's leaders to make sure that its forces abide by the rules of international humanitarian law".²⁸⁷ In a subsequent resolution, the UN Security Council reiterated "its strong condemnation of the attack by UNITA forces, on 27 May 1993,

²⁸³ Report on the Practice of Peru, 1998, Chapter 1.3, referring to E. Angeles Figueroa, *El Derecho Internacional Humanitario y los Conflictos Armados*, Lima, 1992, pp. 119–120.

²⁸⁴ Poland, Statement before the UN Security Council, UN Doc. S/PV.3683, 26 July 1996, p. 19.

²⁸⁵ US, Statement before the UN Security Council, UN Doc. S/PV.3683, 26 July 1996, p. 3.

²⁸⁶ UN Security Council, Res. 582, 24 February 1986, § 2; Res. 598, 20 July 1987, preamble.

²⁸⁷ UN Secretary-General, Further report on UNAVEM II, UN Doc. S/26060, 12 July 1993, § 5.

against a train carrying civilians, and reaffirm[ed] that such criminal attacks are clear violations of international humanitarian law".²⁸⁸

306. In 1996, in a statement by its President in connection with the shooting down of two civil aircraft by the Cuban air force, the UN Security Council stated that:

The Security Council strongly deplores the shooting down by the Cuban air force of two civil aircraft on 24 February 1996, which apparently has resulted in the death of four persons.

The Security Council recalls that according to international law, as reflected in article 3 bis of the International Convention on Civil Aviation of 7 December 1944 added by the Montreal Protocol of 10 May 1984, States must refrain from the use of weapons against civil aircraft in flight and must not endanger the lives of persons on board and the safety of aircraft. States are obliged to respect international law and human rights norms in all circumstances.²⁸⁹

307. Following investigations by the ICAO Secretary-General into the shooting down of two civilian aircraft by the Cuban Air Force in 1996, the UN Security Council adopted a resolution on the conclusions of the ICAO report, in which it condemned:

the use of weapons against civil aircraft in flight as being incompatible with elementary considerations of humanity, the rules of customary international law as codified in article 3 *bis* of the Chicago Convention, and the standards and recommended practices set out in the annexes of the Convention.²⁹⁰

308. In 1993, in a report concerning the situation in Abkhazia, Georgia, the UN Secretary-General stated that he was particularly shocked by deliberate attacks on Georgian aircraft, which had resulted in heavy civilian losses.²⁹¹

Other International Organisations

309. No practice was found.

International Conferences

310. No practice was found.

IV. Practice of International Judicial and Quasi-judicial Bodies

311. In its final report to the ICTY Prosecutor in 2000, the Committee Established to Review the NATO Bombing Campaign Against the Federal Republic of Yugoslavia stated, concerning the "attack on a civilian passenger train at the Grdelica Gorge on 12 April 1999", that "the bridge was a legitimate military

²⁸⁸ UN Security Council, Res. 851, 15 July 1993, § 18.

²⁸⁹ UN Security Council, Statement by the President, UN Doc. S/PRST/1996/9, 27 February 1996.

²⁹⁰ UN Security Council, Res. 1067, 26 July 1996, § 6.

²⁹¹ UN Security Council, Report concerning the situation in Abkhazia, Georgia, UN Doc. S/26551, 7 October 1993, § 17.

objective. The passenger train was not deliberately targeted". The Committee did not refer specifically to the civilian character of the passenger train, but implied that, had the train been intentionally targeted, or had there been in the conduct of the attack against the bridge a sufficient "element of recklessness in the conduct of the pilot or weapons systems officer", an investigation could have been opened.²⁹²

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

312. To fulfil its role of disseminating IHL, the ICRC has delegates around the world teaching armed and security forces the following rules of IHL applicable to foreign aircraft:

Subject to prohibitions and restrictions on access to national air space, foreign aircraft, except enemy military aircraft, may not be attacked. Foreign civilian aircraft may be attacked:

- a) when escorted by enemy military aircraft;
- b) when flying alone: under the conditions stated in this chapter.

Foreign civilian aircraft can be ordered to modify their route or to land or alight on water for inspection . . . If a foreign civilian aircraft refuses to modify its route or to land or alight on water, it may be attacked after due warning.²⁹³

313. In an appeal issued in October 1973, the ICRC urged all the belligerents in the conflict in the Middle East (Egypt, Iraq, Israel and Syria) to observe forthwith, in particular, the provisions of, *inter alia*, Article 47(2) of draft API which stated in part that "objects designed for civilian use, such as . . . installations and means of transport . . . shall not be made the object of attack, except if they are used mainly in support of the military effort". All governments concerned replied favourably.²⁹⁴

314. In an appeal issued in 1979 with respect to the conflict in Rhodesia/Zimbabwe, the ICRC specifically requested that the Patriotic Front "cease the shooting down of civilian passenger aircraft".²⁹⁵

VI. Other Practice

315. No practice was found.

²⁹² ICTY, Final Report to the Prosecutor by the Committee Established to Review the NATO Bombing Campaign Against the Federal Republic of Yugoslavia, The Hague, 14 June 2000, § 62.

²⁹³ Frédéric de Mulinen, *Handbook on the Law of War for Armed Forces*, ICRC, Geneva, 1987, §§ 466–469.

²⁹⁴ ICRC, The International Committee's Action in the Middle East, *IRRC*, No. 152, 1973, pp. 584–585.

²⁹⁵ ICRC, Conflict in Southern Africa: ICRC appeal, 19 March 1979, §§ 5 and 6, *IRRC*, No. 209, 1979, pp. 88–89.

B. Definition of Military Objectives

General definition

I. Treaties and Other Instruments

Treaties

316. Article 2 of 1907 Hague Convention (IX) allows the bombardment of “military works, military or naval establishments, depots of arms or war *matériel*, workshops or plant which could be utilized for the needs of the hostile fleet or army, and the ships of war in the harbour”.

317. Article 19 GC I and Article 4 Annex I GC I and Article 18 GC IV and Article 4 Annex I GC IV use the term “military objectives” without, however, defining it.

318. The 1954 Hague Convention does not define a military objective, but Article 8 provides that refuges intended to shelter movable cultural property, centres containing monuments and other immovable cultural property of very great importance may be placed under special protection, provided that they:

- a) are situated at an adequate distance from any large industrial centre or from any important military objective constituting a vulnerable point, such as, for example, an aerodrome, broadcasting station, establishment engaged upon work of national defence, a port or railway station of relative importance or a main line of communication;
- b) are not used for military purposes.

319. Article 52(2) AP I provides that:

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

Article 52 AP I was adopted by 79 votes in favour, none against and 7 abstentions.²⁹⁶

320. Upon ratification of AP I, Canada, France and Spain stated that the term “military advantage” as used in Article 52(2) AP I was understood to refer to the advantage anticipated from the attack considered as a whole and not only from isolated or particular parts of the attack.²⁹⁷

321. According to the identical definitions provided by Article 2(4) of the 1980 Protocol II to the CCW, Article 2(6) of the 1996 Amended Protocol II to the CCW and Article 1(3) of the 1980 Protocol III to the CCW:

²⁹⁶ CDDH, *Official Records*, Vol. VI, CDDH/SR.41, 26 May 1977, p. 168.

²⁹⁷ Canada, Reservations and statements of understanding made upon ratification of AP I, 20 November 1990, § 10; France, Reservations and declarations made upon ratification of AP I, 11 April 2001, § 10; Spain, Interpretative declarations made upon ratification of AP I, 21 April 1989, § 6.

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

322. Article 1(f) of the 1999 Second Protocol to the 1954 Hague Convention defines a military objective as:

An object which by its nature, location, purpose, or use makes an effective contribution to military action and whose total or partial destruction, capture or neutralization, in the circumstances ruling at the time, offers a definite military advantage.

323. Upon signature of the 1998 ICC Statute, Egypt declared that “the military objectives referred to in article 8, paragraph 2 (b) of the Statute must be defined in the light of the principles, rules and provisions of international humanitarian law”.²⁹⁸

Other Instruments

324. Article 15 of the 1863 Lieber Code provides that:

Military necessity admits of all direct destruction of life or limb of “armed” enemies, and of other persons whose destruction is incidentally “unavoidable” in the armed contests of the war; it allows of the capturing of every armed enemy, and every enemy of importance to the hostile government, or of peculiar danger to the captor; it allows of all destruction of property, and obstruction of the ways and channels of traffic, travel, or communication, and of all withholding of sustenance or means of life from the enemy; of the appropriation of whatever an enemy’s country affords necessary for the subsistence and safety of the army. Men who take up arms against one another in public war do not cease on this account to be moral beings, responsible to one another and to God.

325. Article 24(1) of the 1923 Hague Rules of Air Warfare provides that “aerial bombardment is legitimate only when directed at a military objective, that is to say, an object of which the destruction or injury would constitute a distinct military advantage to the belligerent”.

326. Article 7 of the 1956 New Delhi Draft Rules provides that:

Only objectives belonging to the categories of objective which, in view of their essential characteristics, are generally acknowledged to be of military importance, may be considered as military objectives. Those categories are listed in the annex to the present rules.

However, even if they belong to one of those categories, they cannot be considered as a military objective where their total or partial destruction, in the circumstances ruling at the time, offers no military advantage.

327. Paragraph 40 of the 1994 San Remo Manual adopts the same definition of military objectives as Article 52(2) AP I.

²⁹⁸ Egypt, Declarations made upon signature of the 1988 ICC Statute, 26 December 2000, § 4(b).

II. National Practice

Military Manuals

328. Military manuals of Argentina, Australia, Belgium, Benin, Cameroon, Canada, Colombia, Croatia, France, Germany, Hungary, Italy, Kenya, Madagascar, Netherlands, New Zealand, South Africa, Spain, Sweden, Togo, UK and US use a definition identical to that of Article 52(2) AP I.²⁹⁹

329. Australia's Defence Force Manual specifies that "the objective must be measured by its effect on the whole military operation or campaign and the attack should not be viewed in isolation. Military advantage includes the security of friendly forces."³⁰⁰

330. Belgium's Regulations on the Tactical Use of Large Units states that "an objective is the final goal of an action. It is defined as either an area of land of tactical importance or as enemy elements that have to be destroyed or neutralised."³⁰¹

331. Ecuador's Naval Manual states that:

Military objectives are combatants and those objects which, by their nature, location, purpose or use, effectively contribute to the enemy's war-fighting or war-sustaining capability and whose total or partial destruction, capture, or neutralization would constitute a definite military advantage to the attacker under the circumstances at the time of the attack. Military advantage may involve a variety of considerations, including the security of the attacking forces.³⁰²

332. Germany's Military Manual states that "the term 'military advantage' refers to the advantage which can be expected of an attack as a whole and not only of isolated or specific parts of the attack".³⁰³

333. Indonesia's Directive on Human Rights in Irian Jaya and Maluku provides that "only property which contributes to the objectives of rebels ('GPK') may be attacked".³⁰⁴

334. Italy's IHL Manual states that "the military advantage expected from an attack must be evaluated in the light of the attack as a whole and not only of

²⁹⁹ Argentina, *Law of War Manual* (1989), §§ 4.02(2) and 4.19; Australia, *Defence Force Manual* (1994), §§ 525 and 916(c); Belgium, *Law of War Manual* (1983), p. 27; Benin, *Military Manual* (1995), Fascicule I, pp. 12–13; Cameroon, *Instructors' Manual* (1992), p. 81, see also p. 17; Canada, *LOAC Manual* (1999), p. 4-1, § 8; Canada, *Code of Conduct* (2001), Rule 1, § 4; Colombia, *Instructors' Manual* (1999), pp. 16 and 17; Croatia, *LOAC Compendium* (1991), p. 7; France, *LOAC Teaching Note* (2000), p. 2; France, *LOAC Manual* (2001), p. 90; Germany, *Military Manual* (1992), § 442; Hungary, *Military Manual* (1992), p. 18; Italy, *IHL Manual* (1991), Vol. I, § 12; Kenya, *LOAC Manual* (1997), Précis No. 2, p. 11; Madagascar, *Military Manual* (1994), Fiche No. 2-SO, § C; Netherlands, *Military Manual* (1993), pp. V-2 and V-3; New Zealand, *Military Manual* (1992), § 516(1), see also § 623(1); South Africa, *LOAC Manual* (1996), § 24(d)(iii); Spain, *LOAC Manual* (1996), Vol. I, §§ 4.2.b and 4.2.b.(2); Sweden, *IHL Manual* (1991), Section 3.2.1.5, pp. 53–54; Togo, *Military Manual* (1996), Fascicule I, pp. 13–14; UK, *LOAC Manual* (1981), Section 4, p. 13, § 3(b)(2); US, *Air Force Pamphlet* (1976), § 5-3(b)(1).

³⁰⁰ Australia, *Defence Force Manual* (1994), § 525.

³⁰¹ Belgium, *Regulations on the Tactical Use of Large Units* (1994), § 210.

³⁰² Ecuador, *Naval Manual* (1989), § 8.1.1. ³⁰³ Germany, *Military Manual* (1992), § 444.

³⁰⁴ Indonesia, *Directive on Human Rights in Irian Jaya and Maluku* (1995), § 9(a).

isolated elements or parts of the attack and must be evaluated on the basis of the information available at the time".³⁰⁵

335. The Military Manual of the Netherlands notes that "the definition of 'military objectives' implies that it depends on the circumstances of the moment whether an object is a military objective. The definition leaves the necessary freedom of judgement to the commander on the spot."³⁰⁶

336. New Zealand's Military Manual specifies that:

The military advantage at the time of attack is that advantage from the military campaign or operation of which the attack is a part considered as a whole and not only from isolated or particular parts of that campaign or operation. Military advantage involves a variety of considerations including the security of the attacking forces.³⁰⁷

337. Spain's LOAC Manual states that the military advantage to be gained from an attack has to be interpreted as "that which is anticipated, in the concrete circumstances of the moment, from the attack as a whole, and not from parts thereof".³⁰⁸

338. Sweden's IHL Manual considers that:

According to the definition [of military objectives contained in Article 52(2) AP I,] it is up to the attacker to decide whether the nature, location, purpose or use of the property can admit of its being classified as a military objective and thus as a permissible object of attack. This formulation undeniably gives the military commander great latitude in deciding, but he must also take account of the unintentional damage that may occur. The proportionality rule must always enter into the assessment even though this is not directly stated in the text of Article 52.³⁰⁹

339. The US Naval Handbook states that:

Military objectives are combatants and those objects which, by their nature, location, purpose or use, effectively contribute to the enemy's war-fighting or war-sustaining capability and whose total or partial destruction, capture, or neutralization would constitute a definite military advantage to the attacker under the circumstances at the time of the attack. Military advantage may involve a variety of considerations, including the security of the attacking force.³¹⁰

340. The YPA Military Manual of the SFRY (FRY) defines military objectives as "any object which by its nature, location, purpose or use effectively contributes to military action and whose total or partial destruction offers a military advantage during the attack or in the further course of the operations".³¹¹

³⁰⁵ Italy, *IHL Manual* (1991), Vol. I, § 12. ³⁰⁶ Netherlands, *Military Manual* (1993), p. V-3.

³⁰⁷ New Zealand, *Military Manual* (1992), § 516(1), see also § 623(1).

³⁰⁸ Spain, *LOAC Manual* (1996), Vol. I, § 4.2.b.(2).

³⁰⁹ Sweden, *IHL Manual* (1991), Section 3.2.1.5, p. 54.

³¹⁰ US, *Naval Handbook* (1995), § 8.1.1. ³¹¹ SFRY (FRY), *YPA Military Manual* (1988), § 71.

National Legislation

341. Italy's Law of War Decree as amended states that "it is lawful to bombard directly enemy targets whose destruction, whether total or partial, may be to the advantage of the military operations".³¹²

342. Spain's Penal Code punishes:

anyone who, during an armed conflict . . . attacks . . . civilian objects of the adverse party causing their destruction, provided the objects do not, in the circumstances ruling at the time, offer a definite military advantage nor make an effective contribution to the military action of the adversary.³¹³

National Case-law

343. No practice was found.

Other National Practice

344. The Report on the Practice of Algeria, referring expressly to the notion of "effective contribution" to military action resulting from the nature, location, purpose or use of an object, asserts that the criteria set forth in Article 52(2) AP I were already taken into consideration during the Algerian war of independence.³¹⁴

345. The Report on the Practice of Botswana asserts that the government of Botswana endorses Article 52 AP I and no official document was found rejecting the definition of a military objective provided in Article 52(2) AP I.³¹⁵

346. The Report on the Practice of Colombia notes that the government and the Defensoría del Pueblo (Ombudsman's Office) adopt the definition of military objectives laid down in Article 52 AP I in order to draw a distinction between military objectives and civilian objects.³¹⁶

347. According to the Report on the Practice of Iran, during the Iran–Iraq War, Iran always insisted that it had no intention of attacking civilian objects, all targets being "military objectives or objects which by their nature, location, purpose or use made an effective contribution to military action".³¹⁷

348. On the basis of the reply by Iraq's Ministry of Defence to a questionnaire, the Report on the Practice of Iraq states that the Iraqi armed forces consider that the definition of a military objective set forth in Article 52(2) AP I is part of customary international law.³¹⁸

³¹² Italy, *Law of War Decree as amended* (1938), Article 40.

³¹³ Spain, *Penal Code* (1995), Article 613(1)(b).

³¹⁴ Report on the Practice of Algeria, 1997, Chapter 1.3.

³¹⁵ Report on the Practice of Botswana, 1998, Answers to additional questions on Chapter 1.3.

³¹⁶ Report on the Practice of Colombia, 1998, Chapter 1.3, referring to Defensoría del Pueblo, *Cuarto informe anual del defensor del pueblo al congreso de Colombia*, Santafé de Bogotá, September 1997, pp. 64–65.

³¹⁷ Report on the Practice of Iran, 1997, Chapter 1.3.

³¹⁸ Report on the Practice of Iraq, 1998, Reply by the Iraqi Ministry of Defence to a questionnaire, July 1997, Chapter 1.3.

349. According to the Report on the Practice of Israel, the IDF has no generally applicable definition of what constitutes a “military target”, but its practice most closely reflects the definition found in Article 52(2) AP I.³¹⁹

350. Prior to the adoption of UN General Assembly Resolution 47/37 in 1992 on the protection of the environment in times of armed conflict, Jordan and the US submitted a memorandum to the Sixth Committee of the UN General Assembly entitled “International Law Providing Protection to the Environment in Times of Armed Conflict”. The memorandum stated that “the customary rule that, in so far as objects are concerned, military objectives are limited to those objects which by their nature, location, purpose or use make an effective contribution to military action and whose total or partial destruction, capture or neutralization, in the circumstances ruling at the time, offers a definite military advantage” provides protection for the environment in times of armed conflict.³²⁰

351. The Report on the Practice of Jordan states that the definition of a military objective set forth in Article 52(2) AP I is part of customary international law.³²¹

352. The Report on the Practice of Malaysia notes that although no written law defines the term military objective, the security forces describe military objectives as “targets of military interest” and “military targets”. While the former may include civilian objects like the runway of a civilian airport, the latter only refers to objects belonging to the military. The military character of a target will thus depend on the circumstances and the degree of strategic advantage it offers.³²²

353. At the CDDH, Mexico stated that it believed draft Article 47 AP I (now Article 52) to be so essential that it “cannot be the subject of any reservations whatsoever since these would be inconsistent with the aim and purpose of Protocol I and undermine its basis”.³²³

354. Referring to military documents using similar wording, the Report on the Practice of the Philippines affirms the customary nature of Article 52(2) AP I.³²⁴

355. On the basis of a statement by the Syrian Minister of Foreign Affairs before the UN General Assembly in 1997, the Report on the Practice of Syria asserts that Syria considers Article 52(2) AP I to be part of customary international law.³²⁵

³¹⁹ Report on the Practice of Israel, 1997, Answers to additional questions on Chapter 1.3.

³²⁰ Jordan and US, International Law Providing Protection to the Environment in Times of Armed Conflict, annexed to Letter dated 28 September 1992 to the Chairman of the Sixth Committee of the UN General Assembly, UN Doc. A/C.6/47/3, 28 September 1992, § 1(i).

³²¹ Report on the Practice of Jordan, 1997, Chapter 1.3.

³²² Report on the Practice of Malaysia, 1997, Chapter 1.3 and answers to additional questions on Chapter 1.3.

³²³ Mexico, Statement at the CDDH, *Official Records*, Vol. VI, CDDH/SR.41, 26 May 1977, p. 193.

³²⁴ Report on the Practice of Philippines, 1997, Chapter 1.3.

³²⁵ Report on the Practice of Syria, 1997, Chapter 1.3, referring to Statement by the Syrian Minister of Foreign Affairs before the UN General Assembly, 1 October 1997.

356. In 1991, in a report submitted to the UN Security Council on operations in the Gulf War, the UK stated that “operations by United Kingdom forces have involved aerial attacks on Iraqi installations supporting Iraq’s capacity to sustain its illegal occupation of Kuwait”.³²⁶

357. In 1972, the General Counsel of the US Department of Defense stated that:

In the application of the laws of war, it is important that there be a general understanding in the world community as to what shall be legitimate military objectives which may be attacked by air bombardment under the limitations imposed by treaty or by customary international law. Attempts to limit the effects of attacks in an unrealistic manner, by definition or otherwise, solely to the essential war making potential of enemy States have not been successful. For example, such attempts as the 1923 Hague Rules of Air Warfare, proposed by an International Commission of Jurists, and the 1956 ICRC *Draft Rules for the Limitation of Dangers Incurred by the Civilian Population in Time of War* were not accepted by States and therefore do not reflect the laws of war either as customary international law or as adopted by treaty. [The General Counsel then refers to Articles 1 and 2 of the 1907 Hague Convention (IX) and Article 8 of the 1954 Hague Convention as reflecting customary international law.] The test applicable from the customary international law, restated in [Article 8 of] the Hague Cultural Property Convention, is that the war making potential of such facilities to a party to the conflict may outweigh their importance to the civilian economy and deny them immunity from attack. Turning to the deficiencies in the Resolutions of the Institut de Droit International [adopted at its Edinburgh Session in 1969], and with the foregoing in view, it cannot be said that Paragraph 2, which refers to legal restraints that there must be an “immediate” military advantage, reflects the law of armed conflict that has been adopted in the practices of States.³²⁷

358. In 1987, the Deputy Legal Adviser of the US Department of State stated that “the United States has no great concern over the new definition of ‘military objective’ set forth in Article 52(2) of Protocol I”.³²⁸

359. In 1992, in its final report to Congress on the conduct of the Gulf War, the US Department of Defense stated that:

When objects are used concurrently for civilian and military purposes, they are liable to attack if there is a military advantage to be gained in their attack. (“Military advantage” is not restricted to tactical gains, but is linked to the full context of a

³²⁶ UK, Letter dated 21 January 1991 to the President of the UN Security Council, UN Doc. S/22115, 21 January 1991.

³²⁷ US, Letter from J. Fred Buzhardt, General Counsel of the Department of Defense, to Senator Edward Kennedy, Chairman of the Subcommittee on Refugees of the Committee on the Judiciary, 22 September 1972, *AJIL*, Vol. 67, 1973, p. 123.

³²⁸ US, Remarks of Michael J. Matheson, Deputy Legal Adviser, US Department of State, The Sixth Annual American Red Cross-Washington College of Law Conference on International Humanitarian Law: A Workshop on Customary International Law and the 1977 Protocols Additional to the 1949 Geneva Conventions, *American University Journal of International Law and Policy*, Vol. 2, 1987, p. 436.

war strategy, in this instance, the execution of the Coalition war plan for liberation of Kuwait.)³²⁹

360. In 1992, in a review of the legality of extended range anti-armour munition, the US Department of the Air Force relied on the definition of military objectives set forth in Article 52(2) AP I.³³⁰

361. The Report on US Practice states that:

The *opinio juris* of the U.S. government recognizes the definition of military objectives in Article 52 of Additional Protocol I as customary law. United States practice gives a broad reading to this definition, and would include areas of land, objects screening other military objectives, and war-supporting economic facilities as military objectives. The foreseeable military advantage from an attack includes increasing the security of the attacking force. In any event, the anticipated military advantage need not be expected to immediately follow the success of the attack, and may be inferred from the whole military operation of which the attack is a part.³³¹

III. Practice of International Organisations and Conferences

United Nations

362. No practice was found.

Other International Organisations

363. No practice was found.

International Conferences

364. During the Diplomatic Conference on the Second Protocol to the 1954 Hague Convention, France, Israel, Turkey and US, at that time not party to API, referred to the definition of Article 52(2) AP I as an authoritative definition of a military objective. Several other States stressed that the definition of a military objective in the Second Protocol should follow the exact wording of Article 52(2) AP I, including Argentina, Denmark, Germany, Sweden, Switzerland and UK. Another group of States, including Austria, Cameroon (speaking on behalf of the African group), China, Egypt, Greece, Romania and Syria (speaking on behalf of the Arab group) agreed to rely on Article 52(2) AP I, but to tighten its definition so that cultural property could only become a military objective "by its use" and not "by its location, nature or purpose".³³²

³²⁹ US, Department of Defense, Final Report to Congress on the Conduct of the Persian Gulf War, 10 April 1992, Appendix O, The Role of the Law of War, *ILM*, Vol. 31, 1992, p. 623.

³³⁰ US, Department of the Air Force, The Judge Advocate General, Legal Review: Extended Range Antiarmor Munition (ERAM), 16 April 1992, § 7.

³³¹ Report on US Practice, 1997, Chapter 1.3.

³³² Diplomatic Conference on the Second Protocol to the 1954 Hague Convention, The Hague, 15–26 March 1999 (proceedings to be published by UNESCO).

IV. Practice of International Judicial and Quasi-judicial Bodies

365. In its final report to the ICTY Prosecutor in 2000, the Committee Established to Review the NATO Bombing Campaign Against the Federal Republic of Yugoslavia stated that “the most widely accepted definition of ‘military objective’ is that of Article 52 of Additional Protocol I”.³³³ It added that:

Although the Protocol I definition of military objective is not beyond criticism, it provides the contemporary standard which must be used when attempting to determine the lawfulness of particular attacks. That being said, it must be noted once again [that] neither the USA nor France is a party to Additional Protocol I. The definition is, however, generally accepted as part of customary law.³³⁴

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

366. To fulfil its task of disseminating IHL, the ICRC has delegates around the world teaching armed and security forces that the following can be considered military objectives:

- a) the armed forces except medical service and religious personnel and objects;
- b) the establishments, buildings and positions where armed forces or their materiel are located (e.g. positions, barracks, stores);
- c) other objects which by their nature, location, purpose or use make an effective contribution to military action, and whose total or partial destruction, capture or neutralisation, in the circumstances ruling at the time, offer a definite military advantage.³³⁵

367. In an appeal issued in October 1973, the ICRC urged all the belligerents in the conflict in the Middle East (Egypt, Iraq, Israel and Syria) to observe forthwith, in particular, the provisions of, *inter alia*, Article 47(1) of draft API which defined military objectives as “those objectives which are, by their nature, purpose or use, recognized to be of military interest and whose total or partial destruction, in the circumstances ruling at the time, offers a distinct and substantial military advantage”. All governments concerned replied favourably.³³⁶

VI. Other Practice

368. In a resolution adopted during its Edinburgh Session in 1969, the Institute of International Law gave the following definition of a military objective:

³³³ ICTY, Final Report to the Prosecutor by the Committee Established to Review the NATO Bombing Campaign Against the Federal Republic of Yugoslavia, The Hague, 14 June 2000, § 35.

³³⁴ ICTY, Final Report to the Prosecutor by the Committee Established to Review the NATO Bombing Campaign Against the Federal Republic of Yugoslavia, The Hague, 14 June 2000, § 41.

³³⁵ Frédéric de Mulinen, *Handbook on the Law of War for Armed Forces*, ICRC, Geneva, 1987, § 55.

³³⁶ ICRC, The International Committee's Action in the Middle East, *IRRC*, No. 152, 1973, pp. 584–585.

There can be considered as military objectives only those which, by their very nature or purpose or use, make an effective contribution to military action, or exhibit a generally recognised military significance, such that their total or partial destruction in the actual circumstances gives a substantial, specific and immediate military advantage to those who are in a position to destroy them.³³⁷

369. In 2000, in a report on the NATO bombings in the FRY, Amnesty International, having referred to the definition of military objectives contained in Article 52(2) AP I, stated with regard to the bombing of the Serbian State radio and television (RTS) that:

Disrupting government propaganda may help to undermine the morale of the population and the armed forces, but...justifying an attack on a civilian facility on such grounds stretches the meaning of "effective contribution to military action" and "definite military advantage" beyond the acceptable bounds of interpretation.³³⁸

Armed forces

Note: *For practice concerning attacks against combatants, see Chapter 1, section A.*

I. Treaties and Other Instruments

Treaties

370. The preamble to the 1868 St. Petersburg Declaration states that "the only legitimate object which States should endeavour to accomplish during war is to weaken the military forces of the enemy".

Other Instruments

371. According to Article 24(2) of the 1923 Hague Rules of Air Warfare, "military forces" are military objectives.

372. Article 5(1) of the 1938 ILA Draft Convention for the Protection of Civilian Populations against New Engines of War provides that "aerial bombardment is prohibited unless directed at combatant forces".

373. Paragraph I(1) of the proposed annex to Article 7(2) of the 1956 New Delhi Draft Rules stated that "armed forces, including auxiliary or complementary organizations, and persons who, though not belonging to the above-mentioned formations, nevertheless take part in the fighting" are military objectives considered to be of "generally recognized military importance".

³³⁷ Institute of International Law, Edinburgh Session, Resolution on the Distinction between Military Objectives and Non-military Objects in General and Particularly the Problems Associated with Weapons of Mass Destruction, 9 September 1969, § 2.

³³⁸ Amnesty International, *NATO/Federal Republic of Yugoslavia: "Collateral Damage" or Unlawful Killings? Violations of the Laws of War by NATO during Operation Allied Force*, AI Index EUR 70/18/00, London, June 2000, p. 43.

II. National Practice

Military Manuals

374. Australia's Defence Force Manual lists among military objectives "all persons taking a direct part in hostilities, whether military or civilian".³³⁹

375. Belgium's Law of War Manual considers combatants to be military objectives.³⁴⁰

376. Benin's Military Manual considers the armed forces, with the exception of medical and religious personnel and objects, to be military objectives.³⁴¹

377. Cameroon's Instructors' Manual states that the armed forces are considered military objectives, with the exception of religious and medical personnel.³⁴²

378. Canada's LOAC Manual considers that combatants, airborne troops and unlawful combatants are "legitimate targets".³⁴³

379. According to Colombia's Instructors' Manual, combatants are military objectives.³⁴⁴

380. According to Croatia's LOAC Compendium, military objectives include the armed forces.³⁴⁵

381. The Military Manual of the Dominican Republic states that "under the laws of war, you are not allowed to attack villages, towns, or cities. However, when your mission requires, you are allowed to engage enemy troops, equipment, or supplies in a village, town or city."³⁴⁶

382. Ecuador's Naval Manual provides that combatants and troop concentrations are military objectives.³⁴⁷

383. According to France's LOAC Summary Note, combatants are military objectives.³⁴⁸

384. Germany's Military Manual provides that military objectives include, in particular, armed forces.³⁴⁹

385. According to Hungary's Military Manual, military objectives include the armed forces.³⁵⁰

386. Israel's Manual on the Laws of War states that "any soldier (male or female!) in the enemy's army is a legitimate military target for attack, whether on the battlefield or outside of it".³⁵¹

³³⁹ Australia, *Defence Force Manual* (1994), § 527(d), see also § 916(a) ("armed forces except medical and religious personnel").

³⁴⁰ Belgium, *Law of War Manual* (1983), p. 27.

³⁴¹ Benin, *Military Manual* (1995), Fascicule I, p. 12.

³⁴² Cameroon, *Instructors' Manual* (1992), p. 17.

³⁴³ Canada, *LOAC Manual* (1999), p. 4-1, § 7 and p. 4-2, §§ 12-14.

³⁴⁴ Colombia, *Instructors' Manual* (1999), p. 15.

³⁴⁵ Croatia, *LOAC Compendium* (1991), p. 7; see also *Commanders' Manual* (1992), § 4 ("combatants").

³⁴⁶ Dominican Republic, *Military Manual* (1980), p. 3.

³⁴⁷ Ecuador, *Naval Manual* (1989), § 8.1.1.

³⁴⁸ France, *LOAC Summary Note* (1992), § 1.2; see also *LOAC Teaching Note* (2000), p. 2 ("military units").

³⁴⁹ Germany, *Military Manual* (1992), § 443. ³⁵⁰ Hungary, *Military Manual* (1992), p. 18.

³⁵¹ Israel, *Manual on the Laws of War* (1998), p. 42.

387. Italy's IHL Manual provides that the armed forces are military objectives.³⁵²
388. Kenya's LOAC Manual provides that "the armed forces except medical service and religious personnel and objects" are military objectives.³⁵³
389. According to South Korea's Military Law Manual, combatants are military objectives.³⁵⁴
390. According to Madagascar's Military Manual, military objectives include "armed forces, with the exception of medical units and religious personnel and objects".³⁵⁵
391. The Military Manual of the Netherlands notes that "combatants who are part of the armed forces" are military objectives "under all circumstances".³⁵⁶
392. New Zealand's Military Manual states that combatants are military objectives.³⁵⁷
393. According to Nigeria's Military Manual and Soldiers' Code of Conduct, combatants are military objectives.³⁵⁸
394. According to the Soldier's Rules of the Philippines, enemy combatants are military objectives.³⁵⁹
395. South Africa's LOAC Manual states that military objectives include "the armed forces, with the exception of medical and religious personnel and objects".³⁶⁰
396. Spain's LOAC Manual states that "the armed forces, except medical and religious personnel" are military objectives.³⁶¹
397. Sweden's IHL Manual states that "persons participating in hostilities . . . are thereby legitimate objectives".³⁶²
398. Switzerland's Basic Military Manual considers that the armed forces are military objectives liable to attack.³⁶³
399. Togo's Military Manual considers the armed forces, with the exception of medical and religious personnel and objects, to be military objectives.³⁶⁴
400. The UK LOAC Manual states that military objectives include "concentrations of troops and individual enemy combatants".³⁶⁵

³⁵² Italy, *IHL Manual* (1991), Vol. I, § 12; see also *LOAC Elementary Rules Manual* (1991), § 4 ("combatants").

³⁵³ Kenya, *LOAC Manual* (1997), Précis No. 2, p. 11.

³⁵⁴ South Korea, *Military Law Manual* (1996), p. 86.

³⁵⁵ Madagascar, *Military Manual* (1994), Fiche No. 2-SO, § C, see also Fiche No. 2-O, § 4 and Fiche No. 4-T, § 1.

³⁵⁶ Netherlands, *Military Manual* (1993), p. V-3; see also *Military Handbook* (1995), p. 7-36 ("combatants").

³⁵⁷ New Zealand, *Military Manual* (1992), § 516(1), see also § 623(1).

³⁵⁸ Nigeria, *Military Manual* (1994), p. 39, § 5(a); *Soldiers' Code of Conduct* (undated), § 1.

³⁵⁹ Philippines, *Soldier's Rules* (1989), § 2.

³⁶⁰ South Africa, *LOAC Manual* (1996), § 24(d)(i), see also § 34.

³⁶¹ Spain, *LOAC Manual* (1996), Vol. I, § 4.2.b, see also § 4.2.b.(1).

³⁶² Sweden, *IHL Manual* (1991), Section 3.2.1.5, p. 40.

³⁶³ Switzerland, *Basic Military Manual* (1987), Article 28.

³⁶⁴ Togo, *Military Manual* (1996), Fascicule I, p. 13.

³⁶⁵ UK, *LOAC Manual* (1981), Section 4, p. 13, § 3(b)(2).

401. The US Air Force Pamphlet considers that “troops in the field are military objectives beyond any dispute”.³⁶⁶

402. According to the US Naval Handbook, combatants and troop concentrations are military objectives.³⁶⁷

403. According to the YPA Military Manual of the SFRY (FRY), the armed forces are a military objective.³⁶⁸ The manual further specifies that “it is permitted to directly attack only members of the armed forces and other persons – only if they directly participate in military operations”.³⁶⁹

National Legislation

404. Italy's Law of War Decree as amended provides that the armed forces are military objectives.³⁷⁰

National Case-law

405. No practice was found.

Other National Practice

406. In 1950, the US Secretary of State stated that “the air activity of the United Nations forces in Korea has been, and is, directed solely at military targets of the invader. These targets [include] enemy troop concentrations.”³⁷¹

407. In 1991, in a report submitted to the UN Security Council on operations in the Gulf War, the UK stated that attacks had been directed against Iraq's air force and land army.³⁷²

408. In 1991, in a report submitted to the UN Security Council on operations in the Gulf War, the US stated that it considered the “occupation forces in Kuwait and southern Iraq” as legitimate military targets. It also stated that it had attacked Iraq's naval forces in the northern Gulf and specified that “these attacks have been on Iraqi units that are engaged in operations against coalition forces”.³⁷³ In another such report, the US stated that the Republican Guard remained a “high priority” target.³⁷⁴ In a subsequent report, the US reiterated that it considered “the Republican Guard and other

³⁶⁶ US, *Air Force Pamphlet* (1976), § 5-3(b)(2). ³⁶⁷ US, *Naval Handbook* (1995), § 8.1.1.

³⁶⁸ SFRY (FRY), *YPA Military Manual* (1988), § 49.

³⁶⁹ SFRY (FRY), *YPA Military Manual* (1988), § 67.

³⁷⁰ Italy, *Law of War Decree as amended* (1938), Article 40.

³⁷¹ US, Statement by the Secretary of State, Dean Acheson, 6 September 1950, reprinted in Marjorie Whiteman, *Digest of International Law*, Vol. 10, Department of State Publication 8367, Washington, D.C., 1968, p. 140.

³⁷² UK, Letter dated 28 January 1991 to the President of the UN Security Council, UN Doc. S/22156, 28 January 1991, p. 1.

³⁷³ US, Letter dated 22 January 1991 to the President of the UN Security Council, UN Doc. S/22130, 22 January 1991, p. 1.

³⁷⁴ US, Letter dated 30 January 1991 to the President of the UN Security Council, UN Doc. S/22173, 30 January 1991, p. 1.

ground troops in the Kuwaiti theater of operations" as a legitimate target of attack.³⁷⁵

409. In 1991, during a news briefing concerning the Gulf War, the US Secretary of Defense stated that the "mainstay of Saddam's command forces, the Republican Guard units located near the Iraqi/Kuwaiti border" were considered military targets and had been attacked.³⁷⁶

410. In 1992, in its final report to Congress on the conduct of the Gulf War, the US Department of Defense stated that Iraq's air forces, naval forces and army units, including the Republican Guard, had been included among the 12 target sets for the coalition's attacks.³⁷⁷

III. Practice of International Organisations and Conferences

411. No practice was found.

IV. Practice of International Judicial and Quasi-judicial Bodies

412. No practice was found.

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

413. To fulfil its task of disseminating IHL, the ICRC has delegates around the world teaching armed and security forces that "the armed forces except medical service and religious personnel and objects" are military objectives.³⁷⁸

VI. Other Practice

414. In 1985, in a report on violations of the laws of war in Nicaragua, Americas Watch listed "members of the Popular Sandinista Army and militias", as well as "members of ARDE, FDN, MISURA and MISURASATA [two Indian organisations fighting against the Nicaraguan government]", as persons which "can arguably be regarded as legitimate military objectives subject to direct attack".³⁷⁹

³⁷⁵ US, Letter dated 8 February 1991 to the President of the UN Security Council, UN Doc. S/22216, 13 February 1991, p. 1

³⁷⁶ US, News Briefing by the US Secretary of Defense and the Chairman of the Joint Chiefs of Staff, Washington, 23 January 1991, annexed to Letter dated 25 January 1991 to the President of the UN Security Council, UN Doc. S/22168, 29 January 1991, p. 3.

³⁷⁷ US, Department of Defense, Final Report to Congress on the Conduct of the Persian Gulf War, 10 April 1992, Chapter VI, The Air Campaign, pp. 96–98.

³⁷⁸ Frédéric de Mulinen, *Handbook on the Law of War for Armed Forces*, ICRC, Geneva, 1987, § 55.

³⁷⁹ Americas Watch, *Violations of the Laws of War by Both Sides in Nicaragua: 1981–1985*, New York, March 1985, p. 33.

415. In 1986, in a report on the use of landmines in the conflicts in El Salvador and Nicaragua, Americas Watch listed the following persons as legitimate military objectives subject to direct attack:

1. In Nicaragua
 - (a) Members of the Popular Sandinista Army and Militias
 - (b) Members of ARDE, FDN, KISAN and MISURASATA [two Indian organisations fighting against the Nicaraguan government]
2. In El Salvador
 - (a) Members of the Salvadoran combined armed forces and civil defense forces
 - (b) Members of the FMLN.³⁸⁰

416. In 1989, in a report on violations of the laws of war in Angola, Africa Watch listed “members of the armed forces and civil defense of Angola and other armed forces assisting the defense of Angola, such as the Cuban armed forces”, as well as “members of UNITA armed forces and other armed forces assisting UNITA, such as the South African Defense Force and South West Africa armed forces”, as persons which “may be regarded as legitimate military objectives subject to direct attack by combatants and mines”.³⁸¹

Places where armed forces or their materiel are located

I. Treaties and Other Instruments

Treaties

417. Article 2 of the 1907 Hague Convention (IX) allows the bombardment of “military works, military or naval establishments, depots of arms or war *matériel*”.

418. Under Article 8 of the 1954 Hague Convention, cultural property may be placed under special protection provided, *inter alia*, that it is situated “at an adequate distance . . . from any important military objective constituting a vulnerable point, such as, for example, . . . [an] establishment engaged upon work of national defence”.

Other Instruments

419. According to Article 24(2) of the 1923 Hague Rules of Air Warfare, “military works [and] military establishments or depots” are military objectives.

420. Article 5(1) of the 1938 ILA Draft Convention for the Protection of Civilian Populations against New Engines of War provides that “aerial bombardment is prohibited unless directed at . . . belligerent establishments”.

³⁸⁰ Americas Watch, *Land Mines in El Salvador and Nicaragua: The Civilian Victims*, New York, December 1986, pp. 99–100.

³⁸¹ Africa Watch, *Angola: Violations of the Laws of War by Both Sides*, New York, April 1989, p. 139.

421. Paragraph I of the proposed annex to Article 7(2) of the 1956 New Delhi Draft Rules stated that “the objectives belonging to the following categories are those considered to be of generally recognized military importance”, that is:

- (2) Positions, installations or constructions occupied by the [armed forces], as well as combat objectives (that is to say, those objectives which are directly contested in battle between land or sea forces including airborne forces).
- (3) Installations, constructions and other works of a military nature, such as barracks, fortifications, War Ministries (e.g. Ministries of Army, Navy, Air Force, National Defence, Supply) and other organs for the direction and administration of military operations.
- (4) Stores of arms or military supplies, such as munition dumps, stores of equipment or fuel, vehicle parks.

422. Section 5.4 of the 1999 UN Secretary-General’s Bulletin states that “military installations and equipment of peacekeeping operations, as such, shall not be considered military objectives”.

II. National Practice

Military Manuals

423. Australia’s Defence Force Manual gives “military equipment, units and bases” as examples of military objectives.³⁸²

424. Belgium’s Teaching Manual for Soldiers considers that “all objects occupied or used by enemy military forces (positions, barracks, depots, etc.)” are military objectives.³⁸³

425. Belgium’s Law of War Manual considers that “the army, its positions, provision of its supplies, its stores, workshops, arsenals, depots, defence works, . . . war buildings, etc.” are military objectives.³⁸⁴

426. Benin’s Military Manual considers “the establishments, positions and constructions where armed forces and their materiel are located (e.g. positions, barracks and depots)” as military objectives.³⁸⁵

427. Cameroon’s Instructors’ Manual considers military positions, barracks and depots as military objectives.³⁸⁶

428. Canada’s LOAC Manual considers that “military bases, warehouses . . . buildings and objects that provide administrative and logistical support for military operations are generally accepted as being military objectives”.³⁸⁷

³⁸² Australia, *Defence Force Manual* (1994), § 527(a), see also § 916(b).

³⁸³ Belgium, *Teaching Manual for Soldiers* (undated), p. 20.

³⁸⁴ Belgium, *Law of War Manual* (1983), p. 26.

³⁸⁵ Benin, *Military Manual* (1995), Fascicule I, p. 12.

³⁸⁶ Cameroon, *Instructors’ Manual* (1992), p. 17.

³⁸⁷ Canada, *LOAC Manual* (1999), p. 4-2, § 9.

- 429.** According to Croatia's LOAC Compendium and Commanders' Manual, military objectives include military establishments and positions.³⁸⁸
- 430.** According to Ecuador's Naval Manual, proper targets for naval attack include such military objectives as naval and military bases ashore; warship construction and repair facilities; military depots and warehouses; storage areas for petroleum and lubricants; and buildings and facilities that provide administrative and personnel support for military and naval operations, such as barracks, headquarters buildings, mess halls and training areas.³⁸⁹
- 431.** France's LOAC Summary Note considers military establishments, installations, and materiel and positions of tactical importance to be military objectives.³⁹⁰
- 432.** Germany's Military Manual provides that military objectives include, in particular, "buildings and objects for combat service support".³⁹¹
- 433.** According to Hungary's Military Manual, military objectives include military establishments and positions.³⁹²
- 434.** According to Italy's IHL Manual, "military quarters, military works and establishments, defence works and preparations" are military objectives.³⁹³
- 435.** According to Italy's LOAC Elementary Rules Manual, military objectives include military establishments and positions.³⁹⁴
- 436.** Kenya's LOAC Manual provides that "the establishments, buildings and positions where armed forces or their material are located (e.g. positions, barracks, stores, concentrations of troops)" are military objectives.³⁹⁵
- 437.** According to Madagascar's Military Manual, military objectives include "establishments, constructions and positions where the armed forces and their materiel are located (for example positions, army barracks, depots)".³⁹⁶
- 438.** The Military Manual of the Netherlands considers that positions of military units, such as artillery positions, constitute military objectives "under all circumstances".³⁹⁷
- 439.** New Zealand's Military Manual states that "military bases, warehouses . . . buildings and objects that provide administrative and logistic support for military operations are examples of objects universally regarded as military objectives".³⁹⁸

³⁸⁸ Croatia, *LOAC Compendium* (1991), p. 7; *Commanders' Manual* (1992), § 4.

³⁸⁹ Ecuador, *Naval Manual* (1989), § 8.1.1.

³⁹⁰ France, *LOAC Summary Note* (1992), Part I, § 1.2.

³⁹¹ Germany, *Military Manual* (1992), § 443.

³⁹² Hungary, *Military Manual* (1992), p. 18. ³⁹³ Italy, *IHL Manual* (1991), Vol. I, § 12.

³⁹⁴ Italy, *LOAC Elementary Rules Manual* (1991), § 4.

³⁹⁵ Kenya, *LOAC Manual* (1997), Précis No. 2, p. 11.

³⁹⁶ Madagascar, *Military Manual* (1994), Fiche No. 2-SO, § C, see also Fiche No. 2-O, § 4 and Fiche No. 4-T, § 1.

³⁹⁷ Netherlands, *Military Manual* (1993), p. V-3.

³⁹⁸ New Zealand, *Military Manual* (1992), § 516(2), see also § 623(2).

440. South Africa's LOAC Manual states that military objectives include "the establishments, buildings and positions where armed forces or their material are located".³⁹⁹

441. According to Spain's LOAC Manual, "establishments, constructions and positions where armed forces are located [and] establishments and installations of combat support services and logistics" are military objectives.⁴⁰⁰

442. Switzerland's Basic Military Manual lists the armed forces and "their materiel, sites and buildings occupied by them (barracks, fortresses, arsenals) . . . and establishments directly linked to the activity of the armed forces" among military objectives.⁴⁰¹

443. Togo's Military Manual considers "the establishments, positions and constructions where armed forces and their materiel are located (e.g. positions, barracks and depots)" as military objectives.⁴⁰²

444. The UK LOAC Manual states that military objectives include "buildings".⁴⁰³

445. The US Air Force Pamphlet considers that "an adversary's military encampments . . . are military objectives beyond any dispute".⁴⁰⁴

446. According to the US Naval Handbook, proper targets for naval attack include such military objectives as naval and military bases ashore; warship construction and repair facilities; military depots and warehouses; petroleum/oils/lubricants (POL) storage areas; and buildings and facilities that provide administrative and personnel support for military and naval operations, such as barracks, headquarters buildings, mess halls and training areas.⁴⁰⁵

National Legislation

447. Cuba's Military Criminal Code includes "military installations, other military objects and objects intended for use by military units or institutions" in a list of military objects.⁴⁰⁶

448. According to Italy's Law of War Decree as amended, "military quarters, military works and establishments, defence works and preparations, depots of arms and war materiel" are military objectives.⁴⁰⁷

National Case-law

449. No practice was found.

³⁹⁹ South Africa, *LOAC Manual* (1996), § 24(d)(ii).

⁴⁰⁰ Spain, *LOAC Manual* (1996), Vol. I, § 4.5.b.(2).a.

⁴⁰¹ Switzerland, *Basic Military Manual* (1987), Article 28.

⁴⁰² Togo, *Military Manual* (1995), Fascicule I, p. 13.

⁴⁰³ UK, *LOAC Manual* (1981), Section 4, p. 13, § 3(b)(2).

⁴⁰⁴ US, *Air Force Pamphlet* (1976), § 5-3(b). ⁴⁰⁵ US, *Naval Handbook* (1995), § 8.1.1.

⁴⁰⁶ Cuba, *Military Criminal Code* (1979), Article 33(1).

⁴⁰⁷ Italy, *Law of War Decree as amended* (1938), Article 40.

Other National Practice

450. The Report on the Practice of Algeria states that tanks and munitions and ammunition stores were considered military objectives during the war of independence.⁴⁰⁸

451. In 1983, in reply to criticism of alleged attacks against civilian objects during the hostilities against Iran, the President of Iraq stated that "our aircraft did not bomb civilian targets in Baneh during their raid of 5 June; they bombed a camp in which a large body of Iranian forces was concentrated".⁴⁰⁹

452. The Report on the Practice of Lebanon states that, according to an advisor of the Lebanese Ministry of Foreign Affairs, any position used by the occupying army for military purposes is considered a military objective.⁴¹⁰

453. In 1991, in a report submitted to the UN Security Council on operations in the Gulf War, the UK listed ammunition storage depots among the targets the Royal Air Force had attacked.⁴¹¹

454. In 1950, the US Secretary of State stated that "the air activity of the United Nations forces in Korea has been, and is, directed solely at military targets of the invader. These targets [include] . . . supply dumps."⁴¹²

455. In 1966, in the context of the Vietnam War, the US Department of Defense stated that "military targets include but are not limited to . . . POL facilities, barracks and supply depots. In the specific case of Nam Dinh and Phu Li, targets have been limited to . . . POL dumps."⁴¹³

456. In 1992, in its final report to Congress on the conduct of the Gulf War, the US Department of Defense stated that Iraq's military storage and production sites had been included among the 12 target sets for the coalition's attacks.⁴¹⁴

III. Practice of International Organisations and Conferences

457. No practice was found.

⁴⁰⁸ Report on the Practice of Algeria, 1997, Chapter 1.3.

⁴⁰⁹ Iraq, Message from the President of Iraq, annexed to Letter dated 10 June 1984 to the UN Secretary-General, UN Doc. S/16610, 19 June 1984, p. 2.

⁴¹⁰ Report on the Practice of Lebanon, 1998, Interview with an advisor of the Lebanese Ministry of Foreign Affairs, Chapter 1.3.

⁴¹¹ UK, Letter dated 13 February 1991 to the President of the UN Security Council, UN Doc. S/22218, 13 February 1991, p. 1.

⁴¹² US, Statement by the Secretary of State, Dean Acheson, 6 September 1950, reprinted in Marjorie Whiteman, *Digest of International Law*, Vol. 10, Department of State Publication 8367, Washington, D.C., 1968, p. 140.

⁴¹³ US, Department of Defense, Statement on targeting policy in Vietnam, 26 December 1966, reprinted in Marjorie Whiteman, *Digest of International Law*, Vol. 10, Department of State Publication 8367, Washington, D.C., 1968, p. 427.

⁴¹⁴ US, Department of Defense, Final Report to Congress on the Conduct of the Persian Gulf War, 10 April 1992, Chapter VI, The Air Campaign, p. 98.

IV. Practice of International Judicial and Quasi-judicial Bodies

458. In 1997, in the case concerning the events at La Tablada in Argentina, the IAC iHR stated that a military base is a “quintessential military objective”.⁴¹⁵

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

459. To fulfil its task of disseminating IHL, the ICRC has delegates around the world teaching armed and security forces that military objectives include “the establishments, buildings and positions where armed forces or their material are located (e.g. positions, barracks, stores)”.⁴¹⁶

VI. Other Practice

460. In 1985, in the context of the conflict in El Salvador, the FMLN declared “those places visited by military elements, both from the army of the puppet regime as well as foreign military personnel involved in repressive and genocidal activities against the popular revolutionary movement” to be military objectives. It also considered houses or any other property leased to foreign military advisers as military objectives.⁴¹⁷

461. In 1985, in a report on violations of the laws of war in Nicaragua, Americas Watch listed “military works, military and naval establishments, supplies, vehicles, camp sites, fortifications, and fuel depots or stores which are or could be utilized by either party to the conflict” as objects which “can arguably be regarded as legitimate military objectives subject to direct attack”.⁴¹⁸ This view was reiterated in its 1986 report on the use of landmines in the conflicts in El Salvador and Nicaragua.⁴¹⁹

462. In 1989, in a report on violations of the laws of war in Angola, Africa Watch listed “military works, military and naval establishments, supplies, vehicles, camp sites, fortifications, and fuel depots or stores that are, or could be, utilized by any party to the conflict” as objects which “may be regarded as legitimate military objectives subject to direct attack by combatants and mines”.⁴²⁰

⁴¹⁵ IACiHR, *Case 11.137 (Argentina)*, Report, 18 November 1997, § 155.

⁴¹⁶ Frédéric de Mulinen, *Handbook on the Law of War for Armed Forces*, ICRC, Geneva, 1987, § 55.

⁴¹⁷ Communication by the FMLN, June 1985, § 4, *Estudios Centroamericanos*, Universidad Centroamericana José Simeón Cañas, Vol. XL, Nos. 441–442, July–August 1985, p. 581.

⁴¹⁸ Americas Watch, *Violations of the Laws of War by Both Sides in Nicaragua: 1981–1985*, New York, March 1985, p. 33.

⁴¹⁹ Americas Watch, *Land Mines in El Salvador and Nicaragua: The Civilian Victims*, New York, December 1986, pp. 99–100.

⁴²⁰ Africa Watch, *Angola: Violations of the Laws of War by Both Sides*, New York, April 1989, pp. 139–140.

Weapons and weapon systems

I. Treaties and Other Instruments

Treaties

463. Article 2 of the 1907 Hague Convention (IX) allows the bombardment of “the ships of war in the harbour”.

Other Instruments

464. According to paragraph I(5) of the proposed annex to Article 7(2) of the 1956 New Delhi Draft Rules, “rocket launching ramps” are military objectives considered to be of “generally recognized military importance”.

II. National Practice

Military Manuals

465. Belgium’s Law of War Manual considers that military vehicles and aircraft are military objectives.⁴²¹

466. Cameroon’s Instructors’ Manual considers that enemy warships are military objectives.⁴²²

467. Canada’s LOAC Manual considers that “military aircraft, weapons [and] ammunition are generally accepted as being military objectives”.⁴²³

468. Croatia’s LOAC Compendium states that proper targets in the air include “enemy military aircraft violating national airspace or flying over the high seas”.⁴²⁴

469. Ecuador’s Naval Manual considers that “proper targets for naval attack include such military objectives as enemy warships and military aircraft, naval and military auxiliaries... military vehicles, armour, artillery, ammunition stores”.⁴²⁵

470. Germany’s Military Manual provides that military objectives include, in particular, “military aircraft and warships”.⁴²⁶

471. Hungary’s Military Manual states that proper targets in the air include “enemy military aircraft violating national airspace or flying over the high seas”.⁴²⁷

472. The Military Manual of the Netherlands considers that materiel used by armed forces, such as tanks, vehicles, and aircraft, constitute military objectives “under all circumstances”.⁴²⁸

⁴²¹ Belgium, *Law of War Manual* (1983), p. 26.

⁴²² Cameroon, *Instructors’ Manual* (1992), p. 111.

⁴²³ Canada, *LOAC Manual* (1999), p. 4-2, § 9(b), see also p. 8-7, § 47 (enemy warships and military aircraft).

⁴²⁴ Croatia, *LOAC Compendium* (1991), p. 44. ⁴²⁵ Ecuador, *Naval Manual* (1989), § 8.1.1.

⁴²⁶ Germany, *Military Manual* (1992), § 443. ⁴²⁷ Hungary, *Military Manual* (1992), p. 71.

⁴²⁸ Netherlands, *Military Manual* (1993), p. V-3.

473. New Zealand's Military Manual states that "military aircraft, weapons [and] ammunition are examples of objects universally regarded as military objectives".⁴²⁹

474. Spain's Field Regulations stipulates that objects useful in war, *inter alia*, arms, munitions, machines and tanks, are objects on which an attack is lawful.⁴³⁰

475. According to Spain's LOAC Manual, "military vehicles, warships and military aircraft [and] materiel, objects and goods belonging to the armed forces and which serve no medical or religious purpose" are military objectives.⁴³¹

476. The UK LOAC Manual states that military objectives include "minefields [and] weapons".⁴³²

477. The US Air Force Pamphlet considers that an adversary's "armament, such as military aircraft, tanks, antiaircraft emplacements . . . are military objectives beyond any dispute".⁴³³

478. The US Naval Handbook specifies that "proper targets for naval attack include such military objectives as enemy warships and military aircraft, naval and military auxiliaries, . . . military vehicles, armor, artillery, ammunition stores".⁴³⁴

National Legislation

479. Cuba's Military Criminal Code includes "weapons and munitions" in a list of military objects.⁴³⁵

480. According to Italy's Law of War Decree as amended, "warships and military aircraft" are legitimate military targets.⁴³⁶

National Case-law

481. No practice was found.

Other National Practice

482. In 1991, in a report submitted to the UN Security Council on operations in the Gulf War, Kuwait stated that "Kuwait Air Force aircraft also took part in joint air operations directed primarily against ground-to-ground missile sites, missile launchers, artillery positions and concentrations of Iraqi mechanized units".⁴³⁷

483. In 1991, in a report submitted to the UN Security Council on operations in the Gulf War, the UK stated that it had targeted Iraq's fixed and mobile SCUD missile launchers and its chemical and biological warfare installations,

⁴²⁹ New Zealand, *Military Manual* (1992), § 516(2), see also § 623(2).

⁴³⁰ Spain, *Field Regulations* (1882), § 880. ⁴³¹ Spain, *LOAC Manual* (1996), Vol. I, § 4.5.b.(2).a.

⁴³² UK, *LOAC Manual* (1981), Section 4, p. 13, § 3(b)(2).

⁴³³ US, *Air Force Pamphlet* (1976), § 5-3(b)(2). ⁴³⁴ US, *Naval Handbook* (1995), § 8.1.1.

⁴³⁵ Cuba, *Military Criminal Code* (1979), Article 33(1).

⁴³⁶ Italy, *Law of War Decree as amended* (1938), Article 40.

⁴³⁷ Kuwait, Letter dated 28 January 1991 to the President of the UN Security Council, UN Doc. S/22164, 28 January 1991, p. 1.

production and storage capability.⁴³⁸ In another such report, the UK stated that it had attacked “elements of the Iraqi air defence system” and specified that “the Royal Air Force [had] attacked surface-to-air missile sites, artillery positions, ammunition storage and Silkworm surface-to-surface missile sites”.⁴³⁹

484. In 1966, in the context of the Vietnam War, the US Department of Defense stated that military targets “also include those anti-aircraft and SAM sites which endanger the lives of American pilots... In the specific case of Nam Dinh and Phu Li, targets have been limited to... air defense sites.”⁴⁴⁰

485. In 1991, in a report submitted to the UN Security Council on operations in the Gulf War, the US stated that military targets included “Iraqi biological and chemical warfare facilities, mobile and fixed surface-to-surface missile sites... and the air defense networks that protect these facilities” as well as “Iraqi artillery positions”.⁴⁴¹ In another such report, the US stated that “surface-to-surface missile capabilities remain as high priority targets”.⁴⁴² In the same report, the US stated that “the naval forces of the United States have also engaged Iraqi patrol and mine-laying craft in the Northern Arabian Gulf”.⁴⁴³ In a subsequent report, the US stated that allied attacks had targeted “air defence, combat aircraft in the air and on the ground, nuclear, biological and chemical storage facilities”, as well as “air defence radars and missiles in Kuwait” and “surface-to-surface missile capabilities”.⁴⁴⁴ In the same report, the US reiterated that “the naval forces of the United States and the allied coalition have continued to engage Iraqi patrol and mine-laying craft in the Northern Arabian Gulf”.⁴⁴⁵

486. In 1991, during a news briefing concerning the Gulf War, the US Secretary of Defense stated that “air defence units and radars”, “SCUD missile launchers” and “the factories where Iraq has produced chemical and biological weapons, and until recently, continued working on nuclear weapons” were considered military targets and had been attacked.⁴⁴⁶

⁴³⁸ UK, Letter dated 28 January 1991 to the President of the UN Security Council, UN Doc. S/22156, 28 January 1991, p. 1.

⁴³⁹ UK, Letter dated 13 February 1991 to the President of the UN Security Council, UN Doc. S/22218, 13 February 1991, p. 1.

⁴⁴⁰ US, Department of Defense, Statement on targeting policy in Vietnam, 26 December 1966, reprinted in Marjorie Whiteman, *Digest of International Law*, Vol. 10, Department of State Publication 8367, Washington, D.C., 1968, p. 427.

⁴⁴¹ US, Letter dated 22 January 1991 to the President of the UN Security Council, UN Doc. S/22130, 22 January 1991, p. 1.

⁴⁴² US, Letter dated 30 January 1991 to the President of the UN Security Council, UN Doc. S/22173, 30 January 1991, p. 1.

⁴⁴³ US, Letter dated 30 January 1991 to the President of the UN Security Council, UN Doc. S/22173, 30 January 1991, p. 1.

⁴⁴⁴ US, Letter dated 8 February 1991 to the President of the UN Security Council, UN Doc. S/22216, 13 February 1991, p. 1.

⁴⁴⁵ US, Letter dated 8 February 1991 to the President of the UN Security Council, UN Doc. S/22216, 13 February 1991, p. 2.

⁴⁴⁶ US, News Briefing by the US Secretary of Defense and the Chairman of the Joint Chiefs of Staff, Washington, 23 January 1991, annexed to Letter dated 25 January 1991 to the President of the UN Security Council, UN Doc. S/22168, 29 January 1991, p. 3.

487. In 1992, in its final report to Congress on the conduct of the Gulf War, the US Department of Defense stated that Iraq's strategic integrated air defense system, its nuclear, biological and chemical weapons research, production and storage facilities and its Scud missiles, launchers, and production and storage facilities had been included among the 12 target sets for the coalition's attacks.⁴⁴⁷

III. Practice of International Organisations and Conferences

488. No practice was found.

IV. Practice of International Judicial and Quasi-judicial Bodies

489. No practice was found.

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

490. No practice was found.

VI. Other Practice

491. In 1985, in a report on violations of the laws of war in Nicaragua, Americas Watch listed "weapons [and] other war materiel" as objects which "can arguably be regarded as legitimate military objectives subject to direct attack".⁴⁴⁸ This view was reiterated in its 1986 report on the use of landmines in the conflicts in El Salvador and Nicaragua.⁴⁴⁹

492. In 1989, in a report on violations of the laws of war in Angola, Africa Watch listed "weapons and other war material" as objects which "may be regarded as legitimate military objectives subject to direct attack by combatants and mines".⁴⁵⁰

Lines and means of communication

I. Treaties and Other Instruments

Treaties

493. Under Article 8 of the 1954 Hague Convention, cultural property may be placed under special protection provided, *inter alia*, that it is situated "at

⁴⁴⁷ US, Department of Defense, Final Report to Congress on the Conduct of the Persian Gulf War, 10 April 1992, Chapter VI, The Air Campaign, pp. 96 and 98.

⁴⁴⁸ Americas Watch, *Violations of the Laws of War by Both Sides in Nicaragua: 1981–1985*, New York, March 1985, p. 33.

⁴⁴⁹ Americas Watch, *Land Mines in El Salvador and Nicaragua: The Civilian Victims*, New York, December 1986, pp. 99–100.

⁴⁵⁰ Africa Watch, *Angola: Violations of the Laws of War by Both Sides*, New York, April 1989, p. 139.

an adequate distance . . . from any important military objective constituting a vulnerable point, such as, for example, . . . [a] broadcasting station . . . or a main line of communication”.

Other Instruments

494. According to Article 24(2) of the 1923 Hague Rules of Air Warfare, “lines of communication . . . used for military purposes” are military objectives.

495. Article 5(1) of the 1938 ILA Draft Convention for the Protection of Civilian Populations against New Engines of War provides that “aerial bombardment is prohibited unless directed at . . . lines of communication or transportation used for military purposes”.

496. Paragraph I of the proposed annex to Article 7(2) of the 1956 New Delhi Draft Rules provided that “the objectives belonging to the following categories are those considered to be of generally recognized military importance: . . . (7) The installations of broadcasting and television stations; telephone and telegraph exchanges of fundamental military importance.”

II. National Practice

Military Manuals

497. Australia’s Defence Force Manual cites “facilities which support or enhance command and control, such as communications facilities” as military objectives.⁴⁵¹

498. Ecuador’s Naval Manual considers communications and command and control (C3) facilities, as well as “lines of communication and other objects used to conduct or support military operations”, as proper targets for naval attack.⁴⁵²

499. According to Italy’s IHL Manual, “lines and means of communication which can be used for the needs of the armed forces” are military objectives.⁴⁵³

500. South Korea’s Military Law Manual states that “transmission towers and electronic communication facilities used for military operations” can be regarded as military objectives.⁴⁵⁴

501. New Zealand’s Military Manual states that “command and control points are examples of objects universally regarded as military objectives”.⁴⁵⁵

502. Sweden’s IHL Manual states that:

How and to what extent a given object can effectively contribute to the adversary’s military operations must be decided by the commander. This need not imply that the property in question is being used by the adversary for a given operation . . . It

⁴⁵¹ Australia, *Defence Force Manual* (1994), § 527(c).

⁴⁵² Ecuador, *Naval Manual* (1989), § 8.1.1. ⁴⁵³ Italy, *IHL Manual* (1991), Vol. I, § 12.

⁴⁵⁴ South Korea, *Military Law Manual* (1996), p. 87.

⁴⁵⁵ New Zealand, *Military Manual* (1992), § 516(2), see also § 623(2).

may even be a question of means of communication . . . that indirectly contribute to the adversary's military operations.⁴⁵⁶

503. Switzerland's Basic Military Manual considers "lines of communication . . . of military importance" as military objectives.⁴⁵⁷

504. The US Air Force Pamphlet states that:

Controversy exists over whether, and the circumstances under which, other objects, such as civilian transportation and communications systems, dams and dikes can be classified properly as military objectives . . . A key factor in classification of objects as military objectives is whether they make an effective contribution to an adversary's military action so that their capture, destruction or neutralization offers a definite military advantage in the circumstances ruling at the time.⁴⁵⁸

505. The US Naval Handbook considers communications and command and control facilities, as well as "lines of communication and other objects used to conduct or support military operations", as proper targets for naval attack.⁴⁵⁹

National Legislation

506. Cuba's National Defence Act lists "communications facilities and equipment" among the objects integrated within the "Military Reserve of Facilities and Equipment of the National Economy" to guarantee the necessities of defence in wartime.⁴⁶⁰

507. According to Italy's Law of War Decree as amended, "lines and means of communication which can be used for the needs of the armed forces" are military objectives.⁴⁶¹

National Case-law

508. No practice was found.

Other National Practice

509. The Report on the Practice of Algeria states that:

Leaving aside the objects which do not really raise questions of interpretation such as tanks or weapons and munition depots, the National Liberation Army of Algeria resorted to "economic sabotage" throughout the war. Roads, bridges, railway tracks and telephone lines were preferred targets. It even happened that harvests of important French colonisers were burned or fuel depots used by the French army destroyed . . . Even the petroleum industry which had barely emerged was not spared. In fact, everything which was considered to form part of "the economic machinery of the enemy" had to be brought down.⁴⁶²

⁴⁵⁶ Sweden, *IHL Manual* (1991), Section 3.2.1.5, p. 54.

⁴⁵⁷ Switzerland, *Basic Military Manual* (1987), Article 28.

⁴⁵⁸ US, *Air Force Pamphlet* (1976), § 5-3(b)(2). ⁴⁵⁹ US, *Naval Handbook* (1995), § 8.1.1.

⁴⁶⁰ Cuba, *National Defence Act* (1994), Article 119(c).

⁴⁶¹ Italy, *Law of War Decree as amended* (1938), Article 40.

⁴⁶² Report on the Practice of Algeria, 1997, Chapter 1.3, referring to *El Moudjahid*, Vol. 1, pp. 22 and 25-26, *El Moudjahid*, Vol. 2, p. 151 and *El Moudjahid*, Vol. 3, pp. 153-154.

510. According to the Report on the Practice of Iran, radio and television stations were considered military objectives during the Iran–Iraq War.⁴⁶³

511. The Report on the Practice of Lebanon refers to a communiqué issued in 1997 by the Lebanese Ministry of Foreign Affairs which stated that “all radio stations and media installations in Lebanon are civilian targets. Israel does not have the right to attack them, regardless of their political orientation.”⁴⁶⁴

512. In 1991, in a report submitted to the UN Security Council on operations in the Gulf War, the UK stated that “Iraqi military command and control has been severely damaged and increasingly Iraq has moved to alternative, less effective means of communication. Iraq’s ability to sustain a war has been steadily reduced.”⁴⁶⁵

513. During the Korean War, the US reportedly attacked communication centres in North Korea.⁴⁶⁶

514. In 1950, the US Secretary of State stated that “the air activity of the United Nations forces in Korea has been, and is, directed solely at military targets of the invader. These targets [include] . . . communications lines.”⁴⁶⁷

515. In 1991, in reports submitted to the UN Security Council on operations in the Gulf War, the US included command and control centers among Iraq’s military targets.⁴⁶⁸

516. In 1991, during a news briefing concerning the Gulf War, the US Secretary of Defense stated that “command and control [and] communications facilities” were considered military targets and had been attacked.⁴⁶⁹

517. In 1992, in its final report to Congress on the conduct of the Gulf War, the US Department of Defense stated that Iraq’s leadership command facilities, its telecommunications and command, control and communication nodes had been included among the 12 target sets for the coalition’s attacks.⁴⁷⁰ The report specified that:

To challenge [Saddam Hussein’s] C3 [command, control and communication], the Coalition bombed microwave relay towers, telephone exchanges, switching rooms,

⁴⁶³ Report on the Practice of Iran, 1997, Chapter 1.3.

⁴⁶⁴ Report on the Practice of Lebanon, 1998, Chapter 1.3, referring to Communiqué of the Lebanese Ministry of Foreign Affairs, 29 February 1997.

⁴⁶⁵ UK, Letter dated 28 January 1991 from the UK to the President of the UN Security Council, UN Doc. S/22156, 28 January 1991, p. 1.

⁴⁶⁶ Robert F. Futrell, *The United States Air Force in Korea 1950–1953*, Office of Air Force History, United States Air Force, Washington, D.C., Revised edition, 1983, p. 516.

⁴⁶⁷ US, Statement by Dean Acheson, Secretary of State, 6 September 1950, reprinted in Marjorie Whiteman, *Digest of International Law*, Vol. 10, Department of State Publication 8367, Washington, D.C., 1968, p. 140.

⁴⁶⁸ US, Letter dated 22 January 1991 to the President of the UN Security Council, UN Doc. S/22130, 22 January 1991, p. 1; Letter dated 8 February 1991 to the President of the UN Security Council, UN Doc. S/22216, 13 February 1991, p. 1.

⁴⁶⁹ US, News Briefing by the US Secretary of Defense and the Chairman of the Joint Chiefs of Staff, Washington, 23 January 1991, annexed to Letter dated 25 January 1991 to the President of the UN Security Council, UN Doc. S/22168, 29 January 1991, p. 3.

⁴⁷⁰ US, Department of Defense, Final Report to Congress on the Conduct of the Persian Gulf War, 10 April 1992, Chapter VI, The Air Campaign, pp. 95–96.

fiber optic nodes, and bridges that carried coaxial communications cables . . . More than half of Iraq's military landline communications passed through major switching facilities in Baghdad. Civil TV and radio facilities could be used easily for C3 backup for military purposes. The Saddam Hussein regime also controlled TV and radio and used them as the principal media for Iraqi propaganda. Thus, these installations were also struck.⁴⁷¹

In the same report, the Department of Defense stated that "microwave towers for everyday, peacetime civilian communications can constitute a vital part of a military command and control (C2) system . . . Attack of all segments of the Iraqi communications system was essential to destruction of Iraqi military C2."⁴⁷²

III. Practice of International Organisations and Conferences

518. No practice was found.

IV. Practice of International Judicial and Quasi-judicial Bodies

519. In its final report to the ICTY Prosecutor in 2000, the Committee Established to Review the NATO Bombing Campaign Against the Federal Republic of Yugoslavia stated that:

The precise scope of "military-industrial infrastructure, media and other strategic targets" as referred to in the US statement and "government ministries and refineries" as referred to in the NATO statement is unclear. Whether the media constitutes a legitimate target group is a debatable issue. If the media is used to incite crimes, as in Rwanda, then it is a legitimate target. If it is merely disseminating propaganda to generate support for the war effort, it is not a legitimate target.⁴⁷³

The Committee further stated that:

The media as such is not a traditional target category. To the extent particular media components are part of the C3 (command, control and communications) network they are military objectives. If media components are not part of the C3 network then they may become military objectives depending upon their use. As a bottom line, civilians, civilian objects and civilian morale as such are not legitimate military objectives. The media does have an effect on civilian morale. If that effect is merely to foster support for the war effort, the media is not a legitimate military

⁴⁷¹ US, Department of Defense, Final Report to Congress on the Conduct of the Persian Gulf War, 10 April 1992, Chapter VI, The Air Campaign, p. 96; see also James P. Coyne, Plan of Attack, *Air Force Magazine*, April 1992, pp. 40–42.

⁴⁷² US, Department of Defense, Final Report to Congress on the Conduct of the Persian Gulf War, 10 April 1992, Appendix O, The Role of the Law of War, *ILM*, Vol. 31, 1992, p. 623.

⁴⁷³ ICTY, Final Report to the Prosecutor by the Committee Established to Review the NATO Bombing Campaign Against the Federal Republic of Yugoslavia, The Hague, 14 June 2000, § 47.

objective. If the media is used to incite crimes, as in Rwanda, it can become a legitimate military objective. If the media is the nerve system that keeps a war-monger in power and thus perpetuates the war effort, it may fall within the definition of a legitimate military objective.⁴⁷⁴

With respect to NATO's attack against the radio and television station in Belgrade, the Committee noted that:

The attack appears to have been justified by NATO as part of a more general attack aimed at disrupting the FRY Command, Control and Communications network, the nerve centre and apparatus that keeps Milošević in power, and also as an attempt to dismantle the FRY propaganda machinery. Insofar as the attack actually was aimed at disrupting the communications network, it was legally acceptable.

If, however, the attack was made because equal time was not provided for Western news broadcasts, that is, because the station was part of the propaganda machinery, the legal basis was more debatable. Disrupting government propaganda may help to undermine the morale of the population and the armed forces, but justifying an attack on a civilian facility on such grounds alone may not meet the "effective contribution to military action" and "definite military advantage" criteria required by the Additional Protocols... While stopping such propaganda may serve to demoralize the Yugoslav population and undermine the government's political support, it is unlikely that either of these purposes would offer the "concrete and direct" military advantage necessary to make them a legitimate military objective.⁴⁷⁵

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

520. No practice was found.

VI. Other Practice

521. In 1985, in a report on violations of the laws of war in Nicaragua, Americas Watch listed "objects which, while not directly connected with combat operations, effectively contribute to military operations in the circumstances ruling at the time, such as transportation and communication systems and facilities" as objects which "can arguably be regarded as legitimate military objectives subject to direct attack".⁴⁷⁶ This view was reiterated in its 1986 report on the use of landmines in the conflicts in El Salvador and Nicaragua.⁴⁷⁷

⁴⁷⁴ ICTY, Final Report to the Prosecutor by the Committee Established to Review the NATO Bombing Campaign Against the Federal Republic of Yugoslavia, The Hague, 14 June 2000, § 55.

⁴⁷⁵ ICTY, Final Report to the Prosecutor by the Committee Established to Review the NATO Bombing Campaign Against the Federal Republic of Yugoslavia, The Hague, 14 June 2000, §§ 75–76.

⁴⁷⁶ Americas Watch, *Violations of the Laws of War by Both Sides in Nicaragua: 1981–1985*, New York, March 1985, p. 33.

⁴⁷⁷ Americas Watch, *Land Mines in El Salvador and Nicaragua: The Civilian Victims*, New York, December 1986, pp. 99–100.

522. In 1989, in a report on violations of the laws of war in Angola, Africa Watch listed "objects that, while not directly connected with combat operations, effectively contribute to military operations in the circumstances ruling at the time, such as transportation and communication systems and facilities" as objects which "may be regarded as legitimate military objectives subject to direct attack by combatants and mines".⁴⁷⁸

523. In 1999, in a letter to the NATO Secretary-General concerning NATO's bombing in the FRY, Human Rights Watch stated, with respect to the argument that the Serbian State radio and television headquarters in Belgrade was a legitimate target for NATO to attack, that "while stopping such propaganda may serve to demoralize the Yugoslav population and undermine the government's political support, neither purpose offers the 'concrete and direct' military advantage necessary to make them a legitimate target".⁴⁷⁹

524. In a report on the NATO bombing in the FRY issued in 2000, Human Rights Watch stated that it considered the bombing of the Serbian State radio and television headquarters in Belgrade to be "one of the worst incidents of civilian death" with respect to target selection. It asserted that there was no evidence that the radio and television headquarters met the legal test of military necessity in target selection, as it made no direct contribution to the military effort in Kosovo, and added that in this case the purpose of the attack seemed to have been more "psychological harassment of the civilian population" than to obtain direct military effect. The report further stated that "the risks involved to the civilian population in undertaking the urban attack thus grossly outweighed any perceived military benefit".⁴⁸⁰

525. In 2000, in a report on the NATO bombings in the FRY, Amnesty International concluded that "in one instance, the attack on the headquarters of Serbian state radio and television (RTS), NATO launched a direct attack on a civilian object, killing 16 civilians. Such attack breached article 52(1) of Protocol I and therefore constitutes a war crime."⁴⁸¹

Lines and means of transportation

Note: *Practice concerning military vehicles, ships and aircraft have been included in the subsection on weapons and weapon systems above.*

⁴⁷⁸ Africa Watch, *Angola: Violations of the Laws of War by Both Sides*, New York, April 1989, p. 140.

⁴⁷⁹ Human Rights Watch, Letter to the NATO Secretary-General, 13 May 1999.

⁴⁸⁰ Human Rights Watch, *Civilian Deaths in the NATO Air Campaign*, New York, 7 February 2000, p. 7.

⁴⁸¹ Amnesty International, *NATO/Federal Republic of Yugoslavia: "Collateral Damage" or Unlawful Killings? Violations of the Laws of War by NATO during Operation Allied Force*, AI Index EUR 70/18/00, London, June 2000, p. 25.

I. Treaties and Other Instruments

Treaties

526. Under Article 8 of the 1954 Hague Convention, cultural property may be placed under special protection provided, *inter alia*, that it is situated “at an adequate distance . . . from any important military objective constituting a vulnerable point, such as, for example, an aerodrome . . . a port or railway station of relative importance or a main line of communication”.

Other Instruments

527. According to Article 24(2) of the 1923 Hague Rules of Air Warfare, “lines of . . . transportation used for military purposes” are military objectives.

528. Article 5(1) of the 1938 ILA Draft Convention for the Protection of Civilian Populations against New Engines of War provides that “aerial bombardment is prohibited unless directed at . . . lines of communication or transportation used for military purposes”.

529. Paragraph I of the proposed annex to Article 7(2) of the 1956 New Delhi Draft Rules provided that:

The objectives belonging to the following categories are those considered to be of generally recognized military importance:

- ...
- (5) Airfields . . .
- (6) Those of the lines and means of communication (railway lines, roads, bridges, tunnels and canals) which are of fundamental military importance.

II. National Practice

Military Manuals

530. Australia’s Defence Force Manual cites “transport facilities which support military operations” and “transportation systems for military supplies, transportation centres where lines of communication converge, [and] rail yards” as examples of military objectives.⁴⁸²

531. Canada’s LOAC Manual considers that “ports and airfields are generally accepted as being military objectives”.⁴⁸³ The manual adds that “transportation systems for military supplies; transportation centres where lines of communication converge; [and] railyards may constitute military objectives depending on the circumstances”.⁴⁸⁴

⁴⁸² Australia, *Defence Force Manual* (1994), §§ 527(b) and 527(f).

⁴⁸³ Canada, *LOAC Manual* (1999), p. 4-2, § 9(a).

⁴⁸⁴ Canada, *LOAC Manual* (1999), p. 4-2, § 11(a), (b) and (c).

532. Croatia's *Commanders' Guide* includes "military means of transportation" among military objectives.⁴⁸⁵
533. Ecuador's *Naval Manual* lists airfields, bridges, railyards, docks, port facilities, harbours and embarkation points as military objectives.⁴⁸⁶
534. According to France's *LOAC Summary Note*, "military means of transportation" are military objectives.⁴⁸⁷
535. Italy's *LOAC Elementary Rules Manual* includes "military means of transportation" among military objectives.⁴⁸⁸
536. South Korea's *Military Law Manual* considers highways, railways, ports and airfields used for military operations as military objectives.⁴⁸⁹
537. Madagascar's *Military Manual* states that "military means of transportation" are military objectives.⁴⁹⁰
538. The *Military Manual of the Netherlands* states that:

Whether a road or railway constitutes a military objective depends on the military situation on the spot. The answer to the question of whether the acquisition of such an object at that moment yields a definite military advantage is decisive for the qualification of the object.⁴⁹¹

539. New Zealand's *Military Manual* states that "[military] transport, ports [and] airfields are examples of objects universally regarded as military objectives".⁴⁹² The manual further considers that "transportation systems for military supplies, transportation centres where lines of communication converge, railyards . . . may be attacked if they meet the criteria for military objectives".⁴⁹³
540. Spain's *Field Regulations* stipulates that bridges and railway equipment are legitimate objects of attack.⁴⁹⁴
541. Switzerland's *Basic Military Manual* considers "means of transportation of military importance" as military objectives.⁴⁹⁵
542. The *US Air Force Pamphlet* states that:

Controversy exists over whether, and the circumstances under which, other objects, such as civilian transportation and communications systems, dams and dikes can be classified properly as military objectives . . . A key factor in classification of objects as military objectives is whether they make an effective contribution to an adversary's military action so that their capture, destruction or neutralization offers a definite military advantage in the circumstances ruling at the time.⁴⁹⁶

⁴⁸⁵ Croatia, *Commanders' Manual* (1992), § 4.

⁴⁸⁶ Ecuador, *Naval Manual* (1989), § 8.1.1. ⁴⁸⁷ France, *LOAC Summary Note* (1992), § 1.2.

⁴⁸⁸ Italy, *LOAC Elementary Rules Manual* (1991), § 4.

⁴⁸⁹ South Korea, *Military Law Manual* (1996), p. 87.

⁴⁹⁰ Madagascar, *Military Manual* (1994), Fiche No. 2-O, § 4.

⁴⁹¹ Netherlands, *Military Manual* (1993), p. V-3.

⁴⁹² New Zealand, *Military Manual* (1992), § 516(2), see also § 623(2).

⁴⁹³ New Zealand, *Military Manual* (1992), § 516(4), see also § 623(4).

⁴⁹⁴ Spain, *Field Regulations* (1882), § 880.

⁴⁹⁵ Switzerland, *Basic Military Manual* (1987), Article 28.

⁴⁹⁶ US, *Air Force Pamphlet* (1976), § 5-3(b)(2).

543. The US Naval Handbook lists airfields, bridges, railyards, docks, port facilities, harbours and embarkation points as military objectives.⁴⁹⁷

National Legislation

544. Cuba's Military Criminal Code includes "means of transportation" in a list of military objects.⁴⁹⁸

545. Cuba's National Defence Act lists "means of land, air and water transport [and] airfields, ports and port installations, and plants, workshops, service centres, fuel stores and other installations intended for the exploitation, maintenance and repair of transport facilities and equipment" among the objects integrated within the "Military Reserve of Facilities and Equipment of the National Economy" to guarantee the necessities of defence in wartime.⁴⁹⁹

National Case-law

546. No practice was found.

Other National Practice

547. According to the Report on the Practice of Algeria, the destruction of railways, bridges and roads was part of a policy of "economic sabotage" conducted by the ALN during the war of independence.⁵⁰⁰

548. In 1991, in a report submitted to the UN Security Council on operations in the Gulf War, the UK stated that it had attacked "main Iraqi military airfields".⁵⁰¹ In a further report it stated that "airfields" and "bridges vital to the military supply effort to and from Kuwait" had been attacked.⁵⁰²

549. During the Korean War, the US Joint Chiefs of Staff informed General MacArthur that mass air operations against industrial targets in North Korea were "highly desirable". The Joint Chiefs of Staff accordingly designated, *inter alia*, the following targets: the railway yards and shops at Pyongyang, the railway yards and shops at Wonsan, the railway yards and shops and the harbour facilities at Chongjin, the railway yards at Chinnampo, the railway yards and shops and the docks and storage areas at Songjin, the railway yards at Hamhung and the railway yards at Haeju.⁵⁰³

550. In 1966, in the context of the Vietnam War, the US Secretary of Defense stated that:

⁴⁹⁷ US, *Naval Handbook* (1995), § 8.1.1.

⁴⁹⁸ Cuba, *Military Criminal Code* (1979), Article 33(1).

⁴⁹⁹ Cuba, *National Defence Act* (1994), Article 119(a) and (d).

⁵⁰⁰ Report on the Practice of Algeria, 1997, Chapter 1.3, referring to *El Moudjahid*, Vol. 1, pp. 25–26.

⁵⁰¹ UK, Letter dated 28 January 1991 to the President of the UN Security Council, UN Doc. S/22156, 28 January 1991, p. 1.

⁵⁰² UK, Letter dated 13 February 1991 to the President of the UN Security Council, UN Doc. S/22218, 13 February 1991, p. 1.

⁵⁰³ Robert F. Futrell, *The United States Air Force in Korea 1950–1953*, Office of Air Force History, US Air Force, Washington, D.C., Revised edition, 1983, pp. 186–187.

We are directing the aircraft against military targets, only military targets, and those particularly associated with the lines of communication between North Vietnam and South Vietnam over which they are sending the men and equipment which are the foundation of the Viet Cong effort to subvert the Government of South Vietnam.⁵⁰⁴

551. In 1966, in the context of the Vietnam War, the US Department of Defense stated that:

U.S. policy is to target military targets only, particularly those which have a direct impact on the movement of men and supplies into South Vietnam. These targets include but are not limited to roads, railroads, bridges [and] road junctions . . . In the specific case of Nam Dinh and Phu Li, targets have been limited to railroad and highway bridges, railroad yards . . .⁵⁰⁵

552. In 1991, in a report submitted to the UN Security Council on operations in the Gulf War, the US included "supply lines" among Iraq's military targets.⁵⁰⁶ In another such report, the US stated that "the supply lines leading from Iraq into Kuwait" were to be targeted by coalition forces.⁵⁰⁷

553. In 1991, during a news briefing concerning the Gulf War, the US Secretary of Defense stated that "airfields" were considered military targets and had been attacked.⁵⁰⁸

554. In 1992, in its final report to Congress on the conduct of the Gulf War, the US Department of Defense stated that Iraq's airfields, its port facilities, and its railroads and bridges had been included among the 12 target sets for the coalition's attacks.⁵⁰⁹ In the same report, the US Department of Defense stated that:

A bridge or highway vital to daily commuter and business traffic can be equally crucial to military traffic, or support for a nation's war effort. Railroads, airports, seaports and the interstate highway system in the United States have been funded by the Congress in part because of US national security concerns, for example; each proved invaluable to the movement of US military units to various ports for deployment to Southwest Asia (SWA) for Operations Desert Shield and Desert

⁵⁰⁴ US, Secretary of Defense, Statement on targeting policy in Vietnam, 2 February 1966, reprinted in Marjorie Whiteman, *Digest of International Law*, Vol. 10, Department of State Publication 8367, Washington, D.C., 1968, p. 427.

⁵⁰⁵ US, Department of Defense, Statement on targeting policy in Vietnam, 26 December 1966, reprinted in Marjorie Whiteman, *Digest of International Law*, Vol. 10, Department of State Publication 8367, Washington, D.C., 1968, p. 427.

⁵⁰⁶ US, Letter dated 22 January 1991 to the President of the UN Security Council, UN Doc. S/22130, 22 January 1991, p. 1.

⁵⁰⁷ US, Letter dated 8 February 1991 to the President of the UN Security Council, UN Doc. S/22216, 13 February 1991, p. 1.

⁵⁰⁸ US, News Briefing by the US Secretary of Defense and the Chairman of the Joint Chiefs of Staff, Washington, 23 January 1991, annexed to Letter dated 25 January 1991 to the President of the UN Security Council, UN Doc. S/22168, 29 January 1991, p. 3.

⁵⁰⁹ US, Department of Defense, Final Report to Congress on the Conduct of the Persian Gulf War, 10 April 1992, Chapter VI, The Air Campaign, pp. 96-98.

Storm. Destruction of a bridge, airport, or port facility, or interdiction of a highway can be equally important in impeding an enemy's war effort.⁵¹⁰

III. Practice of International Organisations and Conferences

555. No practice was found.

IV. Practice of International Judicial and Quasi-judicial Bodies

556. In its final report to the ICTY Prosecutor in 2000, the Committee Established to Review the NATO Bombing Campaign Against the Federal Republic of Yugoslavia stated, concerning the "attack on a civilian passenger train at the Grdelica Gorge on 12 April 1999", that the railway bridge on which the train was hit "was a legitimate military objective".⁵¹¹

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

557. No practice was found.

VI. Other Practice

558. In 1985, in a report on violations of the laws of war in Nicaragua, Americas Watch listed "objects which, while not directly connected with combat operations, effectively contribute to military operations in the circumstances ruling at the time, such as transportation and communication systems and facilities" as objects which "can arguably be regarded as legitimate military objectives subject to direct attack".⁵¹² This view was reiterated in its 1986 report on the use of landmines in the conflicts in El Salvador and Nicaragua.⁵¹³

559. In 1989, in a report on violations of the laws of war in Angola, Africa Watch listed "objects that, while not directly connected with combat operations, effectively contribute to military operations in the circumstances ruling at the time, such as transportation and communication systems and facilities,

⁵¹⁰ US, Department of Defense, Final Report to Congress on the Conduct of the Persian Gulf War, 10 April 1992, Appendix O, The Role of the Law of War, *ILM*, Vol. 31, 1992, p. 623; see also James P. Coyne, Plan of Attack, *Air Force Magazine*, April 1992, pp. 40–42.

⁵¹¹ ICTY, Final Report to the Prosecutor by the Committee Established to Review the NATO Bombing Campaign Against the Federal Republic of Yugoslavia, The Hague, 14 June 2000, § 62.

⁵¹² Americas Watch, *Violations of the Laws of War by Both Sides in Nicaragua: 1981–1985*, New York, March 1985, p. 33.

⁵¹³ Americas Watch, *Land Mines in El Salvador and Nicaragua: The Civilian Victims*, New York, December 1986, pp. 99–100.

airfields, ports" as objects which "may be regarded as legitimate military objectives subject to direct attack by combatants and mines".⁵¹⁴

560. Following NATO's air campaign in the FRY in 1999, Human Rights Watch stated that:

The attacks on the Novi Sad bridge and six other bridges in which civilian deaths occurred... also were of questionable military effect. All are road bridges. Most are urban or town bridges that are not major routes of communications. Human Rights Watch questions individual target selection in the case of these bridges. U.S. military sources have told Human Rights Watch that bridges were often selected for attack for reasons other than their role in transportation (for example, they were conduits for communications cables, or because they were symbolic and psychologically lucrative, such as in the case of the bridge over the Danube in Novi Sad). The destruction of bridges that are not central to transportation arteries or have a purely psychological importance does not satisfy the criterion of making an "effective contribution to military action" or offering a "definite military advantage," the baseline tests for legitimate military targets codified in Protocol I, art. 52.⁵¹⁵

Economic installations

I. Treaties and Other Instruments

Treaties

561. Article 2 of the 1907 Hague Convention (IX) allows the bombardment of "workshops or plant which could be utilized for the needs of the hostile fleet or army".

562. Under Article 8 of the 1954 Hague Convention, cultural property may be placed under special protection provided, *inter alia*, that it is situated "at an adequate distance from any large industrial centre or from any important military objective constituting a vulnerable point".

Other Instruments

563. According to Article 24(2) of the 1923 Hague Rules of Air Warfare, "factories constituting important and well-known centres engaged in the manufacture of arms, ammunition or distinctively military supplies" are military objectives.

564. Paragraph I of the proposed annex to Article 7(2) of the 1956 New Delhi Draft Rules provided that:

The objectives belonging to the following categories are those considered to be of generally recognized military importance:

⁵¹⁴ Africa Watch, *Angola: Violations of the Laws of War by Both Sides*, New York, April 1989, p. 140.

⁵¹⁵ Human Rights Watch, *Civilian Deaths in the NATO Air Campaign*, New York, 7 February 2000, p. 11.

- ...
- (8) Industries of fundamental importance for the conduct of the war:
 - (a) industries for the manufacture of armaments such as weapons, munitions, rockets, armoured vehicles, military aircraft, fighting ships, including the manufacture of accessories and all other war material;
 - (b) industries for the manufacture of supplies and material of a military character, such as transport and communications material, equipment for the armed forces;
 - (c) factories or plants constituting other production and manufacturing centres of fundamental importance for the conduct of war, such as the metallurgical, engineering and chemical industries, whose nature and purpose is essentially military;
 - (d) storage and transport installations whose basic function it is to serve the industries referred to in (a)–(c);
 - (e) installations providing energy mainly for national defence, e.g. coal, other fuels, or atomic energy, and plants producing gas or electricity mainly for military consumption.
 - (9) Installations constituting experimental, research centres for experiments on and the development of weapons and war material.

II. National Practice

Military Manuals

565. Australia's Defence Force Manual gives as an example of military objectives:

power stations [and] industry which support military operations... industrial installations producing materiel for combat forces, fuel dumps and distribution centres supplying military users, industrial installations that repair and replenish lines of communication and other economic targets the destruction, capture or neutralisation of which offers a definite military advantage.⁵¹⁶

The manual adds that "economic targets that indirectly but effectively support operations are also military objectives if an attack will gain a definite military advantage".⁵¹⁷

566. Belgium's Law of War Manual states that:

The purpose of combat between belligerents is to weaken and eliminate the power of resistance of the enemy.

This resistance is provided in the first place by the armed forces of a Party to the conflict. As a result, acts of violence are in the first place directed against the military potential of the adversary (the army, its positions, provision of its supplies, its stores, workshops, arsenals, depots, defence works, vehicles, aircraft, war buildings, etc.).

But this resistance also depends on the economic power of the adversary (its war industry, its production capacity, its sources of supply, etc.); in short, its economic

⁵¹⁶ Australia, *Defence Force Manual* (1994), §§ 527(b) and 527(f).

⁵¹⁷ Australia, *Defence Force Manual* (1994), § 527(g).

potential. The breaking up of this economic potential has of course a direct influence on the armed forces' capacity to resist, so that this economic potential also becomes a war objective.⁵¹⁸

567. Canada's LOAC Manual considers that "petroleum storage areas are generally accepted as being military objectives".⁵¹⁹ The manual adds that "industrial installations producing material for armed forces; conventional power plants; and fuel dumps may constitute military objectives depending on the circumstances".⁵²⁰

568. Croatia's LOAC Compendium considers that supply and maintenance bases, namely locations where goods other than medical are produced, processed or stored, are military objectives.⁵²¹

569. Ecuador's Naval Manual states that:

Proper economic targets for naval attack include enemy lines of communication used for military purposes, rail yards, bridges, rolling stock, barges, lighters, industrial installations producing war-fighting products, and power generation plants. Economic targets of the enemy that indirectly but effectively support and sustain the enemy's war-fighting capability may also be attacked.⁵²²

570. Germany's Military Manual provides that military objectives include, in particular, "economic objectives which make an effective contribution to military action (transport facilities, industrial plants, etc.)".⁵²³

571. Hungary's Military Manual considers that supply and maintenance bases, namely locations where goods other than medical are produced, processed or stored, are military objectives.⁵²⁴

572. According to Italy's IHL Manual, "depots, workshops [and] installations... which can be used for the needs of the armed forces" are military objectives.⁵²⁵

573. New Zealand's Military Manual states that "energy installations [and] war supporting industries are examples of objects universally regarded as military objectives".⁵²⁶ The manual further states that:

Industrial installations producing materiel for combat forces, fuel dumps and distribution centres supplying military users, and industrial installations that repair and replenish lines of communication (such as conventional power plants and vehicle plants), and other economic targets may be attacked if they meet the criteria for military objectives.⁵²⁷

⁵¹⁸ Belgium, *Law of War Manual* (1983), p. 26.

⁵¹⁹ Canada, *LOAC Manual* (1999), p. 4-2, § 9(a).

⁵²⁰ Canada, *LOAC Manual* (1999), p. 4-2, § 11(d), (e) and (f).

⁵²¹ Croatia, *LOAC Compendium* (1991), p. 51.

⁵²² Ecuador, *Naval Manual* (1989), § 8.1.1. ⁵²³ Germany, *Military Manual* (1992), § 443.

⁵²⁴ Hungary, *Military Manual* (1992), p. 83. ⁵²⁵ Italy, *IHL Manual* (1991), Vol. I, § 12.

⁵²⁶ New Zealand, *Military Manual* (1992), § 516(2), see also § 623(2).

⁵²⁷ New Zealand, *Military Manual* (1992), § 516(4), see also § 623(4).

In general, the manual considers that:

Economic targets that indirectly but effectively support enemy operations may also be attacked to gain a definite military advantage. For example, an 1870 international arbitral tribunal recognized that the destruction of cotton was justified during the American Civil War since the sale of cotton provided funds for almost all Confederate arms and ammunition. Authorization to attack such targets will be reserved to higher authority.⁵²⁸

574. According to Spain's LOAC Manual, "economic-industrial objectives which make an effective and real contribution to military action" are military objectives.⁵²⁹

575. Sweden IHL Manual states that:

How and to what extent a given object can effectively contribute to the adversary's military operations must be decided by the commander. This need not imply that the property in question is being used by the adversary for a given operation . . . It may even be a question of . . . energy resources or factories that indirectly contribute to the adversary's military operations.⁵³⁰

576. Switzerland's Basic Military Manual considers "plants, factories and establishments directly linked to the activity of the armed forces" as military objectives.⁵³¹

577. The US Naval Handbook states that:

Proper economic targets for naval attack include enemy lines of communication, rail yards, bridges, rolling stock, barges, lighters, industrial installations producing war-fighting products, and power generation plants. Economic targets of the enemy that indirectly but effectively support and sustain the enemy's war-fighting capability may also be attacked.⁵³²

National Legislation

578. Cuba's National Defence Act lists among the objects integrated within the "Military Reserve of Facilities and Equipment of the National Economy" to guarantee the necessities of defence in wartime:

facilities and equipment for the handling and storage of cargo, agricultural machinery, construction machinery, and other facilities, installations and machinery intended for works of engineering [and] facilities and equipment for . . . automation, meteorology, topographical and geodesic systems.⁵³³

⁵²⁸ New Zealand, *Military Manual* (1992), § 516(5), see also § 623(5).

⁵²⁹ Spain, *LOAC Manual* (1996), Vol. I, § 4.5.b.(2).a.

⁵³⁰ Sweden, *IHL Manual* (1991), Section 3.2.1.5, p. 54.

⁵³¹ Switzerland, *Basic Military Manual* (1987), Article 28.

⁵³² US, *Naval Handbook* (1995), § 8.1.1.

⁵³³ Cuba, *National Defence Act* (1994), Article 119(b) and (c).

579. According to Italy's Law of War Decree as amended, "depots, workshops [and] installations . . . which can be used for the needs of the armed forces" are military objectives.⁵³⁴

National Case-law

580. No practice was found.

Other National Practice

581. According to the Report on the Practice of Iran, during the Iran–Iraq War, Iran always insisted that it had no intention of attacking civilian objects, all targets being "military objectives or objects which by their nature, location, purpose or use made an effective contribution to military action, and thus most economic objectives were regarded as military objectives". The report cites refineries, petrochemical complexes, power stations, railway stations, radio and television stations and bridges as examples of economic objectives which were targeted by the Iranian air force and concludes that "the definition of military objectives from Iran's point of view is a broad one which includes economic objectives too".⁵³⁵

582. The Report on the Practice of Lebanon refers to a statement by the General Director of the Ministry of Justice in 1997 in which he stated that he considered the bombardment of economic installations to be a war crime.⁵³⁶

583. In 1991, in a report submitted to the UN Security Council on operations in the Gulf War, the UK stated that Iraq's oil refining capacity had been specifically targeted with the objective of "reducing Iraq's military sustainability".⁵³⁷

584. During the Korean War, the US Joint Chiefs of Staff informed General MacArthur that mass air operations against industrial targets in North Korea were "highly desirable". The Joint Chiefs of Staff accordingly designated, *inter alia*, the following targets: the two munitions plants at Pyongyang, the three chemical plants at Hungnam, the oil refinery at Wonsan, the naval oil-storage tank farm at Rashin, the "Tong Iron Foundry" and the "Sam Yong Industrial Factory" at Chinnampo.⁵³⁸

585. In 1950, the US Secretary of State stated that "the air activity of the United Nations forces in Korea has been, and is, directed solely at military targets of the invader. These targets [include] . . . war plants."⁵³⁹

⁵³⁴ Italy, *Law of War Decree as amended* (1938), Article 40.

⁵³⁵ Report on the Practice of Iran, 1997, Chapter 1.3.

⁵³⁶ Report on the Practice of Lebanon, 1998, Chapter 6.5, referring to Statement by the General Director of the Lebanese Ministry of Justice, *al Raii al ordonia*, 23 December 1997.

⁵³⁷ UK, Letter dated 28 January 1991 to the President of the UN Security Council, UN Doc. S/22156, 28 January 1991, p. 1.

⁵³⁸ Robert F. Futrell, *The United States Air Force in Korea 1950–1953*, Office of Air Force History, US Air Force, Washington, D.C., Revised edition, 1983, pp. 186–187, see also pp. 517–518 (discussing the North Korean metals and mining business as a target category).

⁵³⁹ US, Statement by the Secretary of State, Dean Acheson, 6 September 1950, reprinted in Marjorie Whiteman, *Digest of International Law*, Vol. 10, Department of State Publication 8367, Washington, D.C., 1968, p. 140.

586. In 1966, in reply to an inquiry from a member of the House of Representatives asking for a restatement of US policy on targeting in North Vietnam, a US Deputy Assistant Secretary of Defense wrote that “the United States has not targeted such installations as textile plants, fruit-canning plants, silk factories and thread cooperatives”.⁵⁴⁰

587. In 1992, in its final report to Congress on the conduct of the Gulf War, the US Department of Defense stated that Iraq’s electricity production facilities, its oil refining and distribution facilities and its military production sites had been included among the 12 target sets for the coalition’s attacks.⁵⁴¹

588. In 1993, in its report to Congress on the protection of natural and cultural resources during times of war, the US Department of Defense stated that:

Natural resources that may be of value to an enemy in his war effort are legitimate targets. The 1943 air raids on the Ploesti oil fields in Romania, and the Combined Bomber Offensive campaign against Nazi oil, were critical to allied defeat of Germany in World War II, for example . . . During Desert Storm, Coalition planners targeted Iraq’s ability to produce refined oil products (such as gasoline) that had immediate military use, but eschewed attack on its long-term crude oil production capability.⁵⁴²

589. The Report on US Practice states that:

The *opinio juris* of the U.S. government recognizes the definition of military objectives in Article 52 of Additional Protocol I as customary law. United States practice gives a broad reading to this definition, and would include . . . war-supporting economic facilities as military objectives.⁵⁴³

III. Practice of International Organisations and Conferences

United Nations

590. In a resolution adopted in 1989 on the situation of human rights and fundamental freedoms in El Salvador, the UN Commission on Human Rights expressed its concern at “the systematic destruction of the economic infrastructure as a consequence of the armed conflict” and requested that all parties put an end to “attacks on the economic infrastructure”.⁵⁴⁴

⁵⁴⁰ US, Letter from Deputy Assistant Secretary of Defense Goulding to US Representative Ogden Reid from New York, 30 December 1966, reprinted in Marjorie Whiteman, *Digest of International Law*, Vol. 10, Department of State Publication 8367, Washington, D.C., 1968, p. 428.

⁵⁴¹ US, Department of Defense, Final Report to Congress on the Conduct of the Persian Gulf War, 10 April 1992, Chapter VI, The Air Campaign, pp. 96–98.

⁵⁴² US, Department of Defense, Report to Congress on International Policies and Procedures Regarding the Protection of Natural and Cultural Resources During Times of War, 19 January 1993, p. 204.

⁵⁴³ Report on US Practice, 1997, Chapter 1.3.

⁵⁴⁴ UN Commission on Human Rights, Res. 1989/68, 8 March 1989, preamble and § 5.

Other International Organisations

591. No practice was found.

International Conferences

592. No practice was found.

IV. Practice of International Judicial and Quasi-judicial Bodies

593. No practice was found.

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

594. No practice was found.

VI. Other Practice

595. In 1985, in a report on violations of the laws of war in Nicaragua, Americas Watch listed as objects which "can arguably be regarded as legitimate military objectives subject to direct attack":

objects which, while not directly connected with combat operations, effectively contribute to military operations in the circumstances ruling at the time, such as . . . otherwise non-military industries of importance to the ability of a party to the conflict to conduct military operations, such as raw or processed coffee destined for export.⁵⁴⁵

This view was reiterated in its 1986 report on the use of landmines in the conflicts in El Salvador and Nicaragua.⁵⁴⁶

596. In 1989, in a report on violations of the laws of war in Angola, Africa Watch listed as objects which "may be regarded as legitimate military objectives subject to direct attack by combatants and mines":

objects that, while not directly connected with combat operations, effectively contribute to military operations in the circumstances ruling at the time, such as . . . otherwise nonmilitary industries of importance to the ability of a party to the conflict to conduct military operations, such as diamonds or petroleum destined for export.⁵⁴⁷

⁵⁴⁵ Americas Watch, *Violations of the Laws of War by Both Sides in Nicaragua: 1981–1985*, New York, March 1985, p. 33.

⁵⁴⁶ Americas Watch, *Land Mines in El Salvador and Nicaragua: The Civilian Victims*, New York, December 1986, pp. 99–100.

⁵⁴⁷ Africa Watch, *Angola: Violations of the Laws of War by Both Sides*, New York, April 1989, p. 140.

Areas of land

I. Treaties and Other Instruments

Treaties

597. Upon ratification of AP I, Canada stated that:

A specific area of land may be a military objective if, because of its location or other reasons specified in [Article 52] as to what constitutes a military objective, its total or partial destruction, capture or neutralization in the circumstances governing at the time offers a definite military advantage.⁵⁴⁸

Similar statements were made upon signature and/or ratification of AP I by FRG, Italy, Netherlands, New Zealand, Spain and UK.⁵⁴⁹

598. In a declaration made upon ratification of AP I, France stated that:

A specific zone may be considered as a military objective if, due to its location or for any other criteria mentioned in Article 52 [AP I], its total or partial destruction, capture or neutralisation in the circumstances governing at the time offers a decisive military advantage.⁵⁵⁰

It made a similar interpretative declaration upon ratification of the 1998 ICC Statute.⁵⁵¹

599. Upon ratification of the CCW, the UK issued a declaration to the effect that "a specific area of land may be a military objective if, because of its location or other reasons [nature, purpose or use], its total or partial destruction, capture or neutralisation in the circumstances ruling at the time offers a definite military advantage".⁵⁵² Similar statements were made upon ratification of the CCW and/or acceptance of some of its Protocols by the Netherlands, Pakistan and US.⁵⁵³

Other Instruments

600. No practice was found.

⁵⁴⁸ Canada, Statements of understanding made upon ratification of AP I, 20 November 1990.

⁵⁴⁹ FRG, Declarations made upon ratification of AP I, 14 February 1991, § 7; Italy, Declarations made upon ratification of AP I, 27 February 1986, § 7; Netherlands, Declarations made upon ratification of AP I, 26 June 1987, § 7; New Zealand, Declarations made upon ratification of AP I, 8 February 1988, § 4; Spain, Declarations made upon ratification of AP I, 21 April 1989, § 7; UK, Declaration made upon signature of AP I, 12 December 1977, § f; UK, Reservations and declarations made upon ratification of AP I, 28 January 1998, § j.

⁵⁵⁰ France, Reservations and declarations made upon ratification of AP I, 11 April 2001, § 12.

⁵⁵¹ France, Interpretative declarations made upon ratification of the 1988 ICC Statute, 9 June 2000, § 6.

⁵⁵² UK, Declaration made upon ratification of the CCW, 13 February 1995, § (b).

⁵⁵³ Netherlands, Declaration made upon ratification of the CCW, 18 June 1987, §§ 1 and 4; Netherlands, Declaration made upon acceptance of the 1996 Amended Protocol II to the CCW, 25 March 1999, § 3; Pakistan, Declaration made upon acceptance of the 1996 Amended Protocol II to the CCW, 9 March 1999, § 5; US, Declaration made upon acceptance of the 1996 Amended Protocol II to the CCW, 24 May 1999, § 4.

II. National Practice

Military Manuals

- 601.** Australia's Defence Force Manual includes among military objectives "areas of land which are of direct use to defending or attacking forces, eg land through which an adversary is likely to move its forces or which may be used as a forming up point preceding an attack".⁵⁵⁴
- 602.** Belgium's Regulations on Armoured Infantry Squads defines the objective of a mission as "a vital area of land to be conquered or defended".⁵⁵⁵
- 603.** Belgium's Regulations on Tank Squadrons states that the objective of a tank squadron in attack is "an area of land whose capture requires the enemy's destruction or withdrawal".⁵⁵⁶
- 604.** Belgium's Regulations on the Tactical Use of Large Units states that "an objective is the final goal of an action. It is defined as either an area of land of tactical importance or as enemy elements that have to be destroyed or neutralised."⁵⁵⁷
- 605.** Benin's Military Manual considers "an area of land of tactical importance" as a military objective.⁵⁵⁸
- 606.** According to Canada's LOAC Manual, "a specific area of land may constitute a military objective".⁵⁵⁹
- 607.** According to Croatia's Commanders' Manual, military objectives include "tactically relevant points of terrain".⁵⁶⁰
- 608.** Ecuador's Naval Manual states that "proper naval targets also include geographic targets, such as a mountain pass".⁵⁶¹
- 609.** France's LOAC Summary Note includes "areas of land of tactical importance" among military objectives.⁵⁶²
- 610.** Italy's IHL Manual states that "areas of land that would be useful to capture or deny to the enemy in order to achieve a military operation" are military objectives.⁵⁶³
- 611.** Italy's LOAC Elementary Rules Manual includes "areas of tactical importance" among military objectives.⁵⁶⁴
- 612.** Madagascar's Military Manual states that military objectives include "areas of land of tactical importance".⁵⁶⁵

⁵⁵⁴ Australia, *Defence Force Manual* (1994), § 527(h), see also § 916(b) ("areas of land which armed forces use or which have military significance such as hills and bridgeheads").

⁵⁵⁵ Belgium, *Regulations on Armoured Infantry Squads* (1972), p. 3.

⁵⁵⁶ Belgium, *Regulations on Tank Squadrons* (1982), § 537(b)(2), see also §§ 536(b)(2) and 539(b)(2).

⁵⁵⁷ Belgium, *Regulations on the Tactical Use of Large Units* (1994), § 210.

⁵⁵⁸ Benin, *Military Manual* (1995), Fascicule I, p. 13.

⁵⁵⁹ Canada, *LOAC Manual* (1999), p. 4-1, § 8. ⁵⁶⁰ Croatia, *Commanders' Manual* (1992), § 4.

⁵⁶¹ Ecuador, *Naval Manual* (1989), § 8.1.1.

⁵⁶² France, *LOAC Summary Note* (1992), Part I, § 1.2.

⁵⁶³ Italy, *IHL Manual* (1991), Vol. I, § 12.

⁵⁶⁴ Italy, *LOAC Elementary Rules Manual* (1991), § 4.

⁵⁶⁵ Madagascar, *Military Manual* (1994), Fiche No. 2-O, § 4.

613. The Military Manual of the Netherlands notes that the government of the Netherlands has declared that “an area of land can constitute a military objective as long as it fulfils the conditions thereof”.⁵⁶⁶

614. New Zealand’s Military Manual states that:

An area of land may be a military objective, provided that the particular area offers a definite military advantage to the defending forces or those attacking. This would include a tract of land through which the adverse Party would be likely to move its forces, or an area the occupation of which would provide the occupant with the possibility of mounting a further attack.⁵⁶⁷

615. Spain’s LOAC Manual states that “the capture or preservation of a specific area of land constitutes a military objective when it meets all the requirements laid down in Article 52 AP I and it confers a concrete military advantage taking into account the circumstances ruling at the time”.⁵⁶⁸

616. Sweden’s IHL Manual states that:

The definition [of military objectives contained in Article 52(2) AP I] is intended to apply only to property or objects. Thus for example, areas of land cannot be included; but this does not prevent an area objective if it is a matter of hindering an enemy advance by means of artillery fire or mining. Attacks on an area are permitted as long as the attack cannot be classified as indiscriminate.⁵⁶⁹

617. Togo’s Military Manual considers “an area of land of tactical importance” as a military objective.⁵⁷⁰

618. The UK LOAC Manual states that military objectives include “areas of land which either have military significance such as hills, defiles or bridgeheads or which contain military objects; or . . . minefields”.⁵⁷¹

619. The US Naval Handbook states that “proper naval targets also include geographic targets, such as a mountain pass”.⁵⁷²

National Legislation

620. The Report on the Practice of Spain notes that the fact that a particular zone may be considered a military objective provided it fulfils the requirements of Article 52(2) AP I is consistent with the possibility provided for under Spanish law of establishing zones of interest for national defence, comprising “expanses of land, sea, or airspace declared as such because they constitute or may constitute a permanent base or an effective aid to offensive action necessary for such purpose”.⁵⁷³

⁵⁶⁶ Netherlands, *Military Manual* (1993), p. V-3.

⁵⁶⁷ New Zealand, *Military Manual* (1992), § 516(6), see also § 623(6).

⁵⁶⁸ Spain, *LOAC Manual* (1996), Vol. I, § 4.4.d; see also § 2.3.b.(1).

⁵⁶⁹ Sweden, *IHL Manual* (1991), Section 3.2.1.5, p. 54.

⁵⁷⁰ Togo, *Military Manual* (1996), Fascicule I, p. 13.

⁵⁷¹ UK, *LOAC Manual* (1981), Section 4, p. 13, § 3(b)(1).

⁵⁷² US, *Naval Handbook* (1995), § 8.1.1.

⁵⁷³ Report on the Practice of Spain, 1998, Chapter 1.3, referring to *Zones and Installations Law* (1975), Article 2.

National Case-law

621. No practice was found.

Other National Practice

622. In an explanatory memorandum submitted to the Belgian parliament in 1985 in the context of the ratification procedure of the Additional Protocols, the Belgian government stated that “the notion of ‘military objective’ must be understood as meaning that a specific zone, as such, which by its location or other criteria enumerated in Article 52 makes an effective contribution to enemy military action, can be considered a military objective”.⁵⁷⁴

623. At the CDDH, Canada stated that:

A specific area of land may also be a military objective if, because of its location or other reasons specified in Article 47 [now Article 52 AP I], its total or partial destruction, capture or neutralization, in the circumstances ruling at the time, offers a definite military advantage.⁵⁷⁵

624. At the CDDH, the FRG stated that it had been able to vote in favour of Article 47 of draft AP I (now article 52) on the basis of the understanding that:

A specific area of land may be a military objective if, because of its location or other reasons specified in Article 47 [now Article 52 AP I], its total or partial destruction, capture or neutralization, in the circumstances ruling at the time, offers a definite military advantage.⁵⁷⁶

625. At the CDDH, the Netherlands stated that it interpreted Article 47 of draft AP I (now Article 52) to mean that:

A specific area of land may be a military objective if, because of its location or other reasons specified in Article 47 [now Article 52 AP I], its total or partial destruction, capture or neutralization, in the circumstances ruling at the time, offers a definite military advantage.⁵⁷⁷

626. At the CDDH, the UK stated that:

A specific area of land might be a military objective if, because of its location or for other reasons specified in Article 47 [now Article 52 AP I], its total or partial destruction, capture or neutralization, in the circumstances ruling at the time, offered a definite military advantage.⁵⁷⁸

627. At the CDDH, the US expressed its understanding that:

⁵⁷⁴ Belgium, House of Representatives, Explanatory memorandum on a draft bill for the approval of the Additional Protocols, 1984–1985 Session, Doc. 1096-1, 9 January 1985, p. 10.

⁵⁷⁵ Canada, Statement at the CDDH, *Official Records*, Vol. VI, CDDH/SR.41, 26 May 1977, p. 179.

⁵⁷⁶ FRG, Statement at the CDDH, *Official Records*, Vol. VI, CDDH/SR.41, 26 May 1977, p. 188.

⁵⁷⁷ Netherlands, Statement at the CDDH, *Official Records*, Vol. VI, CDDH/SR.41, 26 May 1977, p. 195.

⁵⁷⁸ UK, Statement at the CDDH, *Official Records*, Vol. VI, CDDH/SR.41, 26 May 1977, p. 169, § 153.

A specific area of land may be a military objective if, because of its location or other reasons specified in Article 47 [now Article 52 AP I], its total or partial destruction, capture or neutralization, in the circumstances ruling at the time, offers a definite military advantage.⁵⁷⁹

628. In 1992, in a review of the legality of extended range anti-armour munition, the US Department of the Air Force stated that:

An area of land can be a military objective if by its nature, location, purpose or use it makes an effective contribution to military action and its total or partial destruction, denial, capture or neutralization offers a definite military advantage, in the circumstances ruling at the time. Most areas which would be mined in war would meet this definition.⁵⁸⁰

629. The Report on US Practice states that:

The *opinio juris* of the U.S. government recognizes the definition of military objectives in Article 52 of Additional Protocol I as customary law. United States practice gives a broad reading to this definition, and would include areas of land . . . as military objectives.⁵⁸¹

III. Practice of International Organisations and Conferences

630. No practice was found.

IV. Practice of International Judicial and Quasi-judicial Bodies

631. No practice was found.

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

632. No practice was found.

VI. Other Practice

633. No practice was found.

Presence of civilians within or near military objectives

I. Treaties and Other Instruments

634. No practice was found.

⁵⁷⁹ US, Statement at the CDDH, *Official Records*, Vol. VI, CDDH/SR.41, 26 May 1977, p. 204.

⁵⁸⁰ US, Department of the Air Force, The Judge Advocate General, Legal Review: Extended Range Antiarmor Munition (ERAM), 16 April 1992, § 7.

⁵⁸¹ Report on US Practice, 1997, Chapter 1.3.

II. National Practice

Military Manuals

635. Australia's Defence Force Manual states that:

The presence of noncombatants in or around a military objective does not change its nature as a military objective. Noncombatants in the vicinity of a military objective must share the danger to which the military objective is exposed.

Civilians working in a store on a military air base may not necessarily be taking . . . a direct part [in hostilities]. However, stores, depots, supply columns and military installations are clearly military objectives which may be attacked, regardless of the presence of civilian workers.

Civilians who are not directly involved in combat but are performing military tasks are not combatants. If they are killed or injured during an attack on a legitimate military objective there is no breach of LOAC provided the death or injury is not disproportionate to the direct and concrete military advantage anticipated from the attack. The presence of civilians on or near the proposed military objective (either in a voluntary capacity or as a shield) is merely one of the factors that must be considered when planning an attack.⁵⁸²

636. Canada's LOAC Manual states that:

For targeting purposes, the presence of civilians who are authorized to accompany the armed forces without actually being members thereof (such as crews of military aircraft, war correspondents, supply contractors or members of services responsible for the welfare of the armed forces) does not render a legitimate target immune from attack. Such persons run the risk of being attacked as part of a legitimate target.⁵⁸³

637. Colombia's Instructors' Manual states that "a military objective remains a military objective even if civilians are inside it. Civilians within or in the immediate vicinity of a military objective share the risk to which the objective is exposed."⁵⁸⁴

638. Croatia's LOAC Compendium considers that supply and maintenance bases are military objectives and that civilian personnel working there share the risk of attack.⁵⁸⁵

639. Ecuador's Naval Manual states that:

Deliberate use of noncombatants to shield military objectives from enemy attack is prohibited. The presence of non-combatants within or near military objectives does not preclude an attack on such objectives . . . Unlike military personnel (other than those in a specially protected status such as medical personnel and the sick and wounded) who are always subject to attack, whether on duty or in a leave capacity, civilians are immune from attack unless they are engaged in direct support of the enemy's armed forces or provide them with logistical support. Civilians who provide command, administrative or logistical support to military operations are

⁵⁸² Australia, *Defence Force Manual* (1994), §§ 526, 532 and 550.

⁵⁸³ Canada, *LOAC Manual* (1999), p. 4-4, § 34.

⁵⁸⁴ Colombia, *Instructors' Manual* (1999), p. 18.

⁵⁸⁵ Croatia, *LOAC Compendium* (1991), p. 51.

exposed to attacks while performing such duties. Similarly, civilian employees of navy shipyards, the merchant navy personnel working on ships carrying military cargo, and the workers on military fortifications can be attacked while they carry out such activities.⁵⁸⁶

640. Germany's Military Manual states that "civilians present in military objectives are not protected against attacks directed at these objectives; the presence of civilian workers in an arms production plant, for instance, will not prevent opposing armed forces from attacking this military objective".⁵⁸⁷

641. Hungary's Military Manual considers that supply and maintenance bases are military objectives and that civilian personnel working there share the risk of attack.⁵⁸⁸

642. Madagascar's Military Manual states that "a military objective remains a military objective even if civilians are present inside it".⁵⁸⁹

643. The Military Manual of the Netherlands considers that:

Acts such as the manufacturing and transport of military materiel in the hinterland certainly do not constitute a direct participation in hostilities. In addition, it has to be borne in mind that the fact that civilians are working in, for example, a weapons factory does not convert such an industrial object into a civilian object. Such a case has to be assessed in the light of the definition of a military objective.⁵⁹⁰

644. New Zealand's Military Manual states that "civilians employed in industries or other activities connected with the war effort may lose while on the job some or all of their protection as civilians but they do not, as a result, become combatants".⁵⁹¹

645. Spain's Field Regulations deals with the question of whether protection should be granted to "individuals who, forming part of a field army, are nonetheless not combatants in the strict sense of the word, such as employees and operatives of administrative and technical bodies, drivers, cleaners".⁵⁹² According to the manual, such individuals "who are not military personnel but follow armies to the battlefield are naturally exposed to the same dangers and cannot expect to be treated differently; but once their position and functions have been identified, they must be respected".⁵⁹³

646. Spain's LOAC Manual states that "indirect objectives" are objectives:

which may not be the object of a direct attack but which can suffer the consequences of an attack upon a military objective. Such is the case for civilians... who may suffer the effects of an attack upon a legitimate military objective due to:

⁵⁸⁶ Ecuador, *Naval Manual* (1989), §§ 11.2 and 11.3.

⁵⁸⁷ Germany, *Military Manual* (1992), § 445. ⁵⁸⁸ Hungary, *Military Manual* (1992), p. 83.

⁵⁸⁹ Madagascar, *Military Manual* (1994), Fiche No. 2-SO, § D.

⁵⁹⁰ Netherlands, *Military Manual* (1993), p. V-5.

⁵⁹¹ New Zealand, *Military Manual* (1992), § 802(2).

⁵⁹² Spain, *Field Regulations* (1882), Article 853.

⁵⁹³ Spain, *Field Regulations* (1882), Article 855.

- their proximity to a military objective aimed at shielding that objective against attack;
- their carrying out activities supporting military operations (units of workers, workers in arms factories, etc.).⁵⁹⁴

The manual further provides that civilian personnel who accompany and render services to the armed forces “do not have the protected status of the civilian population but are entitled to the status of prisoner of war in case of capture”.⁵⁹⁵

647. Switzerland’s Basic Military Manual considers that:

Civilians who are inside or in the immediate vicinity of military objectives run the risks to which the military objectives are exposed. For example, the presence of civilian workers inside a weapons factory does not prevent the enemy from attacking this military objective.⁵⁹⁶

648. The US Naval Handbook states that:

Deliberate use of noncombatants to shield military objectives from enemy attack is prohibited. Although the principle of proportionality underlying the concept of collateral damage and incidental injury continues to apply in such cases, the presence of non-combatants within or adjacent to a legitimate target does not preclude attack of it . . . Unlike military personnel (other than those in a specially protected status such as medical personnel and the sick and wounded) who are always subject to attack whether on duty or in a leave capacity, civilians, as a class, are not to be the object of attack. However, civilians that are engaged in direct support of the enemy’s war-fighting or war-sustaining effort are at risk of incidental injury from attack on such activities.⁵⁹⁷

National Legislation

649. No practice was found.

National Case-law

650. According to the Report on the Practice of Japan, the judgement of the Tokyo District Court in the *Shimoda case* in 1963, which concerned the dropping of the atomic bomb, can be interpreted as having denied the existence of the concept of so-called quasi-combatants, whereby civilians who do not directly partake in hostilities, but indirectly contribute to hostile acts by working in transportation, communication and industrial facilities would be regarded as military objectives.⁵⁹⁸

⁵⁹⁴ Spain, *LOAC Manual* (1996), Vol. I, § 4.4.e, see also § 2.3.b.(1).

⁵⁹⁵ Spain, *LOAC Manual* (1996), Vol. I, § 5.2.a.(2).

⁵⁹⁶ Switzerland, *Basic Military Manual* (1987), Article 28 and commentary.

⁵⁹⁷ US, *Naval Handbook* (1995), §§ 11.2 and 11.3.

⁵⁹⁸ Report on the Practice of Japan, 1998, Chapter 1.2, referring to Tokyo District Court, *Shimoda case*, Judgement, 7 December 1963.

Other National Practice

651. In an explanatory memorandum submitted to the Belgian parliament in 1985 in the context of the ratification procedure of the Additional Protocols, the Belgian government stated that “each person, even a civilian, who is located inside a military objective, is exposed to the consequences of the risks that objective runs”.⁵⁹⁹

652. In 1989, a US memorandum of law concerning the prohibition of assassination stated that:

Civilians who work within a military objective are at risk from attack during the times in which they are present within that objective, whether their injury or death is incidental to the attack of that military objective or results from their direct attack . . . The substitution of a civilian in a position or billet that normally would be occupied by a member of the military will not make that position immune from attack.⁶⁰⁰

653. In 1992, in its final report to Congress on the conduct of the Gulf War, the US Department of Defense stated that:

Civilians using those bridges or near other targets at the time of their attack were at risk of injury incidental to the legitimate attack of those targets . . . The presence of civilians will not render a target immune from attack; legitimate targets may be attacked wherever located (outside neutral territory and waters).⁶⁰¹

III. Practice of International Organisations and Conferences

654. No practice was found.

IV. Practice of International Judicial and Quasi-judicial Bodies

655. No practice was found.

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

656. To fulfil its task of disseminating IHL, the ICRC has delegates around the world teaching armed and security forces that “a military objective remains a military objective even if civilian persons are in it. The civilian persons within

⁵⁹⁹ Belgium, House of Representatives, Explanatory memorandum on a draft bill for the approval of the Additional Protocols, 1984–1985 Session, Doc. 1096-1, 9 January 1985, p. 10.

⁶⁰⁰ US, Executive Order 12333 and Assassination, Memorandum prepared by the Chief of the International Law Branch, Office of the Judge Advocate General, Department of the Army, 2 November 1989, reprinted in Marian Nash (Leich), *Cumulative Digest of United States Practice in International Law, 1981–1988*, Department of State Publication 10120, Washington, D.C., 1993–1995, pp. 3415–3416.

⁶⁰¹ US, Department of Defense, Office of the Judge Advocate General, Final Report to Congress on the Conduct of the Persian Gulf War, 10 April 1992, Appendix O, The Role of the Law of War, *ILM*, Vol. 31, 1992, pp. 624 and 625.

such an objective or its immediate surroundings share the danger to which it is exposed."⁶⁰²

VI. *Other Practice*

657. Oppenheim states that:

Sections of the civilian population, like munition workers, which are closely identified with military objectives proper, may, while so identified, be legitimately exposed to air attack and to other belligerent measures aiming at the destruction of the objectives in question.⁶⁰³

658. In 1985, in a report on violations of the laws of war in Nicaragua, Americas Watch stated that:

Persons providing only indirect support to the Nicaraguan army by, *inter alia*, working in defense plants, distributing or storing military supplies in rear areas, supplying labor and food, or serving as messengers or disseminating propaganda . . . may *not* be subject to direct individualized attack or execution since they pose no immediate threat to the adversary. However, they assume the risk of incidental death or injury arising from attacks against legitimate military targets.⁶⁰⁴ [emphasis in original]

This view was reiterated in its 1986 report on the use of landmines in the conflicts in El Salvador and Nicaragua.⁶⁰⁵

659. In 1989, in a report on violations of the laws of war in Angola, Africa Watch stated that:

Persons providing only indirect support to the Angolan, Cuban, or South African armed forces or UNITA by, *inter alia*, working in defense plants, distributing or storing military supplies behind conflict areas, supplying labor and food, serving as messengers, or disseminating propaganda . . . may not be subject to direct individualized attack because they pose no immediate threat to the adversary. They assume, however, the risk of incidental death or injury arising from attacks and the use of weapons against legitimate military targets.⁶⁰⁶

⁶⁰² Frédéric de Mulinen, *Handbook on the Law of War for Armed Forces*, ICRC, Geneva, 1987, § 56.

⁶⁰³ Lassa Oppenheim, *International Law. A Treatise*, Vol. II, Disputes, War and Neutrality, Sixth edition, revised, Hersch Lauterpacht (ed.), Longmans, Green and Co., London/New York/Toronto, 1944, p. 416, § 214*ea*.

⁶⁰⁴ Americas Watch, *Violations of the Laws of War by Both Sides in Nicaragua: 1981–1985*, New York, March 1985, p. 32.

⁶⁰⁵ Americas Watch, *Land Mines in El Salvador and Nicaragua: The Civilian Victims*, New York, December 1986, p. 98.

⁶⁰⁶ Africa Watch, *Angola: Violations of the Laws of War by Both Sides*, New York, April 1989, p. 138.

C. Definition of Civilian Objects

I. Treaties and Other Instruments

Treaties

660. Article 52(1) AP I defines civilian objects as “all objects which are not military objectives”. Article 52 AP I was adopted by 79 votes in favour, none against and 7 abstentions.⁶⁰⁷

661. Article 2(5) of the 1980 Protocol II to the CCW and Article 2(7) of the 1996 Amended Protocol II to the CCW define civilian objects as “all objects which are not military objectives”.

662. Article 1(4) of the 1980 Protocol III to the CCW defines civilian objects as “all objects which are not military objectives”.

663. Upon signature of the 1998 ICC Statute, Egypt declared that “civilian objects [referred to in article 8, paragraph 2 (b) of the Statute] must be defined and dealt with in accordance with the provisions of [AP I] and, in particular, article 52 thereof”.⁶⁰⁸

Other Instruments

664. No practice was found.

II. National Practice

Military Manuals

665. Military manuals of Argentina, Australia, Cameroon, Canada, Colombia, Kenya, Madagascar, Netherlands, South Africa, Spain, UK and US define civilian objects as all objects which are not military objectives.⁶⁰⁹

666. Benin’s Military Manual defines civilian objects as “any object which is not a military object or which is not used for military purposes”.⁶¹⁰

667. Croatia’s Commanders’ Manual defines civilian objects as “those objects that are not used for military purposes”.⁶¹¹

668. Ecuador’s Naval Manual defines civilian objects as “all civilian property and activities other than those used to support or sustain the enemy’s war-fighting capability”.⁶¹²

⁶⁰⁷ CDDH, *Official Records*, Vol. VI, CDDH/SR.41, 26 May 1977, p. 168.

⁶⁰⁸ Egypt, Declarations made upon signature of the 1988 ICC Statute, 26 December 2000, § 4(b).

⁶⁰⁹ Argentina, *Law of War Manual* (1989), §§ 4.02(2) and 4.45; Australia, *Defence Force Manual* (1994), §§ 530 and 916; Cameroon, *Instructors’ Manual* (1992), p. 17; Canada, *LOAC Manual* (1999), p. 4-4, § 36; Colombia, *Instructors’ Manual* (1999), pp. 16–17; Kenya, *LOAC Manual* (1997), Précis No. 2, p. 11; Madagascar, *Military Manual* (1994), Fiche No. 2-SO, § D, see also Fiche No. 2-O, § 6 and Fiche No. 4-T, § 1; Netherlands, *Military Manual* (1993), p. V-3; South Africa, *LOAC Manual* (1996), § 24(e); Spain, *LOAC Manual* (1996), Vol. I, § 4.5.b.(2).b; UK, *LOAC Manual* (1981), Section 4, p. 13, § 3(c); US, *Air Force Pamphlet* (1976), § 5-3(a)(1)(b).

⁶¹⁰ Benin, *Military Manual* (1995), Fascicule I, p. 13.

⁶¹¹ Croatia, *Commanders’ Manual* (1992), § 6. ⁶¹² Ecuador, *Naval Manual* (1989), § 8.1.2.

669. France's LOAC Summary Note states that "civilian objects are those objects that are not used for military purposes".⁶¹³

670. Italy's LOAC Elementary Rules Manual defines civilian objects as "those objects that are not used for military purposes".⁶¹⁴

671. Sweden IHL Manual states that:

Seen against the background of the enormous destruction of civilian property associated with the Second World War and all later conflicts, application of [Article 52 AP I] could bring about an appreciable humanizing of warfare – people would no longer need to experience the catastrophe of bombed-out homes and ruined cities. However, Article 52 cannot be expected to bring about such great changes in warfare... [An] important reason [for this] is the lack of a definition of civilian objectives.⁶¹⁵

672. Togo's Military Manual defines civilian objects as "any object which is not a military object or which is not used for military purposes".⁶¹⁶

673. The US Naval Handbook defines civilian objects as "all civilian property and activities other than those used to support or sustain the enemy's war-fighting capability".⁶¹⁷

674. The YPA Military Manual of the SFRY (FRY) defines civilian objects as "objects which are not military".⁶¹⁸

National Legislation

675. The Report on the Practice of Cuba asserts that objects not listed by the National Defence Act among the "Military Reserve of Facilities and Equipment of the National Economy" should be considered as civilian objects.⁶¹⁹

National Case-law

676. No practice was found.

Other National Practice

677. On the basis of the reply by Iraq's Ministry of Defence to a questionnaire, the Report on the Practice of Iraq defines civilian objects as objects whose utilisation is confined exclusively to civilian purposes. According to the report, an object should always be considered as civilian if it does not have a major effect on military operations and is indispensable to civilians.⁶²⁰

⁶¹³ France, *LOAC Summary Note* (1992), § 1.1.

⁶¹⁴ Italy, *LOAC Elementary Rules Manual* (1991), § 6.

⁶¹⁵ Sweden, *IHL Manual* (1991), Section 3.2.1.5, p. 53.

⁶¹⁶ Togo, *Military Manual* (1996), Fascicule I, p. 14.

⁶¹⁷ US, *Naval Handbook* (1995), § 8.1.2. ⁶¹⁸ SFRY (FRY), *YPA Military Manual* (1988), § 73.

⁶¹⁹ Report on the Practice of Cuba, 1998, Chapter 1.3, referring to *National Defence Act* (1994), Article 119.

⁶²⁰ Report on the Practice of Iraq, 1998, Reply by the Iraqi Ministry of Defence to a questionnaire, July 1997, Chapter 1.3.

678. The Report on the Practice of Malaysia states that no written laws in Malaysia define the concept of “civilian objects”.⁶²¹

679. At the CDDH, Mexico stated that it believed draft Article 47 AP I (now Article 52) to be so essential that it “cannot be the subject of any reservations whatsoever since these would be inconsistent with the aim and purpose of Protocol I and undermine its basis”.⁶²²

III. Practice of International Organisations and Conferences

680. No practice was found.

IV. Practice of International Judicial and Quasi-judicial Bodies

681. No practice was found.

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

682. To fulfil its task of disseminating IHL, the ICRC has delegates around the world teaching armed and security forces that “civilian object means any object which is not a military objective”.⁶²³

VI. Other Practice

683. In 1985, in a report on violations of the laws of war in Nicaragua, Americas Watch stated that:

For purposes of the Nicaraguan conflict, the following should be considered civilian objects immune from direct attack:

Structures and locales, such as a house, dwelling, school, farm, village and cooperatives, which in fact are exclusively dedicated to civilian purposes and, in the circumstances prevailing [at] the time, do not make an effective contribution to military action.⁶²⁴

This view was reiterated in its 1986 report on the use of landmines in the conflicts in El Salvador and Nicaragua.⁶²⁵

684. In 1989, in a report on violations of the laws of war in Angola, Africa Watch stated that “structures and locales, such as houses, churches, dwellings,

⁶²¹ Report on the Practice of Malaysia, 1997, Chapter 1.3.

⁶²² Mexico, Statement at the CDDH, *Official Records*, Vol. VI, CDDH/SR.41, 26 May 1977, p. 193.

⁶²³ Frédéric de Mulinen, *Handbook on the Law of War for Armed Forces*, ICRC, Geneva, 1987, § 57.

⁶²⁴ Americas Watch, *Violations of the Laws of War by Both Sides in Nicaragua: 1981–1985*, New York, March 1985, p. 32.

⁶²⁵ Americas Watch, *Land Mines in El Salvador and Nicaragua: The Civilian Victims*, New York, December 1986, p. 99.

schools, and farm villages, that are exclusively dedicated to civilian purposes and, in the circumstances prevailing at the time, do not make an effective contribution to military action" should be considered civilian objects immune from direct attack by combatants, as well as by landmines and related devices.⁶²⁶

685. In 2000, in a report on the NATO air campaign against the FRY, Human Rights Watch used the definition of a military objective contained in Article 52(2) AP I.⁶²⁷

D. Loss of Protection from Attack

Civilian objects used for military purposes

I. Treaties and Other Instruments

686. No practice was found.

II. National Practice

Military Manuals

687. Australia's Defence Force Manual lists among military objectives "objects, normally dedicated to civilian purposes, but which are being used for military purposes, eg a school house or home which is being used temporarily as a battalion headquarters".⁶²⁸ The manual specifies that:

For this purpose, "use" does not necessarily mean occupation. For example, if enemy soldiers use a school building as shelter from attack by direct fire, then they are clearly gaining a military advantage from the school. This means the school becomes a military objective and can be attacked.⁶²⁹

The manual also considers that "civilian aircraft, vessels, vehicles and buildings which contain combatants, military equipment or supplies" are also military objectives.⁶³⁰

688. Belgium's Teaching Manual for Soldiers states that objects occupied or used by enemy military forces are military objectives "even if these objects were civilian at the outset (houses, schools or churches occupied by the enemy)".⁶³¹

⁶²⁶ Africa Watch, *Angola: Violations of the Laws of War by Both Sides*, New York, April 1989, p. 139.

⁶²⁷ Human Rights Watch, *Civilian Deaths in the NATO Air Campaign*, New York, 7 February 2000, p. 7.

⁶²⁸ Australia, *Defence Force Manual* (1994), § 527(i).

⁶²⁹ Australia, *Defence Force Manual* (1994), § 530.

⁶³⁰ Australia, *Defence Force Manual* (1994), § 527(e); see also *Commanders' Guide* (1994), § 951.

⁶³¹ Belgium, *Teaching Manual for Soldiers* (undated), pp. 20–21.

689. Cameroon's *Instructors' Manual* considers that "depending on the military situation, [civilian objects] can become military objectives (e.g. a house or bridge used for tactical purposes by the enemy)".⁶³²

690. Canada's *LOAC Manual* states that "where a civilian object is used for military purposes, it loses its protection as a civilian object and may become a legitimate target".⁶³³ The manual further states that "civilian vessels, aircraft, vehicles and buildings are military objectives if they contain combatants, military equipment or supplies."⁶³⁴

691. Colombia's *Instructors' Manual* states that "objects which are normally civilian can, depending on the military situation, be converted into military objectives (for example a house or a bridge used for tactical purposes by the defender and therefore liable to attack)".⁶³⁵

692. Croatia's *Commanders' Manual* states that "civilian objects must not be attacked unless they have become military objectives".⁶³⁶

693. France's *LOAC Summary Note* states that "civilian objects may not be attacked, unless they have become military targets".⁶³⁷

694. Israel's *Manual on the Laws of War* states that:

A situation may arise where the target changes its appearance from civilian to military or vice versa. For instance, if anti-aircraft batteries are stationed on a school roof or a sniper is positioned in a mosque's minaret, the protection imparted to the facility by its being a civilian object will be removed, and the attacking party will be allowed to hit it . . . A reverse situation may also occur in which an originally military objective becomes a civilian object, as for instance, a large military base that is converted to a collection point for the wounded, and is thus rendered immune to attack.⁶³⁸

695. Italy's *LOAC Elementary Rules Manual* states that "civilian objects must not be attacked unless they have become military objectives".⁶³⁹

696. Kenya's *LOAC Manual* provides that "objects which are normally civilian objects can, according to the military situation, become military objectives (e.g. house or bridge tactically used by the defender and thus a target for an attacker)".⁶⁴⁰

697. Madagascar's *Military Manual* states that "objects which are normally civilian can, depending on the military situation, become military objectives (for example, a house or bridge used for tactical purposes by the defender and thus becoming a military objective)".⁶⁴¹

⁶³² Cameroon, *Instructors' Manual* (1992), p. 17.

⁶³³ Canada, *LOAC Manual* (1999), p. 4-5, § 37.

⁶³⁴ Canada, *LOAC Manual* (1999), p. 4-2, § 10.

⁶³⁵ Colombia, *Instructors' Manual* (1999), p. 16.

⁶³⁶ Croatia, *Commanders' Manual* (1992), § 11.

⁶³⁷ France, *LOAC Summary Note* (1992), § 1.5.

⁶³⁸ Israel, *Manual on the Laws of War* (1998), p. 38.

⁶³⁹ Italy, *LOAC Elementary Rules Manual* (1991), § 11.

⁶⁴⁰ Kenya, *LOAC Manual* (1997), Précis No. 2, p. 11.

⁶⁴¹ Madagascar, *Military Manual* (1994), Fiche No. 2-SO, § D.

698. The Military Manual of the Netherlands considers that civilian objects, such as houses and school buildings, can be used in such a way that they become military objectives, for example if they house combatants or are used as commando posts.⁶⁴²

699. The Military Handbook of the Netherlands states that “non-military buildings and other objects not used for military purposes or of no military importance” may not be attacked.⁶⁴³

700. The Aide-Mémoire for IFOR Commanders of the Netherlands prohibits attacks on “objects with a strict civilian or religious character, unless they are used for military purposes”.⁶⁴⁴

701. New Zealand’s Military Manual provides that “civilian vessels, aircraft, vehicles and buildings may be lawfully attacked if they contain combatant personnel or military equipment or supplies or are otherwise associated with combat activity inconsistent with their civilian status”.⁶⁴⁵

702. Russia’s Military Manual prohibits “the bombardment by military aircraft or warships of cities, harbours, villages and dwellings . . . provided they are not being used for military purposes”.⁶⁴⁶

703. According to Spain’s LOAC Manual, “civilian objects can become military objectives if by their location, purpose or use, they may assist the enemy, or if their capture, destruction or neutralisation offers a definite military advantage”.⁶⁴⁷

704. The US Air Force Pamphlet states that “the inherent nature of the object is not controlling since even a traditionally civilian object, such as a civilian house, can be a military objective when it is occupied and used by military forces during an armed engagement”.⁶⁴⁸

705. The US Rules of Engagement for Operation Desert Storm gives the following instruction:

Do not fire into civilian populated areas or buildings which are not defended or being used for military purposes . . . Do not attack traditional civilian objects, such as houses, unless they are being used by the enemy for military purposes and neutralization assists in mission accomplishment.⁶⁴⁹

National Legislation

706. No practice was found.

⁶⁴² Netherlands, *Military Manual* (1993), p. V-3.

⁶⁴³ Netherlands, *Military Handbook* (1995), pp. 7–36 and 7–43.

⁶⁴⁴ Netherlands, *Aide-Mémoire for IFOR Commanders* (1995), § 12.

⁶⁴⁵ New Zealand, *Military Manual* (1992), § 516(3), see also § 623(3).

⁶⁴⁶ Russia, *Military Manual* (1990), Section II, § 5(m).

⁶⁴⁷ Spain, *LOAC Manual* (1996), Vol. I, § 2.3.b.(1).

⁶⁴⁸ US, *Air Force Pamphlet* (1976), § 5-3(b)(2).

⁶⁴⁹ US, *Rules of Engagement for Operation Desert Storm* (1991), §§ B and G.

National Case-law

707. The Report on the Practice of Colombia refers to a decision of the Council of State which considered that when civilian means of transportation are used by combatants they become military objectives.⁶⁵⁰

Other National Practice

708. In a military communiqué issued in 1973, Egypt stated that it condemned attacks against civilian objects, unless such objects were used in military operations.⁶⁵¹

709. On the basis of interviews with members of the armed forces, the Report on the Practice of Malaysia notes that a civilian object would not be regarded as such if it was to be used to contribute to military action, such as in the production of military equipment.⁶⁵²

710. In 1992, in its final report to Congress on the conduct of the Gulf War, the US Department of Defense stated that "civilian objects are protected from direct, intentional attack unless they are used for military purposes, such as shielding military objects from attack".⁶⁵³

711. In 1993, in its report to Congress on the protection of natural and cultural resources during times of war, the US Department of Defense stated that "cultural property, civilian objects, and natural resources are protected from intentional attack so long as they are not utilized for military purposes".⁶⁵⁴

712. In 1991, the Ministry of Defence of the SFRY issued a document entitled "Examples of violations of the rules of international law committed by the so-called armed forces of Slovenia", which included the following example:

Along the road to the frontier with Austria, over 100 heavy lorries were forced to stop and were used to create a barrier to block a YPA unit marching to the frontier. Drivers of the lorries were banned to leave their vehicles, whereby they became hostages, and it was quite clear that their vehicles had lost [their] status of civilian vehicles as they were used to create a barrier to military traffic. Thus, these vehicles became an object of legitimate attack. Simultaneously, the stopped military convoy was fired upon from the barricade, so that there was no choice for the army: as the lives of soldiers was endangered, the barricade had to be eliminated by force.⁶⁵⁵

⁶⁵⁰ Report on the Practice of Colombia, 1998, Chapter 1.3, referring to Council of State, *Administrative Case No. 7013*, Judgement, 13 December 1993.

⁶⁵¹ Egypt, Military Communiqué No. 18, 8 October 1973.

⁶⁵² Report on the Practice of Malaysia, 1997, Interviews with members of the Malaysian armed forces, Chapter 1.3.

⁶⁵³ US, Department of Defense, Final Report to Congress on the Conduct of the Persian Gulf War, 10 April 1992, Appendix O, The Role of the Law of War, *ILM*, Vol. 31, 1992, p. 622.

⁶⁵⁴ US, Department of Defense, Report to Congress on International Policies and Procedures Regarding the Protection of Natural and Cultural Resources During Times of War, 19 January 1993, p. 202.

⁶⁵⁵ SFRY (FRY), Ministry of Defence, Examples of violations of the rules of international law committed by the so-called armed forces of Slovenia, July 1991, § 1(iii).

III. Practice of International Organisations and Conferences

713. No practice was found.

IV. Practice of International Judicial and Quasi-judicial Bodies

714. No practice was found.

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

715. To fulfil its task of disseminating IHL, the ICRC has delegates around the world teaching armed and security forces that "objects which are normally civilian objects can, according to the military situation, become military objectives (e.g. house or bridge tactically used by the defender and thus a target for an attacker)".⁶⁵⁶

716. In an appeal issued in October 1973, the ICRC urged all the belligerents in the conflict in the Middle East (Egypt, Iraq, Israel and Syria) to observe forthwith, in particular, the provisions of, *inter alia*, Article 47(2) of draft API which stated that "objects designed for civilian use, such as houses, dwellings, installations and means of transport, and all objects which are not military objectives, shall not be made the object of attack, except if they are used mainly in support of the military effort". All governments concerned replied favourably.⁶⁵⁷

VI. Other Practice

717. In a resolution adopted during its Edinburgh Session in 1969, the Institute of International Law stated that:

Existing international law prohibits all armed attacks . . . on non-military objects, notably dwellings or other buildings sheltering the civilian population, so long as these are not used for military purposes to such an extent as to justify action against them under the rules regarding military objectives.⁶⁵⁸

718. In 2001, in a report on Israel and the occupied territories, Amnesty International stated that civilian objects "may be attacked while they are being used for firing upon Israeli forces. But they revert to their status as civilian objects as soon as they are no longer being used for launching attacks".⁶⁵⁹

⁶⁵⁶ Frédéric de Mulinen, *Handbook on the Law of War for Armed Forces*, ICRC, Geneva, 1987, § 58.

⁶⁵⁷ ICRC, *The International Committee's Action in the Middle East*, *IRRC*, No. 152, 1973, pp. 584–585.

⁶⁵⁸ Institute of International Law, *Edinburgh Session, Resolution on the Distinction between Military Objectives and Non-military Objects in General and Particularly the Problems Associated with Weapons of Mass Destruction*, 9 September 1969, § 4.

⁶⁵⁹ Amnesty International, *Israel and the Occupied Territories: State Assassinations and Other Unlawful Killings*, AI Index MDE 15/005/2001, London, 21 February 2001, p. 29.

Situations of doubt as to the character of an object*I. Treaties and Other Instruments**Treaties*

719. Article 52(3) AP I states that “in case of doubt whether an object which is normally dedicated to civilian purposes, such as a place of worship, a house or other dwelling or a school, is being used to make an effective contribution to military action, it shall be presumed not to be so used”. Article 52 AP I was adopted by 79 votes in favour, none against and 7 abstentions.⁶⁶⁰

720. Article 3(8)(a) of the 1996 Amended Protocol II to the CCW provides that “in case of doubt as to whether an object which is normally dedicated to civilian purposes, such as a place of worship, a house or other dwelling or a school, is being used to make an effective contribution to military action, it shall be presumed not to be so used”.

721. Upon signature of the 1998 ICC Statute, Egypt declared that “civilian objects [referred to in Article 8, paragraph 2(b) of the Statute] must be defined and dealt with in accordance with the provisions of [AP I] and, in particular, article 52 thereof. In case of doubt, the object shall be considered to be civilian.”⁶⁶¹

Other Instruments

722. Paragraph 6 of the 1991 Memorandum of Understanding on the Application of IHL between Croatia and the SFRY requires that hostilities be conducted in accordance with Article 52(3) AP I.

723. Paragraph 2.5 of the 1992 Agreement on the Application of IHL between the parties to the conflict in Bosnia and Herzegovina requires that hostilities be conducted in accordance with Article 52(3) AP I.

724. Paragraph 58 of the 1994 San Remo Manual provides that “in case of doubt whether a vessel or aircraft exempt from attack is being used to make an effective contribution to military action, it shall be presumed not to be so used”. The commentary on this paragraph states that “this rule, the so-called rule of doubt, imposes an obligation on a party to the conflict to gather and assess relevant information before commencing an attack”.

*II. National Practice**Military Manuals*

725. Argentina’s Law of War Manual provides that “in case of doubt concerning the military use of an object which is usually dedicated to civilian purposes, that object must be considered as civilian”.⁶⁶²

⁶⁶⁰ CDDH, *Official Records*, Vol. VI, CDDH/SR.41, 26 May 1977, p. 168.

⁶⁶¹ Egypt, Declarations made upon signature of the 1988 ICC Statute, 26 December 2000, § 4(b).

⁶⁶² Argentina, *Law of War Manual* (1989), § 4.45, see also § 4.02(2).

726. Australia's Defence Force Manual states that "in cases of doubt whether an object which is normally dedicated to civilian purposes, such as a church, is being used to make an effective contribution to military action, it should be presumed to be a civilian object".⁶⁶³

727. Benin's Military Manual states that "whenever there is a doubt concerning the nature of an objective, it must be considered as a civilian object".⁶⁶⁴

728. Cameroon's Instructors' Manual states that in case of doubt as to whether an object is military or civilian in character, it should be considered as a civilian object.⁶⁶⁵

729. Canada's LOAC Manual states that:

In the case of doubt as to whether an object which is normally dedicated to civilian purposes (such as a place of worship, a house or other dwelling, or a school) is being used to make an effective contribution to military action, it shall be presumed not to be so used.⁶⁶⁶

730. Colombia's Instructors' Manual states that "in case of doubt all objects which are normally dedicated to civilian purposes must be considered civilian".⁶⁶⁷

731. Croatia's LOAC Compendium affirms that in case of doubt as to whether an object is military or civilian in character, it should be considered as a civilian object.⁶⁶⁸

732. France's LOAC Manual states that "in case of doubt, an object usually affected to a civilian use must be considered as civilian and shall not be attacked".⁶⁶⁹

733. Germany's Military Manual provides that "an objective which is normally dedicated to civil purposes shall, in case of doubt, be assumed not to be used in a way to make an effective contribution to military action, and therefore be treated as a civilian object".⁶⁷⁰

734. Hungary's Military Manual affirms that in case of doubt, objects must be considered to be civilian.⁶⁷¹

735. Israel's Manual on the Laws of War states that "in cases where there is doubt as to whether a civilian object has turned into a military objective, the Additional Protocols state that one is to assume that it is not a military objective unless proven otherwise".⁶⁷²

736. Kenya's LOAC Manual states that "in case of doubt whether an object which is normally dedicated to civilian purposes (e.g. a place of worship, a

⁶⁶³ Australia, *Defence Force Manual* (1994), § 528, see also § 530 and *Commanders' Guide* (1994), § 976.

⁶⁶⁴ Benin, *Military Manual* (1995), Fascicule I, p. 13.

⁶⁶⁵ Cameroon, *Instructors' Manual* (1992), p. 17.

⁶⁶⁶ Canada, *LOAC Manual* (1999), p. 4-5, § 38.

⁶⁶⁷ Colombia, *Instructors' Manual* (1999), p. 16.

⁶⁶⁸ Croatia, *LOAC Compendium* (1991), p. 7.

⁶⁶⁹ France, *LOAC Manual* (2001), p. 90.

⁶⁷⁰ Germany, *Military Manual* (1992), § 446.

⁶⁷¹ Hungary, *Military Manual* (1992), p. 18.

⁶⁷² Israel, *Manual on the Laws of War* (1998), p. 38.

house or other dwelling, a school) is a military objective, it shall be considered as a civilian object".⁶⁷³

737. Madagascar's Military Manual states that "in case of doubt, an object which is usually dedicated to civilian purposes (such as a place of worship, school, house or other type of dwelling) will be considered as civilian".⁶⁷⁴

738. The Military Manual of the Netherlands states that "in case of doubt whether an object which usually serves civilian purposes, such as a house, a school, a church, is used for military purposes, it must be assumed to be a civilian object".⁶⁷⁵

739. New Zealand's Military Manual states that "if there is a substantial doubt concerning whether an object normally used for civilian purposes is, in the circumstances, a military objective, it shall be presumed not to be a military objective".⁶⁷⁶

740. Nigeria's Military Manual provides that when "hospital ships, coastal rescue craft, ships sailing under special agreements . . . are of a dubious status, i.e., when it is uncertain whether it is a military objective or not, in that case, it may be stopped and searched so as to establish its status".⁶⁷⁷

741. Spain's LOAC Manual states that "in case of doubt, an object which is normally dedicated to civilian purposes, such as a house, a school or a place of worship, must be considered to be a civilian object".⁶⁷⁸

742. Sweden IHL Manual states that:

During military operations it may often be difficult to establish within a short space of time whether property should be classified as a civilian object or a military objective. To avoid meaningless destruction as far as possible, a so-called dubio rule is included in Article 52 [AP I]. This states that in case of doubt whether an object which is normally dedicated to civilian purposes is being used in the adversary's military activity, it shall be presumed that it is not being so used. Among such normally civilian objects are mentioned particularly places of worship, houses and other dwellings, and schools.⁶⁷⁹

743. Togo's Military Manual states that "whenever there is a doubt concerning the nature of an objective, it must be considered as a civilian object".⁶⁸⁰

744. The US Air Force Pamphlet states that "in case of doubt whether an object which is normally dedicated to civilian purposes, such as a house or other dwelling or a school, is being used to make an effective contribution to military action, it shall be presumed not to be so used".⁶⁸¹

⁶⁷³ Kenya, *LOAC Manual* (1997), Précis No. 2, p. 11.

⁶⁷⁴ Madagascar, *Military Manual* (1994), Fiche No. 2-SO, § D.

⁶⁷⁵ Netherlands, *Military Manual* (1993), p. V-3.

⁶⁷⁶ New Zealand, *Military Manual* (1992), § 524(3), see also §§ 516(7) and 623(7) (following the language of Article 52(3) AP I more closely).

⁶⁷⁷ Nigeria, *Military Manual* (1994), p. 45, § 16(d).

⁶⁷⁸ Spain, *LOAC Manual* (1996), Vol. I, § 4.2.b.(2), see also § 2.3.b.(1).

⁶⁷⁹ Sweden, *IHL Manual* (1991), Section 3.2.1.5, p. 55.

⁶⁸⁰ Togo, *Military Manual* (1996), Fascicule I, p. 14.

⁶⁸¹ US, *Air Force Pamphlet* (1976), § 5-3(a)(1)(b).

National Legislation

745. Under Ireland's Geneva Conventions Act as amended, any "minor breach" of AP I, including violations of Article 52(3) AP I, is a punishable offence.⁶⁸²

746. Under Norway's Military Penal Code as amended, "anyone who contravenes or is accessory to the contravention of provisions relating to the protection of persons or property laid down in . . . the two additional protocols to [the Geneva] Conventions . . . is liable to imprisonment".⁶⁸³

National Case-law

747. No practice was found.

Other National Practice

748. The Report on the Practice of Iraq states that the practice adopted by the Iraqi armed forces is that in case of doubt concerning the nature of objects, they must be considered as civilian objects.⁶⁸⁴

749. The Report on the Practice of Israel states that:

In principle, in cases of significant doubt as to whether a target is legitimate or civilian, the decision would be to refrain from attacking the target. It should be stressed that the introduction of the adjective "significant" in this context is aimed at excluding those cases in which there exists a slight possibility that the definition of the target as legitimate is mistaken. In such cases, the decision whether or not to attack rests with the commander in the field, who has to decide whether or not the possibility of mistake is significant enough to warrant not launching the attack.⁶⁸⁵

750. The Report on the Practice of Malaysia does not expressly mention the presumption in favour of the civilian character in the list of norms applicable to the country's armed forces, but it states that this principle is applied in practice since civilian property is not considered as a military objective. This principle is said to conform to the practice aimed at winning the hearts and minds of the civilian population during the communist insurgency period.⁶⁸⁶

751. At the CDDH, Mexico stated that it believed draft Article 47 AP I (now Article 52) to be so essential that it "cannot be the subject of any reservations whatsoever since these would be inconsistent with the aim and purpose of Protocol I and undermine its basis".⁶⁸⁷

752. In 1992, in its final report to Congress on the conduct of the Gulf War, the US Department of Defense commented on Article 52(3) AP I to the effect that:

⁶⁸² Ireland, *Geneva Conventions Act as amended* (1962), Section 4(1) and (4).

⁶⁸³ Norway, *Military Penal Code as amended* (1902), § 108(b).

⁶⁸⁴ Report on the Practice of Iraq, 1998, Reply by the Iraqi Ministry of Defence to a questionnaire, July 1997, Chapter 1.3.

⁶⁸⁵ Report on the Practice of Israel, 1997, Chapter 1.3.

⁶⁸⁶ Report on the Practice of Malaysia, 1997, Answers to additional questions on Chapter 1.3.

⁶⁸⁷ Mexico, Statement at the CDDH, *Official Records*, Vol. VI, CDDH/SR.41, 26 May 1977, p. 193.

This language, which is not a codification of the customary practice of nations, causes several things to occur that are contrary to the traditional law of war. It shifts the burden for determining the precise use of an object from the party controlling that object (and therefore in possession of the facts as to its use) to the party lacking such control and facts, i.e. from defender to attacker. This imbalance ignores the realities of war in demanding a degree of certainty of an attacker that seldom exists in combat. It also encourages a defender to ignore its obligation to separate the civilian population, individual civilians and civilian objects from military objectives, as the Government of Iraq illustrated during the Persian Gulf War.⁶⁸⁸

Noting that the US Naval Handbook does not refer to such presumption, the Report on US Practice concludes that the US government does not acknowledge the existence of a customary principle requiring a presumption of civilian character in case of doubt.⁶⁸⁹

III. Practice of International Organisations and Conferences

United Nations

753. No practice was found.

Other International Organisations

754. No practice was found.

International Conferences

755. At the CDDH, an exception to the presumption of civilian status was submitted. It provided that the presumption of civilian use for objects which are normally dedicated to civilian purposes would not apply "in contact zones where the security of the armed forces requires a derogation from this presumption". Such an exception was defended on the grounds that "infantry soldiers could not be expected to place their lives in great risk because of such a presumption and that, in fact, civilian buildings which happen to be in the front lines usually are used as part of the defensive works". The exception was criticized by other delegates on the ground that "it would unduly endanger civilian objects to permit any exceptions to the presumption".⁶⁹⁰

IV. Practice of International Judicial and Quasi-judicial Bodies

756. No practice was found.

⁶⁸⁸ US, Department of Defense, Final Report to Congress on the Conduct of the Persian Gulf War, 10 April 1992, Appendix O, The Role of the Law of War, *ILM*, Vol. 31, 1992, p. 627.

⁶⁸⁹ Report on US Practice, 1997, Chapter 1.3.

⁶⁹⁰ CDDH, *Official Records*, Vol. XV, CDDH/III/224, Report to Committee III on the Work of the Working Group, pp. 331-332.

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

757. To fulfil its task of disseminating IHL, the ICRC has delegates around the world teaching armed and security forces that “in case of doubt whether an object which is normally dedicated to civilian purposes (e.g. a place of worship, a house or other dwelling, a school) is a military objective, it shall be considered as a civilian object”.⁶⁹¹

VI. Other Practice

758. No practice was found.

⁶⁹¹ Frédéric de Mulinen, *Handbook on the Law of War for Armed Forces*, ICRC, Geneva, 1987, § 59, see also § 464 (ships of dubious status).

INDISCRIMINATE ATTACKS

A. Indiscriminate Attacks (practice relating to Rule 11)	§§ 1–163
B. Definition of Indiscriminate Attacks (practice relating to Rule 12)	§§ 164–282
Attacks which are not directed at a specific military objective	§§ 164–205
Attacks which cannot be directed at a specific military objective	§§ 206–250
Attacks whose effects cannot be limited as required by international humanitarian law	§§ 251–282
C. Area Bombardment (practice relating to Rule 13)	§§ 283–322

A. Indiscriminate Attacks*I. Treaties and Other Instruments**Treaties*

1. Article 51(4) AP I provides that “indiscriminate attacks are prohibited”. Article 51 AP I was adopted by 77 votes in favour, one against and 16 abstentions.¹
2. According to Article 85(3)(b) AP I, it is a grave breach of the Protocol to launch “an indiscriminate attack affecting the civilian population or civilian objects in the knowledge that such attack will cause excessive loss of life, injury to civilians or damage to civilian objects as defined in Article 57, paragraph 2 a) iii)”. Article 85 AP I was adopted by consensus.²
3. Article 26(3) of draft AP II submitted by the ICRC to the CDDH provided that “the employment of means of combat, and any methods which strike or affect indiscriminately the civilian population and combatants, or civilian objects and military objectives, are prohibited”.³ This provision was adopted in Committee III of the CDDH by 29 votes in favour, 15 against and 16 abstentions, while Article 26 as a whole was adopted by 44 votes in favour, none against

¹ CDDH, *Official Records*, Vol. VI, CDDH/SR.41, 26 May 1977, p. 163.

² CDDH, *Official Records*, Vol. VI, CDDH/SR.44, 30 May 1977, p. 291.

³ CDDH, *Official Records*, Vol. I, Part Three, Draft Additional Protocols, June 1973, p. 40.

and 22 abstentions.⁴ Eventually, however, the proposal to retain this paragraph was rejected in the plenary by 30 votes in favour, 25 against and 34 abstentions.⁵

4. Article 3(3) of the 1980 Protocol II to the CCW and Article 3(8) of the 1996 Amended Protocol II to the CCW provide that “the indiscriminate use of [mines, booby-traps and other devices] is prohibited”.

Other Instruments

5. Articles 3 and 5(2) of the 1938 ILA Draft Convention for the Protection of Civilian Populations against New Engines of War provides that:

The bombardment by whatever means of towns, ports, villages or buildings which are defended is prohibited at any time (whether at night or day) when objects of military character cannot be clearly recognized.

...

In cases where the [military] objectives above specified are so situated that they cannot be bombarded without the indiscriminate bombardment of the civilian population, the aircraft must abstain from bombardment.

6. Paragraph 6 of the 1991 Memorandum of Understanding on the Application of IHL between Croatia and the SFRY requires that hostilities be conducted in accordance with Article 51(4) AP I.

7. Paragraph 2.5 of the 1992 Agreement on the Application of IHL between the Parties to the Conflict in Bosnia and Herzegovina requires that hostilities be conducted in accordance with Article 51(4) AP I.

8. Paragraph 42 of the 1994 San Remo Manual states that “it is forbidden to employ methods or means of warfare which: . . . b) are indiscriminate”.

9. Pursuant to Article 20(b)(ii) of the 1996 ILC Draft Code of Crimes against the Peace and Security of Mankind, “launching an indiscriminate attack affecting the civilian population or civilian objects in the knowledge that such attack will cause excessive loss of life, injury to civilians or damage to civilian objects” is a war crime.

10. Article 2(4) of Part III of the 1998 Comprehensive Agreement on Respect for Human Rights and IHL in the Philippines provides that the Agreement seeks to protect the right to life, especially from “indiscriminate bombardments of communities”.

11. Section 5.5 of the 1999 UN Secretary-General’s Bulletin states that “the United Nations force is prohibited from launching operations of a nature likely to strike military objectives and civilians in an indiscriminate manner”.

⁴ CDDH, *Official Records*, Vol. XIV, CDDH/III/SR.37, 4 April 1975, pp. 390 and 391, §§ 14 and 15.

⁵ CDDH, *Official Records*, Vol. VII, CDDH/SR.52, 6 June 1977, p. 134.

II. National Practice

Military Manuals

12. Military manuals of Argentina, Australia, Belgium, Benin, Canada, France, Indonesia, Israel, Kenya, Netherlands, New Zealand, South Africa, Spain, Sweden, Togo and UK prohibit indiscriminate attacks.⁶

13. Argentina's Law of War Manual provides that it is a grave breach to intentionally launch an indiscriminate attack causing death or serious injury to body or health.⁷

14. Australia's Commanders' Guide and Defence Force Manual cite "launching indiscriminate attacks that affect the civilian population or civilian objects in the knowledge that such attack will cause extensive and disproportionate loss of life, injury to civilians or damage to civilian objects" as an example of acts which constitute "grave breaches or serious war crimes likely to warrant institution of criminal proceedings".⁸

15. Cameroon's Instructors' Manual prohibits "blind bombardment".⁹

16. Canada's LOAC Manual states that "launching an indiscriminate attack affecting the civilian population or civilian objects in the knowledge that such attack will cause excessive collateral civilian damage" constitutes a grave breach.¹⁰

17. According to Ecuador's Naval Manual, "the indiscriminate destruction of cities, towns and villages" is a war crime.¹¹

18. Under Germany's Military Manual, it is prohibited:

to employ means or methods which are intended or of a nature . . . to injure military objectives, civilians, or civilian objects without distinction. The prohibition of indiscriminate warfare implies that the civilian population as such as well as individual civilians shall not be the object of attack and that they shall be spared as far as possible.¹²

The manual provides that grave breaches of IHL are in particular "launching an indiscriminate attack in the knowledge that such attack will have adverse effects on civilian life and civilian objects".¹³

⁶ Argentina, *Law of War Manual* (1989), § 4.03; Australia, *Defence Force Manual* (1994), § 921; Australia, *Commanders' Guide* (1994), § 955(d); Belgium, *Law of War Manual* (1983), p. 27; Benin, *Military Manual* (1995), Fascicule III, p. 13; Canada, *LOAC Manual* (1999), p. 4-3, § 22, see also p. 6-3, § 28, p. 7-5, § 48 and p. 8-5, § 38; France, *LOAC Manual* (2001), p. 85; Indonesia, *Military Manual* (undated), § 109; Israel, *Law of War Booklet* (1986), pp. 4-5; Kenya, *LOAC Manual* (1997), Précis No. 4, p. 3; Netherlands, *Military Manual* (1993), p. V-4; New Zealand, *Military Manual* (1992), § 517; South Africa, *Medical Services Military Manual* (undated), § 40; South Africa, *LOAC Manual* (1996), § 28(f); Spain, *LOAC Manual* (1996), Vol. I, § 4.4.c; Sweden, *IHL Manual* (1991), Section 3.2.1.5, p. 45; Togo, *Military Manual* (1996), Fascicule III, p. 13; UK, *LOAC Manual* (1981), Section 4, p. 15, § 5(j).

⁷ Argentina, *Law of War Manual* (1989), § 8.03.

⁸ Australia, *Commanders' Guide* (1994), § 1305(h); *Defence Force Manual* (1994), § 1315(h).

⁹ Cameroon, *Instructors' Manual* (1992), pp. 113 and 149.

¹⁰ Canada, *LOAC Manual* (1999), p. 16-3, § 16(b). ¹¹ Ecuador, *Naval Manual* (1989), § 6.2.5.

¹² Germany, *Military Manual* (1992), §§ 401 and 404.

¹³ Germany, *Military Manual* (1992), § 1209.

19. India's Army Training Note orders troops to "avoid indiscriminate firing".¹⁴
20. India's Police Manual prohibits the use of indiscriminate force against civilian rioters and demonstrators.¹⁵
21. With reference to Israel's Law of War Booklet, the Report on the Practice of Israel states that "the IDF does not engage in indiscriminate attacks".¹⁶
22. Italy's IHL Manual states that "indiscriminate attacks against the civilian population or civilian objects" are war crimes.¹⁷
23. According to the Military Manual of the Netherlands, "the carrying out of indiscriminate attacks" is a grave breach.¹⁸
24. New Zealand's Military Manual states that "launching an indiscriminate attack affecting the civilian population or civilian objects in the knowledge that such attack will cause excessive loss of life, injury to civilians or damage to civilian objects" constitutes a grave breach.¹⁹
25. The Report on the Practice of Nigeria interprets the prohibition of malicious destruction of property, buildings, churches and mosques provided for in Nigeria's Operational Code of Conduct as a prohibition of indiscriminate attacks.²⁰
26. Russia's Military Manual prohibits "the launching of an indiscriminate attack affecting the civilian population or civilian persons in the knowledge that such attack will cause excessive loss of life, injury to civilians or damage to civilian objects".²¹
27. Under South Africa's LOAC Manual "launching an indiscriminate attack which affects the civilian population or civilian objects in the knowledge that such attack will cause loss of life, injury to civilians and damage to certain civilian objects" is a grave breach.²²
28. Spain's LOAC Manual states that "launching an indiscriminate attack affecting the civilian population or civilian objects which would be excessive in relation to the military advantage anticipated" constitutes a grave breach.²³
29. According to Switzerland's Basic Military Manual, the following constitutes a grave breach:

An attack which is launched without making any distinction [between civilians and civilian objects on the one hand and military objectives on the other hand] and which may affect the civilian population or civilian objects in the knowledge that

¹⁴ India, *Army Training Note* (1995), p. 4/24, § 17.

¹⁵ India, *Police Manual* (1986), pp. 36 and 101.

¹⁶ Report on the Practice of Israel, 1997, Chapter 1.4, referring to *Law of War Booklet* (1986), pp. 4-5.

¹⁷ Italy, *IHL Manual* (1991), Vol. I, § 85. ¹⁸ Netherlands, *Military Manual* (1993), p. IX-5.

¹⁹ New Zealand, *Military Manual* (1992), § 1703(3).

²⁰ Report on the Practice of Nigeria, 1997, Chapter 1.4, referring to *Operational Code of Conduct* (1968), §§ f-g.

²¹ Russia, *Military Manual* (1990), § 8(g). ²² South Africa, *LOAC Manual* (1996), § 37(b).

²³ Spain, *LOAC Manual* (1996), Vol. I, § 11.8.b.(1).

the attack will cause loss of human life, injuries to civilians and damage to civilian objects which would be excessive in the sense of Article 57(2)(a)(iii) [AP I].²⁴

30. The US Air Force Pamphlet states that “particular weapons or methods of warfare may be prohibited because of their indiscriminate effects”.²⁵

31. Although the YPA Military Manual of the SFRY (FRY) does not expressly refer to the prohibition against indiscriminate attacks, the Report on the Practice of the SFRY (FRY) finds that a similar norm may be derived from the fundamental principle restricting the parties’ right to choose means and methods of warfare.²⁶

National Legislation

32. Argentina’s Draft Code of Military Justice punishes any soldier who “carries out or orders the commission of indiscriminate attacks”.²⁷

33. Under Armenia’s Penal Code, launching, during an armed conflict, an “indiscriminate attack affecting the civilian population or civilian objects in the knowledge that such attack will cause loss of life to civilians or damage to civilian objects excessive in relation to the concrete and direct military advantage anticipated” constitutes a crime against the peace and security of mankind.²⁸

34. Australia’s Geneva Conventions Act as amended provides that “a person who, in Australia or elsewhere, commits a grave breach . . . of [AP I] is guilty of an indictable offence”.²⁹

35. The Criminal Code of Belarus provides that it is a war crime to “use means and methods of warfare which . . . strike indiscriminately” and to “launch an indiscriminate attack affecting the civilian population or civilian objects in the knowledge that such attack will cause excessive loss of life, injury to civilians or damage to civilian objects”.³⁰

36. Belgium’s Law concerning the Repression of Grave Breaches of the Geneva Conventions and their Additional Protocols as amended provides that it is a crime under international law to launch

an indiscriminate attack affecting the civilian population or civilian objects in the knowledge that such attack will cause loss of human life, injury to civilians or damage to civilian objects which would be excessive in relation to the concrete and direct military advantage anticipated, without prejudice to the criminal nature of an attack whose harmful effects, even where proportionate to the military advantage

²⁴ Switzerland, *Basic Military Manual* (1987), Article 193(1)(b).

²⁵ US, *Air Force Pamphlet* (1976), § 6-3(c).

²⁶ Report on the Practice of the SFRY (FRY), 1997, Chapter 1.4, referring to *YPA Military Manual* (1988), § 65.

²⁷ Argentina, *Draft Code of Military Justice* (1998), Article 291, introducing a new Article 875(1) in the *Code of Military Justice as amended* (1951).

²⁸ Armenia, *Penal Code* (2003), Article 390.3(2).

²⁹ Australia, *Geneva Conventions Act as amended* (1957), Section 7(1).

³⁰ Belarus, *Criminal Code* (1999), Article 136(1) and (11).

anticipated, would be inconsistent with the principles of international law derived from established custom, from the principles of humanity and from the dictates of public conscience.³¹

37. The Criminal Code of the Federation of Bosnia and Herzegovina provides that it is a war crime to order “an indiscriminate attack without selecting a target, causing injury to the civilian population” or order “that civilian objects which are under specific protection of international law, non-defended localities and demilitarised zones be indiscriminately targeted” or carry out such attacks.³² The Criminal Code of the Republika Srpska contains the same provisions.³³

38. Canada’s Geneva Conventions Act as amended provides that “every person who, whether within or outside Canada, commits a grave breach [of AP I] . . . is guilty of an indictable offence”.³⁴

39. China’s Law Governing the Trial of War Criminals provides that “indiscriminate destruction of property” constitutes a war crime.³⁵

40. Colombia’s Penal Code imposes a criminal sanction on “anyone who, during an armed conflict, carries out or orders the carrying out of indiscriminate attacks”.³⁶

41. The Geneva Conventions and Additional Protocols Act of the Cook Islands punishes “any person who in the Cook Islands or elsewhere commits, or aids or abets or procures the commission by another person of, a grave breach . . . of [AP I]”.³⁷

42. Croatia’s Criminal Code provides that it is a war crime to launch or order the launching of “an indiscriminate attack affecting the civilian population, causing loss of civilian life” or “an indiscriminate attack affecting civilian objects under special protection of international law, as well as non-defended localities and demilitarised zones”.³⁸

43. Cyprus’s AP I Act punishes “any person who, whatever his nationality, commits in the Republic or outside the Republic any grave breach of the provisions of the Protocol, or takes part or assists or incites another person in the commission of such a breach”.³⁹

44. The Draft Amendments to the Penal Code of El Salvador provide for a prison sentence for anyone who, in the context of an international or a non-international armed conflict, launches

³¹ Belgium, *Law concerning the Repression of Grave Breaches of the Geneva Conventions and their Additional Protocols as amended* (1993), Article 1(3)(12).

³² Bosnia and Herzegovina, Federation, *Criminal Code* (1998), Article 154(1) and (2).

³³ Bosnia and Herzegovina, Republika Srpska, *Criminal Code* (2000), Article 433(1) and (2).

³⁴ Canada, *Geneva Conventions Act as amended* (1985), Section 3(1).

³⁵ China, *Law Governing the Trial of War Criminals* (1946), Article 3(27).

³⁶ Colombia, *Penal Code* (2000), Article 144.

³⁷ Cook Islands, *Geneva Conventions and Additional Protocols Act* (2002), Section 5(1).

³⁸ Croatia, *Criminal Code* (1997), Article 158(1) and (2).

³⁹ Cyprus, *AP I Act* (1979), Section 4(1).

an indiscriminate attack affecting the civilian population, in the knowledge that such attacks will cause death or injury among the civilian population or damage to civilian objects, which is excessive in relation to the concrete and direct military advantage anticipated.⁴⁰

45. Under Estonia's Penal Code, "a person who uses means of warfare in a manner not allowing to discriminate between military and civilian objects and thereby causes the death of civilians, health damage to civilians, damage to civilian objects or a danger to the life, health of property of civilians" commits a war crime.⁴¹

46. Under Georgia's Criminal Code, "launching an indiscriminate attack affecting the civilian population or civilian objects, in the knowledge that it will cause loss and injury among civilians and damage to civilian objects" in an international or non-international armed conflict is a crime.⁴²

47. Indonesia's Military Penal Code provides for the punishment of military personnel who are found guilty of having carried out an indiscriminate attack.⁴³

48. Ireland's Geneva Conventions Act as amended provides that grave breaches of AP I are punishable offences.⁴⁴ It adds that any "minor breach" of AP I, including violations of Article 51(4) AP I, is also a punishable offence.⁴⁵

49. Under Jordan's Draft Military Criminal Code, "indiscriminate attacks against civilians or civilian objects in the knowledge that such attacks will cause considerable loss of human life, injury to civilians or damage to civilian objects" in time of armed conflict are war crimes.⁴⁶

50. Under the Draft Amendments to the Code of Military Justice of Lebanon, "an indiscriminate attack against civilian populations or civilian objects in the knowledge that such an attack will cause excessive loss of life, injury to civilians or damage to civilian objects" constitutes a war crime.⁴⁷

51. Under Lithuania's Criminal Code as amended, "a military attack without choosing a specific military target or knowing it might cause loss of civilian life or the destruction of civilian objects" is a war crime.⁴⁸

52. Under the International Crimes Act of the Netherlands, it is a crime, during an international armed conflict, to commit:

the following acts, when they are committed intentionally and in violation of the relevant provisions of Additional Protocol (I) and cause death or serious injury to body or health: . . . launching an indiscriminate attack affecting the civilian population or civilian objects in the knowledge that such attack will cause excessive loss of life, injury to civilians or damage to civilian objects.⁴⁹

⁴⁰ El Salvador, *Draft Amendments to the Penal Code* (1998), Article entitled "Ataque indiscriminado a personas protegidas".

⁴¹ Estonia, *Penal Code* (2001), § 96. ⁴² Georgia, *Criminal Code* (1999), Article 411(1)(b).

⁴³ Indonesia, *Military Penal Code* (1947), Article 103.

⁴⁴ Ireland, *Geneva Conventions Act as amended* (1962), Section 3(1).

⁴⁵ Ireland, *Geneva Conventions Act as amended* (1962), Section 4(1) and (4).

⁴⁶ Jordan, *Draft Military Criminal Code* (2000), Article 41(A)(10).

⁴⁷ Lebanon, *Draft Amendments to the Code of Military Justice* (1997), Article 146(10).

⁴⁸ Lithuania, *Criminal Code as amended* (1961), Article 337.

⁴⁹ Netherlands, *International Crimes Act* (2003), Article 5(2)(c)(ii).

Likewise, “intentionally launching an attack in the knowledge that such an attack will cause incidental loss of life or injury to civilians or damage to civilian objects . . . which would be clearly excessive in relation to the concrete and direct overall military advantage anticipated” is also a crime, when committed in an international armed conflict.⁵⁰

53. New Zealand’s Geneva Conventions Act as amended provides that “any person who in New Zealand or elsewhere commits, or aids or abets or procures the commission by another person of, a grave breach . . . of [AP I] is guilty of an indictable offence”.⁵¹

54. Nicaragua’s Draft Penal Code punishes anyone who, during an international or internal armed conflict,

launches an indiscriminate attack affecting the civilian population, in the knowledge that such attack will cause incidental loss of civilian life, injury to civilians or damage to civilian objects, which would be excessive in relation to the concrete and direct military advantage anticipated.⁵²

55. According to Niger’s Penal Code as amended, it is a war crime to launch against persons and objects protected under the 1949 Geneva Conventions or their Additional Protocols of 1977:

an indiscriminate attack affecting the civilian population or civilian objects in the knowledge that such attack will cause loss of human life, injury to civilians or damage to civilian objects which would be excessive in relation to the concrete and direct military advantage anticipated, without prejudice to the criminal nature of an attack whose harmful effects, even where proportionate to the military advantage anticipated, would be inconsistent with the principles of international law derived from established custom, from the principles of humanity and from the dictates of public conscience.⁵³

56. Under Norway’s Military Penal Code as amended, “anyone who contravenes or is accessory to the contravention of provisions relating to the protection of persons or property laid down in . . . the two additional protocols to [the Geneva] Conventions . . . is liable to imprisonment”.⁵⁴

57. Slovenia’s Penal Code provides that it is a war crime to order or commit “a random attack harming the civilian population” or “a random attack on civil buildings specially protected under international law, or on defenceless or demilitarised areas”.⁵⁵

58. Spain’s Penal Code punishes “anyone who, during an armed conflict, . . . carries out or orders an indiscriminate attack”.⁵⁶

⁵⁰ Netherlands, *International Crimes Act* (2003), Article 5(5)(b).

⁵¹ New Zealand, *Geneva Conventions Act as amended* (1958), Section 3(1).

⁵² Nicaragua, *Draft Penal Code* (1999), Article 450(1).

⁵³ Niger, *Penal Code as amended* (1961), Article 208.3(12).

⁵⁴ Norway, *Military Penal Code as amended* (1902), § 108(b).

⁵⁵ Slovenia, *Penal Code* (1994), Article 374(1) and (2).

⁵⁶ Spain, *Penal Code* (1995), Article 611(1).

59. Under Sweden's Penal Code as amended, "initiating an indiscriminate attack knowing that such attack will cause exceptionally heavy losses or damage to civilians or to civilian property" constitutes a crime against international law.⁵⁷

60. Tajikistan's Criminal Code punishes the act of "launching an indiscriminate attack affecting the civilian population or civilian objects" in an international or internal armed conflict.⁵⁸

61. The UK Geneva Conventions Act as amended punishes "any person, whatever his nationality, who, whether in or outside the United Kingdom, commits, or aids, abets or procures the commission by any other person of, a grave breach of . . . [AP I]".⁵⁹

62. The Penal Code as amended of the SFRY (FRY) provides that it is a war crime to order or commit "an indiscriminate attack affecting the civilian population" or "an indiscriminate attack on civilian facilities that are specifically protected under international law, non-defended localities and demilitarised zones".⁶⁰

63. Zimbabwe's Geneva Conventions Act as amended punishes "any person, whatever his nationality, who, whether in or outside Zimbabwe, commits any such grave breach of . . . [AP I]".⁶¹

National Case-law

64. No practice was found.

Other National Practice

65. In its oral pleadings before the ICJ in the *Nuclear Weapons case* in 1995, Australia stated that "the right to self-defence is not unlimited. It is subject to fundamental principles of humanity. Self-defence is not a justification . . . for indiscriminate attacks on the civilian population. Nor is it a justification for the use of nuclear weapons."⁶²

66. The Report on the Practice of Bosnia and Herzegovina provides the following examples of alleged violations of the prohibition of indiscriminate attacks which were denounced by the authorities: indiscriminate artillery shelling of Sarajevo on 16 May 1992;⁶³ the attacks by aircraft of the Yugoslav Army in the Tuzla region, in which many residential facilities were destroyed and several civilians killed or wounded;⁶⁴ the artillery shelling in the centre of Srebrenica,

⁵⁷ Sweden, *Penal Code as amended* (1962), Chapter 22, § 6.

⁵⁸ Tajikistan, *Criminal Code* (1998), Article 403(1).

⁵⁹ UK, *Geneva Conventions Act as amended* (1957), Section 1(1).

⁶⁰ SFRY (FRY), *Penal Code as amended* (1976), Article 142(1) and (2).

⁶¹ Zimbabwe, *Geneva Conventions Act as amended* (1981), Section 3(1).

⁶² Australia, Oral pleadings before the ICJ, *Nuclear Weapons case*, 30 October 1995, Verbatim Record CR 95/22, p. 52, § 47.

⁶³ Bosnia and Herzegovina, Ministry of Defence, Letter to the Headquarters of the Yugoslav Army in Belgrade, No. 02/236-1, 17 May 1992, Report on the Practice of Bosnia and Herzegovina, 2000, Chapter 1.4.

⁶⁴ Bosnia and Herzegovina, Ministry of Defence, Letter to the Headquarters of the Yugoslav Army in Belgrade, Number 02/333-232, 1 June 1992, Report on the Practice of Bosnia and Herzegovina, 2000, Chapter 1.4.

which resulted in civilian casualties;⁶⁵ and the attack by a Croatian army helicopter in the centre of Mostar, which resulted in civilian casualties.⁶⁶

67. In 1996, during a debate in the UN Security Council, Botswana stated that it was appalled by the indiscriminate killing of innocent Lebanese civilians and the destruction of their towns and villages.⁶⁷

68. The Report on the Practice of Brazil states that Brazil has ratified the Geneva Conventions and their Additional Protocols and that, under the Brazilian Constitution, treaties become part of domestic law once ratified by the Congress and published in the official journal. Therefore, the rules pertaining to indiscriminate attacks as set forth in these treaties are binding upon Brazil.⁶⁸

69. The Report on the Practice of Chile states that it can be inferred from the *opinio juris* of Chile that the prohibition against indiscriminate attacks is an integral part of customary international law.⁶⁹

70. The Report on the Practice of China states that any attack on a refugee camp will certainly be regarded by the Chinese government as an indiscriminate attack that deserves condemnation.⁷⁰

71. The Report on the Practice of Croatia maintains that it is Croatia's *opinio juris* that the rules pertaining to the prohibition of indiscriminate attacks are part of customary international law.⁷¹

72. In 1977, during a debate in the Sixth Committee of the UN General Assembly, Finland stated that Article 51 AP I, including Article 51(4) prohibiting indiscriminate attacks, contained important and timely principles that should be respected in all circumstances.⁷²

73. At the CDDH, France voted against Article 46 of draft AP I (now Article 51) because it considered that:

The provisions of paragraphs 4, 5 and 7 were of a type which by their very complexity would seriously hamper the conduct of defensive military operations against an invader and prejudice the exercise of the inherent right of legitimate defence recognized in Article 51 of the Charter of the United Nations.⁷³

74. The instructions given to the French armed forces for the conduct of Opération Mistral, simulating a military operation under the right of self-defence

⁶⁵ Bosnia and Herzegovina, Appeal of the War Presidency of Srebrenica Municipality, No. 180/93, 25 January 1993, Report on the Practice of Bosnia and Herzegovina, 2000, Chapter 1.4.

⁶⁶ Bosnia and Herzegovina, Headquarters of the Supreme Command of the Armed Forces, Office of the Commander in Chief, Information to UNPROFOR, Number 01-1/21-82, 8 February 1994, Report on the Practice of Bosnia and Herzegovina, 2000, Chapter 1.4.T.

⁶⁷ Botswana, Statement before the UN Security Council, UN Doc. S/PV.3653, 15 April 1996, p. 11.

⁶⁸ Report on the Practice of Brazil, 1997, Chapter 1.4.

⁶⁹ Report on the Practice of Chile, 1997, Chapter 1.4.

⁷⁰ Report on the Practice of China, 1997, Chapter 1.4.

⁷¹ Report on the Practice of Croatia, 1997, Chapter 1.4.

⁷² Finland, Statement before the Sixth Committee of the UN General Assembly, UN Doc. A/C.6/32/SR.17, 13 October 1977, § 19.

⁷³ France, Statement at the CDDH, *Official Records*, Vol. VI, CDDH/SR.41, 26 May 1977, p. 163, § 118.

or a mandate of the UN Security Council, state that “indiscriminate attacks . . . are prohibited”.⁷⁴

75. In 1996, the Monitoring Group on the Implementation of the 1996 Israel-Lebanon Ceasefire Understanding, consisting of France, Israel, Lebanon, Syria and US, issued communiqués requesting that all parties avoid arbitrary or indiscriminate attacks on inhabited areas, which directly or indirectly endangered civilian life or integrity.⁷⁵

76. In 1993, in response to a question in parliament about the situation in Sudan, the German government stated that “during military operations, instances occur over and over again which violate the international law of war [such as] . . . the indiscriminate bombing of villages”.⁷⁶

77. In its written statement submitted to the ICJ in the *Nuclear Weapons case* in 1995, India stated that “the very purpose of international humanitarian law is to forbid indiscriminate attacks and demand protection of civilians”.⁷⁷

78. The Report on the Practice of India states that:

When [the armed forces] are called upon to deal with an internal conflict, they are bound to follow the principles regarding distinction between military objects and civilian objects so as to avoid indiscriminate attacks. The armed forces are instructed that when they provide assistance to civil authorities in dealing with internal conflicts, they must avoid indiscriminate use of force . . . The regulations addressed to armed police contain elaborate provisions aimed at avoiding indiscriminate attacks.⁷⁸

79. In 1992, in a letter to the UN Secretary-General, Iran expressed “alarm at the indiscriminate attacks by Iraqi forces against innocent Iraqi civilians” in the southern marshlands of Iraq.⁷⁹

80. In a message sent to the UN Secretary-General in 1984, the President of Iraq stated that “the indiscriminate Iranian bombardment of civilian targets crowded with inhabitants is a major aspect of its ceaseless aggression against Iraq”.⁸⁰

81. The Report on the Practice of Iraq states that Iraq “inclines towards intensifying the refusal of [indiscriminate] attacks in order to avoid harming civilians”, regardless of whether “such attacks . . . might serve a military purpose”. The report interprets this as meaning “the banning of any kind of attacks directed on the civilians”, regardless of the nature of the intended military target.⁸¹

⁷⁴ France, Etat-major de la Force d’Action Rapide, Ordres pour l’Opération Mistral, 1995, Section 6, § 66.

⁷⁵ Monitoring Group on the Implementation of the 1996 Israel-Lebanon Ceasefire Understanding, Communiqué, 22 September 1996; Communiqué, 14–18 October 1996.

⁷⁶ Germany, Reply by the government to a question in the Lower House of Parliament, Menschenrechtslage im Sudan, *BT-Drucksache* 12/6513, 28 December 1993, p. 3.

⁷⁷ India, Written statement submitted to the ICJ, *Nuclear Weapons case*, 20 June 1995, p. 3.

⁷⁸ Report on the Practice of India, 1997, Chapter 1.4.

⁷⁹ Iran, Letter dated 10 August 1992 to the UN Secretary-General, UN Doc. S/24414, 11 August 1992.

⁸⁰ Iraq, Message from the President of Iraq, annexed to Letter dated 10 June 1984 to the UN Secretary-General, UN Doc. S/16610, 19 June 1984, p. 2.

⁸¹ Report on the Practice of Iraq, 1998, Chapter 1.4.

The report also cites the text of a military communiqué issued by the General Command of the Iraqi armed forces during the Iran–Iraq War stating that “the enemy has reached a maximum degree of nervousness and loss of balance that lead it to commit repeated infringements and random bombardment without any distinction”.⁸²

82. The Report on the Practice of Jordan states that there have been no reports of indiscriminate attacks conducted by the armed forces of Jordan.⁸³

83. In 1992, in a letter to the President of the UN Security Council, Malaysia relayed its deep concern over the deterioration of the situation in Bosnia and Herzegovina and in particular the continuous indiscriminate bombardments of civilian populated areas.⁸⁴

84. The Report on the Practice of Malaysia refers to the general prohibition of indiscriminate attacks.⁸⁵ It also notes that during the communist insurgency, the security forces were prohibited from launching indiscriminate attacks against civilians.⁸⁶

85. In its written statement submitted to the ICJ in the *Nuclear Weapons case* in 1995, Mexico invoked “the principle by which the civilian population enjoys general protection and the prohibition to carry out indiscriminate attacks”.⁸⁷

86. In its written statement submitted to the ICJ in the *Nuclear Weapons case* in 1995, New Zealand stated, with reference to customary international law, that “it is prohibited to use indiscriminate methods and means of warfare which do not distinguish between combatants and civilians and other non-combatants”.⁸⁸

87. According to the Report on the Practice of Nigeria, it is Nigeria’s *opinio juris* that the prohibition of indiscriminate attacks is part of customary international law.⁸⁹

88. According to the Report on the Practice of Pakistan, it is Pakistan’s *opinio juris* that indiscriminate attacks against civilians are prohibited.⁹⁰

89. At the CDDH, Poland stated that Article 46 of draft AP I (now Article 51) “had a special function since it contained the most important provisions of the Protocol, such as the prohibition of indiscriminate attacks that made no distinction between military personnel and civilians”.⁹¹

⁸² Iraq, Military Communiqué No. 23, 25 September 1980, Report on the Practice of Iraq, 1998, Chapter 1.4.

⁸³ Report on the Practice of Jordan, 1997, Chapter 1.4.

⁸⁴ Malaysia, Letter dated 10 August 1992 to the President of the UN Security Council, UN Doc. S/24400, 10 August 1992.

⁸⁵ Report on the Practice of Malaysia, 1997, Answers to additional questions on Chapter 1.4.

⁸⁶ Report on the Practice of Malaysia, 1997, Chapter 1.4.

⁸⁷ Mexico, Written statement submitted to the ICJ, *Nuclear Weapons case*, 19 June 1995, § 77(d).

⁸⁸ New Zealand, Written statement submitted to the ICJ, *Nuclear Weapons case*, 20 June 1995, § 71.

⁸⁹ Report on the Practice of Nigeria, 1997, Chapter 1.4.

⁹⁰ Report on the Practice of Pakistan, 1998, Chapter 1.4.

⁹¹ Poland, Statement at the CDDH, *Official Records*, Vol. VI, CDDH/SR.41, 26 May 1977, p. 166, § 129.

90. The Report on the Practice of Rwanda states that indiscriminate attacks are prohibited according to the practice and the *opinio juris* of Rwanda and considers that this prohibition is a norm of customary international law binding on all States.⁹²

91. In 1992, in a note verbale addressed to the UN Secretary-General, Slovenia expressed its readiness to provide information concerning violations of IHL committed by members of the Yugoslav army during the 10-day conflict with Slovenia, including the “indiscriminate use of weapons”.⁹³

92. In its five-volume report on “gross violations of human rights” committed between 1960 and 1993, the South African Truth and Reconciliation Commission noted that the killing of more than 600 people in a 1978 attack by the SADF on the SWAPO base/refugee camp at Kassinga in Angola constituted a breach of IHL. It stated that:

There is little evidence that the SADF took sufficient precautions to spare those civilians whom they knew were resident at Kassinga in large numbers. The fact that the operational orders for *Reindeer* included the instruction that “women and children must, where possible, not be shot” is evidence of the SADF’s prior knowledge of the presence of civilians. However, this apparent intention to spare their lives was rendered meaningless by the SADF’s decision to use fragmentation bombs in the initial air assault as such weapons kill and maim indiscriminately. Their use, therefore, in the face of knowledge of the presence of civilians, amounts to an indiscriminate and illegitimate use of force and a violation of Protocol I to the Geneva Conventions of 1949. The foreseeable killing of civilians at Kassinga was therefore a breach of humanitarian law.⁹⁴

93. At the CDDH, Sweden stated that “Article 46 [now Article 51 AP I] might be considered as one of fundamental value for the whole Protocol. This article was elaborated during long negotiations in 1975 and was adopted in the same year by consensus in Committee III.”⁹⁵

94. On the basis of a statement by the Syrian Minister of Foreign Affairs before the UN General Assembly in 1997, the Report on the Practice of Syria asserts that Syria considers Article 51(4) AP I to be part of customary international law.⁹⁶

95. On 21 January 1991, in the context of the Gulf War, the UK Minister of Foreign Affairs summoned the Iraqi Ambassador to discuss Iraq’s obligations under international law. According to a statement by an FCO spokesperson after the meeting, the Minister had “expressed concern at the indiscriminate targeting of civilian sites by Iraqi SCUD missiles”.⁹⁷

⁹² Report on the Practice of Rwanda, 1997, Chapter 1.4.

⁹³ Slovenia, Note verbale dated 5 November 1992 to the UN Secretary-General, UN Doc. S/24789, 9 November 1992, p. 2.

⁹⁴ South Africa, *Truth and Reconciliation Commission Report*, 1998, Vol. 2, pp. 52–55, §§ 44–45.

⁹⁵ Sweden, Statement at the CDDH, *Official Records*, Vol. VI, CDDH/SR.41, 26 May 1977, p. 198.

⁹⁶ Report on the Practice of Syria, 1997, Chapter 1.4, referring to Statement by the Syrian Minister of Foreign Affairs before the UN General Assembly, 1 October 1997.

⁹⁷ UK, Statement by FCO spokesperson, 21 January 1991, *BYIL*, Vol. 62, 1991, p. 680.

96. In 1991, in a report submitted to the UN Security Council on operations in the Gulf War, the UK accused Iraq of having had “no compunction about launching indiscriminate missile attacks directed at civilians”.⁹⁸

97. In 1991, during a debate in the UN Security Council concerning the Gulf War, the UK reiterated its condemnation of the indiscriminate firing of missiles at civilian population centres.⁹⁹

98. In 1992, in its final report to Congress on the conduct of the Gulf War, the US Department of Defense stated that “Iraqi war crimes... included... indiscriminate attacks in the launching of Scud missiles against cities rather than specific military objectives, in violation of customary international law”.¹⁰⁰

99. In its written statement submitted to the ICJ in the *Nuclear Weapons (WHO) case* in 1994, the US stated that “it is unlawful to conduct any indiscriminate attack”.¹⁰¹

100. On the basis of two accounts of events during the conflict in Croatia, the Report on the Practice of the SFRY (FRY) states that:

There are many examples... of indiscriminate attacks of individual and collective character which both parties to the armed conflict in Croatia in 1991 and 1992 were pointing at. The mixed nature of this conflict, being both internal and international, contributed to this as well. Both parties referred to these incidents as violations of international humanitarian law. The fact that the parties did not question this norm [prohibiting indiscriminate attacks] when speaking about the behavior of the opposite side is a clear indication of their *opinio juris* and a confirmation that such attacks were considered prohibited.¹⁰²

101. The Report on the Practice of Zimbabwe considers that the question of indiscriminate attacks is problematic since much depends on the objective in question, on necessity and on the military advantage to be gained. According to the report, the principle of proportionality, however, remains applicable.¹⁰³

III. Practice of International Organisations and Conferences

United Nations

102. In a resolution on Kosovo adopted in 1998, the UN Security Council expressed its grave concern at “the excessive and indiscriminate use of force by

⁹⁸ UK, Letter dated 13 February 1991 to the President of the UN Security Council, UN Doc. S/22218, 13 February 1991, pp. 1–2.

⁹⁹ UK, Statement before the UN Security Council, UN Doc. S/PV.2977, 14 February 1991, § 72.

¹⁰⁰ US, Department of Defense, Final Report to Congress on the Conduct of the Persian Gulf War, 10 April 1992, Appendix O, The Role of the Law of War, *ILM*, Vol. 31, 1992, pp. 632–633.

¹⁰¹ US, Written statement submitted to the ICJ, *Nuclear Weapons (WHO) case*, 10 June 1994, p. 27.

¹⁰² Report on the Practice of the SFRY (FRY), 1997, Chapter 1.4, referring to Vesna Bosanac, The Tragedy of the Civilian Population of the Commune of Vukovar during 1991 – a Testimony, in Zvonimir Šeparović (ed.), *Documenta Croatica, Croatian History and Identity and the War against Croatia*, p. 114, and Miodrag Starcević and Nikola Petković (eds.), *Croatia '91 – Violence and Crime against the Law*, pp. 67–69.

¹⁰³ Report on the Practice of Zimbabwe, 1998, Chapter 1.4.

Serbian security forces and the Yugoslav Army which have resulted in numerous civilian casualties".¹⁰⁴

103. In 1994, in a statement by its President, the UN Security Council strongly condemned "the indiscriminate shelling by the Bosnian Serb party of the civilian population of Maglaj, which has resulted in heavy casualties, loss of life and material destruction".¹⁰⁵

104. In a resolution adopted in 1938 concerning the protection of civilian populations against air bombardment in case of war, the Assembly of the League of Nations stated that "any attack on legitimate military objectives must be carried out in such a way that civilian populations in the neighbourhood are not bombed through negligence".¹⁰⁶

105. In a resolution adopted in 1971 on territories under Portuguese administration, the UN General Assembly condemned the indiscriminate bombing of civilians.¹⁰⁷

106. In a resolution on Afghanistan adopted in 1985, the UN General Assembly expressed its deep concern "at the severe consequences for the civilian population of indiscriminate bombardments and military operations aimed primarily at the villages and the agricultural structure".¹⁰⁸

107. In resolutions on the situation of human rights in the former Yugoslavia adopted in 1993 and 1994, the UN General Assembly condemned "the indiscriminate shelling" of cities and civilian areas.¹⁰⁹ In a further resolution on the same subject adopted in 1995, the General Assembly condemned "the indiscriminate shelling of civilians" in certain safe areas.¹¹⁰

108. In a resolution adopted in 1996 on the situation of human rights in Sudan, the UN General Assembly expressed concern about "continuing deliberate and indiscriminate aerial bombardments by the Government of the Sudan of civilian targets in southern Sudan, in clear violation of international humanitarian law" and urged the government "to cease immediately all . . . attacks that are in violation of international humanitarian law".¹¹¹

109. In a resolution adopted in 1998 on the situation of human rights in Kosovo, the UN General Assembly strongly condemned "indiscriminate and widespread attacks on civilians".¹¹²

110. In a resolution adopted in 2000 on the situation of human rights in Sudan, the UN General Assembly expressed its deep concern at continuing serious

¹⁰⁴ UN Security Council, Res. 1199, 23 September 1998, preamble.

¹⁰⁵ UN Security Council, Statement by the President, UN Doc. S/PRST/1994/11, 14 March 1994, p. 1.

¹⁰⁶ League of Nations, Assembly, Resolution adopted on 30 September 1938, § I(3), *Official Journal*, Special Supplement No. 182, Records of the XIXth Ordinary Session of the Assembly, pp. 15–17.

¹⁰⁷ UN General Assembly, Res. 2795 (XXVI), 10 December 1971, § 4.

¹⁰⁸ UN General Assembly, Res. 40/137, 13 December 1985, § 4.

¹⁰⁹ UN General Assembly, Res. 48/153, 20 December 1993, § 6; Res. 49/196, 23 December 1994, § 7.

¹¹⁰ UN General Assembly, Res. 50/193, 22 December 1995, § 5.

¹¹¹ UN General Assembly, Res. 51/112, 12 December 1996, preamble and § 8.

¹¹² UN General Assembly, Res. 53/164, 9 December 1998, § 8.

violations of IHL by all parties, in particular “the indiscriminate aerial bombardments seriously and recurrently affecting civilian populations and installations, particularly bombings of schools and hospitals”.¹¹³

111. In a resolution on Afghanistan adopted in 1987, the UN Commission on Human Rights expressed its grave concern over the methods of warfare employed contrary to IHL and in particular the severe consequences caused to civilians by indiscriminate bombardments.¹¹⁴ In a further resolution in 1995 in the same context, the Commission noted with deep concern that the civilian population was still the target of indiscriminate military attacks.¹¹⁵

112. In two resolutions on the human rights situation in the former Yugoslavia adopted in 1992 and 1993, the UN Commission on Human Rights condemned “the indiscriminate shelling of cities and civilian areas”.¹¹⁶

113. In a resolution adopted in 1994 on the human rights situation in Bosnia and Herzegovina, the UN Commission on Human Rights strongly condemned “the indiscriminate shelling of civilian populations, particularly in Sarajevo, and in the other declared safe areas of Tuzla, Bihac, Goražde, Srebrenica and Žepa, as well as Mostar and other endangered areas in central Bosnia and elsewhere”.¹¹⁷ In another resolution on the former Yugoslavia in 1995, the Commission condemned “the indiscriminate shelling and besieging of cities and civilian areas”.¹¹⁸

114. In a resolution adopted in 1995 on the situation of human rights in Sudan, the UN Commission on Human Rights expressed its deep concern “about continued reports of indiscriminate bombing of civilian targets, including camps for displaced persons, in southern Sudan” and called upon the government of Sudan “to cease immediately the deliberate and indiscriminate aerial bombardment of civilian targets”.¹¹⁹ The latter demand was reiterated in subsequent resolutions in 1996, 1997 and 1998.¹²⁰

115. In a resolution adopted in 1998 on the situation of human rights in Burundi, the UN Commission on Human Rights urged “all parties to the conflict to end the cycle of violence and killing, notably the indiscriminate violence against the civilian population”.¹²¹

116. In a resolution on Chechnya adopted in 2000, the UN Commission on Human Rights expressed its grave concern about “reports indicating disproportionate and indiscriminate use of Russian military force” and called upon all

¹¹³ UN General Assembly, Res. 55/116, 4 December 2000, § 2(a)(iv).

¹¹⁴ UN Commission on Human Rights, Res. 1987/58, 11 March 1987, §§ 3–4.

¹¹⁵ UN Commission on Human Rights, Res. 1995/74, 8 March 1995, preamble.

¹¹⁶ UN Commission on Human Rights, Res. 1992/S-2/1, 1 December 1992, § 7; Res. 1993/7, 23 February 1993, § 12.

¹¹⁷ UN Commission on Human Rights, Res. 1994/75, 9 March 1994, § 1.

¹¹⁸ UN Commission on Human Rights, Res. 1995/89, 8 March 1995, § 5.

¹¹⁹ UN Commission on Human Rights, Res. 1995/77, 8 March 1995, preamble and § 16.

¹²⁰ UN Commission on Human Rights, Res. 1996/73, 23 April 1996, § 12; Res. 1997/59, 15 April 1997, § 15; Res. 1998/67, 21 April 1998, § 15.

¹²¹ UN Commission on Human Rights, Res. 1998/82, 24 April 1998, § 7.

parties to the conflict “to take immediate steps to halt . . . the indiscriminate use of force”.¹²²

117. In January 1990, in a report on UNIFIL in Lebanon, the UN Secretary-General stated that “indiscriminate fire from DFF positions has on several occasions resulted in fatal injuries to civilians in the UNIFIL area of operation”.¹²³

118. In July 1990, in a report on UNIFIL in Lebanon, the UN Secretary-General stated that “indiscriminate fire has also been directed at villages from IDF/DFF positions when the latter have come under attack from armed elements”.¹²⁴ This statement was repeated in January 1991.¹²⁵

119. In January 1992, in a report on UNIFIL in Lebanon, the UN Secretary-General stated that “IDF/DFF increasingly reacted to attacks by firing indiscriminately into nearby villages, especially after sustaining casualties”.¹²⁶

120. In 1997, in a report on the situation in Somalia, the UN Secretary-General commented on disturbing violations of human rights and IHL, citing as an example the indiscriminate use of force against and the killing of civilians in Mogadishu.¹²⁷

121. In 1998, in a report on MONUA in Angola, the UN Secretary-General stated that:

Over the past few months, indiscriminate as well as summary killings . . . have been reported in the course of attacks targeting entire villages . . . At such times, principles of humanitarian law are especially important as they seek to protect the most vulnerable groups – those who are not involved in military operations – from direct or indiscriminate attack or being forced to flee.¹²⁸

122. In 1994, in a report on the situation of human rights in the former Yugoslavia, the Special Rapporteur of the UN Commission on Human Rights noted that “although a number of Bosnian Serb attacks on Sarajevo occur in response to firing by forces of the army of Bosnia and Herzegovina from positions situated close to highly sensitive civilian locations, most attacks would appear to be indiscriminate”.¹²⁹

123. In its 1993 report, the UN Commission on the Truth for El Salvador noted that the violence in rural areas in 1980 and 1981 was extremely indiscriminate. It stated that the violence was slightly more discriminate in urban areas and

¹²² UN Commission on Human Rights, Res. 2000/58, 25 April 2000, preamble and § 2.

¹²³ UN Secretary-General, Report on UNIFIL, UN Doc. S/21102, 25 January 1990, § 15.

¹²⁴ UN Secretary-General, Report on UNIFIL, UN Doc. S/21406, 24 July 1990, § 15.

¹²⁵ UN Secretary-General, Report on UNIFIL, UN Doc. S/22129, 23 January 1991, § 16.

¹²⁶ UN Secretary-General, Report on UNIFIL, UN Doc. S/23452, 21 January 1992, § 19.

¹²⁷ UN Secretary-General, Report on the situation in Somalia, UN Doc. S/1997/135, 17 February 1997, § 32.

¹²⁸ UN Secretary-General, Report on MONUA, UN Doc. S/1998/931, 8 October 1998, § 17.

¹²⁹ UN Commission on Human Rights, Special Rapporteur on the Situation of Human Rights in the Former Yugoslavia, Sixth periodic report, UN Doc. E/CN.4/1994/110, 21 February 1994, §§ 59–61.

also in rural zones after 1983.¹³⁰ Describing incidents which took place in El Junquillo canton, where soldiers and members of the civil defence unit attacked a population composed exclusively of women, young children and old people, the Commission found the attack to be indiscriminate.¹³¹

124. In 1994, in its final report on grave breaches of the Geneva Conventions and other violations of IHL committed in the former Yugoslavia, the UN Commission of Experts Established pursuant to Security Council Resolution 780 (1992) stated, with respect to its investigation into the attack on Dubrovnik, that:

There is evidence that the Dubrovnik authorities, (aided by UNESCO observers), appear to have been scrupulous about keeping weapons out of the Old Town, that the besieging forces could see virtually everything that was going on in the Old Town, and that the Old Town was clearly subject to indiscriminate, and possibly even deliberate, targeting. Therefore, this conclusion will also be the subject of a recommendation for further investigation with a view to prosecution.¹³²

Other International Organisations

125. In a declaration adopted in March 1992, the Committee of Ministers of the Council of Europe expressed its deep concern over reports of "indiscriminate killings and outrages" committed during the conflict in Nagorno-Karabakh.¹³³

126. In a declaration on Bosnia and Herzegovina adopted in February 1994, the Committee of Ministers of the Council of Europe demanded the immediate cessation of the indiscriminate shelling of Sarajevo, which had been declared a safe area by the UN Security Council.¹³⁴

127. In 1995, in a resolution concerning Russia's request for membership in the light of the situation in Chechnya, the Parliamentary Assembly of the Council of Europe unreservedly condemned "the indiscriminate and disproportionate use of force by the Russian military, in particular against the civilian population",¹³⁵

128. In a declaration adopted in 1991 on the situation in Yugoslavia, the EC Ministers of Foreign Affairs expressed alarm at "reports that the Yugoslav National Army (JNA), having resorted to a disproportionate and indiscriminate use of force, has shown itself to be no longer a neutral and disciplined institution".¹³⁶

¹³⁰ UN Commission on the Truth for El Salvador, Report, UN Doc. S/25500, 1 April 1993, p. 44.

¹³¹ UN Commission on the Truth for El Salvador, Report, UN Doc. S/25500, 1 April 1993, p. 67.

¹³² UN Commission of Experts Established pursuant to Security Council Resolution 780 (1992), Final report, Annex XI.A, UN Doc. S/1994/674/Add.2 (Vol. V), 28 December 1994, § 76.

¹³³ Council of Europe, Committee of Ministers, Declaration on Nagorno-Karabakh, 11 March 1992, § 1.

¹³⁴ Council of Europe, Committee of Ministers, Declaration on Bosnia and Herzegovina, 14 February 1994, § 3.

¹³⁵ Council of Europe, Parliamentary Assembly, Res. 1055, 2 February 1995, § 2.

¹³⁶ EC, Declaration on Yugoslavia, Haarzuilens, 6 October 1991, annexed to Letter dated 7 October 1991 from the Netherlands to the UN Secretary-General, UN Doc. A/46/533, 7 October 1991.

129. In July 1992, following the bombardments of the city of Goražde and other cities in Bosnia and Herzegovina by Serb forces, the EC issued a statement to the effect that “these brutal and indiscriminate attacks upon defenceless civilians are wholly contrary to the basic humanitarian precepts of international law”.¹³⁷ In another declaration on Yugoslavia dated 21 July 1992, the EC denounced attacks on unarmed civilians in similar terms.¹³⁸

130. In 1998, the EU Council of Ministers issued a regulation stating that “the Government of the Federal Republic of Yugoslavia has not stopped the use of indiscriminate violence and brutal repression against its own citizens, which constitute serious violations of human rights and international humanitarian law”.¹³⁹

131. In 2000, the conclusions of the Presidency of the European Council reaffirmed the need for Russia, in regard to Chechnya, to abide by its commitments, in particular to put an end to the indiscriminate use of military force.¹⁴⁰

International Conferences

132. The 20th International Conference of the Red Cross in 1965 adopted a resolution on the protection of the civilian population against the dangers of indiscriminate warfare, in which it stated that “indiscriminate warfare constitutes a danger to the civilian population and the future of civilization”. The resolution urged the ICRC to pursue the development of IHL “with particular reference to the need for protecting the civilian population against the sufferings caused by indiscriminate warfare”.¹⁴¹

133. The 25th International Conference of the Red Cross in 1986 adopted a resolution in which it deplored “the indiscriminate attacks inflicted on civilian populations . . . in violation of the laws and customs of war”.¹⁴²

IV. Practice of International Judicial and Quasi-judicial Bodies

134. In its decision on the defence motion for interlocutory appeal on jurisdiction in the *Tadić case* in 1995, the ICTY Appeals Chamber held that rules of customary international law have developed that regulate non-international armed conflict. To reach this conclusion the Tribunal referred to various sources including, *inter alia*, the behaviour of belligerent States, governments and insurgents, the action of the ICRC, UN General Assembly Resolutions 2444 (XXIII)

¹³⁷ EC, Statement on the bombardment of Goražde, annexed to Letter dated 15 July 1992 from Belgium, France and UK to the President of the UN Security Council, UN Doc. S/24299, 16 July 1992.

¹³⁸ EC, Declaration on Yugoslavia, annexed to Letter dated 21 July 1992 from Belgium, France and UK to the President of the UN Security Council, UN Doc. S/24328, 21 July 1992.

¹³⁹ EU, Council of Ministers, Council Regulation EC No. 1901/98, 7 September 1998.

¹⁴⁰ European Council, SN 100/00, Presidency Conclusions, Lisbon, 23–24 March 2000, p. 16, § 56.

¹⁴¹ 20th International Conference of the Red Cross, Vienna, 2–9 October 1965, Res. XXVIII.

¹⁴² 25th International Conference of the Red Cross, Geneva, 23–31 October 1986, Res. I, preamble.

of 1968 and 2675 (XXV) of 1970, military manuals and declarations issued by regional organisations. The Appeals Chamber stated that these rules covered areas such as the protection of civilians against the effects of hostilities, in particular protection against indiscriminate attacks.¹⁴³

135. In its review of the indictments in the *Karadžić and Mladić case* in 1996, the ICTY Trial Chamber stated that “throughout the conflict, the strategy of Bosnian Serb forces consisted in indiscriminately targeting civilians. Such was the case during the entire siege of Sarajevo, and at times in the safe areas of Srebrenica, Žepa, Goražde, Bihac and Tuzla.”¹⁴⁴

136. In an interlocutory decision in the *Kordić and Čerkez case* in 1999, the ICTY Trial Chamber held that it was “indisputable” that the prohibition of indiscriminate attacks was a generally accepted obligation.¹⁴⁵

137. In its judgement in the *Kupreškić case* in 2000, the ICTY Trial Chamber stated that “attacks, even when they are directed against legitimate military targets, are unlawful if conducted using indiscriminate means or methods of warfare, or in such a way as to cause indiscriminate damage to civilians”.¹⁴⁶

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

138. To fulfil its task of disseminating IHL, the ICRC has delegates around the world teaching armed and security forces that “the attack may only be directed at a specific military objective. The military objective must be identified as such and clearly designated and assigned. The attack shall be limited to the assigned military objective.”¹⁴⁷ They teach, furthermore, that an “indiscriminate attack affecting the civilian population or civilian objects in the knowledge that such attack will cause excessive civilian casualties and damage” constitutes a grave breach of the law of war.¹⁴⁸

139. In an appeal issued in October 1973, the ICRC urged all the belligerents in the conflict in the Middle East (Egypt, Iraq, Israel and Syria) to observe forthwith, in particular, the provisions of, *inter alia*, Article 46(3) of draft AP I, which stated that “the employment of . . . any methods which strike or affect indiscriminately the civilian population and combatants, or civilian objects and military objectives, are prohibited”. All governments concerned replied favourably.¹⁴⁹

¹⁴³ ICTY, *Tadić case*, Interlocutory Appeal, 2 October 1995, §§ 100–127.

¹⁴⁴ ICTY, *Karadžić and Mladić case*, Review of the Indictments, 11 July 1996, § 18.

¹⁴⁵ ICTY, *Kordić and Čerkez case*, Decision on the Joint Defence Motion, 2 March 1999, § 31.

¹⁴⁶ ICTY, *Kupreškić case*, Judgement, 14 January 2000, § 524.

¹⁴⁷ Frédéric de Mulinen, *Handbook on the Law of War for Armed Forces*, ICRC, Geneva, 1987, § 428.

¹⁴⁸ Frédéric de Mulinen, *Handbook on the Law of War for Armed Forces*, ICRC, Geneva, 1987, § 778(c).

¹⁴⁹ ICRC, The International Committee's Action in the Middle East, *IRRC*, No. 152, 1973, pp. 584–585.

140. In a press release issued in 1978 concerning the conflict in Lebanon, the ICRC urgently appealed to the belligerents “to cease forthwith the indiscriminate shelling of the civilian population”.¹⁵⁰

141. In an appeal issued in 1983 concerning the Iran–Iraq War, the ICRC pointed to grave violations of IHL committed by both countries, including “indiscriminate bombardment of towns and villages”.¹⁵¹

142. In a press release issued in 1983 concerning the conflict in Lebanon, the ICRC stated that:

In the camps of *Nahr el Bared* and *Bedaoui*, and in certain sectors of the city of Tripoli, civilians are at the mercy of indiscriminate shelling. . . The ICRC insists that the presence of armed elements among the civilian population does not justify the indiscriminate shelling of women, children and old people.¹⁵²

143. At its Rio de Janeiro Session in 1987, the Council of Delegates adopted a resolution on the formal commitment by the Movement to obtain the full implementation of the Geneva Conventions in which it requested the ICRC “to take all necessary steps to enable it to protect and assist civilian victims of indiscriminate attacks”.¹⁵³

144. In a press release issued in 1988 with respect to the Iran–Iraq War, the ICRC recalled that it had already denounced the indiscriminate bombing of civilians on several occasions and stated that it had again approached the two belligerents in order to insist that “all necessary measures be taken to ensure that civilians are no longer subjected to indiscriminate attack”.¹⁵⁴

145. In a communication to the press issued in 1989 in the context of the conflict in Lebanon, the ICRC stated that:

The ICRC once again earnestly appeals to the parties concerned to end immediately the indiscriminate shelling of civilians and civilian property, which is an unacceptable violation of the most elementary humanitarian rules, and urges them to do everything in their power to ensure that these rules are henceforth duly respected.¹⁵⁵

146. In a Memorandum on the Applicability of International Humanitarian Law sent in 1990 to all States party to the Geneva Conventions in the context of the Gulf War, the ICRC stated that “the following general rules are recognized as binding on any party to an armed conflict: . . . It is forbidden . . . to launch indiscriminate attacks.”¹⁵⁶

¹⁵⁰ ICRC, Press Release No. 1341, Lebanon: ICRC appeals for truce, 2 October 1978.

¹⁵¹ ICRC, Conflict between Iraq and Iran: ICRC Appeal, *IRRC*, No. 235, 1983, p. 221.

¹⁵² ICRC, Press Release No. 1474, Fighting in Tripoli: appeal from the ICRC, 4 November 1983.

¹⁵³ International Red Cross and Red Crescent Movement, Council of Delegates, Rio de Janeiro, 27 November 1987, Res. 5, § 2.

¹⁵⁴ ICRC, Press Release No. 1563, Iran/Iraq conflict: civilian population affected by bombing, 10 March 1988.

¹⁵⁵ ICRC, Communication to the Press No. 89/8, ICRC appeal against shelling in Lebanon, 28 July 1989.

¹⁵⁶ ICRC, Memorandum on the Applicability of International Humanitarian Law, 14 December 1990, § II, *IRRC*, No. 280, 1991, p. 24.

147. On several occasions in 1992, the ICRC called on the parties to the conflict in Afghanistan not to launch indiscriminate attacks.¹⁵⁷

148. In 1992, the ICRC considered the shelling of a city indiscriminate because it was without pattern and there was no indication of any attempt to spare the civilian population.¹⁵⁸

149. In a communication to the press in 1993, the ICRC enjoined the parties to the conflict in Somalia “not to launch indiscriminate attacks”.¹⁵⁹

150. In a communication to the press in 1993, the ICRC reminded the parties to the conflict in Nagorno-Karabakh of their obligation “to refrain from indiscriminate attacks”.¹⁶⁰

151. In a press release issued in 1994 in the context of the conflict in Yemen, the ICRC stated that indiscriminate attacks were prohibited.¹⁶¹

152. In 1994, in a Memorandum on Respect for International Humanitarian Law in Angola, the ICRC stated that “all attacks directed indiscriminately at military and civilian objectives . . . are prohibited”.¹⁶²

153. In 1994, in a Memorandum on Compliance with International Humanitarian Law by the Forces Participating in Opération Turquoise in the Great Lakes region, the ICRC stated that “attacks which indiscriminately strike military and civilian objectives . . . are prohibited”.¹⁶³

154. In a press release issued in 1995, the ICRC called upon all the parties involved in Turkey’s military operations in northern Iraq “to refrain from launching any indiscriminate attack that may endanger the civilian population”.¹⁶⁴

155. In a working paper on war crimes submitted in 1997 to the Preparatory Committee for the Establishment of an International Criminal Court, the ICRC proposed that the following war crime, when committed in an international armed conflict, be subject to the jurisdiction of the Court:

¹⁵⁷ ICRC, Press Release No. 1712, Afghanistan: ICRC Appeal for Compliance with Humanitarian Rules, 5 May 1992; Press Release No. 1724, Kabul: ICRC urges respect for civilians as medical facilities struggle to cope, 20 July 1992; Press Release No. 1726, Afghanistan: New ICRC Appeal for Compliance with Humanitarian Rules, 14 August 1992.

¹⁵⁸ ICRC archive document.

¹⁵⁹ ICRC, Communication to the Press No. 93/17, Somalia: ICRC appeals for compliance with international humanitarian law, 17 June 1993.

¹⁶⁰ ICRC, Communication to the Press No. 93/25, Nagorno-Karabakh conflict: 60,000 civilians flee fighting in south-western Azerbaijan, 19 August 1993.

¹⁶¹ ICRC, Press Release No. 1773, Fighting in Yemen, 9 May 1994; see also Press Release No. 1775, Yemen: ICRC active on both sides appeals to belligerents, 12 May 1994.

¹⁶² ICRC, Memorandum on Respect for International Humanitarian Law in Angola, 8 June 1994, § II, *IRRC*, No. 320, 1997, p. 504.

¹⁶³ ICRC, Memorandum on Compliance with International Humanitarian Law by the Forces Participating in Opération Turquoise, 23 June 1994, § II, reprinted in Marco Sassòli and Antoine A. Bouvier, *How Does Law Protect in War?*, ICRC, Geneva, 1999, p. 1308.

¹⁶⁴ ICRC, Press Release No. 1797, ICRC calls for compliance with international humanitarian law in Turkey and Northern Iraq, 22 March 1995.

launching an indiscriminate attack affecting the civilian population or civilian objects in the knowledge that such attack will cause excessive loss of life, injury to civilians or damage to civilian objects, which is excessive in relation to the concrete and direct military advantage anticipated.¹⁶⁵

156. In a communication to the press in 2000, the ICRC reminded all those involved in the violence in the Near East that indiscriminate attacks were “absolutely and unconditionally prohibited”.¹⁶⁶

157. In a communication to the press in 2001 in connection with the conflict in Afghanistan, the ICRC stated that indiscriminate attacks were prohibited.¹⁶⁷

VI. Other Practice

158. In their commentary on the 1977 Additional Protocols, Bothe, Partsch and Solf state that:

The deletion of the prohibition against indiscriminate attacks in the simplified Protocol II suggests that para. 2 [of Article 13] be examined carefully to determine whether it covers any type of indiscriminate attacks covered by paras. 4 and 5 of Art. 51 of Protocol I. It is certainly arguable that attacks against densely populated places which are not directed at military objectives, those which cannot be so directed, and the area bombardments prohibited by para. 5(a) of Art. 51 are inferentially included within the prohibition against making the civilian population the object of attack. Their deletion may be said to be part of the simplification of the text.¹⁶⁸

159. Oppenheim states that “International Law protects non-combatants from indiscriminate bombardment from the air; recourse to such bombardment constitutes a war crime”.¹⁶⁹

160. Rule A1 of the Rules of International Humanitarian Law Governing the Conduct of Hostilities in Non-international Armed Conflicts, adopted in 1990 by the Council of the IHL, provides that “the obligation to distinguish between combatants and civilians is a general rule applicable in non-international armed conflicts. It prohibits indiscriminate attacks.”¹⁷⁰

161. The Report on the Practice of Rwanda notes that in April 1994, during the conflict in Rwanda, the FPR confirmed that future attacks against military

¹⁶⁵ ICRC, Working paper on war crimes submitted to the Preparatory Committee for the Establishment of an International Criminal Court, New York, 14 February 1997, § 1(b)(ii).

¹⁶⁶ ICRC, Communication to the Press No. 00/42, ICRC Appeal to All Involved in Violence in the Near East, 21 November 2000.

¹⁶⁷ ICRC, Communication to the Press No. 01/47, Afghanistan: ICRC calls on all parties to the conflict to respect international humanitarian law, 24 October 2001.

¹⁶⁸ Michael Bothe, Karl Joseph Partsch, Waldemar A. Solf (eds.), *New Rules for Victims of Armed Conflicts*, Martinus Nijhoff, The Hague, 1982, p. 677.

¹⁶⁹ Lassa Oppenheim, *International Law. A Treatise*, Vol. II, Disputes, War and Neutrality, Sixth edition, revised, Hersch Lauterpacht (ed.), Longmans, Green and Co., London/New York/Toronto, 1944, p. 416, § 214*ea*.

¹⁷⁰ IHL, Rules of International Humanitarian Law Governing the Conduct of Hostilities in Non-international Armed Conflicts, Rule A1, *IRRC*, No. 278, 1990, p. 387.

positions in Kigali where the civilian population was being used as a human shield would be avoided. According to the report, the reason invoked was that FPR soldiers did not want to strike at military objectives and at civilians without distinction.¹⁷¹

162. In 1994, in the context of the conflict in Yemen, Human Rights Watch urged the government of Yemen “to pay closest attention to the requirements of the rules of war, in particular to the prohibition on indiscriminate attacks in areas of civilian concentration . . . We note that the rules of war apply equally to government and rebel troops.”¹⁷²

163. A report by the Memorial Human Rights Center documenting Russia’s operation in the Chechen village of Samashki in April 1995 alleged that Russian forces had attacked the village indiscriminately. The report stated that ICRC representatives had

evaluated the general number of deaths in the village and the large proportion of civilians among them. The ICRC gave a series of interviews on the topic in which they protested violations of common laws of warfare by MVD soldiers, i.e. “indiscriminate attacks” during military operations.¹⁷³

B. Definition of Indiscriminate Attacks

Note: *For practice concerning attacks in violation of the principle of proportionality, see Chapter 4.*

Attacks which are not directed at a specific military objective

I. Treaties and Other Instruments

Treaties

164. According to Article 51(4)(a) API, attacks “which are not directed at a specific military objective” and consequently “are of a nature to strike military objectives and civilians or civilian objects without distinction” are indiscriminate. Article 51 AP I was adopted by 77 votes in favour, one against and 16 abstentions.¹⁷⁴

165. Article 3(3)(a) of the 1980 Protocol II to the CCW defines the indiscriminate use of mines, booby-traps and other devices as any placement of such weapons “which is not on, or directed at, a military objective”.

¹⁷¹ Report on the Practice of Rwanda, 1997, Chapter 1.4, referring to Statement of the FPR, *Ingabo*, No. 027, Kanama, 1997, pp. 17–18.

¹⁷² Human Rights Watch, Letter to the Government of Yemen, New York, 19 May 1994.

¹⁷³ Memorial Human Rights Center, *By All Available Means: the Russian Federation Ministry of Internal Affairs Operation in the Village of Samashki: April 7–8, 1995*, Moscow, 1996, § 9.3, reprinted in Marco Sassòli and Antoine A. Bouvier, *How Does Law Protect in War?*, ICRC, Geneva, 1999, p. 1415.

¹⁷⁴ CDDH, *Official Records*, Vol. VI, CDDH/SR.41, 26 May 1977, p. 163.

166. Article 3(8)(a) of the 1996 Amended Protocol II to the CCW defines the indiscriminate use of mines, booby-traps and other devices as any placement of such weapons “which is not on, or directed against, a military objective”.

Other Instruments

167. Paragraph 6 of the 1991 Memorandum of Understanding on the Application of IHL between Croatia and the SFRY requires that hostilities be conducted in accordance with Article 51(4)(a) AP I.

168. Paragraph 2.5 of the 1992 Agreement on the Application of IHL between the Parties to the Conflict in Bosnia and Herzegovina requires that hostilities be conducted in accordance with Article 51(4)(a) AP I.

169. Paragraph 42(b)(i) of the 1994 San Remo Manual states that “it is forbidden to employ methods or means of warfare which are indiscriminate in that they are not . . . directed against a specific military objective”.

II. National Practice

Military Manuals

170. Military manuals of Australia, Belgium, Canada, Germany, Netherlands, New Zealand, Spain and Sweden consider attacks which are not directed at a specific military objective to be indiscriminate.¹⁷⁵

171. Benin’s Military Manual defines indiscriminate attacks as “attacks which are not directed at military objectives and which will probably strike at military objectives and civilian objects without distinction”.¹⁷⁶

172. Ecuador’s Naval Manual states that “any weapon may serve an unlawful purpose when it is directed against noncombatants and other protected persons and objects”.¹⁷⁷

173. Israel’s Manual on the Laws of War states that “in any attack it is imperative to verify that the attack will be directed against a specific military target”.¹⁷⁸

174. Kenya’s LOAC Manual defines indiscriminate attacks as “attacks which are not directed at a specific military objective and which are likely to strike at military objectives and civilian objects without distinction”.¹⁷⁹

175. The Report on the Practice of Nigeria states that “Nigeria’s notion of indiscriminate attacks are those attacks or firepower directed against non-military

¹⁷⁵ Australia, *Defence Force Manual* (1994), § 502(b)(1); Australia, *Commanders’ Guide* (1994), § 956(a); Belgium, *Law of War Manual* (1983), p. 27; Canada, *LOAC Manual* (1999), p. 4-3, § 22(a); Germany, *Military Manual* (1992), § 455; Netherlands, *Military Manual* (1993), p. V-4; New Zealand, *Military Manual* (1992), § 517; Spain, *LOAC Manual* (1996), Vol. I, § 4.4.c; Sweden, *IHL Manual* (1991), Section 3.2.1.5, p. 45.

¹⁷⁶ Benin, *Military Manual* (1995), Fascicule III, p. 13.

¹⁷⁷ Ecuador, *Naval Manual* (1989), § 9.1.

¹⁷⁸ Israel, *Manual on the Laws of War* (1998), p. 37.

¹⁷⁹ Kenya, *LOAC Manual* (1997), Précis No. 4, p. 3.

objectives as found in paragraphs (f) and (g) of the [Operational Code of Conduct]".¹⁸⁰

176. South Africa's Medical Services Military Manual states that "indiscriminate attacks . . . do not take into consideration the basic distinction of protection between military and civilian objectives".¹⁸¹

177. Togo's Military Manual defines indiscriminate attacks as "attacks which are not directed at military objectives and which will probably strike at military objectives and civilian objects without distinction".¹⁸²

178. The UK LOAC Manual defines indiscriminate attacks as "attacks which are not directed at a military objective and which are likely to strike at military objectives and civilian objects without distinction".¹⁸³

179. The US Air Force Pamphlet states that:

The extent to which a weapon discriminates between military objectives and protected persons and objects depends usually on the manner in which the weapon is employed rather than on the design qualities of the weapon itself. Where a weapon is designed so that it can be used against military objectives, its employment in a different manner, such as against the civilian population, does not make the weapon itself unlawful.¹⁸⁴

180. The US Naval Handbook states that "any weapon may be set to an unlawful purpose when it is directed against noncombatants and other protected persons and objects".¹⁸⁵

National Legislation

181. Under the Draft Amendments to the Penal Code of El Salvador, indiscriminate attacks are defined as including attacks "which are not directed against a specific military objective".¹⁸⁶

182. Nicaragua's Draft Penal Code defines indiscriminate attacks as including attacks "which are not directed against a specific military objective".¹⁸⁷

National Case-law

183. No practice was found.

Other National Practice

184. The Report on the Practice of Colombia notes that the government describes direct attacks on civilians as indiscriminate attacks. Reports describing

¹⁸⁰ Report on the Practice of Nigeria, 1997, Chapter 1.4, referring to *Operational Code of Conduct* (1968), §§ f–g.

¹⁸¹ South Africa, *Medical Services Military Manual* (undated), § 40.

¹⁸² Togo, *Military Manual* (1996), Fascicule III, p. 13.

¹⁸³ UK, *LOAC Manual* (1981), Section 4, p. 15, § 5(j).

¹⁸⁴ US, *Air Force Pamphlet* (1976), § 6-3(c). ¹⁸⁵ US, *Naval Handbook* (1995), § 9.1.

¹⁸⁶ El Salvador, *Draft Amendments to the Penal Code* (1998), Article entitled "Ataque indiscriminado a personas protegidas".

¹⁸⁷ Nicaragua, *Draft Penal Code* (1999), Article 450(2).

the aerial shelling of houses in a conflict zone and bombardments that directly and exclusively affect the civilian population forcing it to move are provided as examples of indiscriminate attacks.¹⁸⁸

185. In its written statement submitted to the ICJ in the *Nuclear Weapons case* in 1995, India stated that indiscriminate attacks are generally defined as including “those that are not directed at any single military objective”.¹⁸⁹

186. Prior to the adoption of UN General Assembly Resolution 47/37 in 1992 on the protection of the environment in times of armed conflict, Jordan and the US submitted a memorandum to the Sixth Committee of the UN General Assembly entitled “International Law Providing Protection to the Environment in Times of Armed Conflict”. The memorandum stated that:

It is a war crime to employ acts of violence not directed at specific military objectives, to employ a method or means of combat which cannot be directed at a specific military objective, or to employ a means or method of combat the effects of which cannot be limited as required by the law of armed conflict.¹⁹⁰

187. The Report on the Practice of Jordan cites as an example of indiscriminate attacks those which are not directed at a specific military objective.¹⁹¹

188. In its written statement submitted to the ICJ in the *Nuclear Weapons case* in 1995, Mexico stated that “in accordance with international humanitarian law, indiscriminate attacks are those that can reach both military targets and civilians”.¹⁹²

189. The Report on the Practice of Nigeria states that it is the *opinio juris* of Nigeria that “the prohibition of direct attacks on civilians and the adherence to the notion of abolition of indiscriminate attacks are part of customary international law”.¹⁹³

190. On the basis of replies by army officers to a questionnaire, the Report on the Practice of Rwanda defines indiscriminate attacks as those which are carried out without making a distinction between military and civilian objectives. As examples of indiscriminate attacks, the report cites attacks on enemy positions located in an area inhabited by civilians and the shooting into a crowd because an enemy is hidden somewhere in the middle of it.¹⁹⁴

¹⁸⁸ Report on the Practice of Colombia, 1998, Chapter 1.4, referring to Defensoría del Pueblo, *Informe de Comisión Municipio de Miraflores*, Queja 9500280, pp. 7 and 15 and Defensoría del Pueblo, *Cuarto informe anual del defensor del pueblo al congreso de Colombia*, Santafé de Bogotá, September 1997, p. 43.

¹⁸⁹ India, Written statement submitted to the ICJ, *Nuclear Weapons case*, 20 June 1995, p. 3.

¹⁹⁰ Jordan and US, International Law Providing Protection to the Environment in Times of Armed Conflict, annexed to Letter dated 28 September 1992 to the Chairman of the Sixth Committee of the UN General Assembly, UN Doc. A/C.6/47/3, 28 September 1992, § 1(g).

¹⁹¹ Report on the Practice of Jordan, 1997, Chapter 1.4.

¹⁹² Mexico, Written statement submitted to the ICJ, *Nuclear Weapons case*, 19 June 1995, § 77(d).

¹⁹³ Report on the Practice of Nigeria, 1997, Chapter 1.4.

¹⁹⁴ Report on the Practice of Rwanda, 1997, Replies by Rwandan army officers to a questionnaire, Chapter 1.4.

191. In 1991, in a report submitted to the UN Security Council on operations in the Gulf War, the UK criticised Iraq for launching indiscriminate missile attacks against civilians.¹⁹⁵

192. In 1991, in a report submitted to the UN Security Council on operations in the Gulf War, the US denounced the continued indiscriminate launching of surface-to-surface missiles at civilian targets.¹⁹⁶

193. In 1992, in its final report to Congress on the conduct of the Gulf War, the US Department of Defense accused Iraq of "indiscriminate Scud missile attacks".¹⁹⁷

194. In its written statement submitted to the ICJ in the *Nuclear Weapons (WHO) case* in 1994, the US stated that "it is unlawful to conduct any indiscriminate attack, including those employing weapons that are not . . . directed at a military objective".¹⁹⁸

195. In submitting the 1996 Amended Protocol II to the CCW to Congress for advice and consent to ratification, the US President stated that the prohibition of indiscriminate use of mines, booby-traps and other devices as defined in Article 3(8)(a) of the Protocol "is already a feature of customary international law that is applicable to all weapons".¹⁹⁹

196. According to the Report on US Practice, it is the *opinio juris* of the US that indiscriminate attacks include attacks which are not directed at a military objective.²⁰⁰

III. Practice of International Organisations and Conferences

United Nations

197. In 1990, in a report on UNIFIL in Lebanon, the UN Secretary-General described the following incident:

A further serious incident occurred at dawn on 21 December 1989, when the DFF compound in Al Qantarrah in the Finnish battalion sector directed tank, mortar and heavy machine-gun fire indiscriminately in all directions in response to the firing of an anti-tank round by unidentified armed elements . . . The incident was strongly protested to IDF.²⁰¹

¹⁹⁵ UK, Letter dated 13 February 1991 to the President of the UN Security Council, UN Doc. S/22218, 13 February 1991, pp. 1-2.

¹⁹⁶ US, Letter dated 5 March 1991 to the President of the UN Security Council, UN Doc. S/22341, 8 March 1991, p. 1.

¹⁹⁷ US, Department of Defense, Final Report to Congress on the Conduct of the Persian Gulf War, 10 April 1992, Appendix O, The Role of the Law of War, *ILM*, Vol. 31, 1992, p. 635.

¹⁹⁸ US, Written statement submitted to the ICJ, *Nuclear Weapons (WHO) case*, 10 June 1994, p. 27.

¹⁹⁹ US, Message from the US President Transmitting the Protocols to the CCW to Congress for Advice and Consent to Ratification, Treaty Doc. 105-1, Washington, D.C., 7 January 1997, Analysis of Article 3(8).

²⁰⁰ Report on US Practice, 1997, Chapter 1.4.

²⁰¹ UN Secretary-General, Report on UNIFIL, UN Doc. S/21102, 25 January 1990, § 22.

198. In 1994, in its final report on grave breaches of the Geneva Conventions and other violations of IHL committed in the former Yugoslavia, the UN Commission of Experts Established pursuant to Security Council Resolution 780 (1992) stated that:

The concealment of Bosnian Government forces among civilian property may have caused the attraction of fire from the Bosnian Serb Army which may have resulted in legitimate collateral damage. There is enough apparent damage to civilian objects in Sarajevo to conclude that either civilian objects have been deliberately targeted or they have been indiscriminately attacked.²⁰²

Other International Organisations

199. No practice was found.

International Conferences

200. A report on the work of Committee III of the CDDH stated that:

The main problem was that of defining the term “indiscriminate attacks”. There was general agreement that a proper definition would include the act of not directing an attack at a military objective, the use of means or methods of combat which cannot be directed at a specific military objective, and the use of means or methods of combat the effects of which cannot be limited as required by the protocol.²⁰³

IV. Practice of International Judicial and Quasi-judicial Bodies

201. In its final report to the ICTY Prosecutor in 2000, the Committee Established to Review the NATO Bombing Campaign Against the Federal Republic of Yugoslavia stated that:

Attacks which are not directed against a military objective (particularly attacks directed against the civilian population) . . . may constitute the *actus reus* for the offence of unlawful attack [as a violation of the laws and customs of war]. The *mens rea* for the offence is intention or recklessness, not simple negligence.²⁰⁴

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

202. To fulfil its task of disseminating IHL, the ICRC has delegates around the world teaching armed and security forces that “the attack may only be directed at a specific military objective. The military objective must be identified as

²⁰² UN Commission of Experts Established pursuant to Security Council Resolution 780 (1992), Final report, UN Doc. S/1994/674, 27 May 1994, Annex, § 206.

²⁰³ CDDH, *Official Records*, Vol. XV, CDDH/215/Rev.1, Second Session, Report of Committee III, 3 February–18 April 1975, p. 274, § 55.

²⁰⁴ ICTY, Final Report to the Prosecutor by the Committee Established to Review the NATO Bombing Campaign Against the Federal Republic of Yugoslavia, The Hague, 14 June 2000, § 28.

such and clearly designated and assigned. The attack shall be limited to the assigned military objective."²⁰⁵

VI. *Other Practice*

203. In 1985, in a report on violations of the laws of war in Nicaragua, Americas Watch listed the following kinds of attacks among those that "are prohibited by applicable international law rules":

4. Direct attacks against individual or groups of unarmed civilians where no legitimate military objective, such as enemy combatants or war materiel, is present. Such attacks are indiscriminate.
5. Direct attacks against towns, villages, dwellings or buildings dedicated to civilian purposes where no military objective is present. Such attacks are also indiscriminate.²⁰⁶

204. In 1989, in a report on violations of the laws of war in Angola, Africa Watch listed the following kinds of attacks and uses of landmines among those that "should be prohibited in the conduct of hostilities":

- A. Direct attacks, by ground or air, and direct use of weapons against individuals or groups of unarmed civilians where no legitimate military objectives, such as enemy combatants or war material, are present. Such attacks and uses of these weapons are indiscriminate.
- B. Direct attacks, by ground or air, and direct weapons use against civilian objects dedicated to civilian purposes, such as towns, villages, dwellings, buildings, agricultural areas for the production of civilian foodstuffs, and drinking water sources, where no military objective is present. This type of attack and weapons use is similarly indiscriminate.²⁰⁷

205. The Commentary on Rule A1 of the Rules of International Humanitarian Law Governing the Conduct of Hostilities in Non-international Armed Conflicts, adopted in 1990 by the Council of the IHL, defines indiscriminate attacks as "attacks launched at or affecting the civilian population without discrimination".²⁰⁸

Attacks which cannot be directed at a specific military objective

Note: For practice concerning weapons that are by nature indiscriminate, see Chapter 20, section B.

²⁰⁵ Frédéric de Mulinen, *Handbook on the Law of War for Armed Forces*, ICRC, Geneva, 1987, § 428.

²⁰⁶ Americas Watch, *Violations of the Laws of War by Both Sides in Nicaragua: 1981–1985*, New York, March 1985, p. 34.

²⁰⁷ Africa Watch, *Angola: Violations of the Laws of War by Both Sides*, New York, April 1989, p. 140.

²⁰⁸ IHL, Rules of International Humanitarian Law Governing the Conduct of Hostilities in Non-international Armed Conflicts, Commentary on Rule A1, *IRRC*, No. 278, 1990, p. 388.

I. Treaties and Other Instruments

Treaties

206. According to Article 51(4)(b) AP I, attacks “which employ a method or means of combat which cannot be directed at a specific military objective” and consequently “are of a nature to strike military objectives and civilians or civilian objects without distinction” are indiscriminate. Article 51 AP I was adopted by 77 votes in favour, one against and 16 abstentions.²⁰⁹

207. Article 3(3)(b) of the 1980 Protocol II to the CCW and Article 3(8)(b) of the 1996 Amended Protocol II to the CCW define the indiscriminate use of mines, booby-traps and other devices as any placement of such weapons “which employs a method or means of delivery which cannot be directed at a specific military objective”.

Other Instruments

208. Article 14 of the 1956 New Delhi Draft Rules states that:

Without prejudice to the present or future prohibition of certain specific weapons, the use is prohibited of weapons whose harmful effects – resulting in particular from the dissemination of incendiary, chemical, bacteriological, radioactive or other agents – could spread to an unforeseen degree or escape, either in space or in time, from the control of those who employ them, thus endangering the civilian population.

209. Paragraph 6 of the 1991 Memorandum of Understanding on the Application of IHL between Croatia and the SFRY requires that hostilities be conducted in accordance with Article 51(4)(b) AP I.

210. Paragraph 2.5 of the 1992 Agreement on the Application of IHL between the Parties to the Conflict in Bosnia and Herzegovina requires that hostilities be conducted in accordance with Article 51(4)(b) AP I.

211. Paragraph 42(b)(i) of the 1994 San Remo Manual states that “it is forbidden to employ methods or means of warfare which are indiscriminate in that they . . . cannot be directed against a specific military objective”.

II. National Practice

Military Manuals

212. Military manuals of Australia, Belgium, Canada, Germany, Netherlands, New Zealand, Spain and Sweden state that attacks which employ a method or means of combat which cannot be directed at a specific military objective are indiscriminate.²¹⁰

²⁰⁹ CDDH, *Official Records*, Vol. VI, CDDH/SR.41, 26 May 1977, p. 163.

²¹⁰ Australia, *Defence Force Manual* (1994), § 502(b)(2); Australia, *Commanders' Guide* (1994), § 956(b); Belgium, *Law of War Manual* (1983), p. 27; Canada, *LOAC Manual* (1999), p. 4-3, § 22(b), see also p. 5-2, § 11; Germany, *Soldiers' Manual* (1991), p. 5; Germany, *Military Manual*

213. Ecuador's Naval Manual states that "the use of weapons which by their nature are incapable of being directed specifically against military objectives, and therefore that put noncombatants at equivalent risk, are forbidden due to their indiscriminate effect".²¹¹ The manual further specifies that:

Weapons that are incapable of being controlled in the sense that they can be directed at a military target are forbidden as being indiscriminate in their effect . . . A weapon is not indiscriminate simply because it may cause incidental or collateral civilian casualties, provided such casualties are not foreseeably excessive in light of the expected military advantage to be gained.²¹²

214. Israel's Manual on the Laws of War states that "in any attacks it is imperative to verify that the attack will be carried out employing weapons that can be aimed at the military target".²¹³

215. The US Air Force Pamphlet states that:

The existing law of armed conflict does not prohibit the use of weapons whose destructive force cannot strictly be confined to the specific military objective. Weapons are not unlawful simply because their use may cause incidental casualties to civilians and destruction of civilian objects. Nevertheless, particular weapons or methods of warfare may be prohibited because of their indiscriminate effects . . . Indiscriminate weapons are those incapable of being controlled, through design or function, and thus they can not, with any degree of certainty, be directed at military objectives.²¹⁴

216. The US Air Force Commander's Handbook states that:

Weapons that are incapable of being controlled enough to direct them against a military objective . . . are forbidden. A weapon is not unlawful simply because its use may cause incidental or collateral casualties to civilians, as long as those casualties are not foreseeably excessive in light of the expected military advantage.²¹⁵

217. The US Naval Handbook states that "weapons which by their nature are incapable of being directed specifically against military objectives, and therefore that put noncombatants at equivalent risk, are forbidden due to their indiscriminate effect".²¹⁶ The Handbook further specifies that:

Weapons that are incapable of being controlled (i.e., directed at a military target) are forbidden as being indiscriminate in their effect . . . A weapon is not indiscriminate simply because it may cause incidental or collateral civilian casualties, provided such casualties are not foreseeably excessive in light of the expected military advantage to be gained.²¹⁷

(1992), § 455; Netherlands, *Military Manual* (1993), p. V-4; New Zealand, *Military Manual* (1992), § 517, see also § 509(4); Spain, *LOAC Manual* (1996), Vol. I, § 4.4.c; Sweden, *IHL Manual* (1991), Section 3.2.1.5, p. 45.

²¹¹ Ecuador, *Naval Manual* (1989), § 9.1. ²¹² Ecuador, *Naval Manual* (1989), § 9.1.2.

²¹³ Israel, *Manual on the Laws of War* (1998), p. 37, see also pp. 11-12.

²¹⁴ US, *Air Force Pamphlet* (1976), § 6-3(c).

²¹⁵ US, *Air Force Commander's Handbook* (1980), § 6-2(b).

²¹⁶ US, *Naval Handbook* (1995), § 9.1. ²¹⁷ US, *Naval Handbook* (1995), § 9.1.2.

National Legislation

218. The Draft Amendments to the Penal Code of El Salvador define indiscriminate attacks as including attacks “in which methods or means of warfare are used which cannot be directed against a specific military objective”.²¹⁸

219. Nicaragua’s Draft Penal Code defines indiscriminate attacks as including attacks “in which methods or means of warfare are used which cannot be directed against a specific military objective”.²¹⁹

National Case-law

220. No practice was found.

Other National Practice

221. At the CDDH, Canada stated that:

The definition of indiscriminate attack contained in paragraph 4 of Article 46 [now Article 51] is not intended to mean that there are means of combat the use of which would constitute an indiscriminate attack in all circumstances. It is our view that this definition takes account of the circumstances, as evidenced by the examples listed in paragraph 5 to determine the legitimacy of the use of means of combat.²²⁰

222. At the CDDH, the FRG stated that:

The definition of indiscriminate attacks contained in paragraph 4 of Article 46 [now Article 51 AP I] is not intended to mean that there are means of combat the use of which would constitute an indiscriminate attack in all circumstances. Rather, the definition is intended to take account of the fact that the legality of the use of means of combat depends upon circumstances, as shown by the examples listed in paragraph 5. Consequently the definition does not prohibit as indiscriminate any specific weapon.²²¹

223. At the CDDH, the GDR stated that:

The prohibition of indiscriminate attacks or of attacks which employed methods or means of combat that could not be directed at a specific military objective was of the utmost importance, since it re-established the priority of humanitarian principles over the uncontrolled development and barbarous use of highly sophisticated weapons and means of warfare, which from the outset disregarded the fundamental rights of the human being.²²²

224. In its written statement submitted to the ICJ in the *Nuclear Weapons case* in 1995, India stated that indiscriminate attacks were generally defined as

²¹⁸ El Salvador, *Draft Amendments to the Penal Code* (1998), Article entitled “Ataque indiscriminado a personas protegidas”.

²¹⁹ Nicaragua, *Draft Penal Code* (1999), Article 450(2).

²²⁰ Canada, Statement at the CDDH, *Official Records*, Vol. VI, CDDH/SR.41, 26 May 1977, p. 179.

²²¹ FRG, Statement at the CDDH, *Official Records*, Vol. VI, CDDH/SR.41, 26 May 1977, pp. 187–188.

²²² GDR, Statement at the CDDH, *Official Records*, Vol. VI, CDDH/SR.41, 26 May 1977, p. 167, § 136, see also p. 187.

including “those which employ methods or means of combat which cannot be directed at a specific military objective”.²²³

225. During the discussion on the armistice following the Gulf War, Iraq argued that high-altitude bombing by US B-52s made it impossible to distinguish between civilian and military targets.²²⁴

226. At the CDDH, Italy stated that:

There was nothing in paragraph 4 [of Article 46, now Article 51] to show that certain methods or means of combat were prohibited in all circumstances by the Protocol except where an explicit prohibition was established by international rules in force for the State concerned with regard to certain weapons or methods.²²⁵

227. Prior to the adoption of UN General Assembly Resolution 47/37 in 1992 on the protection of the environment in times of armed conflict, Jordan and the US submitted a memorandum to the Sixth Committee of the UN General Assembly entitled “International Law Providing Protection to the Environment in Times of Armed Conflict”, which provided that:

It is a war crime to employ acts of violence not directed at specific military objectives, to employ a method or means of combat which cannot be directed at a specific military objective, or to employ a means or method of combat the effects of which cannot be limited as required by the law of armed conflict.²²⁶

228. At the CDDH, Mexico stated that “the protection of the civilian population and civilian objects must be universally recognized, even at the cost of restricting the use of means and methods of warfare, the effects of which cannot be confined to specific military targets”. Mexico believed Articles 46 and 47 AP I (now Articles 51 and 52) to be so essential that they “cannot be the subject of any reservations whatsoever since these would be inconsistent with the aim and purpose of Protocol I and undermine its basis”.²²⁷

229. In its written statement submitted to the ICJ in the *Nuclear Weapons case* in 1995, Mexico stated that “in accordance with international humanitarian law, indiscriminate attacks are those that can reach both military targets and civilians”.²²⁸

230. In its written statement submitted to the ICJ in the *Nuclear Weapons (WHO) case* in 1995, Nauru invoked the rule of international law that prohibits

²²³ India, Written statement submitted to the ICJ, *Nuclear Weapons case*, 20 June 1995, p. 3.

²²⁴ Iraq, Statement before the UN Security Council, UN Doc. S/PV.2981, 3 April 1991, p. 23.

²²⁵ Italy, Statement at the CDDH, *Official Records*, Vol. VI, CDDH/SR.41, 26 May 1977, p. 164, § 122.

²²⁶ Jordan and US, International Law Providing Protection to the Environment in Times of Armed Conflict, annexed to Letter dated 28 September 1992 to the Chairman of the Sixth Committee of the UN General Assembly, UN Doc. A/C.6/47/3, 28 September 1992, § 1(g).

²²⁷ Mexico, Statement at the CDDH, *Official Records*, Vol. VI, CDDH/SR.41, 26 May 1977, pp. 192–193.

²²⁸ Mexico, Written statement submitted to the ICJ, *Nuclear Weapons case*, 19 June 1995, § 77(d); see also Written statement submitted to the ICJ, *Nuclear Weapons case*, 9 June 1994, § 25.

the use of weapons which “cannot distinguish between civilian objects and military objectives”.²²⁹

231. In its written statement submitted to the ICJ in the *Nuclear Weapons (WHO) case*, Sri Lanka stated that “the unacceptability of the use of weapons that fail to discriminate between military and civilian personnel is firmly established as a fundamental principle of international humanitarian law”.²³⁰

232. At the CDDH, the UK stated that it considered that:

The definition of indiscriminate attacks given in [Article 51(4) AP I] was not intended to mean that there were means of combat the use of which would constitute an indiscriminate attack in all circumstances. The paragraph did not in itself prohibit the use of any specific weapon, but it took account of the fact that the lawful use of means of combat depended on the circumstances.²³¹

233. In 1992, a legal review by the US Department of the Air Force of the legality of extended range anti-armour munition stated that:

International law also forbids the use of weapons or means of warfare which are “indiscriminate.” A weapon is indiscriminate if it cannot be directed at a military objective or if, under the circumstances, it produces excessive civilian casualties in relation to the concrete and direct military advantage anticipated.²³²

234. In 1993, in its report to Congress on the protection of natural and cultural resources during times of war, the US Department of Defense stated that:

Finally, with the poor track record of compliance with the law of war by some nations, the United States has a responsibility to protect against threats that may inflict serious collateral damage to our own interests and allies. These threats can arise from any nation that does not have the capability or desire to respect the law of war. One example is Iraq’s indiscriminate use of SCUDs during the Iran–Iraq War and the Gulf War. These highly inaccurate theater ballistic missiles can cause extensive collateral damage well out of proportion to military results.²³³

235. In its written statement submitted to the ICJ in the *Nuclear Weapons (WHO) case* in 1994, the US stated that “it is unlawful to conduct any indiscriminate attack, including those employing weapons that . . . cannot be directed at a military objective”.²³⁴

236. In submitting the 1996 Amended Protocol II to the CCW to Congress for advice and consent to ratification, the US President stated that the prohibition

²²⁹ Nauru, Written statement submitted to the ICJ, *Nuclear Weapons (WHO) case*, 15 June 1995, pp. 19–20.

²³⁰ Sri Lanka, Written statement submitted to the ICJ, *Nuclear Weapons case*, undated, p. 2.

²³¹ UK, Statement at the CDDH, *Official Records*, Vol. VI, CDDH/SR.41, 26 May 1977, p. 164, § 119.

²³² US, Department of the Air Force, The Judge Advocate General, Legal Review: Extended Range Antiarmor Munition (ERAM), 16 April 1992, § 4.

²³³ US, Department of Defense, Report to Congress on International Policies and Procedures Regarding the Protection of Natural and Cultural Resources During Times of War, 19 January 1993, p. 203.

²³⁴ US, Written statement submitted to the ICJ, *Nuclear Weapons (WHO) case*, 10 June 1994, p. 27; Written statement submitted to the ICJ, *Nuclear Weapons case*, 20 June 1995, p. 23.

of indiscriminate use of mines, booby-traps and other devices as defined in Article 3(8)(b) of the Protocol "is already a feature of customary international law that is applicable to all weapons".²³⁵

237. In 1998, in a legal review of Oleoresin Capsicum (OC) pepper spray in 1998, the Deputy Assistant Judge Advocate General of the US Department of the Navy stated that:

A weapon must be discriminating, or capable of being controlled (i.e., it can be directed against intended targets). Those weapons which cannot be employed in a manner which distinguishes between lawful combatants and noncombatants violate these principles. Indiscriminate weapons are prohibited by customary international law and treaty law.²³⁶

238. According to the Report on US Practice, it is the *opinio juris* of the US that indiscriminate attacks include attacks that employ methods or means of warfare that cannot be directed at a military objective.²³⁷

III. Practice of International Organisations and Conferences

United Nations

239. No practice was found.

Other International Organisations

240. No practice was found.

International Conferences

241. A report on the work of Committee III of the CDDH stated that:

The main problem was that of defining the term "indiscriminate attacks". There was general agreement that a proper definition would include the act of not directing an attack at a military objective, the use of means or methods of combat which cannot be directed at a specific military objective, and the use of means or methods of combat the effects of which cannot be limited as required by the Protocol. Many but not all of those who commented were of the view that the definition was not intended to mean that there are means or methods of combat whose use would involve an indiscriminate attack in all circumstances. Rather, it was intended to take account of the fact that means or methods of combat which can be used perfectly legitimately in some situations could, in other circumstances, have effects that would be contrary to some limitations contained in the Protocol,

²³⁵ US, Message from the President Transmitting the Protocols to the CCW to Congress for Advice and Consent to Ratification, Treaty Doc. 105-1, Washington, D.C., 7 January 1997, Analysis of Article 3(8).

²³⁶ US, Department of the Navy, Deputy Assistant Judge Advocate General, International and Operational Law Division, Legal Review of Oleoresin Capsicum (OC) Pepper Spray, 19 May 1998, § 5.

²³⁷ Report on US Practice, 1997, Chapter 1.4.

in which event their use in those circumstances would involve an indiscriminate attack.²³⁸

242. The 24th International Conference of the Red Cross in 1981 adopted a resolution on disarmament, weapons of mass destruction and respect for non-combatants in which it urged parties to armed conflicts “not to use methods and means of warfare that cannot be directed against specific military targets and whose effects cannot be limited”.²³⁹

IV. Practice of International Judicial and Quasi-judicial Bodies

243. In its advisory opinion in the *Nuclear Weapons case* in 1996, the ICJ stated that:

The cardinal principles contained in the texts constituting the fabric of humanitarian law are the following. The first is aimed at the protection of the civilian population and civilian objects and establishes the distinction between combatants and non-combatants; States must never make civilians the object of attack and must consequently never use weapons that are incapable of distinguishing between civilian and military targets. . . In conformity with the aforementioned principles, humanitarian law, at a very early stage, prohibited certain types of weapons either because of their indiscriminate effect on combatants and civilians . . . Further these fundamental rules are to be observed by all States whether or not they have ratified the conventions that contain them, because they constitute intransgressible principles of international customary law.²⁴⁰

244. In her dissenting opinion in the *Nuclear Weapons case* before the ICJ in 1996, Judge Higgins stated that:

Very important also . . . is the requirement of humanitarian law that weapons may not be used which are incapable of discriminating between civilian and military targets.

The requirement that a weapon be capable of differentiating between military and civilian targets is not a general principle of humanitarian law specified in the 1899, 1907 or 1949 law, but flows from the basic rule that civilians may not be the target of attack . . . It may be concluded that a weapon will be unlawful *per se* if it is incapable of being targeted at a military objective only, even if collateral damage occurs.²⁴¹

245. In his separate opinion in the *Nuclear Weapons case* before the ICJ in 1996, Judge Guillaume stated that indiscriminate weapons were “blind weapons

²³⁸ CDDH, *Official Records*, Vol. XV, CDDH/215/Rev.1, Second session, Report of Committee III, 3 February–18 April 1975, p. 274, § 55.

²³⁹ 24th International Conference of the Red Cross, Manila, 7–14 November 1981, Res. XIII, § 1.

²⁴⁰ ICJ, *Nuclear Weapons case*, Advisory Opinion, 8 July 1996, §§ 78–79.

²⁴¹ ICJ, *Nuclear Weapons case*, Dissenting Opinion of Judge Higgins, 8 July 1996, §§ 23–24.

which are incapable of distinguishing between civilian targets and military targets".²⁴²

246. In its review of the indictment in the *Martić case* in 1996, the ICTY Trial Chamber had to determine whether the use of cluster bombs was prohibited in an armed conflict. Noting that no formal provision forbade the use of such bombs, the Trial Chamber recalled that the choice of weapons and their use were clearly delimited by IHL. Among the relevant norms of customary law, the Court referred to Article 51(4)(b) AP I, which forbade indiscriminate attacks involving the use of a means or method of combat that could not be directed against a specific military objective.²⁴³

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

247. To fulfil its task of disseminating IHL, the ICRC has delegates around the world teaching armed and security forces that "belligerent Parties and their armed forces shall abstain from using weapons which, because of their lack of precision or their effects, affect civilian persons and combatants without distinction".²⁴⁴

VI. Other Practice

248. In a resolution adopted during its Edinburgh Session in 1969, the Institute of International Law stated that "existing international law prohibits the use of all weapons which, by their very nature, affect indiscriminately both military objectives and non-military objects, or both armed forces and civilian populations".²⁴⁵

249. In 1985, in a report on violations of the laws of war in Nicaragua, Americas Watch listed the "use of 'blind' weapons that cannot be directed with any reasonable assurance against a specific military objective" among actions which were "prohibited by applicable international law rules".²⁴⁶

250. In 1989, in a report on violations of the laws of war in Angola, Africa Watch listed the "use of 'blind' weapons that cannot be directed with any reasonable assurance against a specific military objective" among prohibited practices.²⁴⁷

²⁴² ICJ, *Nuclear Weapons case*, Separate Opinion of Judge Guillaume, 8 July 1996, § 5.

²⁴³ ICTY, *Martić case*, Review of the Indictment, 8 March 1996, § 18.

²⁴⁴ Frédéric de Mulinen, *Handbook on the Law of War for Armed Forces*, ICRC, Geneva, 1987, § 912(b).

²⁴⁵ Institute of International Law, Edinburgh Session, Resolution on the Distinction between Military Objectives and Non-military Objects in General and Particularly the Problems Associated with Weapons of Mass Destruction, 9 September 1969, § 7.

²⁴⁶ Americas Watch, *Violations of the Laws of War by Both Sides in Nicaragua: 1981–1985*, New York, March 1985, p. 34.

²⁴⁷ Africa Watch, *Angola: Violations of the Laws of War by Both Sides*, New York, April 1989, p. 141.

Attacks whose effects cannot be limited as required by international humanitarian law

Note: For practice concerning weapons that are by nature indiscriminate, see Chapter 20, section B.

I. Treaties and Other Instruments

Treaties

251. According to Article 51(4)(c) AP I, attacks “which employ a method or means of combat the effects of which cannot be limited as required by this Protocol” and consequently “are of a nature to strike military objectives and civilians or civilian objects without distinction” are indiscriminate. Article 51 AP I was adopted by 77 votes in favour, one against and 16 abstentions.²⁴⁸

Other Instruments

252. Article 14 of the 1956 New Delhi Draft Rules states that:

Without prejudice to the present or future prohibition of certain specific weapons, the use is prohibited of weapons whose harmful effects – resulting in particular from the dissemination of incendiary, chemical, bacteriological, radioactive or other agents – could spread to an unforeseen degree or escape, either in space or in time, from the control of those who employ them, thus endangering the civilian population.

253. Paragraph 6 of the 1991 Memorandum of Understanding on the Application of IHL between Croatia and the SFRY requires that hostilities be conducted in accordance with Article 51(4)(c) AP I.

254. Paragraph 2.5 of the 1992 Agreement on the Application of IHL between the Parties to the Conflict in Bosnia and Herzegovina requires that hostilities be conducted in accordance with Article 51(4)(c) AP I.

255. Paragraph 42(b)(ii) of the 1994 San Remo Manual provides that “it is forbidden to employ methods or means of warfare which are indiscriminate in that their effects cannot be limited as required by international law as reflected in this document”.

II. National Practice

Military Manuals

256. Military manuals of Australia, Belgium, Canada, Germany, Netherlands, New Zealand, Spain and Sweden state that attacks which employ a method or means of combat the effects of which cannot be limited as required by IHL are indiscriminate.²⁴⁹

²⁴⁸ CDDH, *Official Records*, Vol. VI, CDDH/SR.41, 26 May 1977, p. 163.

²⁴⁹ Australia, *Defence Force Manual* (1994), § 502(b)(3) (“the effect of which cannot be limited, as required by LOAC); Australia, *Commanders’ Guide* (1994), § 956(c) (“the effects of which

257. Israel's Manual on the Laws of War states that "in any attack it is imperative to verify that the attack will not employ means of warfare whose impact cannot be controlled".²⁵⁰

258. The US Air Force Pamphlet states that:

Some weapons, though capable of being directed only at military objectives, may have otherwise uncontrollable effects so as to cause disproportionate civilian injuries or damage. Biological warfare is a universally agreed illustration of such an indiscriminate weapon. Uncontrollable effects, in this context, may include injury to the civilian population of other states as well as injury to an enemy's civilian population. Uncontrollable refers to effects which escape in time or space from the control of the user as to necessarily create risks to civilian persons or objects excessive in relation to the military advantage anticipated. International law does not require that a weapon's effects be strictly confined to the military objectives against which it is directed, but it does restrict weapons whose foreseeable effects result in unlawful disproportionate injury to civilians or damage to civilian objects.²⁵¹

259. The YPA Military Manual of the SFRY (FRY) prohibits "blind weapons" the effects of which "cannot be controlled during their use".²⁵²

National Legislation

260. The Draft Amendments to the Penal Code of El Salvador define indiscriminate attacks as including attacks in which methods or means of warfare are used "whose effects cannot be limited as required by international humanitarian law".²⁵³

261. Nicaragua's Draft Penal Code defines indiscriminate attacks as including attacks in which methods and means of warfare are used "whose effects cannot be limited as required by international humanitarian law".²⁵⁴

National Case-law

262. No practice was found.

cannot be limited as required by LOAC"); Belgium, *Law of War Manual* (1983), p. 28 ("which cannot be limited as required by the First Protocol"); Canada, *LOAC Manual* (1999), p. 4-3, § 22(c) ("the effects of which cannot be limited as required by the LOAC"), see also p. 5-2, § 11; Germany, *Military Manual* (1992), § 455 ("whose intended effects cannot be limited to the military objective"); Netherlands, *Military Manual* (1993), p. V-4 ("which cannot be limited as required by Additional Protocol I"); New Zealand, *Military Manual* (1992), § 517 ("which cannot be limited as required by this Protocol"), see also § 509(4) ("the effects of which cannot be limited"); Spain, *LOAC Manual* (1996), Vol. I, § 4.4.c ("whose effects cannot be limited"); Sweden, *IHL Manual* (1991), Section 3.2.1.5, p. 45 ("which cannot be limited as required by Additional Protocol I").

²⁵⁰ Israel, *Manual on the Laws of War* (1998), p. 37, see also pp. 11-12.

²⁵¹ US, *Air Force Pamphlet* (1976), § 6-3(c).

²⁵² SFRY (FRY), *YPA Military Manual* (1988), § 102.

²⁵³ El Salvador, *Draft Amendments to the Penal Code* (1998), Article entitled "Ataque indiscriminado a personas protegidas".

²⁵⁴ Nicaragua, *Draft Penal Code* (1999), Article 450(2).

Other National Practice

263. At the CDDH, Canada stated that:

The definition of indiscriminate attack contained in paragraph 4 of Article 46 [now Article 51] is not intended to mean that there are means of combat the use of which would constitute an indiscriminate attack in all circumstances. It is our view that this definition takes account of the circumstances, as evidenced by the examples listed in paragraph 5 to determine the legitimacy of the use of means of combat.²⁵⁵

264. At the CDDH, the FRG stated that:

The definition of indiscriminate attacks contained in paragraph 4 of Article 46 [now Article 51 AP I] is not intended to mean that there are means of combat the use of which would constitute an indiscriminate attack in all circumstances. Rather, the definition is intended to take account of the fact that the legality of the use of means of combat depends upon circumstances, as shown by the examples listed in paragraph 5. Consequently the definition does not prohibit as indiscriminate any specific weapon.²⁵⁶

265. In its written statement submitted to the ICJ in the *Nuclear Weapons case* in 1995, India stated that indiscriminate attacks are generally defined as including "those with effects which cannot be limited".²⁵⁷

266. At the CDDH, Italy stated that:

There was nothing in paragraph 4 [of Article 46, now Article 51] to show that certain methods or means of combat were prohibited in all circumstances by the Protocol except where an explicit prohibition was established by international rules in force for the State concerned with regard to certain weapons or methods.²⁵⁸

267. Prior to the adoption of UN General Assembly Resolution 47/37 in 1992 on the protection of the environment in times of armed conflict, Jordan and the US submitted a memorandum to the Sixth Committee of the UN General Assembly entitled "International Law Providing Protection to the Environment in Times of Armed Conflict", which provided that:

It is a war crime to employ acts of violence not directed at specific military objectives, to employ a method or means of combat which cannot be directed at a specific military objective, or to employ a means or method of combat the effects of which cannot be limited as required by the law of armed conflict.²⁵⁹

²⁵⁵ Canada, Statement at the CDDH, *Official Records*, Vol. VI, CDDH/SR.41, 26 May 1977, p. 179.

²⁵⁶ FRG, Statement at the CDDH, *Official Records*, Vol. VI, CDDH/SR.41, 26 May 1977, pp. 187-188.

²⁵⁷ India, Written statement submitted to the ICJ, *Nuclear Weapons case*, 20 June 1995, p. 3.

²⁵⁸ Italy, Statement at the CDDH, *Official Records*, Vol. VI, CDDH/SR.41, 26 May 1977, p. 164, § 122.

²⁵⁹ Jordan and US, International Law Providing Protection to the Environment in Times of Armed Conflict, annexed to Letter dated 28 September 1992 to the Chairman of the Sixth Committee of the UN General Assembly, UN Doc. A/C.6/47/3, 28 September 1992, § 1(g).

268. At the CDDH, Mexico stated that “the protection of the civilian population and civilian objects must be universally recognized, even at the cost of restricting the use of means and methods of warfare, the effects of which cannot be confined to specific military targets”. Mexico believed Article 51 AP I to be so essential that it “cannot be the subject of any reservations whatsoever since these would be inconsistent with the aim and purpose of Protocol I and undermine its basis”.²⁶⁰

269. In its written statement submitted to the ICJ in the *Nuclear Weapons case* in 1995, Mexico stated that “in accordance with international humanitarian law, indiscriminate attacks are those that can reach both military targets and civilians”.²⁶¹

270. At the CDDH, the UK considered that:

The definition of indiscriminate attacks given in [Article 51(4) AP I] was not intended to mean that there were means of combat the use of which would constitute an indiscriminate attack in all circumstances. The paragraph did not in itself prohibit the use of any specific weapon, but it took account of the fact that the lawful use of means of combat depended on the circumstances.²⁶²

271. In 1972, the General Counsel of the US Department of Defense stated that:

Existing laws of armed conflict do not prohibit the use of weapons whose destructive force cannot be limited to a specific military objective. The use of such weapons is not proscribed when their use is necessarily required against a military target of sufficient importance to outweigh inevitable, but regrettable, incidental casualties to civilians and destruction of civilian objects . . . I would like to reiterate that it is recognized by all states that they may not lawfully use their weapons against civilian population[s] or civilians as such, but there is no rule of international law that restrains them from using weapons against enemy armed forces or military targets. The correct rule of international law which has applied in the past and continued to apply to the conduct of our military operations in Southeast Asia is that “the loss of life and damage to property must not be out of proportion to the military advantage to be gained”.²⁶³

272. According to the Report on US Practice, at the 1974 Lucerne Conference of Government Experts on Weapons which may Cause Unnecessary Suffering or have Indiscriminate Effects, the US

rejected any effort to label weapons indiscriminate merely because they were likely to affect civilians as well as military objectives. The correct rule was that the

²⁶⁰ Mexico, Statement at the CDDH, *Official Records*, Vol. VI, CDDH/SR.41, 26 May 1977, pp. 192–193.

²⁶¹ Mexico, Written statement submitted to the ICJ, *Nuclear Weapons case*, 19 June 1995, § 77(d).

²⁶² UK, Statement at the CDDH, *Official Records*, Vol. VI, CDDH/SR.41, 26 May 1977, p. 164, § 119.

²⁶³ US, Letter from J. Fred Buzhardt, General Counsel of the Department of Defense, to Senator Edward Kennedy, Chairman of the Subcommittee on Refugees of the Committee on the Judiciary, 22 September 1972, *AJIL*, Vol. 67, 1973, p. 124.

law of war prohibits attacks which entail a high risk of civilian casualties clearly disproportionate to the military advantage sought.²⁶⁴

273. Course material from the US Army War College states that:

The Law of War does not ban the use of weapons when their effects cannot be strictly confined to the specific military objective. But this rule is true only so long as the rule of proportionality is not violated. However, a weapon which is incapable of being controlled, and thus will cause incidental damage without any reasonable likelihood of gaining a military advantage, is illegal.²⁶⁵

274. In 1992, a legal review by the US Department of the Air Force of the legality of extended range anti-armour munition stated that:

International law also forbids the use of weapons or means of warfare which are "indiscriminate." A weapon is indiscriminate if it cannot be directed at a military objective or if, under the circumstances, it produces excessive civilian casualties in relation to the concrete and direct military advantage anticipated.²⁶⁶

275. In 1993, in its report to Congress on the protection of natural and cultural resources during times of war, the US Department of Defense stated that:

Finally, with the poor track record of compliance with the law of war by some nations, the United States has a responsibility to protect against threats that may inflict serious collateral damage to our own interests and allies. These threats can arise from any nation that does not have the capability or desire to respect the law of war. One example is Iraq's indiscriminate use of SCUDs during the Iran-Iraq War and the Gulf War. These highly inaccurate theater ballistic missiles can cause extensive collateral damage well out of proportion to military results.²⁶⁷

III. Practice of International Organisations and Conferences

United Nations

276. No practice was found.

Other International Organisations

277. No practice was found.

²⁶⁴ Report on US Practice, 1997, Chapter 1.4; Statement of 25 September 1974 at the Conference of Government Experts on Weapons which may Cause Unnecessary Suffering or have Indiscriminate Effects, Lucerne, 24 September–18 October 1974, reprinted in Arthur W. Rovine, *Digest of United States Practice in International Law, 1974*, Department of State Publication 8809, Washington, D.C., 1975, p. 713.

²⁶⁵ US Army War College Selected Readings, Advanced Course, *Law for the Joint Warfighter*, Volume II, Second edition, 1989, p. 170.

²⁶⁶ US, Department of the Air Force, The Judge Advocate General, Legal Review: Extended Range Antiarmor Munition (ERAM), 16 April 1992, § 4.

²⁶⁷ US, Department of Defense, Report to Congress on International Policies and Procedures Regarding the Protection of Natural and Cultural Resources During Times of War, 19 January 1993, p. 203.

International Conferences

278. A report on the work of Committee III of the CDDH stated that:

The main problem was that of defining the term "indiscriminate attacks". There was general agreement that a proper definition would include the act of not directing an attack at a military objective, the use of means or methods of combat which cannot be directed at a specific military objective, and the use of means or methods of combat the effects of which cannot be limited as required by the Protocol. Many but not all of those who commented were of the view that the definition was not intended to mean that there are means or methods of combat whose use would involve an indiscriminate attack in all circumstances. Rather, it was intended to take account of the fact that means or methods of combat which can be used perfectly legitimately in some situations could, in other circumstances, have effects that would be contrary to some limitations contained in the Protocol, in which event their use in those circumstances would involve an indiscriminate attack.²⁶⁸

279. The 24th International Conference of the Red Cross in 1981 adopted a resolution on disarmament, weapons of mass destruction and respect for non-combatants in which it urged parties to armed conflicts "not to use methods and means of warfare that cannot be directed against specific military targets and whose effects cannot be limited".²⁶⁹

IV. Practice of International judicial and Quasi-judicial Bodies

280. No practice was found.

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

281. To fulfil its task of disseminating IHL, the ICRC has delegates around the world teaching armed and security forces that "belligerent Parties and their armed forces shall abstain from using weapons whose harmful effects go beyond the control, in time or place, of those employing them".²⁷⁰

VI. Other Practice

282. In a resolution adopted during its Edinburgh Session in 1969, the Institute of International Law stated that:

Existing international law prohibits the use of all weapons which, by their very nature, affect indiscriminately both military objectives and non-military objects, or both armed forces and civilian populations. In particular, it prohibits the use

²⁶⁸ CDDH, *Official Records*, Vol. XV, CDDH/215/Rev.1, Second session, Report of Committee III, 3 February–18 April 1975, p. 274, § 55.

²⁶⁹ 24th International Conference of the Red Cross, Manila, 7–14 November 1981, Res. XIII, § 1.

²⁷⁰ Frédéric de Mulinen, *Handbook on the Law of War for Armed Forces*, ICRC, Geneva, 1987, § 912(c).

of weapons the destructive effect of which is so great that it cannot be limited to specific military objectives or is otherwise uncontrollable (self-generating weapons) as well as of "blind" weapons.²⁷¹

C. Area Bombardment

I. Treaties and Other Instruments

Treaties

283. Article 51(5)(a) AP I considers as indiscriminate:

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

Article 51 AP I was adopted by 77 votes in favour, one against and 16 abstentions.²⁷²

284. Article 26(3)(a) of draft AP II submitted by the ICRC to the CDDH provided that it was forbidden "to attack without distinction, as one single objective, by bombardment or any other method, a zone containing several military objectives, which are situated in populated areas and are at some distance from each other".²⁷³ Committee III of the CDDH amended this proposal and adopted the amended proposal, by 25 votes in favour, 13 against and 24 abstentions, while Article 26 as a whole was adopted by Committee III by 44 votes in favour, none against and 22 abstentions.²⁷⁴ The adopted text provided that:

An attack by bombardment by any methods or means which treats as a single military objective a number of clearly separate and distinct military objectives located in a city, town, village, or other area containing a concentration of civilians or civilian objects is to be considered as indiscriminate.²⁷⁵

Eventually, however, the proposal to retain this paragraph was rejected in the plenary by 30 votes in favour, 25 against and 34 abstentions.²⁷⁶

285. Article 3(9) of the 1996 Amended Protocol II to the CCW provides that "several clearly separated and distinct military objectives located in a city, town, village or other area containing a similar concentration of civilians and civilian objects are not to be treated as a single military objective".

²⁷¹ Institute of International Law, Edinburgh Session, Resolution on the Distinction between Military Objectives and Non-military Objects in General and Particularly the Problems Associated with Weapons of Mass Destruction, 9 September 1969, § 7.

²⁷² CDDH, *Official Records*, Vol. VI, CDDH/SR.41, 26 May 1977, p. 163.

²⁷³ CDDH, *Official Records*, Vol. I, Part Three, Draft Additional Protocols, June 1973, p. 40.

²⁷⁴ CDDH, *Official Records*, Vol. XIV, CDDH/III/SR.37, 4 April 1975, pp. 390 and 391, §§ 14 and 15.

²⁷⁵ CDDH, *Official Records*, Vol. XV, CDDH/215/Rev.1, 3 February–18 April 1975, p. 321.

²⁷⁶ CDDH, *Official Records*, Vol. VII, CDDH/SR.52, 6 June 1977, p. 134.

Other Instruments

286. Article 24(3) of the 1923 Hague Rules of Air Warfare provides that:

The bombardment of cities, towns, villages, dwellings or buildings not in the immediate neighbourhood of the operations of land forces is prohibited. In cases where [military objectives] are so situated, that they cannot be bombarded without the indiscriminate bombardment of the civilian population, the aircraft must abstain from bombardment.

287. Article 10 of the 1956 New Delhi Draft Rules provides that “it is forbidden to attack without distinction, as a single objective, an area including several military objectives at a distance from one another where elements of the civilian population, or dwellings, are situated in between the said military objectives”.

288. Paragraph 6 of the 1991 Memorandum of Understanding on the Application of IHL between Croatia and the SFRY requires that hostilities be conducted in accordance with Article 51(5)(a) AP I.

289. Paragraph 2.5 of the 1992 Agreement on the Application of IHL between the Parties to the Conflict in Bosnia and Herzegovina requires that hostilities be conducted in accordance with Article 51(5)(a) AP I.

*II. National Practice**Military Manuals*

290. Australia's *Commanders' Guide* states that “indiscriminate attacks [include] those which . . . employ any methods or means which treat, as a single military object, a number of clearly separated military objectives in an area where there is a concentration of civilians”.²⁷⁷

291. Australia's *Defence Force Manual* states that:

An example of an indiscriminate attack would be to bomb a city, town, village or area as though it were a single military objective when it contains a number of separate and distinct military objectives mixed in with a similar concentration of civilians and civilian objects.²⁷⁸

292. Belgium's *Law of War Manual* prohibits “bombardment which treats as a single military objective a certain number of military objectives clearly separated and distinct and located in an area containing a similar concentration of civilian persons and objects”.²⁷⁹

293. Benin's *Military Manual* provides that “carpet bombings are an example of indiscriminate attack” and are, as such, prohibited.²⁸⁰

²⁷⁷ Australia, *Commanders' Guide* (1994), § 956(d).

²⁷⁸ Australia, *Defence Force Manual* (1994), § 502(b)(3).

²⁷⁹ Belgium, *Law of War Manual* (1983), p. 28.

²⁸⁰ Benin, *Military Manual* (1995), Fascicule III, p. 13.

294. Canada's LOAC Manual gives the following as an example of an indiscriminate attack and, as such, prohibited:

An attack by bombardment by any methods or means which treats as a single legitimate target a number of clearly separated and distinct legitimate targets located in a city, town, village or other area containing a similar concentration of civilians or civilian objects.²⁸¹

295. Croatia's Commanders' Manual provides that "distinct objectives and targets within or in close vicinity to civilian objects shall be attacked separately".²⁸²

296. Germany's Military Manual states that, when "a number of clearly separated and distinct military objectives located in a built-up area are attacked as if they were one single military objective", it constitutes an indiscriminate attack and is, as such, prohibited.²⁸³

297. Israel's Manual on the Laws of War provides that "it is forbidden to regard an area with mixed military objectives and civilian objects as a single target area".²⁸⁴

298. Italy's LOAC Elementary Rules Manual stipulates that "distinct objectives within or in close vicinity to civilian objects shall be attacked separately".²⁸⁵

299. Kenya's LOAC Manual provides that "area bombardment is an example of an indiscriminate attack" and is, as such, prohibited.²⁸⁶

300. Madagascar's Military Manual states that "distinct objectives, aims and targets within or in close vicinity to civilian objects shall be attacked separately".²⁸⁷

301. The Military Manual of the Netherlands provides that "attacks (by bombardment) which treat as a single military objective a number of clearly separated and distinct military objectives located in a city, village or area containing a concentration of civilians or civilian objects" are an example of indiscriminate attacks and, as such, prohibited.²⁸⁸

302. New Zealand's Military Manual states that "an attack by bombardment by any methods or means which treats as a single military objective a number of clearly separated and distinct military objectives located in a city, town, village or other area containing a similar concentration of civilians or civilian objects" is an indiscriminate attack and, as such, prohibited.²⁸⁹

²⁸¹ Canada, *LOAC Manual* (1999), p. 4-3, §§ 22 and 23(a), see also p. 6-3, § 28 (land warfare) and pp. 8-5/8-6, § 38 (naval warfare).

²⁸² Croatia, *Commanders' Manual* (1992), § 51.

²⁸³ Germany, *Military Manual* (1992), §§ 454 and 456.

²⁸⁴ Israel, *Manual on the Laws of War* (1998), p. 38.

²⁸⁵ Italy, *LOAC Elementary Rules Manual* (1991), § 51.

²⁸⁶ Kenya, *LOAC Manual* (1997), Précis No. 4, p. 3.

²⁸⁷ Madagascar, *Military Manual* (1994), Fiche No. 6-O, § 22.

²⁸⁸ Netherlands, *Military Manual* (1993), p. V-4.

²⁸⁹ New Zealand, *Military Manual* (1992), § 517(1)(5)(a) (land warfare) and § 630(1)(5)(a) (air warfare).

303. Under Spain's LOAC Manual, an attack launched while "considering as a single military objective a number of clearly separated and distinct military objectives located in a city, town, village or other area containing a concentration of civilians and civilian objects" is an indiscriminate attack and, as such prohibited.²⁹⁰

304. Sweden's IHL Manual states that:

If the military objectives are located in a densely-populated area which has been evacuated only to a limited extent if at all, area bombardment may not be employed since this would be a breach of the basic rule prohibiting indiscriminate attack. Moreover, area bombardment would most probably lead to excessive injury and losses, and would thus be a breach of the proportionality rule.²⁹¹

305. Switzerland's Basic Military Manual notes that "area bombardments are prohibited".²⁹²

306. Togo's Military Manual provides that "carpet bombings are an example of indiscriminate attack" and, as such, prohibited.²⁹³

307. The UK LOAC Manual stipulates that "area bombardment is an example of an indiscriminate attack" and is, as such, prohibited.²⁹⁴

308. The US Air Force Pamphlet quotes Article 24(3) of the 1923 Hague Rules of Air Warfare, specifying, however, that "they do not represent existing customary law as a total code".²⁹⁵ It also restates the opinion of a legal scholar concerning target area bombing:

Any legal justification of target-area bombing must be based on two factors. The first must be the fact that the area is so preponderantly used for war industry as to impress that character on the whole of the neighborhood, making it essentially an indivisible whole. The second factor must be that the area is so heavily defended from air attack that the selection of specific targets within the area is impracticable.

In such circumstances, the whole area might be regarded as a defended place from the standpoint of attack from the air, and its status, for that purpose, is assimilated to that of a defended place attacked by land troops. In the latter case, the attacking force may attack the whole of the defended area in order to overcome the defense, and incurs no responsibility for unavoidable damage to civilians and nonmilitary property caused by the seeking-out of military objectives in the bombardment. Legal justification for target-area bombing would appear to rest upon analogous reasoning.²⁹⁶

The Pamphlet states, however, that "in fact, the use of target area bombing in populated areas has always been controversial".²⁹⁷

²⁹⁰ Spain, *LOAC Manual* (1996), Vol. I, § 4.4.d.

²⁹¹ Sweden, *IHL Manual* (1991), Section 3.2.1.5, p. 47.

²⁹² Switzerland, *Basic Military Manual* (1987), Article 29, commentary.

²⁹³ Togo, *Military Manual* (1996), Fascicule III, p. 13.

²⁹⁴ UK, *LOAC Manual* (1981), Section 4, p. 15, § 5(j).

²⁹⁵ US, *Air Force Pamphlet* (1976), § 5-2(c).

²⁹⁶ US, *Air Force Pamphlet* (1976), § 5-2(d), referring to Morris Greenspan, *The Modern Law of Land Warfare*, University of California Press, Berkeley, 1959, p. 336.

²⁹⁷ US, *Air Force Pamphlet* (1976), § 5-2(d), footnote 9, referring to James M. Spaight, *Air Power and War Rights*, Longmans, Green and Co., London/New York/Toronto, Third edition, 1947,

National Legislation

309. No practice was found.

National Case-law

310. No practice was found.

Other National Practice

311. At the CDDH, Canada stated that it supported the comments made by the US (see below).²⁹⁸

312. At the CDDH, Egypt stated that it supported the comments made by the US (see below).²⁹⁹

313. On the basis of an interview with an advisor of the Lebanese Ministry of Foreign Affairs, the Report on the Practice of Lebanon defines indiscriminate attacks as all bombardments which target an entire zone instead of a precise location.³⁰⁰

314. At the CDDH, the UAE stated that it fully agreed with the remarks made by Egypt (see above).³⁰¹

315. During the CDDH, the US delegation stated that the words “clearly separated” referred:

not only to a separation of two or more military objectives, which could be observed or which were usually separated, but to include the element of a significant distance. Moreover, that distance should be at least sufficiently large to permit the individual military objectives to be attacked separately.³⁰²

III. Practice of International Organisations and Conferences

United Nations

316. No practice was found.

Other International Organisations

317. No practice was found.

International Conferences

318. According to the Report of Committee III of the CDDH, the phrase “bombardment by any methods or means” in Article 51(5)(a) AP I referred to “all

p. 272 and Julius Stone, *Legal Controls of International Conflict*, Garland Publishing, New York/London, 1973, p. 627.

²⁹⁸ Canada, Statement at the CDDH, *Official Records*, Vol. XIV, CDDH/III/SR.31, 14 March 1975, p. 308, § 58.

²⁹⁹ Egypt, Statement at the CDDH, *Official Records*, Vol. XIV, CDDH/III/SR.31, 14 March 1975, p. 308, § 56.

³⁰⁰ Report on the Practice of Lebanon, 1998, Interview with an advisor of the Lebanese Ministry of Foreign Affairs, Chapter 1.4.

³⁰¹ UAE, Statement at the CDDH, *Official Records*, Vol. XIV, CDDH/III/SR.31, 14 March 1975, p. 308, § 61.

³⁰² US, Statement at the CDDH, *Official Records*, Vol. XIV, CDDH/III/SR.31, 14 March 1975, p. 307, § 50.

attacks by fire, and the use of any type of projectile except for direct fire by small arms".³⁰³ The term "concentration of civilians" in the same Article meant "such a concentration as to be similar to a city, town, or village. Thus, a refugee camp or a column of refugees moving along a road would be examples of such a similar concentration."³⁰⁴

IV. Practice of International Judicial and Quasi-judicial Bodies

319. No practice was found.

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

320. To fulfil its task of disseminating IHL, the ICRC has delegates around the world teaching armed and security forces that "an attack is prohibited which treats as a single military objective a number of clearly separated and distinct military objectives located in a city, town, village or other area containing a similar concentration of civilian persons or civilian objects".³⁰⁵

321. In an appeal launched in 1973, the ICRC urged all the belligerents in the conflict in the Middle East (Egypt, Iraq, Israel and Syria) to observe forthwith, in particular, the provisions of, *inter alia*, Article 47(3)(a) of draft AP I, which stated that "it is forbidden to attack without distinction, as one single objective, by bombardment or any other method, a zone containing several military objectives, which are situated in populated areas, and are at some distance from each other". All governments concerned replied favourably.³⁰⁶

VI. Other Practice

322. No practice was found.

³⁰³ CDDH, *Official Records*, Vol. XV, CDDH/215/Rev.1, Second session, Report of Committee III, 3 February–18 April 1975, p. 275, § 56.

³⁰⁴ CDDH, *Official Records*, Vol. XV, CDDH/407/Rev.1, Fourth session, Report of Committee III, 17 March–10 June 1977, p. 455, § 28.

³⁰⁵ Frédéric de Mulinen, *Handbook on the Law of War for Armed Forces*, ICRC, Geneva, 1987, § 428.

³⁰⁶ ICRC, *The International Committee's Action in the Middle East*, *IRRC*, No. 152, 1973, pp. 584–585.

PROPORTIONALITY IN ATTACK

Proportionality in Attack (practice relating to Rule 14)	§§ 1–223
General	§§ 1–160
Determination of the anticipated military advantage	§§ 161–192
Information required for judging proportionality in attack	§§ 193–223

Proportionality in Attack**General**

Note: *For practice concerning precautions to be taken in attack in order to avoid disproportionate attacks, see Chapter 5, sections D and E. For practice concerning the limitation of destruction of enemy property to what is required by the mission, see Chapter 16, section B.*

*I. Treaties and Other Instruments**Treaties*

1. Article 51(5)(b) AP I prohibits “an attack which may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated”. Article 51 AP I was adopted by 77 votes in favour, one against and 16 abstentions.¹
2. Under Article 85(3)(b) AP I, “launching an indiscriminate attack affecting the civilian population or civilian objects in the knowledge that such attack will cause excessive loss of life, injury to civilians or damage to civilian objects, as defined in Article 57, paragraph 2 a) iii) is a grave breach. Article 85 AP I was adopted by consensus.²
3. Article 26(3)(b) of draft AP II submitted by the ICRC to the CDDH provided that it was forbidden “to launch attacks which may be expected to entail incidental losses among the civilian population and cause the destruction of civilian objects to an extent disproportionate to the direct and substantial military

¹ CDDH, *Official Records*, Vol. VI, CDDH/SR.41, 26 May 1977, p. 163.

² CDDH, *Official Records*, Vol. VI, CDDH/SR.44, 30 May 1977, p. 291.

advantage anticipated".³ This provision was deleted from the proposal adopted by Committee III of the CDDH.⁴

4. Article 3(3)(c) of the 1980 Protocol II to the CCW and Article 3(8)(c) of the 1996 Amended Protocol II to the CCW prohibit any placement of mines, booby-traps and other devices "which may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated".

5. Pursuant to Article 8(2)(b)(iv) of the 1998 ICC Statute, the following constitutes a war crime in international armed conflicts:

intentionally launching an attack in the knowledge that such attack will cause incidental loss of life or injury to civilians or damage to civilian objects... which would be clearly excessive in relation to the concrete and direct overall military advantage anticipated.

Other Instruments

6. Article 15 of the 1863 Lieber Code states that "military necessity admits of all direct destruction of life or limb of 'armed' enemies, and of other persons whose destruction is incidentally 'unavoidable' in the armed contests of the war".

7. Article 24(4) of the 1923 Hague Rules of Air Warfare states that:

In the immediate neighbourhood of the operations of land forces, the bombardment of cities, towns, villages, dwellings or buildings is legitimate provided that there exists a reasonable presumption that the military concentration is sufficiently important to justify such bombardment, having regard to the danger thus caused to the civilian population.

8. Paragraph 6 of the 1991 Memorandum of Understanding on the Application of IHL between Croatia and the SFRY requires that hostilities be conducted in accordance with Article 51(5)(b) AP I.

9. Paragraph 2.5 of the 1992 Agreement on the Application of IHL between the Parties to the Conflict in Bosnia and Herzegovina requires that hostilities be conducted in accordance with Article 51(5)(b) AP I.

10. Paragraph 46(d) of the 1994 San Remo Manual provides that "an attack shall not be launched if it may be expected to cause collateral casualties or damage which would be excessive in relation to the concrete and direct military advantage anticipated from the attack as a whole".

11. Pursuant to Article 20(b)(ii) of the 1996 ILC Draft Code of Crimes against the Peace and Security of Mankind, "launching an indiscriminate attack affecting the civilian population or civilian objects in the knowledge that such

³ CDDH, *Official Records*, Vol. I, Part Three, Draft Additional Protocols, June 1973, p. 40.

⁴ CDDH, *Official Records*, Vol. XV, CDDH/215/Rev.1, 3 February–18 April 1975, p. 321.

attack will cause excessive loss of life, injury to civilians or damage to civilian objects" constitutes a war crime.

12. Section 5.5 of the 1999 UN Secretary-General's Bulletin provides that:

The United Nations force is prohibited from launching operations . . . that may be expected to cause incidental loss of life among the civilian population or damage to civilian objects that would be excessive in relation to the concrete and direct military advantage anticipated.

13. The 2000 UNTAET Regulation No. 2000/15 establishes panels with exclusive jurisdiction over serious criminal offences, including war crimes. According to Section 6(1)(b)(iv), the following constitutes a war crime in international armed conflicts:

intentionally launching an attack in the knowledge that such attack will cause incidental loss of life or injury to civilians or damage to civilian objects . . . which would be clearly excessive in relation to the concrete and direct overall military advantage anticipated.

II. National Practice

Military Manuals

14. Australia's Defence Force Manual states that:

Collateral damage may be the result of military attacks. This fact is recognised by LOAC and, accordingly, it is not unlawful to cause such injury and damage. The principle of proportionality dictates that the results of such action must not be excessive in light of the military advantage anticipated from the attack.⁵

The manual further states, in the specific context of siege warfare, that "if there are noncombatants in the locality, the anticipated collateral damage must not be excessive in relation to the concrete and direct military advantage expected to result from the bombardment".⁶ Both the Defence Force Manual and the Commanders' Guide list "launching indiscriminate attacks that affect the civilian population or civilian objects in the knowledge that such attack will cause extensive and disproportionate loss of life, injury to civilians or damage to civilian objects" as an example of acts which constitute "grave breaches or serious war crimes likely to warrant institution of criminal proceedings".⁷

15. Belgium's Law of War Manual states that:

An attack against a military objective must not be launched when it is to be expected that such an attack will cause incidental loss or damage to civilians and civilian objects which would be excessive in relation to the concrete and direct military advantage expected.⁸

⁵ Australia, *Defence Force Manual* (1994), § 535.

⁶ Australia, *Defence Force Manual* (1994), § 733.

⁷ Australia, *Commanders' Guide* (1994), § 1305(h); *Defence Force Manual* (1994), § 1315(h).

⁸ Belgium, *Law of War Manual* (1983), p. 26, see also p. 28.

16. Benin's Military Manual requires respect for the principle of proportionality. According to the manual, "a military action is proportionate if it does not cause loss or damage to civilians which is excessive in relation to the expected overall result. This rule cannot justify unlimited destruction or attacks against civilians and civilian objects as such".⁹ The manual also states that "the principle of proportionality requires that needless suffering and damage be avoided. Pursuant to this principle, all forms of violence which are not indispensable to gain superiority over an enemy are prohibited."¹⁰

17. Cameroon's Instructors' Manual states that "the rule of proportionality prohibits the launching of attacks which will cause loss or damage to civilians and civilian objects which is excessive in relation to the military advantage anticipated".¹¹

18. According to Canada's LOAC Manual,

The fact that an attack on a legitimate target may cause civilian casualties or damage to civilian objects does not necessarily make the attack unlawful under the LOAC. However, such collateral civilian damage must not be disproportionate to the concrete and direct military advantage anticipated from the attack.

The proportionality test is as follows: Is the attack expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof ("collateral civilian damage") which would be excessive in relation to the concrete and direct military advantage anticipated? If the answer is "yes", the attack must be cancelled or suspended. The proportionality test must be used in the selection of any target.¹²

The manual also states that "launching an indiscriminate attack affecting the civilian population or civilian objects in the knowledge that such attack will cause excessive collateral civilian damage" constitutes a grave breach.¹³

19. Canada's Code of Conduct explains that the principle of proportionality "imposes a duty to ensure that the collateral civilian damage created is not excessive in relation to the concrete and direct military advantage anticipated".¹⁴

20. Colombia's Instructors' Manual prohibits the disproportionate use of force. The manual states that "in time of war, the principle of proportionality must be observed. This principle means that the degree of force, the weapons used and the actions taken must be proportionate to the seriousness of the situation."¹⁵

21. Croatia's LOAC Compendium considers a military action to be proportionate "when it does not cause collateral civilian casualties and excessive damage in relation to the expected military advantage of the operation".¹⁶

⁹ Benin, *Military Manual* (1995), Fascicule III, p. 14, see also Fascicule II, p. 6.

¹⁰ Benin, *Military Manual* (1995), Fascicule III, p. 11.

¹¹ Cameroon, *Instructors' Manual* (1992), p. 83, see also p. 149.

¹² Canada, *LOAC Manual* (1999), pp. 4-2 and 4-3, §§ 17 and 18, see also p. 2-2, § 15, p. 6-3, § 29, p. 7-5, § 47 and p. 8-6, § 40.

¹³ Canada, *LOAC Manual* (1999), p. 16-3, § 16(b).

¹⁴ Canada, *Code of Conduct* (2001), Rule 2, § 1.

¹⁵ Colombia, *Instructors' Manual* (1999), p. 19, see also p. 20.

¹⁶ Croatia, *LOAC Compendium* (1991), p. 38.

22. Ecuador's Naval Manual states that, "loss of civilian life, injury to civilians or damage to civilian objects, incidental to an attack upon a legitimate military objective, are not illegal. Such injury or collateral damage must not, however, be excessive in light of the military advantage anticipated by the attack."¹⁷ The manual further specifies that "a weapon is not indiscriminate simply because it may cause incidental or collateral civilian casualties, provided such casualties are not foreseeably excessive in light of the expected military advantage to be gained".¹⁸

23. France's LOAC Teaching Note provides that the action of both commanders and combatants must be guided by respect for the fundamental principle of proportionality.¹⁹

24. France's LOAC Manual states that the principle of proportionality requires that no attack must be launched,

which may be expected to cause incidental loss of civilian lives, injuries to civilians, damage to civilian objects, or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated. The application of this principle raises the question of the balance between the means used and the desired military effect. The application of the principle of proportionality does not exclude that collateral damage may be suffered by the civilian population or civilian objects provided they are not excessive in relation to the concrete and direct military advantage anticipated.²⁰

25. Germany's Military Manual states that "attacks on military objects shall not cause any loss of civilian life that would be excessive in relation to the concrete and direct military advantage anticipated".²¹

26. According to Germany's IHL Manual, "attacks against the civilian population, including launching an indiscriminate attack affecting the civilian population or civilian objects in the knowledge that such attacks will cause excessive loss of life, injury to civilians or damage to civilian objects" are war crimes.²²

27. Hungary's Military Manual considers a military action to be proportionate "when it does not cause collateral civilian casualties and excessive damage in relation to the expected military advantage of the operation".²³

28. Indonesia's Directive on Human Rights in Irian Jaya and Maluku states that "the use of force should be proportionate, meaning there should be a balance between military necessity and humanity. Force must only be used in accordance with the objectives of the task or the achievement of the target."²⁴

29. With reference to Israel's Law of War Booklet, the Report on the Practice of Israel states that "the IDF would not attack a target in cases in which it is

¹⁷ Ecuador, *Naval Manual* (1989), § 8.1.2.1. ¹⁸ Ecuador, *Naval Manual* (1989), § 9.1.2.

¹⁹ France, *LOAC Teaching Note* (2000), p. 2. ²⁰ France, *LOAC Manual* (2001), pp. 13–14.

²¹ Germany, *Military Manual* (1992), § 509. ²² Germany, *IHL Manual* (1996), § 404.

²³ Hungary, *Military Manual* (1992), p. 62.

²⁴ Indonesia, *Directive on Human Rights in Irian Jaya and Maluku* (1995), § 7(d) and (e).

expected that the attack would cause civilian loss, injury or damage excessive in relation to the military advantage anticipated".²⁵

30. Israel's Manual on the Laws of War states that:

Even when it is not possible to isolate the civilians from an assault and there is no other recourse but to attack, this does not constitute a green light to inflict unbridled harm on civilians. The commander is required to refrain from an attack that is expected to inflict harm on the civilian population that is disproportionate to the expected military gain.²⁶

31. Kenya's LOAC Manual states that one of the main principles which places constraints on the conduct of hostilities is "the principle of proportionality which calls for the avoidance of unnecessary suffering and damage and therefore prohibits all forms of violence not indispensable for the overpowering of the enemy".²⁷

32. Madagascar's Military Manual states that "the rule of proportionality must be respected so that civilian losses are not excessive in relation to the expected military advantage".²⁸

33. The Military Manual of the Netherlands states that:

During an attack on a military objective, the collateral damage (loss of civilian life and damage to civilian objects) may not be excessive in relation to the military advantage anticipated from the attack. In every combat action, therefore, the commander must assess whether the action is to take place in the proximity of civilians or civilian objects.²⁹

34. New Zealand's Military Manual states that "as a general rule, an attack is not to be carried out if it would result in collateral civilian casualties clearly disproportionate to the expected military advantage".³⁰ The manual considers that:

The principle of proportionality establishes a link between the concepts of military necessity and humanity. This means that the commander is not allowed to cause damage to non-combatants which is disproportionate to military need . . . It involves weighing the interests arising from the success of the operation on the one hand, against the possible harmful effects upon protected persons and objects on the other. That is, there must be an acceptable relation between the legitimate destructive effect and the undesirable collateral effects.³¹

The manual also states that "launching an indiscriminate attack affecting the civilian population or civilian objects in the knowledge that such attack will

²⁵ Report on the Practice of Israel, 1997, Chapter 1.5, referring to *Law of War Booklet* (1986), pp. 4-5.

²⁶ Israel, *Manual on the Laws of War* (1998), p. 40.

²⁷ Kenya, *LOAC Manual* (1997), Précis No. 4, p. 1, see also Précis No. 4, p. 9.

²⁸ Madagascar, *Military Manual* (1994), Fiche No. 5-SO, § A.

²⁹ Netherlands, *Military Manual* (1993), p. V-5.

³⁰ New Zealand, *Military Manual* (1992), §§ 517(2) and 630(2).

³¹ New Zealand, *Military Manual* (1992), § 207.

cause excessive loss of life, injury to civilians or damage to civilian objects" constitutes a grave breach.³²

35. According to Nigeria's Military Manual,

Every commander has . . . to respect the rule of proportionality, i.e. the use of proportional military force so as to avoid causing incidental civilian casualties and damage which is excessive in relation to the value of the expected result of the whole operation.³³

36. Nigeria's Manual on the Laws of War states that "in any case of attack or bombardment of a defended locality, the killing and destruction must be proportionate to the military advantage sought".³⁴

37. The Joint Circular on Adherence to IHL and Human Rights of the Philippines states that "when the use of armed force is inevitable, strict controls must be exercised to insure that only reasonable force necessary for mission accomplishment shall be taken".³⁵

38. South Africa's LOAC Manual lists the principle of proportionality among the general principles of the LOAC. It states that "the loss of life and damage to property caused by military action must not be disproportionate to the military advantage to be gained".³⁶ The manual further emphasises that "the law of war does not prohibit effective military action. Its purpose is to prevent unnecessary suffering and damage which would afford no military advantage or which is disproportionate to the military advantage obtained."³⁷

39. Spain's LOAC Manual states that:

The principle of proportionality seeks to limit the damage caused by military operations. It is based on a recognition of the fact that it is difficult to limit the effects of modern means and methods of warfare exclusively to military objectives and that it is likely that they will cause collateral damage to civilians and civilian objects.³⁸

The manual specifies, however, that:

An attack is prohibited if, during the planning phase, the available information makes it foreseeable that the damage to the civilian population and/or to civilian objects which the attack will cause is excessive in relation to the military advantage anticipated from the attack as a whole.³⁹

The manual further states that "launching an indiscriminate attack affecting the civilian population or civilian objects which would be excessive in relation to the military advantage anticipated" constitutes a grave breach.⁴⁰

³² New Zealand, *Military Manual* (1992), § 1703(3).

³³ Nigeria, *Military Manual* (1994), p. 42, § 11.

³⁴ Nigeria, *Manual on the Laws of War* (undated), § 13.

³⁵ Philippines, *Joint Circular on Adherence to IHL and Human Rights* (1991), § 2(a)(2).

³⁶ South Africa, *LOAC Manual* (1996), § 8(c).

³⁷ South Africa, *LOAC Manual* (1996), § 16.

³⁸ Spain, *LOAC Manual* (1996), Vol. I, § 2.5.

³⁹ Spain, *LOAC Manual* (1996), Vol. I, § 2.5.a, see also § 4.3.

⁴⁰ Spain, *LOAC Manual* (1996), Vol. I, § 11.8.b.(1).

40. Sweden's IHL Manual considers that the principle of proportionality as contained in Article 51(5)(b) AP I reflects customary international law.⁴¹

41. Switzerland's Basic Military Manual states that "if the military advantage is not proportionate to the damage [suffered by the civilian population], [commanders] must cancel an attack".⁴² The manual further states that "an attack which is launched without making any distinction [between civilians and civilian objects on the one hand and military objectives on the other hand] and which may affect the civilian population or civilian objects in the knowledge that the attack will cause loss of human life, injuries to civilians and damage to civilian objects which would be excessive in the sense of Article 57(2)(a)(iii) [AP I]" constitutes a grave breach.⁴³

42. Togo's Military Manual requires respect for the principle of proportionality. According to the manual, "a military action is proportionate if it does not cause loss or damage to civilians which is excessive in relation to the expected overall result. This rule cannot justify unlimited destruction or attacks against civilians and civilian objects as such."⁴⁴ The manual also states that "the principle of proportionality requires that needless suffering and damage be avoided. Pursuant to this principle, all forms of violence which are not indispensable to gain superiority over an enemy are prohibited."⁴⁵

43. The UK Military Manual states that "in defended towns and localities modern methods of bombardment will inevitably destroy many buildings and sites which are not military objectives. Such destruction, if incidental to the bombardment of military objectives, is not unlawful."⁴⁶

44. The US Field Manual states, in the context of sieges and bombardments, that "loss of life and damage to property must not be out of proportion to the military advantage to be gained".⁴⁷

45. The US Air Force Pamphlet states that:

Complementing the principle of necessity and implicitly contained within it is the principle of humanity which forbids the infliction of suffering, injury or destruction not actually necessary for the accomplishment of legitimate military purposes. This principle of humanity results in a specific prohibition against unnecessary suffering, a requirement of proportionality and a variety of more specific rules examined later. The principle of humanity also confirms the basic immunity of civilian populations and civilians from being objects of attack during armed conflict. This immunity of the civilian population does not preclude unavoidable incidental civilian casualties which may occur during the course of attacks against military objectives, and which are not excessive in relation to the concrete and direct military advantage anticipated.⁴⁸

⁴¹ Sweden, *IHL Manual* (1991), Section 3.2.3, p. 19.

⁴² Switzerland, *Basic Military Manual* (1987), Article 29(1).

⁴³ Switzerland, *Basic Military Manual* (1987), Article 193(1)(b).

⁴⁴ Togo, *Military Manual* (1996), Fascicule III, p. 14, see also Fascicule II, p. 6.

⁴⁵ Togo, *Military Manual* (1996), Fascicule III, p. 11.

⁴⁶ UK, *Military Manual* (1958), § 288. ⁴⁷ US, *Field Manual* (1956), § 41.

⁴⁸ US, *Air Force Pamphlet* (1976), § 1-3(a).

46. The US Air Force Commander's Handbook states that "a weapon is not unlawful simply because its use may cause incidental or collateral casualties to civilians, as long as those casualties are not foreseeably excessive in light of the expected military advantage".⁴⁹

47. The US Instructor's Guide states that:

In attacking a military target, the amount of suffering or destruction must be held to the minimum necessary to accomplish the mission. Any excessive destruction or suffering not required to accomplish the objective is illegal as a violation of the law of war.⁵⁰

48. The US Naval Handbook states that:

It is not unlawful to cause incidental injury to civilians or collateral damage to civilian objects, during an attack upon a legitimate military objective. Incidental injury or collateral damage must not, however, be excessive in light of the military advantage anticipated by the attack.⁵¹

The manual further specifies that "a weapon is not indiscriminate simply because it may cause incidental or collateral civilian casualties, provided such casualties are not foreseeably excessive in light of the expected military advantage to be gained".⁵²

National Legislation

49. Argentina's Draft Code of Military Justice punishes any soldier who carries out or orders the commission of "excessive" attacks.⁵³

50. Under Armenia's Penal Code, launching, during an armed conflict, an "indiscriminate attack affecting the civilian population or civilian objects in the knowledge that such attack will cause loss of life to civilians or damage to civilian objects excessive in relation to the concrete and direct military advantage anticipated" constitutes a crime against the peace and security of mankind.⁵⁴

51. Australia's Geneva Conventions Act as amended provides that "a person who, in Australia or elsewhere, commits a grave breach . . . of [AP I] is guilty of an indictable offence".⁵⁵

52. Australia's ICC (Consequential Amendments) Act incorporates in the Criminal Code the war crimes defined in the 1998 ICC Statute, including launching an attack which causes "excessive incidental death, injury or damage" in international armed conflicts.⁵⁶

⁴⁹ US, *Air Force Commander's Handbook* (1980), § 6-2(b).

⁵⁰ US, *Instructor's Guide* (1985), p. 6. ⁵¹ US, *Naval Handbook* (1995), § 8.1.2.1.

⁵² US, *Naval Handbook* (1995), § 9.1.2.

⁵³ Argentina, *Draft Code of Military Justice* (1998), Article 291, introducing a new Article 875(1) in the *Code of Military Justice as amended* (1951).

⁵⁴ Armenia, *Penal Code* (2003), Article 390.3(2).

⁵⁵ Australia, *Geneva Conventions Act as amended* (1957), Section 7(1).

⁵⁶ Australia, *ICC (Consequential Amendments) Act* (2002), Schedule 1, § 268.38.

53. The Criminal Code of Belarus provides that it is a war crime “to launch an indiscriminate attack affecting the civilian population or civilian objects in the knowledge that such attack will cause excessive loss of life, injury to civilians or damage to civilian objects”.⁵⁷

54. Belgium’s Law concerning the Repression of Grave Breaches of the Geneva Conventions and their Additional Protocols as amended provides that it is a crime under international law to launch:

an indiscriminate attack affecting the civilian population or civilian objects in the knowledge that such attack will cause loss of human life, injury to civilians or damage to civilian objects which would be excessive in relation to the concrete and direct military advantage anticipated, without prejudice to the criminal nature of an attack whose harmful effects, even where proportionate to the military advantage anticipated, would be inconsistent with the principles of international law derived from established custom, from the principles of humanity and from the dictates of public conscience.⁵⁸

55. The Report on the Practice of Brazil considers that the provision in Brazil’s Military Penal Code which punishes the excessive execution of an order is relevant in the context of the principle of proportionality.⁵⁹

56. Under Burundi’s Draft Law on Genocide, Crimes against Humanity and War Crimes, “intentionally launching an attack in the knowledge that such attack will cause incidental loss of life or injury to civilians or damage to civilian objects . . . which would be clearly excessive in relation to the concrete and direct overall military advantage anticipated” is a war crime in international armed conflicts.⁶⁰

57. Canada’s Geneva Conventions Act as amended provides that “every person who, whether within or outside Canada, commits a grave breach [of AP I] . . . is guilty of an indictable offence”.⁶¹

58. Canada’s Crimes against Humanity and War Crimes Act provides that the war crimes defined in Article 8(2) of the 1998 ICC Statute are “crimes according to customary international law” and, as such, indictable offences under the Act.⁶²

59. Colombia’s Penal Code imposes a criminal sanction on “anyone who, during an armed conflict, carries out or orders the carrying out of . . . excessive attacks”.⁶³

⁵⁷ Belarus, *Criminal Code* (1999), Article 136(11).

⁵⁸ Belgium, *Law concerning the Repression of Grave Breaches of the Geneva Conventions and their Additional Protocols as amended* (1993), Article 1(3)(12).

⁵⁹ Report on the Practice of Brazil, 1997, Chapter 1.5, referring to *Military Penal Code* (1969), Article 38(2).

⁶⁰ Burundi, *Draft Law on Genocide, Crimes against Humanity and War Crimes* (2001), Article 4(B)(d).

⁶¹ Canada, *Geneva Conventions Act as amended* (1985), Section 3(1).

⁶² Canada, *Crimes against Humanity and War Crimes Act* (2000), Section 4(1) and (4).

⁶³ Colombia, *Penal Code* (2000), Article 144, see also Article 154.

60. Congo's Genocide, War Crimes and Crimes against Humanity Act defines war crimes with reference to the categories of crimes defined in Article 8 of the 1998 ICC Statute.⁶⁴

61. The Geneva Conventions and Additional Protocols Act of the Cook Islands punishes "any person who in the Cook Islands or elsewhere commits, or aids or abets or procures the commission by another person of, a grave breach . . . of [AP I]".⁶⁵

62. Cyprus's AP I Act punishes "any person who, whatever his nationality, commits in the Republic or outside the Republic any grave breach of the provisions of the Protocol, or takes part or assists or incites another person in the commission of such a breach".⁶⁶

63. The Draft Amendments to the Penal Code of El Salvador provide for a prison sentence for anyone who, in the context of an international or a non-international armed conflict, launches:

an indiscriminate attack affecting the civilian population, in the knowledge that such attack will cause death or injury among the civilian population or damage to civilian objects, which is excessive in relation to the concrete and direct military advantage anticipated.⁶⁷

64. Under Georgia's Criminal Code, any war crime provided for by the 1998 ICC Statute, which is not explicitly mentioned in the Code is a crime, such as "intentionally launching an attack in the knowledge that such attack will cause incidental loss of life or injury to civilians or damage to civilian objects . . . which would be clearly excessive in relation to the concrete and direct overall military advantage anticipated" in international armed conflicts.⁶⁸

65. Germany's Law Introducing the International Crimes Code punishes anyone who, in connection with an international or a non-international armed conflict, "carries out an attack by military means and definitely anticipates that the attack will cause death or injury to civilians or damage to civilian objects on a scale out of proportion to the concrete and direct overall military advantage anticipated".⁶⁹

66. Ireland's Geneva Conventions Act as amended provides that grave breaches of AP I are punishable offences.⁷⁰ It adds that any "minor breach" of AP I, including violations of Article 51(5)(b) AP I, is also a punishable offence.⁷¹

67. Under the Draft Amendments to the Code of Military Justice of Lebanon, "an indiscriminate attack against civilian populations or civilian objects in

⁶⁴ Congo, *Genocide, War Crimes and Crimes against Humanity Act* (1998), Article 4.

⁶⁵ Cook Islands, *Geneva Conventions and Additional Protocols Act* (2002), Section 5(1).

⁶⁶ Cyprus, *AP I Act* (1979), Section 4(1).

⁶⁷ El Salvador, *Draft Amendments to the Penal Code* (1998), Article entitled "Ataque indiscriminado a personas protegidas".

⁶⁸ Georgia, *Criminal Code* (1999), Article 413(d).

⁶⁹ Germany, *Law Introducing the International Crimes Code* (2002), Article 1, § 11(1)(3).

⁷⁰ Ireland, *Geneva Conventions Act as amended* (1962), Section 3(1).

⁷¹ Ireland, *Geneva Conventions Act as amended* (1962), Section 4(1) and (4).

the knowledge that such an attack will cause excessive loss of life, injury to civilians or damage to civilian objects” constitutes a war crime.⁷²

68. Under Mali’s Penal Code, the following constitutes a war crime in international armed conflicts:

intentionally launching an attack in the knowledge that such attack will cause incidental loss of life or injury to civilians or damage to civilian objects . . . which would be clearly excessive in relation to the concrete and direct overall military advantage anticipated.⁷³

69. Under the International Crimes Act of the Netherlands, it is a crime, during an international armed conflict, to commit

the following acts, when they are committed intentionally and in violation of the relevant provisions of Additional Protocol (I) and cause death or serious injury to body or health: . . . launching an indiscriminate attack affecting the civilian population or civilian objects in the knowledge that such attack will cause excessive loss of life, injury to civilians or damage to civilian objects.⁷⁴

Likewise, “intentionally launching an attack in the knowledge that such an attack will cause incidental loss of life or injury to civilians or damage to civilian objects . . . which would be clearly excessive in relation to the concrete and direct overall military advantage anticipated” is also a crime, when committed in an international armed conflict.⁷⁵

70. New Zealand’s Geneva Conventions Act as amended provides that “any person who in New Zealand or elsewhere commits, or aids or abets or procures the commission by another person of, a grave breach . . . of [AP I] is guilty of an indictable offence”.⁷⁶

71. Under New Zealand’s International Crimes and ICC Act, war crimes include the crime defined in Article 8(2)(b)(iv) of the 1998 ICC Statute.⁷⁷

72. Nicaragua’s Draft Penal Code punishes anyone who, during an international or internal armed conflict,

launches an indiscriminate attack affecting the civilian population, in the knowledge that such attack will cause incidental loss of civilian life, injury to civilians or damage to civilian objects, which would be excessive in relation to the concrete and direct military advantage anticipated.⁷⁸

73. According to Niger’s Penal Code as amended, it is a war crime to launch against persons and objects protected under the 1949 Geneva Conventions or their Additional Protocols of 1977:

⁷² Lebanon, *Draft Amendments to the Code of Military Justice* (1997), Article 146(10).

⁷³ Mali, *Penal Code* (2001), Article 31(i)(4).

⁷⁴ Netherlands, *International Crimes Act* (2003), Article 5(2)(c)(ii).

⁷⁵ Netherlands, *International Crimes Act* (2003), Article 5(5)(b).

⁷⁶ New Zealand, *Geneva Conventions Act as amended* (1958), Section 3(1).

⁷⁷ New Zealand, *International Crimes and ICC Act* (2000), Section 11(2).

⁷⁸ Nicaragua, *Draft Penal Code* (1999), Article 450(1).

an indiscriminate attack affecting the civilian population or civilian objects in the knowledge that such attack will cause loss of human life, injury to civilians or damage to civilian objects which would be excessive in relation to the concrete and direct military advantage anticipated, without prejudice to the criminal nature of an attack whose harmful effects, even where proportionate to the military advantage anticipated, would be inconsistent with the principles of international law derived from established custom, from the principles of humanity and from the dictates of public conscience.⁷⁹

74. Under Norway's Military Penal Code as amended, "anyone who contravenes or is accessory to the contravention of provisions relating to the protection of persons or property laid down in . . . the two additional protocols to [the Geneva] Conventions . . . is liable to imprisonment".⁸⁰

75. Spain's Penal Code punishes "anyone who, during an armed conflict, . . . carries out or orders an . . . excessive attack".⁸¹

76. Under Sweden's Penal Code, "initiating an indiscriminate attack knowing that such attack will cause exceptionally heavy losses or damage to civilians or to civilian property" constitutes a crime against international law.⁸²

77. Under Trinidad and Tobago's Draft ICC Act, it is a punishable offence to commit a war crime as defined in Article 8(2)(b)(iv) of the 1998 ICC Statute.⁸³

78. The UK Geneva Conventions Act as amended punishes "any person, whatever his nationality, who, whether in or outside the United Kingdom, commits, or aids, abets or procures the commission by any other person of, a grave breach of . . . [AP I]".⁸⁴

79. Under the UK ICC Act, it is a punishable offence to commit a war crime as defined in Article 8(2)(b)(iv) of the 1998 ICC Statute.⁸⁵

80. Zimbabwe's Geneva Conventions Act as amended punishes "any person, whatever his nationality, who, whether in or outside Zimbabwe, commits any such grave breach of . . . [AP I]".⁸⁶

National Case-law

81. The Report on the Practice of Argentina states that in a case concerning armed operations against insurgents in 1985, "the National Court of Appeals referred to the principle of proportionality, which it considered to be a customary norm based on its repeated doctrinal approbation".⁸⁷

⁷⁹ Niger, *Penal Code as amended* (1961), Article 208.3(12).

⁸⁰ Norway, *Military Penal Code as amended* (1902), § 108(b).

⁸¹ Spain, *Penal Code* (1995), Article 611(1).

⁸² Sweden, *Penal Code as amended* (1962), Chapter 22, § 6.

⁸³ Trinidad and Tobago, *Draft ICC Act* (1999), Section 5(1)(a).

⁸⁴ UK, *Geneva Conventions Act as amended* (1957), Section 1(1).

⁸⁵ UK, *ICC Act* (2001), Sections 50(1) and 51(1) (England and Wales) and Section 58(1) (Northern Ireland).

⁸⁶ Zimbabwe, *Geneva Conventions Act as amended* (1981), Section 3(1).

⁸⁷ Report on the Practice of Argentina, 1997, Chapter 1.5, referring to National Court of Appeals, *Military Junta Case*, Judgement, 9 December 1985.

Other National Practice

82. In a press release issued in 1991, an Australian Senator asserted that Article 51(5)(b) API would bar Australian ships from providing “naval gunfire support” (NGS) to an amphibian landing in Kuwait and from engaging batteries located in a heavily populated port. According to the Senator, it would prove very difficult for an Australian naval commander to determine whether a shore bombardment would or would not injure civilians or damage civilian property to an extent that would be excessive in relation to the direct military advantage.⁸⁸ In response to these statements, ACOPS recalled first that Australia was not yet legally bound by AP I and that even if it had been, such action would not be in breach of Article 51(5)(b). On the basis of the US and Australian Rules of Engagement and given the very high targeting standards shown by the US authorities, ACOPS deemed that both the Australian government and the warship commanders “can confidently expect that NGS targeting tasks and associated co-ordinates have been rigorously scrutinised to ensure a lawful balance between incidental civilian losses and the anticipated concrete and direct military advantage”. ACOPS also differed with the Senator’s opinion because even if, in retrospect, it should emerge that excessive civilian casualties resulted from such an operation, the Australian warship commanders would not incur personal responsibility for a grave breach of AP I since such a grave breach can only result “from a ‘wilful’ decision, i.e. deliberate disregard for consequences whilst having full knowledge”.⁸⁹

83. The Report on the Practice of Bosnia and Herzegovina states that “during the aggression against the Republic of Bosnia and Herzegovina the aggressor didn’t respect the principle of proportionality in attack, but systematically violated it during the whole time of the aggression” and provides a number of examples in this respect.⁹⁰

84. The Report on the Practice of Botswana recalls that Article 51(5)(b) AP I provides for the principle of proportionality, but it argues that its essence is not well defined because there are no clear criteria concerning the distinction between indiscriminate and disproportionate attacks.⁹¹

85. The Report on the Practice of Brazil states that the principle of proportionality binds Brazil, since Brazil has ratified the Geneva Conventions and its Additional Protocols, and according to the Constitution of Brazil, international treaties are automatically applicable once ratified and published in the official journal.⁹²

⁸⁸ Australia, Media Release by the Shadow Minister for Defence, Protocol One: A Problem for Naval Operations in the Gulf, 20 February 1991.

⁸⁹ Australia, Media Release by the Shadow Minister for Defence, Protocol One and RAN Gulf Operations, 25 February 1991.

⁹⁰ Report on the Practice of Bosnia and Herzegovina, 2000, Chapter 1.5.

⁹¹ Report on the Practice of Botswana, 1998, Chapter 1.5.

⁹² Report on the Practice of Brazil, 1997, Chapter 1.5.

86. The Report on the Practice of Cuba states that the principle of proportionality has been applied “in relation to armaments and the means of combat, taking into account the humanitarian principle enshrined in Cuban military doctrine”. The report cites the actions resulting from the Bay of Pigs invasion as an illustration of this point.⁹³

87. In its written statement submitted to the ICJ in the *Nuclear Weapons case* in 1995, Egypt stated that the use of nuclear weapons cannot at all be legal because they “are expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated”.⁹⁴

88. The Report on the Practice of Egypt states that “Egypt is of the opinion that the principle of proportionality must be respected [at] all times and in any circumstance”.⁹⁵

89. At the CDDH, France voted against Article 46 of draft AP I (now Article 51) because it considered that:

The provisions of paragraphs 4, 5 and 7 were of a type which by their very complexity would seriously hamper the conduct of defensive military operations against an invader and prejudice the exercise of the inherent right of legitimate defence recognized in Article 51 of the Charter of the United Nations.⁹⁶

90. At the CDDH, the GDR stated that it considered that:

Protection of the civilian population could not be improved if the concept of proportionality was retained. To permit attacks against the civilian population and civilian objects if such attacks had military advantages was tantamount to making civilian protection dependent on subjective decisions taken by a single person, namely, the military commander.⁹⁷

91. In 1983, in reply to a question in parliament about the principle of proportionality in attack, the German government declared that the principle contained in Article 51(5) AP I required decisions on a case-by-case basis and that no abstract calculations were possible.⁹⁸

92. In 1996, the German government reminded the Turkish government to respect the principle of proportionality during hostilities in northern Iraq.⁹⁹

⁹³ Report on the Practice of Cuba, 1998, Chapter 1.5.

⁹⁴ Egypt, Written statement submitted to the ICJ, *Nuclear Weapons case*, 20 June 1995, § 18, see also § 35(B)(2) and (3).

⁹⁵ Report on the Practice of Egypt, 1997, Chapter 1.5.

⁹⁶ France, Statement at the CDDH, *Official Records*, Vol. VI, CDDH/SR.41, 26 May 1977, p. 163, § 118.

⁹⁷ GDR, Statement at the CDDH, *Official Records*, Vol. XIV, CDDH/III/SR.7, 18 March 1974, p. 56, § 48.

⁹⁸ Germany, Reply by the government to a question in the Lower House of Parliament, *Kriegsvölkerrechtliche Grundsätze, BT-Drucksache 10/445*, 5 October 1983, pp. 11–12.

⁹⁹ Germany, Reply by the government to a question in the Lower House of Parliament, Lage der kurdischen Flüchtlinge im Nordirak, *BT-Drucksache 13/5451*, 27 August 1996, pp. 7–8.

93. At the CDDH, Hungary stated that:

The debate had shown that opinion in the [Third] Committee was divided on the principle of proportionality . . . [A] rule well established in international law should be reflected in practice and should produce the intended effects. Yet the number of civilians victims had increased alarmingly over the past few years: accordingly, either the rule was not well established and hence not binding; or it existed and could not be applied in armed conflicts; or it existed and was applied, but the results of its application provided the best argument against it. The [proposed] amendments . . . improved the ICRC text and maintained the rule of proportionality, but did not provide a satisfactory solution of the problem.¹⁰⁰

94. In its written statement submitted to the ICJ in the *Nuclear Weapons case* in 1995, India stated that:

The relationship between military advantage and the collateral damage involved also determines the legality of use of a weapon or a method of warfare employed. If the collateral damage is excessive in relation to the military advantage, the attack is forbidden.¹⁰¹

95. In its written statement submitted to the ICJ in the *Nuclear Weapons case* in 1995, Iran stated that "some of the principles of humanitarian international law from which one can deduce the illegitimacy of the use of nuclear weapons are: . . . The existence of proportionality between military advantages gained and the used weapons and methods."¹⁰²

96. On the basis of a press conference and a statement by the President of Iraq, the Report on the Practice of Iraq considers that the armed forces must act with only the degree of force necessary to achieve the specific military objective. The aim is to give due regard to humanitarian requirements and to lessen civilian suffering.¹⁰³

97. Prior to the adoption of UN General Assembly Resolution 47/37 in 1992 on the protection of the environment in times of armed conflict, Jordan and the US submitted a memorandum to the Sixth Committee of the UN General Assembly entitled "International Law Providing Protection to the Environment in Times of Armed Conflict", which stated that "the customary rule that prohibits attacks which reasonably may be expected at the time to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, which would be excessive in relation to the concrete

¹⁰⁰ Hungary, Statement at the CDDH, *Official Records*, Vol. XIV, CDDH/III/SR.8, 19 March 1974, p. 68, § 80.

¹⁰¹ India, Written statement submitted to the ICJ, *Nuclear Weapons case*, 20 June 1995, p. 3.

¹⁰² Iran, Written statement submitted to the ICJ, *Nuclear Weapons case*, 19 June 1995, p. 2; see also Written statement submitted to the ICJ, *Nuclear Weapons (WHO) case*, undated, pp. 1–2.

¹⁰³ Report on the Practice of Iraq, 1998, Chapter 1.5, referring to Press Conference of the President, 10 November 1980, *Encyclopedia of the Iraqi-Iranian War*, Vol. I, p. 318 and Statement by the Iraqi President during preliminary discussions with the Committee of Good Offices, 2 March 1984, *Encyclopedia of the Iraqi-Iranian War*, Vol. III, p. 54.

and direct military advantage anticipated, are prohibited" provides protection for the environment in times of armed conflict.¹⁰⁴

98. According to the Report on the Practice of South Korea, it is South Korea's *opinio juris* that the principle of proportionality in attack is a requirement of international law.¹⁰⁵

99. The Report on the Practice of Kuwait affirms that numerous statements by Kuwait highlight the importance of the principle of proportionality in attack.¹⁰⁶ The report specifies that there is an obvious violation of the principle of proportionality if no military advantage could be expected from the destruction of an object. This point was illustrated by the country's vigorous protests over violations of the principle of proportionality committed by the Iraqi armed forces in setting oil wells and other facilities on fire without any hope of gaining a military advantage. The report notes that it is the *opinio juris* of Kuwait that the principle of proportionality must be respected, and that objects whose destruction provide no military advantage should be spared.¹⁰⁷

100. In its written statement submitted to the ICJ in the *Nuclear Weapons (WHO) case* in 1995, Malaysia quoted with approval the US statement in the same case (see below).¹⁰⁸

101. In its written statement submitted to the ICJ in the *Nuclear Weapons case* in 1995, the Netherlands stated that "the general principles of international humanitarian law in armed conflict also apply to the use of nuclear weapons . . . in particular . . . the prohibition on attacking military targets if this would cause disproportionate harm to the civilian population".¹⁰⁹

102. In its written statement submitted to the ICJ in the *Nuclear Weapons case* in 1995, New Zealand stated that:

Discrimination between combatants and those who are not directly involved in armed conflict is a fundamental principle of international humanitarian law. While it is prohibited to actually target civilians and civilian objects, there is no absolute protection from collateral damage. The application of the principle requires an assessment of whether the civilian casualties are out of proportion to the legitimate military advantage achieved and whether collateral damage is so widespread as to amount to an indiscriminate attack.¹¹⁰

¹⁰⁴ Jordan and US, International Law Providing Protection to the Environment in Times of Armed Conflict, annexed to Letter dated 28 September 1992 to the Chairman of the Sixth Committee of the UN General Assembly, UN Doc. A/C.6/47/3, 28 September 1992, § 1(h).

¹⁰⁵ Report on the Practice of South Korea, 1997, Chapter 1.5.

¹⁰⁶ Report on the Practice of Kuwait, 1997, Chapter 1.5.

¹⁰⁷ Report on the Practice of Kuwait, 1997, Chapter 1.5.

¹⁰⁸ Malaysia, Written statement submitted to the ICJ, *Nuclear Weapons (WHO) case*, 19 June 1995, p. 22.

¹⁰⁹ Netherlands, Written statement submitted to the ICJ, *Nuclear Weapons case*, 16 June 1995, § 32; see also Written statement submitted to the ICJ, *Nuclear Weapons (WHO) case*, 6 June 1994, § 39.

¹¹⁰ New Zealand, Written statement submitted to the ICJ, *Nuclear Weapons case*, 20 June 1995, § 71.

103. According to the Report on the Practice of Nigeria, it is Nigeria's *opinio juris* that the rule of proportionality forms part of customary international law.¹¹¹ The report also notes that the principle of proportionality was violated by the Nigerian air force on numerous occasions during the civil war. Senior military officials and aircraft pilots were reported to have regretted such violations.¹¹²

104. The Report on the Practice of Pakistan affirms that the practice of Pakistan is consistent with the principle of proportionality.¹¹³

105. At the CDDH, Poland stated that:

The rule of proportionality as expressed in the ICRC text would give military commanders the practically unlimited right to decide to launch an attack if they considered that there would be a military advantage. Civilian suffering and military advantage were two values that could not conceivably be compared.¹¹⁴

106. At the CDDH, Romania stated that it had always opposed the "rule of proportionality" and considered that:

It amounted to legal acceptance of the fact that one part of the civilian population was to be deliberately sacrificed to real or assumed military advantages and it gave military commanders the power to weigh their military advantage against the probable losses among the civilian population during an attack against the enemy. Military leaders would tend to consider military advantage to be more important than the incidental loss. The principle of proportionality was therefore a subjective principle which could give rise to serious violations.¹¹⁵

107. The Report on the Practice of Russia considers the principle of proportionality the "weakest point of IHL" because

IHL itself does not clearly enough define the criteria of respecting the balance between the requirements of humanism and military necessity. This issue is not treated in any of the available documents. It remains the exclusive domain of commanders at the helm of military operations . . . Armed conflicts on the territory of the former USSR demonstrate that conflicting parties do not observe in their acts the limitations set forth in IHL. We are sorry to say that we do not know of any occurrence when a party to a conflict complained of the non-respect of the principle of proportionality by the parties. In all probability, this principle is in reality opposed by a practice based on the assumption that the aim to gain military superiority over the enemy can justify any means of warfare, which, in fact, often means the violation of the principle of proportionality. In this connection, we can point out that the large-scale military operations of the federal troops in Chechnya were at

¹¹¹ Report on the Practice of Nigeria, 1997, Chapter 1.5.

¹¹² Report on the Practice of Nigeria, 1997, Chapter 1.5, referring to *The War in the Air*, New Nigerian War Souvenir Edition, 12 January 1970.

¹¹³ Report on the Practice of Pakistan, 1998, Chapter 1.5.

¹¹⁴ Poland, Statement at the CDDH, *Official Records*, Vol. XIV, CDDH/III/SR.8, 19 March 1974, p. 61, § 13.

¹¹⁵ Romania, Statement at the CDDH, *Official Records*, Vol. XIV, CDDH/III/SR.31, 14 March 1974, p. 305, § 42; see also Statement at the CDDH, *Official Records*, Vol. XIV, CDDH/III/SR.7, 18 March 1974, p. 57, § 55.

the beginning contrary to the principle of proportionality. In the armed forces of the CIS countries there are neither provisions defining the terms of the respect of the principle of proportionality nor provisions envisaging prosecution of individuals who violate this principle.¹¹⁶

108. On 22 April 1995, between 200 and 300 people died in a camp for internally displaced persons in Kibeho in Rwanda. The Rwandan President stated that these deaths were the result of:

the same machetes of those who committed the genocide and the massacres. Others were killed during shootings in self-defence by the governmental armed forces and by MINUAR in response to attacks launched by the *Interahamwe* militia located in the camp of Kibeho.¹¹⁷

An international commission investigating the events of Kibeho considered that by using automatic guns and heavier weapons, such as grenades and rocket-launchers, against persons who carried guns and traditional weapons, such as machetes and stones, the Rwandan army had acted disproportionately.¹¹⁸ Since no official statement denied this alleged violation of the principle of proportionality in attack, the Report on the Practice of Rwanda concludes that Rwandan practice implicitly confirms the existence of such a norm.¹¹⁹

109. In its written statement submitted to the ICJ in the *Nuclear Weapons case* in 1995, the Solomon Islands stated that “the principles of proportionality and humanity are obviously violated” by the use of nuclear weapons.¹²⁰

110. On the basis of statements by the Spanish Minister of Foreign Affairs and Minister of Defence, the Report on the Practice of Spain states that “the Spanish government has, in general, advocated respect for the principle of proportionality during the conflict in Chechnya, the Turkish attacks on the Kurds in northern Iraq and the conflict in Bosnia and Herzegovina”.¹²¹

111. In its written statement submitted to the ICJ in the *Nuclear Weapons case* in 1995, Sweden stated that “in the case of an attack on a military target,

¹¹⁶ Report on the Practice of Russia, 1997, Chapter 1.5.

¹¹⁷ Rwanda, Declaration by the President concerning the decision to close the IDP camps of Gikongoro, Kigali, 24 April 1995, p. 2, Report on the Practice of Rwanda, 1997, Chapter 1.5.

¹¹⁸ Rapport de la Commission Internationale d'Enquête Indépendante sur les événements de Kibeho, April 1995, pp. 9–10, Report on the Practice of Rwanda, 1997, Chapter 1.5.

¹¹⁹ Report on the Practice of Rwanda, 1997, Chapter 1.5.

¹²⁰ Solomon Islands, Written statement submitted to the ICJ, *Nuclear Weapons case*, 19 June 1995, § 3.103; see also Written statement submitted to the ICJ, *Nuclear Weapons (WHO) case*, 9 June 1994, § 3.94.

¹²¹ Report on the Practice of Spain, 1998, Chapter 1.5, referring to Statement by Javier Solana Madariaga, Minister of Foreign Affairs, before the Commission of Foreign Affairs of the House of Representatives, 28 February 1995, *Actividades, Textos y Documentos de la Política Exterior Española*, Madrid, 1995, p. 353, Statement by Javier Solana Madariaga, Minister of Foreign Affairs, before the Commission of Foreign Affairs of the House of Representatives, 7 June 1995, *Actividades, Textos y Documentos de la Política Exterior Española*, Madrid, 1995, p. 473 and Statement by García Vargas, Minister of Defence, before the Defence Commission of the House of Representatives, *Boletín Oficial de las Cortes Generales – Congreso*, V Legislatura, Comisiones, No. 513, 6 June 1995, p. 15649.

disproportionately substantial damage may not be inflicted on the civilian population or on civilian property".¹²²

112. At the CDDH, Syria stated that it "could not accept the theory of some kind of "proportionality" between military advantages and losses and destruction of the civilian population and civilian objects, or that the attacking force should pronounce on the matter".¹²³

113. On the basis of a statement by the Syrian Minister of Foreign Affairs before the UN General Assembly in 1997, the Report on the Practice of Syria concludes that Syria considers Article 51(5)(b) AP I to be a norm of customary international law.¹²⁴

114. At the CDDH, the UK stated that the principle of proportionality as defined in Article 51(5)(b) AP I was "a useful codification of a concept that was rapidly becoming accepted by all States as an important principle of international law relating to armed conflict".¹²⁵

115. In 1991, in reply to a question in the House of Lords concerning the Gulf War, the UK Parliamentary Under-Secretary of State for Defence stated that:

The Geneva Conventions contain no provisions expressly regulating targeting in armed conflict. The Hague Regulations of 1907 and customary international law do, however, incorporate the twin principles of distinction between military and civilian objects, and of proportionality so far as the risk of collateral civilian damage from an attack on a military objective is concerned. These principles and associated rules of international law were observed at all times by coalition forces in the planning and execution of attacks against Iraq.¹²⁶

116. In 1993, the UK government stated that:

The Rules of Engagement under which BRITFOR are operating in Bosnia allow them to return fire in self defence if the source can be identified; in doing so, they must attempt to minimise collateral damage and be mindful of the principle of proportionality.¹²⁷

117. In 1993, in reply to questions in the Foreign Affairs Committee of the House of Commons about the launching of "around 40 Cruise missiles by the Americans which resulted in the killing of innocent civilians in places like the Al Rashid Hotel", the UK Minister of Foreign Affairs stated that:

¹²² Sweden, Written statement submitted to the ICJ, *Nuclear Weapons case*, 20 June 1995, p. 3; see also Written statement submitted to the ICJ, *Nuclear Weapons (WHO) case*, 2 June 1994, p. 3.

¹²³ Syria, Statement at the CDDH, *Official Records*, Vol. XIV, CDDH/III/SR.6, 15 March 1974, p. 48, § 38.

¹²⁴ Report on the Practice of Syria, 1997, Chapter 1.5, referring to Statement by the Syrian Minister of Foreign Affairs before the UN General Assembly, 1 October 1997.

¹²⁵ UK, Statement at the CDDH, *Official Records*, Vol. VI, CDDH/SR. 41, 26 May 1977, p. 164, § 120.

¹²⁶ UK, House of Lords, Statement by the Parliamentary Under-Secretary of State for Defence, 22 July 1991, *Hansard*, Vol. 531, Written Answers, col. 43.

¹²⁷ UK, House of Commons, Defence Committee, Sixth Special Report: Government Reply to the Fourth Report from the Defence Committee, Session 1992–1993, p. X.

I do not believe the action was disproportionate. You know what it was aimed against; it was aimed against a plant that the Iraqis had themselves admitted was producing material for their nuclear programme . . . It seemed to me a proportionate target. It looks and sounds as if . . . one of the Cruise missiles went astray and killed innocent civilians in the Al Rashid Hotel. That clearly is to be deplored but I do not think the action as a whole can be regarded as disproportionate.¹²⁸

118. In its written statement submitted to the ICJ in the *Nuclear Weapons case* in 1995, the UK stated that:

The principle of proportionality requires that even a military objective should not be attacked if to do so would cause collateral civilian casualties or damage to civilian objects which would be excessive in relation to the concrete and direct military advantage anticipated from the attack.¹²⁹

119. In 1972, the General Counsel of the US Department of Defense stated that:

I would like to reiterate that it is recognized by all states that they may not lawfully use their weapons against civilian population[s] or civilians as such, but there is no rule of international law that restrains them from using weapons against enemy armed forces or military targets. The correct rule of international law which has applied in the past and continued to apply to the conduct of our military operations in Southeast Asia is that "the loss of life and damage to property must not be out of proportion to the military advantage to be gained". A review of the operating authorities and rules of engagements for all of our forces in Southeast Asia, in air as well as ground and sea operations, by my office reveals that not only are such operations in conformity with this basic rule, but that in addition, extensive constraints are imposed to avoid if at all possible the infliction of casualties on noncombatants and the destruction of property other than that related to the military operations in carrying out military objectives.¹³⁰

120. In 1974, at the Lucerne Conference of Government Experts on Weapons which may Cause Unnecessary Suffering or have Indiscriminate Effects, the head of the US delegation stated that:

The law of war also prohibits attacks which, though directed at lawful military targets, entail a high risk of incidental civilian casualties or damage to civilian objects which is disproportionate to the military advantage sought to be secured by the attack.¹³¹

¹²⁸ UK, Statement by the Secretary of State, Minutes of Evidence taken before the Foreign Affairs Committee, 28 January 1993, Vol. II, p. 146.

¹²⁹ UK, Written statement submitted to the ICJ, *Nuclear Weapons case*, 16 June 1995, § 3.67.

¹³⁰ US, Letter from J. Fred Buzhardt, General Counsel of the Department of Defense, to Senator Edward Kennedy, Chairman of the Subcommittee on Refugees of the Committee on the Judiciary, 22 September 1972, *AJIL*, Vol. 67, 1973, p. 124.

¹³¹ US, Statement of 25 September 1974 at the Conference of Government Experts on Weapons which may Cause Unnecessary Suffering or have Indiscriminate Effects, Lucerne, 24 September–18 October 1974, reprinted in Arthur W. Rovine, *Digest of United States Practice in International Law, 1974*, Department of State Publication 8809, Washington, D.C., 1975, p. 713.

121. In 1987, the Deputy Legal Adviser of the US Department of State stated that “we support the principle . . . that attacks not be carried out that would clearly result in collateral civilian casualties disproportionate to the expected military advantage”.¹³²

122. In 1991, in reaction to an ICRC memorandum on the applicability of IHL in the Gulf region, the US Department of the Army stated that:

The concept of “incidental loss of life excessive in relation to the military advantage anticipated” generally is measured against an overall campaign. While it is difficult to weigh the possibility of collateral civilian casualties on a target-by-target basis, minimization of collateral civilian casualties is a continuing responsibility at all levels of the targeting process. Combat is a give-and-take between attacker and defender, and collateral civilian casualties are likely to occur notwithstanding the best efforts of either party. What is prohibited is wanton disregard for possible collateral civilian casualties.¹³³

123. In 1992, in its final report to Congress on the conduct of the Gulf War, the US Department of Defense stated that:

While the prohibition contained in Article 23(g) [HR] generally refers to intentional destruction or injury, it also precludes collateral damage of civilian objects or injury to noncombatant civilians that is clearly disproportionate to the military advantage gained in the attack of military objectives, as discussed below. As previously indicated, Hague IV was found to be customary international law in the course of war crimes trials following World War II, and continues to be so regarded.

An uncodified but similar provision is the principle of proportionality. It prohibits military action in which the negative effects (such as collateral civilian casualties) clearly outweigh the military gain. This balancing may be done on a target-by-target basis, as frequently was the case during Operation Desert Storm, but also may be weighed in overall terms against campaign objectives. CENTCOM [Central Command] conducted its campaign with a focus on minimizing collateral civilian casualties and damage to civilian objects. Some targets were specifically avoided because the value of destruction of each target was outweighed by the potential risk to nearby civilians or, as in the case of certain archaeological and religious sites, to civilian objects.¹³⁴

124. In 1992, a legal review by the US Department of the Air Force of the legality of extended range anti-armour munition stated that, while legal as such, this munition “should, however, only be used in concentrations of civilians if the military necessity for such use is great, and the expected collateral

¹³² US, Remarks of Michael J. Matheson, Deputy Legal Adviser, US Department of State, The Sixth Annual American Red Cross-Washington College of Law Conference on International Humanitarian Law: A Workshop on Customary International Law and the 1977 Protocols Additional to the 1949 Geneva Conventions, *American University Journal of International Law and Policy*, Vol. 2, 1987, p. 426.

¹³³ US, Letter from the Department of the Army to the legal adviser of the US Army forces deployed in the Gulf region, 11 January 1991, § 8(F), Report on US Practice, 1997, Chapter 1.5.

¹³⁴ US, Department of Defense, Final Report to Congress on the Conduct of the Persian Gulf War, Appendix O, The Role of the Law of War, 10 April 1992, *ILM*, Vol. 31, 1992, p. 622.

civilian casualties would not be excessive in relation to the expected military advantage".¹³⁵

125. In 1993, in its report to Congress on the protection of natural and cultural resources during times of war, the US Department of Defense stated that cultural property, civilian objects, and natural resources are protected from:

collateral damage that is clearly disproportionate to the military advantage to be gained in the attack of military objectives. The law of war acknowledges the unfortunate inevitability of collateral damage when military objectives and civilian objects (including cultural property and natural resources) are commingled.¹³⁶

126. In its written statement submitted to the ICJ in the *Nuclear Weapons (WHO) case* in 1994, the US stated that:

It is unlawful to carry out any attack that may reasonably be expected to cause collateral damage or injury to civilians or civilian objects that would be excessive in relation to the military advantage anticipated from the attack. Whether an attack with nuclear weapons would be disproportionate depends entirely on the circumstances, including the importance of destroying the objective, the character, size and likely effects of the device, and the magnitude of the risk to civilians.¹³⁷

127. The Report on US Practice states that "United States practice recognizes the principle of proportionality as part of the customary law of non-nuclear war".¹³⁸

128. According to the Report on the Practice of the SFRY (FRY), no doubt can be raised about the existence of an *opinio juris* in favour of the principle of proportionality. The report alleges that serious violations of the principle of proportionality did occur during the conflict in Croatia, for example, during hostilities in Vukovar and Dubrovnik where artillery was massively used, and notes that the press regularly covered this issue in 1991.¹³⁹

129. In its oral pleadings before the ICJ in the *Nuclear Weapons case* in 1995, Zimbabwe fully shared the analysis by other states that "the threat or use of nuclear weapons violates the principles of humanitarian law prohibiting the use of weapons or methods of warfare that . . . are disproportionate".¹⁴⁰

¹³⁵ US, Department of the Air Force, The Judge Advocate General, Legal Review: Extended Range Antiarmor Munition (ERAM), 16 April 1992, § 9, see also §§ 4, 5 and 8.

¹³⁶ US, Department of Defense, Report to Congress on International Policies and Procedures Regarding the Protection of Natural and Cultural Resources During Times of War, 19 January 1993, p. 202.

¹³⁷ US, Written statement submitted to the ICJ, *Nuclear Weapons (WHO) case*, 10 June 1994, p. 27; see also Written statement submitted to the ICJ, *Nuclear Weapons case*, 20 June 1995, p. 23.

¹³⁸ Report on US Practice, 1997, Chapter 1.5.

¹³⁹ Report on the Practice of the SFRY (FRY), 1997, Chapter 1.5.

¹⁴⁰ Zimbabwe, Oral pleadings before the ICJ, *Nuclear Weapons case*, 15 November 1995, Verbatim Record CR 95/35, p. 27.

130. The Report on the Practice of Zimbabwe considers that the principle of proportionality is a norm of customary international law but states that its application is difficult to gauge under war conditions.¹⁴¹

III. Practice of International Organisations and Conferences

United Nations

131. In a resolution on Cyprus adopted in 1996, the UN Security Council deplored:

the violent incidents of 11 and 14 August, 8 September and 15 October 1996 [in Cyprus], which resulted in the tragic deaths of three Greek Cypriot civilians and one member of the Turkish Cypriot Security Forces, as well as injuries to civilians and UNFICYP personnel, in particular the unnecessary and disproportionate use of force by the Turkish/Turkish Cypriot side.¹⁴²

132. In a resolution adopted in 1998, the UN Security Council condemned “the use of excessive force by Serbian police forces against civilians and peaceful demonstrators in Kosovo”.¹⁴³ Later that year, in another resolution in the same context, the Security Council expressed its grave concern at “the excessive and indiscriminate use of force by Serbian security forces and the Yugoslav Army which have resulted in numerous civilian casualties”.¹⁴⁴

133. In a resolution adopted in 2000 on events in Jerusalem and other areas throughout the territories occupied by Israel, the UN Security Council condemned “acts of violence, especially the excessive use of force against Palestinians, resulting in injury and loss of human life”.¹⁴⁵

134. In a resolution adopted in 2000, the UN Commission on Human Rights expressed its grave concern about “reports indicating disproportionate and indiscriminate use of Russian military force” in Chechnya and underlined “the need to respect the principle of proportionality”.¹⁴⁶

135. In 1994, in its final report on grave breaches of the Geneva Conventions and other violations of IHL committed in the former Yugoslavia, the UN Commission of Experts Established pursuant to Security Council Resolution 780 (1992), stated that:

There have been incidents in the past where substantial civilian casualties have been caused and substantial military advantage gained by a particular military action. In those cases, one might attempt to quantify both military advantage and civilian losses and apply the somewhat subjective rule of proportionality. As a general statement, however, the rule of proportionality is not relevant to the sniping activities of the Bosnia Serb Army forces, and it is of questionable relevance to

¹⁴¹ Report on the Practice of Zimbabwe, 1998, Chapter 1.5.

¹⁴² UN Security Council, Res. 1092, 23 December 1996, § 2.

¹⁴³ UN Security Council, Res. 1160, 31 March 1998, preamble.

¹⁴⁴ UN Security Council, Res. 1199, 23 September 1998, preamble.

¹⁴⁵ UN Security Council, Res. 1322, 7 October 2000, § 2.

¹⁴⁶ UN Commission on Human Rights, Res. 2000/58, 25 April 2000, preamble.

many of the artillery bombardments. The Bosnian Serb Army forces are deliberately targeting the civilian population of Sarajevo, either as a measure of retaliation or to weaken their political resolve. Attacking the civilian population is a war crime.¹⁴⁷

Other International Organisations

136. In a resolution adopted in 1995 concerning Russia's request for membership in the light of the situation in Chechnya, the Parliamentary Assembly of the Council of Europe unreservedly condemned "the indiscriminate and disproportionate use of force by the Russian military, in particular against the civilian population".¹⁴⁸

137. In a declaration adopted in 1991, the EC Ministers of Foreign Affairs expressed alarm at "reports that the Yugoslav National Army (JNA), having resorted to a disproportionate and indiscriminate use of force, has shown itself to be no longer a neutral and disciplined institution".¹⁴⁹

International Conferences

138. No practice was found.

IV. Practice of International Judicial and Quasi-judicial Bodies

139. In its advisory opinion in the *Nuclear Weapons case* in 1996, the ICJ held that:

States must take environmental considerations into account when assessing what is necessary and proportionate in the pursuit of legitimate military objectives. Respect for the environment is one of the elements that go to assessing whether an action is in conformity with the principles of necessity and proportionality.¹⁵⁰

The Court did not elaborate further on the general principle of proportionality in the conduct of hostilities but rather focused on the application of this principle in the context of the use of force in the framework of the right of self-defence as defined in Article 51 of the UN Charter.¹⁵¹

140. In her dissenting opinion in the *Nuclear Weapons case* before the ICJ in 1996, Judge Higgins stated that "even a legitimate military target may not be attacked if the collateral civilian casualties would be disproportionate to the specific military gain from the attack".¹⁵²

141. In its review of the indictment in the *Martić case* in 1996, the ICTY Trial Chamber referred, among the relevant norms of customary law, to Article

¹⁴⁷ UN Commission of Experts Established pursuant to Security Council Resolution 780 (1992), Final report, UN Doc. S/1994/674, 27 May 1994, Annex, § 207.

¹⁴⁸ Council of Europe, Parliamentary Assembly, Res. 1055, 2 February 1995, § 2.

¹⁴⁹ EC, Declaration on Yugoslavia, Haarzuilens, 6 October 1991, annexed to Letter dated 7 October 1991 from the Netherlands to the UN Secretary-General, UN Doc. A/46/533, 7 October 1991.

¹⁵⁰ ICJ, *Nuclear Weapons case*, Advisory Opinion, 8 July 1996, § 30.

¹⁵¹ ICJ, *Nuclear Weapons case*, Advisory Opinion, 8 July 1996, § 41.

¹⁵² ICJ, *Nuclear Weapons case*, Dissenting Opinion of Judge Higgins, 8 July 1996, § 20.

51(5)(b) AP I and held that, even when directed against a legitimate military target, "attacks must not cause damage and harm to the civilian population disproportionate in relation to the concrete and direct military advantage anticipated".¹⁵³

142. In its judgement in the *Kupreškić case* in 2000, the ICTY Trial Chamber stated that the principle of proportionality required that "any incidental (and unintentional) damage to civilians must not be out of proportion to the direct military advantage gained by the military attack".¹⁵⁴

143. In its final report to the ICTY Prosecutor in 2000, the Committee Established to Review the NATO Bombing Campaign Against the Federal Republic of Yugoslavia stated that "civilians present within or near military objectives must... be taken into account in the proportionality equation".¹⁵⁵ The Committee suggested that:

The determination of relative values [of military advantage and injury to non-combatants] must be that of the "reasonable military commander". Although there will be room for argument in close cases, there will be many cases where reasonable military commanders will agree that the injury to non-combatants or the damage to civilian objects was clearly disproportionate to the military advantage gained.¹⁵⁶

According to the Committee, "attacks which cause disproportionate civilian casualties or civilian property damage may constitute the *actus reus* for the offence of unlawful attack [as a violation of the laws and customs of war]. The *mens rea* for the offence is intention or recklessness, not simple negligence."¹⁵⁷

144. In a report on Colombia in 1999, the IACiHR noted that the legitimacy of a military target did not provide unlimited license to attack it. According to the report, the rule of proportionality prohibited "an attack which may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated".¹⁵⁸ The Commission added that the principle of proportionality required that foreseeable injury to civilians and damage to civilian objects should not be disproportionate or excessive to the anticipated concrete and direct military advantage.¹⁵⁹

¹⁵³ ICTY, *Martić case*, Review of the Indictment, 8 March 1996, p. 7, § 18.

¹⁵⁴ ICTY, *Kupreškić case*, Judgement, 14 January 2000, § 524.

¹⁵⁵ ICTY, Final Report to the Prosecutor by the Committee Established to Review the NATO Bombing Campaign Against the Federal Republic of Yugoslavia, The Hague, 14 June 2000, § 51.

¹⁵⁶ ICTY, Final Report to the Prosecutor by the Committee Established to Review the NATO Bombing Campaign Against the Federal Republic of Yugoslavia, The Hague, 14 June 2000, § 50.

¹⁵⁷ ICTY, Final Report to the Prosecutor by the Committee Established to Review the NATO Bombing Campaign Against the Federal Republic of Yugoslavia, The Hague, 14 June 2000, § 28.

¹⁵⁸ IACiHR, Third report on the human rights situation in Colombia, Doc. OEA/Ser.L/V/II.102 Doc. 9 rev.1, 26 February 1999, § 77.

¹⁵⁹ IACiHR, Third report on the human rights situation in Colombia, Doc. OEA/Ser.L/V/II.102 Doc. 9 rev.1, 26 February 1999, § 79.

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

145. To fulfil its task of disseminating IHL, the ICRC has delegates around the world teaching armed and security forces that:

The rule of proportionality shall be respected. An action is proportionate when it does not cause incidental civilian casualties and damage which is excessive in relation to the value of the expected result of the whole military operation. The rule of proportionality cannot be used to justify unlimited destruction or attacks on civilian persons and objects as such.¹⁶⁰

ICRC delegates teach, furthermore, that an “indiscriminate attack affecting the civilian population or civilian objects in the knowledge that such attack will cause excessive civilian casualties and damage” constitutes a grave breach of the law of war.¹⁶¹

146. In an appeal launched in 1973, the ICRC urged all the belligerents in the conflict in the Middle East (Egypt, Iraq, Israel and Syria) to observe forthwith, in particular, the provisions of, *inter alia*, Article 46(3)(b) of draft AP I which stated that “it is forbidden to launch attacks which may be expected to entail incidental losses among the civilian population and cause the destruction of civilian objects to an extent disproportionate to the direct and substantial military advantage anticipated”. All governments concerned replied favourably.¹⁶²

147. At the CDDH, the ICRC stated that Article 51(5)(b) did not contain an exception to the prohibition of attacks against civilians, “but, as the word ‘incidental’ showed, was intended to cover a different situation”.¹⁶³ It further stated that:

Since the First World War there had been many vain attempts at codifying the immunity of the civilian population. The 1922/23 project would have required combatants to abstain from bombing when it might affect the civilian population, but a good text was useless if it went unsigned, unratified and unimplemented. The Red Cross was conscious of the fact that the rule of proportionality contained a subjective element, and was thus liable to abuse. The aim was, however, to avoid or in any case restrict the incidental effects of attacks directed against military objectives.¹⁶⁴

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

¹⁶⁰ Frédéric de Mulinen, *Handbook on the Law of War for Armed Forces*, ICRC, Geneva, 1987, § 389.

¹⁶¹ Frédéric de Mulinen, *Handbook on the Law of War for Armed Forces*, ICRC, Geneva, 1987, § 778(c).

¹⁶² ICRC, The International Committee's Action in the Middle East, *IRRC*, No. 152, 1973, pp. 584–585.

¹⁶³ ICRC, Statement at the CDDH, *Official Records*, Vol. XIV, CDDH/III/SR.5, 14 March 1974, p. 37, § 11.

¹⁶⁴ ICRC, Statement at the CDDH, *Official Records*, Vol. XIV, CDDH/III/SR.5, 14 March 1974, p. 37, § 12.

of the Gulf War, the ICRC stated that “the following general rules are recognized as binding on any party to an armed conflict: . . . attacks that would cause incidental loss of life or damage which would be excessive in relation to the direct military advantage anticipated are prohibited”.¹⁶⁵

149. In a report on a mission in 1991, the ICRC described attacks launched in a district as disproportionate, the targets being mostly public buildings where numerous civilians could have been located.¹⁶⁶

150. In a communication to the press in 1993, the ICRC enjoined the parties to the conflict in Somalia “not to launch military operations that may cause incidental civilian casualties or damage to civilian objects disproportionate to the direct military advantage anticipated”.¹⁶⁷

151. In 1994, in a Memorandum on Respect for International Humanitarian Law in Angola, the ICRC stated that “all attacks . . . which may be expected to cause incidental loss of civilian life, injury to civilians or damage to civilian objects which would be excessive in relation to the concrete and direct military advantage anticipated are prohibited”.¹⁶⁸

152. In 1994, in a Memorandum on Compliance with International Humanitarian Law by the Forces Participating in Opération Turquoise in the Great Lakes region, the ICRC stated that “attacks . . . which may be expected to cause incidental losses of human life among the civilian population or damage to civilian objects which would be excessive in relation to the concrete and direct military advantage anticipated are prohibited”.¹⁶⁹

153. In a working paper on war crimes submitted in 1997 to the Preparatory Committee for the Establishment of an International Criminal Court, the ICRC proposed that the following war crime be subject to the jurisdiction of the Court:

launching an indiscriminate attack affecting the civilian population or civilian objects in the knowledge that such attack will cause excessive loss of life, injury to civilians or damage to civilian objects, which is excessive in relation to the concrete and direct military advantage anticipated.¹⁷⁰

VI. *Other Practice*

154. According to Oppenheim, civilians “do not enjoy absolute immunity”. He adds that:

¹⁶⁵ ICRC, Memorandum on the Applicability of International Humanitarian Law, Geneva, 14 December 1990, § II, *IRRC*, No. 280, 1991, pp. 24–25.

¹⁶⁶ ICRC archive document.

¹⁶⁷ ICRC, Communication to the Press No. 93/17, Somalia: ICRC appeals for compliance with international humanitarian law, 17 June 1993.

¹⁶⁸ ICRC, Memorandum on Respect for International Humanitarian Law in Angola, 8 June 1994, § II, *IRRC*, No. 320, 1997, p. 504.

¹⁶⁹ ICRC, Memorandum on Compliance with International Humanitarian Law by the Forces Participating in Opération Turquoise, 23 June 1994, § II, reprinted in Marco Sassòli and Antoine A. Bouvier, *How Does Law Protect in War?*, ICRC, Geneva, 1999, p. 1308.

¹⁷⁰ ICRC, Working paper on war crimes submitted to the Preparatory Committee for the Establishment of an International Criminal Court, New York, 14 February 1997, § 1(b)(ii).

Their presence will not render military objectives immune from attack for the mere reason that it is impossible to bombard them without causing injury to the non-combatants. But . . . it is of the essence that a just balance be maintained between the military advantage and the injury to non-combatants. The restrictions imposed by customary International Law upon the sinking of merchant-vessels are one of the many examples of the principle that noxious, though otherwise lawful, action must be desisted from when its object cannot be obtained without causing disproportionate injury to legally recognised rights.¹⁷¹

155. In their commentary on the 1977 Additional Protocols, Bothe, Partsch and Solf state that:

The same argument [that the prohibition of indiscriminate is inferentially included in Article 13 AP II within the prohibition against making the civilian population the object of attack and that the deletion of this prohibition may be said to be part of the simplification of the text] cannot be made with respect to attacks which may be expected to cause disproportionate civilian losses; Committee III [of the CDDH] had rejected that provision before the simplification process had been manifested. Nevertheless, . . . the principle of proportionality is inherent in the principle of humanity which was explicitly made applicable to Protocol II under the fourth clause of the Preamble. Thus, the principle of proportionality cannot be ignored in applying Protocol II.¹⁷²

156. In 1986, in a report on the use of landmines in the conflicts in El Salvador and Nicaragua, Americas Watch stated that:

The principle of humanity, which both complements and inherently limits the doctrine of military necessity, is defined in the U.S. Air Force's *Pamphlet on the Conduct of Armed Conflict and Air Operations* as resulting "...in a specific prohibition against unnecessary suffering and a requirement of proportionality..." "...These customary principles of the laws of war constitute legal obligation[s] for the warring parties to the internal armed conflicts in El Salvador and Nicaragua."¹⁷³

157. In 1989, in a report on violations of the laws of war in Angola, Africa Watch stated that "another fundamental principle of customary humanitarian law is the principle of humanity, which both complements and inherently limits the doctrine of military necessity". The report cited the US Air Force Pamphlet with approval where the latter provides that "this principle of humanity results in a specific prohibition of unnecessary suffering and a requirement of proportionality".¹⁷⁴

¹⁷¹ Lassa Oppenheim, *International Law. A Treatise*, Vol. II, Disputes, War and Neutrality, Sixth edition, revised, Hersch Lauterpacht (ed.), Longmans, Green and Co., London/New York/Toronto, 1944, p. 415, § 214ea.

¹⁷² Michael Bothe, Karl Joseph Partsch, Waldemar A. Solf (eds.), *New Rules for Victims of Armed Conflicts*, Martinus Nijhoff, The Hague, 1982, pp. 677–678.

¹⁷³ Americas Watch, *Land Mines in El Salvador and Nicaragua: The Civilian Victims*, New York, December 1986, pp. 77–78.

¹⁷⁴ Africa Watch, *Angola: Violations of the Laws of War by Both Sides*, New York, April 1989, p. 127, citing US, *Air Force Pamphlet* (1976), § 1-3(a).

158. The Declaration of Minimum Humanitarian Standards, adopted by an expert meeting convened by the Institute for Human Rights of Åbo Akademi University in Turku/Åbo, Finland in 1990 states that “whenever the use of force is unavoidable, it shall be in proportion to the seriousness of the offence or the objective to be achieved”.¹⁷⁵

159. In 1994, in the context of the conflict in Yemen, Human Rights Watch urged the government of Yemen:

to play closest attention to the requirements of the rules of war, in particular . . . to the rule of proportionality. Under that rule, even attacks on legitimate military targets such as enemy forces or tanks may be prohibited if such attacks would cause loss of civilian life, injury to civilians, or damage to civilian objects that would be excessive in relation to the concrete and direct military advantage anticipated . . . We note that the rules of war apply equally to government and rebel troops.¹⁷⁶

160. In a report on the NATO bombings in the FRY issued in 2000, Amnesty International stated that:

In other words, NATO deliberately attacked a civilian object [the Serbian state radio and television headquarters], killing 16 civilians, for the purpose of disrupting Serbian television broadcasts in the middle of the night for approximately three hours. It is hard to see how this can be consistent with the rule of proportionality.¹⁷⁷

Determination of the anticipated military advantage

I. Treaties and Other Instruments

Treaties

161. Upon ratification of AP I, Australia and New Zealand stated that references to the “military advantage” were intended to mean “the advantage anticipated from the attack considered as a whole and not only from isolated or particular parts of that attack” and maintained that the term “military advantage” involved a number of considerations, including the security of the attacking forces. They also stated that the expression “concrete and direct military advantage anticipated” meant “a *bona fide* expectation that the attack will make a relevant and proportional contribution to the objective of the military attack involved”.¹⁷⁸

162. Upon ratification of AP I, Belgium, Canada, France, Germany, Italy, Netherlands, Spain and UK stated that the term “military advantage” as used

¹⁷⁵ Declaration of Minimum Humanitarian Standards, adopted by an expert meeting convened by the Institute for Human Rights, Åbo Akademi University, Turku/Åbo, 30 November–2 December 1990, Article 5(2), *IRRC*, No. 282, 1991, p. 332.

¹⁷⁶ Human Rights Watch, Letter to the Government of Yemen, New York, 19 May 1994.

¹⁷⁷ Amnesty International, *NATO/Federal Republic of Yugoslavia: “Collateral Damage” or Unlawful Killings? Violations of the Laws of War by NATO during Operation Allied Force*, AI Index EUR 70/18/00, London, June 2000, p. 45.

¹⁷⁸ Australia, Declarations made upon ratification of AP I, 21 June 1991, § 4; New Zealand, Declarations made upon ratification of AP I, 8 February 1988, § 3.

in the proportionality test of Articles 51 and 57 AP I was understood to refer to the advantage anticipated from the attack considered as a whole and not only from isolated or particular parts of the attack.¹⁷⁹

163. Article 8(2)(b)(iv) of the 1998 ICC Statute provides that incidental loss of civilian life or injury to civilians must not be clearly excessive “in relation to the concrete and direct *overall* military advantage anticipated”. (emphasis added)

164. Upon signature of the 1998 ICC Statute, Egypt declared that:

The term “the concrete and direct overall military advantage anticipated” used in article 8, paragraph 2 (b) (iv), must be interpreted in the light of the relevant provisions of [AP I]. The term must also be interpreted as referring to the advantage anticipated by the perpetrator at the time when the crime was committed. No justification may be adduced for the nature of any crime which may cause incidental damage in violation of the law applicable in armed conflicts. The overall military advantage must not be used as a basis on which to justify the ultimate goal of the war or any other strategic goals. The advantage anticipated must be proportionate to the damage inflicted.¹⁸⁰

165. Upon ratification of the 1998 ICC Statute, France declared that “the term ‘military advantage’ in article 8, paragraph 2 (b) (iv), refers to the advantage anticipated from the attack as a whole and not from isolated or specific elements thereof”.¹⁸¹

Other Instruments

166. An explanatory footnote in the 2000 ICC Elements of Crimes (footnote 36) states that:

The expression “concrete and direct overall military advantage” refers to a military advantage that is foreseeable by the perpetrator at the relevant time. Such advantage may or may not be temporally or geographically related to the object of the attack. The fact that this crime admits the possibility of lawful incidental injury and collateral damage does not in any way justify any violation of the law applicable in armed conflict. It does not address justifications for war or other rules related to *jus ad bellum*. It reflects the proportionality requirement inherent in determining the legality of any military activity undertaken in the context of an armed conflict.

¹⁷⁹ Belgium, Interpretative declarations made upon ratification of AP I, 20 May 1986, § 5; Canada, Reservations and statements of understanding made upon ratification of AP I, 20 November 1990, § 10; France, Reservations and declarations made upon ratification of AP I, 11 April 2001, § 10; Germany, Declarations made upon ratification of AP I, 14 February 1992, § 5; Italy, Declarations made upon ratification, 27 February 1986, § 6; Netherlands, Declarations made upon ratification of AP I, 26 June 1987, § 5; Spain, Interpretative declarations made upon ratification of AP I, 21 April 1989, § 6; UK, Reservations and declarations made upon ratification of AP I, 28 January 1998, § i; see also UK, Declarations made upon signature of API, 12 December 1977, § e and Declarations made upon ratification of Amended Protocol II to the CCW, 13 February 1995.

¹⁸⁰ Egypt, Declarations made upon signature of the 1998 ICC Statute, 26 December 2000, § 4(c).

¹⁸¹ France, Interpretative declarations made upon ratification of the 1998 ICC Statute, 9 June 2000, § 5.

II. National Practice

Military Manuals

167. Australia's Defence Force Manual refers to the declaration made by Australia upon ratification of API to the effect that references to military advantage in Articles 51(5)(b) and 57 AP I mean "the advantage anticipated from the attack as a whole and not only from isolated or particular parts of the attack" and that "military advantage involves a number of considerations, including the security of the attacking forces".¹⁸²

168. Belgium's Law of War Manual states that, when deciding whether or not to launch an attack, "the commander must consider the advantage of the attack as a whole (and not the advantages of specific or separate parts of the attack)".¹⁸³

169. Canada's LOAC Manual states that:

The military advantage at the time of the attack is that advantage anticipated from the military campaign or operation of which the attack is part, considered as a whole, and not only from isolated or particular parts of that campaign or operation. A concrete and direct military advantage exists if the commander has an honest and reasonable expectation that the attack will make a relevant contribution to the success of the overall operation. Military advantage may include a variety of considerations including the security of the attacking forces.¹⁸⁴

170. Germany's Military Manual states that "the term 'military advantage' refers to the advantage which can be expected of an attack as a whole and not only of isolated or specific parts of the attack".¹⁸⁵

171. New Zealand's Military Manual states that:

In deciding whether the principle of proportionality is being respected, the standard of measurement is the contribution to the military purpose of an attack or operation considered as a whole, as compared with other consequences of the action, such as the effect upon civilians or civilian objects.¹⁸⁶

172. According to Nigeria's Military Manual, the principle of proportionality requires that "incidental civilian casualties and damage which is excessive in relation to the value of the expected result of the *whole* operation" must be avoided.¹⁸⁷ (emphasis added)

173. Spain's LOAC Manual states that "an attack is prohibited if . . . the damage to the civilian population and/or to civilian objects which the attack will cause is excessive in relation to the military advantage anticipated from the attack *as a whole*".¹⁸⁸ (emphasis added)

174. The US Naval Handbook states that the term military advantage "refers to the advantage anticipated from the military operation of which the attack

¹⁸² Australia, *Defence Force Manual* (1994), §§ 510 and 511.

¹⁸³ Belgium, *Law of War Manual* (1983), p. 29.

¹⁸⁴ Canada, *LOAC Manual* (1999), p. 4-3, §§ 20 and 21, see also p. 2-3, § 16.

¹⁸⁵ Germany, *Military Manual* (1992), § 444.

¹⁸⁶ New Zealand, *Military Manual* (1992), § 207.

¹⁸⁷ Nigeria, *Military Manual* (1994), p. 42, § 11.

¹⁸⁸ Spain, *LOAC Manual* (1996), Vol. I, § 2.5.a, see also § 4.3.

is a part, taken as a whole, and not from isolated or particular parts of that operation".¹⁸⁹

National Legislation

175. No practice was found.

National Case-law

176. No practice was found.

Other National Practice

177. In an explanatory memorandum submitted to the Belgian parliament in 1985 in the context of the ratification procedure of the Additional Protocols, the Belgian government stated that "the military advantage must be assessed in the light of the attack considered as a whole".¹⁹⁰

178. At the CDDH, Canada stated that in its view the expression "military advantage anticipated" was intended to refer to "the advantage anticipated from the attack considered as a whole, and not only from isolated or particular parts of that attack".¹⁹¹

179. At the CDDH, the FRG stated that in its view the expression "military advantage anticipated" was intended to refer to "the advantage anticipated from the attack considered as a whole and not only from isolated or particular parts of that attack".¹⁹²

180. At the CDDH, Italy stated that "as to the evaluation of the military advantage expected from an attack . . . that expected advantage should be seen in relation to the attack as a whole, and not in relation to each action regarded separately".¹⁹³

181. At the CDDH, the Netherlands stated that in its view the expression "military advantage anticipated" was intended to refer to "the advantage anticipated from the attack considered as a whole and not only from isolated or particular phases of that attack".¹⁹⁴

182. At the CDDH, the UK stated that in its view the expression "military advantage anticipated" was intended to refer to "the advantage anticipated from the attack considered as a whole and not only from isolated or particular parts of the attack".¹⁹⁵

¹⁸⁹ US, *Naval Handbook* (1995), § 8.1.2.1.

¹⁹⁰ Belgium, House of Representatives, Explanatory memorandum on a draft bill for the approval of the Additional Protocols, 1984–1985 Session, Doc. 1096-1, 9 January 1985, p. 11.

¹⁹¹ Canada, Statement at the CDDH, *Official Records*, Vol. VI, CDDH/SR.41, 26 May 1977, p. 179.

¹⁹² FRG, Statement at the CDDH, *Official Records*, Vol. VI, CDDH/SR.41, 26 May 1977, p. 188; Statement at the CDDH, *Official Records*, Vol. VI, CDDH/SR.42, 27 May 1977, p. 226.

¹⁹³ Italy, Statement at the CDDH, *Official Records*, Vol. VI, CDDH/SR.42, 27 May 1977, p. 231.

¹⁹⁴ Netherlands, Statement at the CDDH, *Official Records*, Vol. VI, CDDH/SR.41, 26 May 1977, p. 168, § 141 and p. 195.

¹⁹⁵ UK, Statement at the CDDH, *Official Records*, Vol. VI, CDDH/SR.41, 26 May 1977, p. 164, § 120.

183. At the CDDH, the US stated that in its view the expression “military advantage anticipated” was intended to refer to “the advantage anticipated from the attack considered as a whole and not only from isolated or particular parts of the attack”.¹⁹⁶

184. In 1991, in reaction to an ICRC memorandum on the applicability of IHL in the Gulf region, the US Department of the Army pointed out that:

The concept of “incidental loss of life excessive in relation to the military advantage anticipated” generally is measured against an overall campaign. While it is difficult to weigh the possibility of collateral civilian casualties on a target-by-target basis, minimization of collateral civilian casualties is a continuing responsibility at all levels of the targeting process.¹⁹⁷

185. In 1992, in its final report to Congress on the conduct of the Gulf War, the US Department of Defense stated that the balancing of collateral damage against military gain “may be done on a target-by-target basis, as frequently was the case during Operation Desert Storm, but also may be weighed in overall terms against campaign objectives”.¹⁹⁸

186. The Report on US Practice states that:

United States practice recognizes the principle of proportionality as part of the customary law of non-nuclear war. In applying this principle, it is necessary to consider military advantage not only on an immediate or target-by-target basis, but also in light of the military objectives of an entire campaign or operation.¹⁹⁹

III. Practice of International Organisations and Conferences

187. No practice was found.

IV. Practice of International Judicial and Quasi-judicial Bodies

188. No practice was found.

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

189. The ICRC Commentary on the Additional Protocols considers that “the expression ‘concrete and direct’ was intended to show that the advantage concerned should be substantial and relatively close, and that advantages which are hardly perceptible and those which would only appear in the long term should be disregarded”.²⁰⁰

¹⁹⁶ US, Statement at the CDDH, *Official Records*, Vol. VI, CDDH/SR.42, 27 May 1977, p. 241.

¹⁹⁷ US, Letter from the Department of the Army to the legal adviser of the US Army forces deployed in the Gulf region, 11 January 1991, § 8(F).

¹⁹⁸ US, Department of Defense, Final Report to Congress on the Conduct of the Persian Gulf War, Appendix O, The Role of the Law of War, 10 April 1992, *ILM*, Vol. 31, 1992, p. 622.

¹⁹⁹ Report on US Practice, 1997, Chapter 1.5.

²⁰⁰ Yves Sandoz *et al.* (eds.), *Commentary on the Additional Protocols*, ICRC, Geneva, 1987, § 2209.

190. In 1999, in a paper relating to the crimes listed in Article 8(2)(b) of the 1998 ICC Statute, and submitted to the Working Group on Elements of Crimes of the Preparatory Commission for the ICC, the ICRC reiterated its position that:

The addition of the words “clearly” and “overall” in the definition of collateral damage [in Article 8(2)(b)(iv) of the 1998 ICC Statute] is not reflected in any existing legal source. Therefore, the addition must be understood as not changing existing law.²⁰¹

191. At the Rome Conference on the Establishment of an International Criminal Court in 1998, the ICRC stated that:

The addition of the words “clearly” and “overall” in [the] provision relating to proportionality in attacks must be understood as not changing existing law. The word “overall” could give the impression that an extra unspecified element has been added to a formulation that was carefully negotiated during the 1974–1977 Diplomatic Conference that led to [AP I] and this formulation is generally recognized as reflecting customary law. The intention of this additional word appears to be to indicate that a particular target can have an important military advantage that can be felt over a lengthy period of time and affect military action in areas other than the vicinity of the target itself. As this meaning is included in the existing wording of AP I, the inclusion of the word “overall” is redundant.²⁰²

VI. Other Practice

192. No practice was found.

Information required for judging proportionality in attack

I. Treaties and Other Instruments

Treaties

193. Upon accession to AP I, Algeria stated that “to judge any decision, the circumstances, the means and the information available at the time the decision was made are determinant factors and elements in assessing the nature of the said decision”.²⁰³

194. Upon ratification of AP I, Australia stated that:

In relation to Articles 51 to 58 inclusive it is the understanding of Australia that military commanders and others responsible for planning, deciding upon, or executing attacks, necessarily have to reach their decisions on the basis of their assessment of the information from all sources, which is available to them at the relevant time.²⁰⁴

²⁰¹ ICRC, Paper relating to the crimes listed in article 8, paragraph 2 (b) (i), (ii), (iii), (iv), (v), (vi), (ix), (xi) and (xii) of the Statute of the ICC, annexed to UN Doc. PCNICC/1999/WGEC/INF.2/Add.1, 30 July 1999, p. 29.

²⁰² ICRC, Statement at the UN Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, 8 July 1998, UN Doc. A/CONF.183/INF/10, 13 July 1998, p. 1, § 2.

²⁰³ Algeria, Interpretative declarations made upon accession to AP I, 16 August 1989, § 2.

²⁰⁴ Australia, Declarations made upon ratification of AP I, 21 June 1991, § 3.

195. Upon ratification of AP I, Austria stated that “Article 57, paragraph 2, of Protocol I will be applied on the understanding that, with respect to any decision taken by a military commander, the information actually available at the time of the decision is determinative”.²⁰⁵ It further stated that:

For the purposes of judging any decision taken by a military commander, Articles 85 and 86 of Protocol I will be applied on the understanding that military imperatives, the reasonable possibility of recognizing them and the information actually available at the time that decision was taken, are determinative.²⁰⁶

196. Upon ratification of AP I, Belgium stated that:

With respect to Part IV, Section I, of the Protocol, the Belgian Government wishes to emphasize that, whenever a military commander is required to take a decision affecting the protection of civilians or civilian objects or objects assimilated therewith, the only information on which that decision can possibly be taken is such relevant information as is then available and that it has been feasible from him to obtain for that purpose.²⁰⁷

197. Upon ratification of AP I, Canada stated that:

It is the understanding of the Government of Canada that, in relation to Articles 48, 51 to 60 inclusive, 62 and 67, military commanders and others responsible for planning, deciding upon or executing attacks have to reach decisions on the basis of their assessment of the information reasonably available to them at the relevant time and that such decisions cannot be judged on the basis of information which has subsequently come to light.²⁰⁸

198. Upon ratification of AP I, Egypt stated that “military commanders planning or executing attacks make their decisions on the basis of their assessment of all kinds of information available to them at the time of the military operations”.²⁰⁹

199. Upon ratification of AP I, Germany stated that:

It is the understanding of the Federal Republic of Germany that in the application of the provisions of Part IV, Section I, of Additional Protocol I, to military commanders and others responsible for planning, deciding upon or executing attacks, the decision taken by the person responsible has to be judged on the basis of all information available to him at the relevant time, and not on the basis of hindsight.²¹⁰

200. Upon ratification of AP I, Ireland stated that:

In relation to Article 51 to 58 inclusive, it is the understanding of Ireland that military commanders and others responsible for planning, deciding upon, or executing

²⁰⁵ Austria, Reservations made upon ratification of AP I, 13 August 1982, § 1.

²⁰⁶ Austria, Reservations made upon ratification of AP I, 13 August 1982, § 4.

²⁰⁷ Belgium, Interpretative declarations made upon ratification of AP I, 20 May 1986, § 3.

²⁰⁸ Canada, Reservations and statements of understanding made upon ratification of AP I, 20 November 1990, § 7.

²⁰⁹ Egypt, Declaration made upon ratification of AP I, 9 October 1992.

²¹⁰ Germany, Declarations made upon ratification of AP I, 14 February 1991, § 4.

attacks necessarily have to reach decisions on the basis of their assessment of the information from all sources which is reasonably available to them at the relevant time.²¹¹

201. Upon ratification of AP I, Italy declared that:

In relation to Articles 51 to 58 inclusive, the Italian Government understands that military commanders and others responsible for planning, deciding upon or executing attacks necessarily have to reach decisions on the basis of their assessment of the information from all sources which is available to them at the relevant time.²¹²

202. Upon ratification of API, the Netherlands declared with regard to Articles 51 to 58 AP I inclusive that:

It is the understanding of the Government of the Kingdom of the Netherlands that military commanders and others responsible for planning, deciding upon or executing attacks necessarily have to reach decisions on the basis of their assessment of the information from all sources which is available to them at the relevant time.²¹³

203. Upon ratification of AP I, New Zealand stated that:

In relation to Article 51 to 58 inclusive, it the understanding of the Government of New Zealand that military commanders and others responsible for planning, deciding upon, or executing attacks necessarily have to reach decisions on the basis of their assessment of the information from all sources which is reasonably available to them at the relevant time.²¹⁴

204. Upon ratification of AP I, Spain declared with regard to Articles 51 to 58 AP I inclusive that:

It is the understanding [of the Spanish government] that the decision made by military commanders, or others with the legal capacity to plan or execute attacks which may have repercussions on civilians or civilian objects or similar objects, shall not necessarily be based on anything more than the relevant information available at the relevant time and which it has been possible to obtain to that effect.²¹⁵

205. Upon signing AP I, the UK stated that "military commanders and others responsible for planning, deciding upon or executing attacks necessarily have to reach decisions on the basis of their assessment of the information from all sources which is available to them at the relevant time".²¹⁶ It repeated this statement upon ratification of AP I.²¹⁷

Other Instruments

206. No practice was found.

²¹¹ Ireland, Declarations and reservations made upon ratification of API, 19 May 1999, § 9.

²¹² Italy, Declarations made upon ratification of AP I, 27 February 1986, § 5.

²¹³ Netherlands, Declarations made upon ratification of API, 26 June 1987, § 6.

²¹⁴ New Zealand, Declarations made upon ratification of AP I, 8 February 1988, § 2.

²¹⁵ Spain, Interpretative declarations made upon ratification of AP I, 21 April 1989, § 5.

²¹⁶ UK, Declarations made upon signature of AP I, 12 December 1977, § d.

²¹⁷ UK, Reservations and declarations made upon ratification of AP I, 28 January 1998, § c.

II. National Practice

Military Manuals

207. Australia's Defence Force Manual refers to the declaration made by Australia upon ratification of AP I to the effect that "ADF commanders will, by necessity, have to reach decisions on the basis of their assessment of the information available to them at the relevant time".²¹⁸

208. Belgium's Law of War Manual states that:

It will not always be easy for a commander to evaluate this situation [whether an attack will be disproportionate] with precision. On the one hand, he must take into account the elements *which are available to him*, related to the military necessity necessary to justify an attack, and on the other hand, he must take into account the elements *which are available to him*, related to the possible loss of human life and damage to civilian objects.²¹⁹ [emphasis in original]

209. Canada's LOAC Manual notes that decisions must be based on an honest and reasonable expectation made by the responsible commanders "that the attack will make a relevant contribution to the success of the overall operation", based on the information reasonably available to them at the relevant time, and taking fully into account the urgent and difficult circumstances under which such decisions must usually be made.²²⁰

210. Ecuador's Naval Manual states that "the commander must determine whether incidental injuries and collateral damage would be excessive, on the basis of an objective and reasonable estimate of the available information".²²¹

211. The US Naval Handbook states that "the commander must determine whether incidental injuries and collateral damage would be excessive, on the basis of an honest and reasonable estimate of the facts available to him".²²²

National Legislation

212. No practice was found.

National Case-law

213. No practice was found.

Other National Practice

214. In an explanatory memorandum submitted to the Belgian parliament in 1985 in the context of the ratification procedure of the Additional Protocols, the Belgian government stated that "the military advantage must be assessed . . . in the light of what a military commander can foresee on the basis of the available and relevant information which is available at the time of the assessment".²²³

²¹⁸ Australia, *Defence Force Manual* (1994), § 511.

²¹⁹ Belgium, *Law of War Manual* (1983), p. 29. ²²⁰ Canada, *LOAC Manual* (1999), pp. 4-2/4-3.

²²¹ Ecuador, *Naval Manual* (1989), § 8.1.2.1. ²²² US, *Naval Handbook* (1995), § 8.1.2.1.

²²³ Belgium, House of Representatives, Explanatory memorandum on a draft bill for the approval of the Additional Protocols, 1984-1985 Session, Doc. 1096-1, 9 January 1985, p. 11.

215. At the CDDH, Canada stated that “commanders and others responsible for planning, deciding upon or executing necessary attacks, have to reach decisions on the basis of their assessment of whatever information from all sources may be available to them at the relevant time”.²²⁴

216. At the CDDH, the FRG stated that “commanders and others responsible for planning, deciding upon or executing an attack necessarily have to reach decisions on the basis of their assessment of the information from all sources which is available to them at the relevant time”.²²⁵

217. At the CDDH, the Netherlands stated that “commanders and others responsible for planning, deciding upon or executing attacks necessarily had to reach decisions on the basis of their assessment of the information from all sources which was available to them at the relevant time”.²²⁶

218. At the CDDH, the UK stated that “military commanders and others responsible for planning, initiating or executing attacks necessarily had to reach decisions on the basis of their assessment of the information from all sources which was available to them at the relevant time”.²²⁷

219. At the CDDH, the US stated that “commanders and others responsible for planning, deciding upon or executing attacks necessarily have to reach decisions on the basis of their assessment of the information from all sources which is available to them at the relevant time”.²²⁸

III. Practice of International Organisations and Conferences

220. No practice was found.

IV. Practice of International Judicial and Quasi-judicial Bodies

221. No practice was found.

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

222. No practice was found.

VI. Other Practice

223. No practice was found.

²²⁴ Canada, Statement at the CDDH, *Official Records*, Vol. VI, CDDH/SR.41, 26 May 1977, p. 178.

²²⁵ FRG, Statement at the CDDH, *Official Records*, Vol. VI, CDDH/SR.42, 27 May 1977, Vol. VI, p. 226.

²²⁶ Netherlands, Statement at the CDDH, *Official Records*, Vol. VI, CDDH/SR.42, 27 May 1977, p. 205, § 1.

²²⁷ UK, Statement at the CDDH, *Official Records*, Vol. VI, CDDH/SR.41, 26 May 1977, p. 164, § 121.

²²⁸ US, Statement at the CDDH, *Official Records*, Vol. VI, CDDH/SR.42, 27 May 1977, p. 241.

PRECAUTIONS IN ATTACK

A. General (practice relating to Rule 15)	§§ 1–206
Constant care to spare the civilian population, civilians and civilian objects	§§ 1–62
Avoidance or minimisation of incidental damage	§§ 63–146
Feasibility of precautions in attack	§§ 147–181
Information required for deciding upon precautions in attack	§§ 182–206
B. Target Verification (practice relating to Rule 16)	§§ 207–264
C. Choice of Means and Methods of Warfare (practice relating to Rule 17)	§§ 265–324
D. Assessment of the Effects of Attacks (practice relating to Rule 18)	§§ 325–366
E. Control during the Execution of Attacks (practice relating to Rule 19)	§§ 367–419
F. Advance Warning (practice relating to Rule 20)	§§ 420–501
G. Target Selection (practice relating to Rule 21)	§§ 502–542

A. General

Constant care to spare the civilian population, civilians and civilian objects

Note: For practice concerning measures to spare cultural and religious objects, see Chapter 12.

I. Treaties and Other Instruments

Treaties

1. Article 57(1) AP I states that “in the conduct of military operations, constant care shall be taken to spare the civilian population, civilians and civilian objects”. Article 57 AP I was adopted by 90 votes in favour, none against and 4 abstentions.¹

¹ CDDH, *Official Records*, Vol. VI, CDDH/SR.42, 27 May 1977, p. 211.

2. Article 13(1) AP II provides that “the civilian population and individual civilians shall enjoy general protection against the dangers arising from military operations”. Article 13 AP II was adopted by consensus.²

3. Article 24(2) of draft AP II submitted by the ICRC to the CDDH provided that “constant care shall be taken, when conducting military operations, to spare the civilian population, civilians and civilian objects. This rule shall, in particular, apply to the planning, deciding or launching of an attack.”³ This provision was adopted in Committee III of the CDDH by 50 votes in favour, none against and 11 abstentions.⁴ Eventually, however, it was deleted in the plenary, because it failed to obtain the necessary two-thirds majority (36 in favour, 19 against and 36 abstentions).⁵

Other Instruments

4. Paragraph 6 of the 1991 Memorandum of Understanding on the Application of IHL between Croatia and the SFRY requires that hostilities be conducted in accordance with Article 57 AP I.

5. Paragraph 2.5 of the 1992 Agreement on the Application of IHL between the Parties to the Conflict in Bosnia and Herzegovina requires that hostilities be conducted in accordance with Article 57 AP I.

II. National Practice

Military Manuals

6. Australia’s Defence Force Manual states that “in the conduct of military operations, constant care must be taken to spare the civilian population and civilian objects to the maximum extent possible”.⁶

7. Belgium’s Law of War Manual states that “when preparing attacks, care shall be taken to spare the civilian population and civilian objects”.⁷

8. Benin’s Military Manual states that “constant care shall be taken to spare the civilian population and civilian objects”.⁸

9. Cameroon’s Instructors’ Manual considers that “a commander must take constant care to spare civilians and civilian objects”.⁹

10. Canada’s LOAC Manual states that “civilians are entitled to protection from the dangers arising from military operations. In conducting operations care should always be taken to spare civilians and civilian objects.”¹⁰

11. Croatia’s Commanders’ Guide states that “constant care shall be taken to spare the civilian population, civilian persons and civilian objects”.¹¹

² CDDH, *Official Records*, Vol. VII, CDDH/SR.52, 6 June 1977, p. 134.

³ CDDH, *Official Records*, Vol. I, Part Three, Draft Additional Protocols, June 1973, p. 40.

⁴ CDDH, *Official Records*, Vol. XIV, CDDH/III/SR.37, 4 April 1975, p. 390, § 13.

⁵ CDDH, *Official Records*, Vol. VII, CDDH/SR.52, 6 June 1977, p. 135.

⁶ Australia, *Defence Force Manual* (1994), § 556.

⁷ Belgium, *Law of War Manual* (1983), p. 28.

⁸ Benin, *Military Manual* (1995), Fascicule III, p. 11.

⁹ Cameroon, *Instructors’ Manual* (1992), p. 95.

¹⁰ Canada, *LOAC Manual* (1999), p. 4-2, § 15.

¹¹ Croatia, *Commanders’ Guide* (1992), § 43.

12. Ecuador's Naval Manual states that "all reasonable precautions must be taken to ensure that only military objectives are targeted so that civilians and civilian objects are spared as much as possible from the ravages of war".¹²
13. France's LOAC Manual states that "in the conduct of military operations, constant care shall be taken to spare the civilian population, civilians and civilian objects".¹³
14. Germany's Military Manual states that "the civilian population as such as well as individual civilians . . . shall be spared as far as possible".¹⁴
15. Hungary's Military Manual requires that "all possible measures must be taken to spare civilian persons and objects [and] specifically protected persons and objects".¹⁵
16. Israel's Manual on the Laws of War states that there is an "obligation to refrain from harming civilians insofar as possible".¹⁶
17. Italy's LOAC Elementary Rules Manual states that "constant care shall be taken to spare the civilian population, civilian persons and civilian objects".¹⁷
18. Madagascar's Military Manual states that "constant care shall be taken to spare the civilian population as well as civilian objects".¹⁸
19. The Military Manual of the Netherlands states that "in the conduct of military operations, constant care shall be taken to spare the civilian population, civilians and civilian objects".¹⁹
20. The Military Handbook of the Netherlands states that "the civilian population which does not participate in hostilities must be spared".²⁰
21. New Zealand's Military Manual states that "in the conduct of military operations, constant care shall be taken to spare the civilian population, civilians and civilian objects".²¹
22. Nigeria's Military Manual lists as one of the basic principles in the conduct of operations, every commander's duty "to spare the civilian population, civilian persons and civilian objects". The manual adds that "when planning action that could endanger civilian persons and objects therefore, care and precaution must be emphasised and exercised in the conduct of the war".²²
23. Nigeria's Military Manual and Soldiers' Code of Conduct state that "civilian persons and objects must be spared".²³
24. Romania's Soldiers' Manual states that combatants must "spare civilians and their property".²⁴

¹² Ecuador, *Naval Manual* (1989), § 8.1.

¹³ France, *LOAC Manual* (2001), p. 98; see also *LOAC Teaching Note* (2000), p. 4.

¹⁴ Germany, *Military Manual* (1992), § 404. ¹⁵ Hungary, *Military Manual* (1992), p. 45.

¹⁶ Israel, *Manual on the Laws of War* (1998), p. 42.

¹⁷ Italy, *LOAC Elementary Rules Manual* (1991), § 43.

¹⁸ Madagascar, *Military Manual* (1994), Fiche No. 6-O, § 11.

¹⁹ Netherlands, *Military Manual* (1993), p. V-10.

²⁰ Netherlands, *Military Handbook* (1995), p. 7-43, § 6.

²¹ New Zealand, *Military Manual* (1992), § 518(1).

²² Nigeria, *Military Manual* (1994), p. 42, § 11.

²³ Nigeria, *Military Manual* (1994), p. 39, § 5(c); *Soldiers' Code of Conduct* (undated), § 3.

²⁴ Romania, *Soldiers' Manual* (1991), p. 4.

25. Spain's LOAC Manual states that "constant care shall be taken to spare the civilian population, civilian persons and civilian objects".²⁵
26. Sweden's IHL Manual states that the precautions in attack "have come about only to protect the civilian population, individual civilians and civilian property in connection with military operations, and particularly when planning, deciding upon and executing attacks".²⁶
27. Togo's Military Manual states that "constant care shall be taken to spare the civilian population and civilian objects".²⁷
28. The US Air Force Pamphlet states that "in conducting military operations, constant care must be taken to spare the civilian population, civilians, and civilian objects".²⁸
29. The US Naval Handbook states that "all reasonable precautions must be taken to ensure that only military objectives are targeted so that civilians and civilian objects are spared as much as possible from the ravages of war".²⁹

National Legislation

30. Ireland's Geneva Conventions Act as amended provides that any "minor breach" of AP I, including violations of Article 57(1) AP I, as well as any "contravention" of AP II, including violations of Article 13(1) AP II, are punishable offences.³⁰
31. Under Norway's Military Penal Code as amended, "anyone who contravenes or is accessory to the contravention of provisions relating to the protection of persons or property laid down in . . . the two additional protocols to [the Geneva] Conventions . . . is liable to imprisonment".³¹

National Case-law

32. No practice was found.

Other National Practice

33. The Report on the Practice of Algeria states that during the war of independence the ALN always tried to avoid hostilities in towns in order to spare needless casualties among the civilian population.³²
34. In 1992, the Presidency of the Republika Srpska of Bosnia and Herzegovina made an urgent appeal "to spare [the] civilian population from all attacks".³³

²⁵ Spain, *LOAC Manual* (1996), Vol. I, § 10.8.e.(1), see also § 2.3.b.(2).

²⁶ Sweden, *IHL Manual* (1991), Section 3.2.1.5, p. 68.

²⁷ Togo, *Military Manual* (1996), Fascicule III, p. 11.

²⁸ US, *Air Force Pamphlet* (1976), § 5-3(c)(1)(a). ²⁹ US, *Naval Handbook* (1995), § 8.1.

³⁰ Ireland, *Geneva Conventions Act as amended* (1962), Section 4(1) and (4).

³¹ Norway, *Military Penal Code as amended* (1902), § 108(b).

³² Report on the Practice of Algeria, 1997, Chapter 1.5, referring to *El Moudjahid*, Vol. 1, p. 440.

³³ Bosnia and Herzegovina, Republika Srpska, Appeal of the Presidency concerning the International Committee of the Red Cross Operations, Pale, 7 June 1992.

35. On the basis of an interview with a senior officer of the armed forces, the Report on the Practice of Indonesia states that the Indonesian armed forces normally observe the precautions listed in Article 57 AP I.³⁴

36. In 1971, during a debate in the Third Committee of the UN General Assembly concerning respect for human rights in armed conflicts, Liberia stated that it “agreed wholeheartedly with the principle that, in the conduct of military operations, every effort should be made to spare civilian populations . . . as affirmed in [principle 3] of General Assembly resolution 2675 (XXV)”.³⁵

37. According to the Report on the Practice of Malaysia, the obligation to take constant care to spare the civilian population and civilian objects in the conduct of military operations forms part of Malaysian practice.³⁶

38. According to the government of the Netherlands, commanders have to take all the precautionary measures required by Article 57 AP I when carrying out an attack.³⁷

39. In its consideration of the legality of the 1978 attack by the SADF on the SWAPO base/refugee camp at Kassinga in Angola, the South African Truth and Reconciliation Commission stated that “international humanitarian law stipulates that a distinction must at all times be made between persons taking part in hostilities and civilians, with the latter being spared as much as possible”.³⁸

40. The Report on the Practice of Syria asserts that Syria considers Article 57 AP I to be part of customary international law.³⁹

41. In 1938, during a debate in the House of Commons, the UK Prime Minister listed among rules of international law applicable to warfare on land, at sea and from the air the rule that “reasonable care must be taken in attacking these military objectives so that by carelessness a civilian population in the neighbourhood is not bombed”.⁴⁰

42. In 1972, the General Counsel of the US Department of Defense stated that the US regarded the principle contained in UN General Assembly Resolution 2444 (XXIII) of 1968 that “a distinction must be made at all times between persons taking part in the hostilities and members of the civilian population to

³⁴ Report on the Practice of Indonesia, 1997, Interview with a senior officer of the Indonesian armed forces, Chapter 1.6.

³⁵ Liberia, Statement before the Third Committee of the UN General Assembly, UN Doc. A/C.3/SR.1890, 1 December 1971, § 8.

³⁶ Report on the Practice of Malaysia, 1997, Answers to additional questions on Chapter 1.6.

³⁷ Netherlands, Lower House of Parliament, Memorandum in response to the report on the ratification of the Additional Protocols, 1985–1986 Session, Doc. 18 277 (R 1247), No. 6, 16 December 1985, p. 7, § 17.

³⁸ South Africa, *Truth and Reconciliation Commission Report*, 1998, Vol. 2, pp. 52–55, §§ 44–45.

³⁹ Report on the Practice of Syria, 1997, Chapter 1.6.

⁴⁰ UK, House of Commons, Statement by the Prime Minister, Sir Neville Chamberlain, 21 June 1938, *Hansard*, Vol. 337, cols. 937–938.

the effect that the civilians be spared as much as possible . . . as declaratory of existing customary international law".⁴¹

43. According to the Report on US Practice, it is the *opinio juris* of the US that a "distinction must be made between persons taking part in the hostilities and members of the civilian population to the effect that the civilians be spared as much as possible".⁴²

44. The Report on the Practice of Zimbabwe states that the provisions of Article 57 AP I would be regarded as customary by Zimbabwe because of its adoption of the Geneva Conventions Amendment Act which incorporates AP I into Zimbabwe's law and practice.⁴³

III. Practice of International Organisations and Conferences

United Nations

45. UN General Assembly Resolution 2444 (XXIII), adopted in 1968, affirmed Resolution XXVIII of the 20th International Conference of the Red Cross in 1965 and the basic humanitarian principle applicable in all armed conflicts laid down therein that "distinction must be made at all times between persons taking part in the hostilities and members of the civilian population to the effect that the latter be spared as much as possible".⁴⁴

46. UN General Assembly Resolution 2675 (XXV), adopted in 1970, states that "in the conduct of military operations, every effort should be made to spare civilian populations from the ravages of war, and all necessary precautions should be taken to avoid injury, loss or damage to civilian populations".⁴⁵

Other International Organisations

47. No practice was found.

International Conferences

48. The 20th International Conference of the Red Cross in 1965 adopted a resolution on protection of civilian populations against the dangers of indiscriminate warfare in which it solemnly declared that:

All Governments and other authorities responsible for action in armed conflicts should conform at least to the following principles: . . . that distinction must be made at all times between persons taking part in the hostilities and members of the civilian population to the effect that the latter be spared as much as possible.⁴⁶

⁴¹ US, Letter from J. Fred Buzhardt, General Counsel of the Department of Defense, to Senator Edward Kennedy, Chairman of the Subcommittee on Refugees of the Committee on the Judiciary, 22 September 1972, *AJIL*, Vol. 67, 1973, p. 122.

⁴² Report on US Practice, 1997, Chapter 1.4.

⁴³ Report on the Practice of Zimbabwe, 1998, Chapter 1.6.

⁴⁴ UN General Assembly, Res. 2444 (XXIII), 19 December 1968, § 1(c).

⁴⁵ UN General Assembly, Res. 2675 (XXV), 9 December 1970, § 3.

⁴⁶ 20th International Conference of the Red Cross, Vienna, 2–9 October 1965, Res. XXVIII.

IV. Practice of International Judicial and Quasi-judicial Bodies

49. In its judgement in the *Kupreškić case* in 2000, the ICTY Trial Chamber stated that Article 57 AP I was now part of customary international law, not only because it specified and fleshed out general pre-existing norms, but also because it did not appear to be contested by any State, including those who had not ratified the Protocol. The Trial Chamber also noted that in the case of attacks on military objectives causing damage to civilians, “international law contains a general principle prescribing that reasonable care must be taken in attacking military objectives so that civilians are not needlessly injured through carelessness”.⁴⁷ With reference to the Martens Clause, the Chamber held that:

The prescriptions of ... [Article 57] (and of the corresponding customary rules) must be interpreted so as to construe as narrowly as possible the discretionary power to attack belligerents and, by the same token, so as to expand the protection accorded to civilians.⁴⁸

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

50. To fulfil its task of disseminating IHL, the ICRC has delegates around the world teaching armed and security forces that “constant care shall be taken to spare the civilian population, civilian persons and civilian objects”.⁴⁹

51. In an appeal issued in October 1973, the ICRC urged all the belligerents in the conflict in the Middle East (Egypt, Iraq, Israel and Syria) to observe forthwith, in particular, the provisions of, *inter alia*, Article 50(1) of draft AP I, which stated that “constant care shall be taken, when conducting military operations, to spare the civilian population, civilians and civilian objects”. All governments concerned replied favourably.⁵⁰

52. The ICRC Commentary on the Additional Protocols considers that the obligation to take constant care to spare the civilian population, civilians and civilian objects

appropriately supplements the basic rule [of distinction] ... It is quite clear that by respecting this obligation the Parties to the conflict will spare the civilian population, civilians and civilian objects ... This is only an enunciation of a general principle which is already recognized in customary law.⁵¹

⁴⁷ ICTY, *Kupreškić case*, Judgement, 14 January 2000, § 524.

⁴⁸ ICTY, *Kupreškić case*, Judgement, 14 January 2000, § 525.

⁴⁹ Frédéric de Mulinen, *Handbook on the Law of War for Armed Forces*, ICRC, Geneva, 1987, § 388.

⁵⁰ ICRC, *The International Committee's Action in the Middle East, IRRC*, No. 152, 1973, pp. 584–585.

⁵¹ Yves Sandoz *et al.* (eds.), *Commentary on the Additional Protocols*, ICRC, Geneva, 1987, § 2191.

53. In a press release issued in 1991 in the context of the Gulf War, the ICRC insisted that “all necessary precautions be taken by those conducting the hostilities to spare civilians”.⁵²

54. On several occasions, the ICRC has reminded the parties to the conflicts in Nagorno-Karabakh, Afghanistan and Chechnya of their obligation to take all possible measures to spare the civilian population and civilian facilities.⁵³

55. In a press release issued in 1992 during the conflict in Tajikistan, the ICRC urged the parties “to take every possible precaution to spare civilians”.⁵⁴

56. In a press release issued in 1994 in the context of the conflict in Yemen, the ICRC called upon all combatants “to spare the civilian population”.⁵⁵

57. In a communication to the press issued in 1999 concerning NATO’s intervention in the FRY, the ICRC stated that “those conducting hostilities must take all necessary precautions to spare civilians”.⁵⁶

58. In 1999, in a statement following the start of NATO operations against the FRY, the ICRC noted that:

Thousands of Serb and Romany families also face an uncertain future, having fled their homes in Kosovo out of fear of airstrikes or retaliation. Among the essential principles of international humanitarian law are the requirements that civilians be spared violence.⁵⁷

59. In a communication to the press in 2000, the ICRC appealed to Israel and Lebanon to ensure that in the conduct of military operations constant care was taken to spare the civilian population, civilians and civilian objects.⁵⁸

60. In a communication to the press in 2000, during the conflict between Ethiopia and Eritrea, the ICRC stated that “the belligerents are also duty bound to take all necessary steps to safeguard the civilian population from the dangers of military operations”.⁵⁹

61. In a communication to the press in 2000, the ICRC reminded all those involved in the violence in the Near East that “armed and security forces must

⁵² ICRC, Press Release No. 1658, Gulf War: ICRC reminds States of their obligations, 17 January 1991, *IRRC*, No. 280, 1991, p. 26.

⁵³ ICRC, Press Release No. 1670, Nagorno-Karabakh: ICRC calls for respect for humanitarian rules, 12 March 1992; Press Release No. 1764, Afghanistan: ICRC calls for respect for the civilian population, 8 February 1994; Press Release No. 1793, Chechnya: The ICRC urges respect for humanitarian rules, 28 November 1994.

⁵⁴ ICRC, Press Release, Tajikistan: ICRC urges respect for humanitarian rules, ICRC Dushanbe, 25 November 1992.

⁵⁵ ICRC, Press Release No. 1773, Fighting in Yemen, 9 May 1994.

⁵⁶ ICRC, Communication to the Press No. 99/15, Nato intervention in Yugoslavia: ICRC reminds States of their obligations, 24 March 1999, *IRRC*, No. 834, 1999, p. 408.

⁵⁷ ICRC, Statement: The Balkan conflict and respect for international humanitarian law, 26 April 1999, *IRRC*, No. 834, 1999, p. 410.

⁵⁸ ICRC, Communication to the Press No. 00/10, Lebanon and Northern Israel: ICRC appeals for civilians to be spared and respect for civilian infrastructure, 5 May 2000.

⁵⁹ ICRC, Communication to the Press No. 00/14, Eritrea/Ethiopia: ICRC urges respect for humanitarian law, 12 May 2000.

spare and protect all civilians who are not or are no longer taking part in the clashes, in particular children, women and the elderly".⁶⁰

VI. Other Practice

62. The Head of Foreign Affairs of an armed opposition group told the ICRC in 1995 that his group was conscious of the necessity to respect and to spare the civilian population during an armed conflict.⁶¹

Avoidance or minimisation of incidental damage

I. Treaties and Other Instruments

Treaties

63. Article 2(3) of the 1907 Hague Convention (IX) provides that:

If for military reasons immediate action [against naval or military objects located within an undefended town or port] is necessary, and no delay can be allowed the enemy, . . . [the commander of a naval force] shall take all due measures in order that the town may suffer as little harm as possible.

64. Article 57(4) AP I provides that:

In the conduct of military operations at sea or in the air, each Party to the conflict shall, in conformity with its rights and duties under the rules of international law applicable in armed conflict, take all reasonable precautions to avoid losses of civilian lives and damage to civilian objects.

Article 57 AP I was adopted by 90 votes in favour, none against and 4 abstentions.⁶²

65. Article 13(1) AP II provides that "the civilian population and individual civilians shall enjoy general protection against the dangers arising from military operations". Article 13 AP II was adopted by consensus.⁶³

Other Instruments

66. Article 9 of the 1956 New Delhi Draft Rules states that:

All possible precautions shall be taken, both in the choice of the weapons and methods to be used, and in the carrying out of an attack, to ensure that no losses or damage are caused to the civilian population in the vicinity of the objective, or to its dwellings, or that such losses or damage are at least reduced to a minimum.

⁶⁰ ICRC, Communication to the Press No. 00/42, ICRC Appeal to All Involved in Violence in the Near East, 21 November 2000.

⁶¹ ICRC archive document.

⁶² CDDH, *Official Records*, Vol. VI, CDDH/SR.42, 27 May 1977, p. 211.

⁶³ CDDH, *Official Records*, Vol. VII, CDDH/SR.52, 6 June 1977, p. 134.

67. Paragraph 6 of the 1991 Memorandum of Understanding on the Application of IHL between Croatia and the SFRY requires that hostilities be conducted in accordance with Article 57 AP I.

68. Paragraph 2.5 of the 1992 Agreement on the Application of IHL between the Parties to the Conflict in Bosnia and Herzegovina requires that hostilities be conducted in accordance with Article 57 AP I.

69. Paragraph 36 of the 1994 CSCE Code of Conduct states that “the armed forces will take due care to avoid injury to civilians or their property”.

70. Section 5.3 of the 1999 UN Secretary-General’s Bulletin states that “the United Nations force shall take all feasible precautions to avoid, and in any event to minimize, incidental loss of civilian life, injury to civilians or damage to civilian property”.

II. National Practice

Military Manuals

71. Australia’s Defence Force Manual asserts that:

All reasonable precautions must be taken to avoid injury, loss or damage to civilians and civilian objects and locations. It is therefore important to obtain accurate intelligence before mounting an attack. While LOAC recognises that civilian casualties are unavoidable at times, a failure to take all reasonable precautions to minimise such damage may lead to a breach of those laws. The same principles apply to the risk of damage or injury to any other protected persons, places and objects.⁶⁴

72. Belgium’s Law of War Manual provides that “everything possible must be done to avoid incidental damage to civilian objects and loss of civilian life”.⁶⁵

73. Benin’s Military Manual states that “precautions must be taken when planning military operations in order to avoid civilian losses and damage to civilian objects or to minimise such losses and damage when they are unavoidable”.⁶⁶

74. Canada’s Code of Conduct requires that the operations of Canadian forces be “conducted in such a way that damage to civilians and their property is minimized”.⁶⁷

75. Croatia’s LOAC Compendium requires that all precautionary measures be taken to avoid or minimise injury to civilians and damage to civilian objects.⁶⁸

76. Croatia’s Commanders’ Manual states that “the commander shall consider all precautions in order to avoid and, at least, to minimise civilian casualties and damage to civilian objects”.⁶⁹

77. Ecuador’s Naval Manual requires naval commanders to “take all reasonable precautions, taking into account military and humanitarian considerations, to

⁶⁴ Australia, *Defence Force Manual* (1994), § 548, see also § 846.

⁶⁵ Belgium, *Law of War Manual* (1983), p. 28.

⁶⁶ Benin, *Military Manual* (1995), Fascicule III, p. 8, see also Fascicule II, p. 6.

⁶⁷ Canada, *Code of Conduct* (2001), Rule 2, § 4.

⁶⁸ Croatia, *LOAC Compendium* (1991), p. 30.

⁶⁹ Croatia, *Commanders’ Manual* (1992), § 35.

keep civilian casualties and damage to the minimum consistent with mission accomplishment and the security of the force".⁷⁰

78. France's LOAC Teaching Note provides that "all precautions must be taken in order to avoid or minimise incidental injury and collateral damage".⁷¹

79. Germany's Military Manual requires that "when launching an attack on a military objective, all feasible precautions shall be taken to avoiding, and in any event to minimizing, incidental losses of civilian life, injury to civilians and damage to civilian objects".⁷²

80. Hungary's Military Manual requires the taking of "precautions to minimise civilian casualties and damages".⁷³

81. Italy's LOAC Elementary Rules Manual states that "the commander shall consider all precautions in order to avoid and, at least, to minimise civilian casualties and damage to civilian objects".⁷⁴

82. Kenya's LOAC Manual states that "all possible precautionary measures must be taken to reduce the 'collateral' [damage] as much as possible".⁷⁵

83. Madagascar's Military Manual states that "the commander must examine all the precautions to be taken in order to avoid or, at least to minimise, civilian losses and damage to civilian objects".⁷⁶

84. The Military Handbook of the Netherlands states that "collateral damage to civilian objects must be avoided as far as possible".⁷⁷

85. New Zealand's Military Manual states that:

An attack on a military objective may not be considered indiscriminate, disproportionate or otherwise unlawful simply because there is a risk of collateral injury to civilians or civilian objects. Civilian casualties or damage incidental to attacks on legitimate military objectives are therefore not unlawful. Such injuries and damage, however, should not be disproportionate (that is, clearly excessive in relation to the concrete and direct military advantage anticipated from the attack) and every feasible precaution must be taken to minimise them.⁷⁸

86. According to Nigeria's Military Manual, "precaution shall be taken to minimise civilian casualties and damage".⁷⁹

87. The Joint Circular on Adherence to IHL and Human Rights of the Philippines states that:

Actions during security/police operations will be guided by these rules [of behavior for soldiers/police during security/police operations] in order . . . to reduce the destruction that may be inflicted against lives and properties . . . Members of the AFP and PNP shall exercise the utmost restraint and caution in the use of armed force

⁷⁰ Ecuador, *Naval Manual* (1989), § 8.1.2.1.

⁷¹ France, *LOAC Teaching Note* (2000), p. 2. ⁷² Germany, *Military Manual* (1992), § 510.

⁷³ Hungary, *Military Manual* (1992), p. 50, see also p. 54.

⁷⁴ Italy, *LOAC Elementary Rules Manual* (1991), § 35.

⁷⁵ Kenya, *LOAC Manual* (1997), Précis No. 2, p. 3.

⁷⁶ Madagascar, *Military Manual* (1994), Fiche No. 5-O, § 35, see also Fiche No. 9-SO, § A and Fiche No. 2-T, § 27.

⁷⁷ Netherlands, *Military Handbook* (1995), p. 7-43, § 7.

⁷⁸ New Zealand, *Military Manual* (1992), §§ 515(2) and 622(2).

⁷⁹ Nigeria, *Military Manual* (1994), p. 45, § 16(b).

to implement policies . . . Members of the AFP and PNP shall inhibit themselves from unnecessary military/police actions that could cause destruction to private and public properties.⁸⁰

88. Spain's LOAC Manual states that "the commander shall consider all precautions in order to avoid and, at least, to minimise civilian casualties and damage to civilian objects".⁸¹

89. According to Switzerland's Basic Military Manual, "during every attack, commanding officers at the battalion or group level, and those of higher ranks, shall see to it that the civilian population . . . does not suffer any damage".⁸²

90. Togo's Military Manual states that "precautions must be taken when planning military operations in order to avoid civilian losses and damage to civilian objects or to minimise such losses and damage when they are unavoidable".⁸³

91. The UK LOAC Manual states that "care must be taken to avoid incidental loss or damage to civilians or civilian objects".⁸⁴

92. The US Rules of Engagement for the Vietnam War stated that "while the goal is maximum effectiveness in combat operations, every effort must be made to avoid civilian casualties, minimize the destruction of private property, and conserve diminishing resources".⁸⁵

93. The US Rules of Engagement for Operation Desert Storm required soldiers to avoid harming civilians and civilian property "unless necessary to save US lives".⁸⁶

94. The US Naval Handbook requires naval commanders to "take all reasonable precautions, taking into account military and humanitarian considerations, to keep civilian casualties and damage to the minimum consistent with mission accomplishment and the security of the force".⁸⁷

National Legislation

95. Ireland's Geneva Conventions Act as amended provides that any "minor breach" of AP I, including violations of Article 57(4) AP I, as well as any "contravention" of AP II, including violations of Article 13(2) AP II, are punishable offences.⁸⁸

96. Under Norway's Military Penal Code as amended, "anyone who contravenes or is accessory to the contravention of provisions relating to the protection of persons or property laid down in . . . the two additional protocols to [the Geneva] Conventions . . . is liable to imprisonment".⁸⁹

⁸⁰ Philippines, *Joint Circular on Adherence to IHL and Human Rights* (1991), § 2(a).

⁸¹ Spain, *LOAC Manual* (1996), Vol. I, § 10.8.d.(2).

⁸² Switzerland, *Basic Military Manual* (1987), Article 29(1).

⁸³ Togo, *Military Manual* (1996), Fascicule III, p. 8, see also Fascicule II, p. 6.

⁸⁴ UK, *LOAC Manual* (1981), Section 4, p. 13, § 4(b).

⁸⁵ US, *Rules of Engagement for the Vietnam War* (1971), § 3(a).

⁸⁶ US, *Rules of Engagement for Operation Desert Storm* (1991), §§ B and G.

⁸⁷ US, *Naval Handbook* (1995), § 8.1.2.1.

⁸⁸ Ireland, *Geneva Conventions Act as amended* (1962), Section 4(1) and (4).

⁸⁹ Norway, *Military Penal Code as amended* (1902), § 108(b).

National Case-law

97. No practice was found.

Other National Practice

98. The Report on the Practice of Colombia refers to an opinion of the Attorney General given before the House of Representatives and an attestation by the Cabinet to the effect that attacks on installations must be made in conditions of maximum safety for civilians. This obligation includes the duty to halt any action that might present a serious danger to civilian lives and physical integrity and the obligation to take all possible measures to preserve civilian lives and physical integrity.⁹⁰

99. In 1991, in a letter to the UN Secretary-General concerning the Gulf War, Costa Rica commended "the precautions taken by the forces of the United States of America and its allies aimed at attacking as far as possible only military targets and causing the least possible suffering to the civilian population".⁹¹

100. On the basis of an interview with a senior officer of the armed forces, the Report on the Practice of Indonesia states that the Indonesian armed forces normally observe the precautions listed in Article 57 AP I.⁹²

101. In a briefing in 1982, the Israeli Ministry of Foreign Affairs declared that Israeli forces had taken all precautions to concentrate military operations against only "terrorist" targets to diminish incidental loss of civilian life. In the same briefing, Israeli officials stated that their forces had taken all necessary and possible precautions to protect individual civilians, the civilian population and civilian objects from the danger of military operations.⁹³

102. According to the Report on the Practice of Israel, "during the pre-attack planning phases, the IDF incorporates all feasible precautions to ensure, as far as possible, that incidental civilian loss, injury or damage is minimized".⁹⁴

103. The Report on the Practice of Jordan considers that "it is normal that the military command[er] in charge should take in an attack all feasible precautions to avoid causing injury, loss or damage to the civilian population".⁹⁵

104. On the basis of interviews with members of the armed forces and the Ministry of Home Affairs, the Report on the Practice of Malaysia states that in any planned attack during the communist insurgency, "the Security Forces

⁹⁰ Report on the Practice of Colombia, 1998, Chapter 1.6, referring to Cundinamarca Administrative Court, *Case No. 4010*, Opinion of the Attorney General given before the House of Representatives, pp. 33, 35 and 36 and Cundinamarca Administrative Court, *Case No. 4010*, Attestation by the Cabinet, 6 November 1985, Record of evidence, pp. 13–14.

⁹¹ Costa Rica, Letter dated 17 January 1991 to the UN Secretary-General, UN Doc. S/22101, 17 January 1991, p. 2.

⁹² Report on the Practice of Indonesia, 1997, Interview with a senior officer of the Indonesian armed forces, Chapter 1.6.

⁹³ Israel, Ministry of Foreign Affairs, Department of Information, Briefing No. 342/18.7.82/3.10.108, 18 July 1982.

⁹⁴ Report on the Practice of Israel, 1997, Chapter 1.6.

⁹⁵ Report on the Practice of Jordan, 1997, Chapter 1.6.

would always determine the position of the enemy to avoid or minimise civilian casualties".⁹⁶ The report further states that "in practice, the Armed Forces, whenever possible, will not cause collateral damage to civilian objects".⁹⁷

105. According to the government of the Netherlands, commanders have to take all the precautionary measures required by Article 57 AP I when carrying out an attack.⁹⁸

106. In 1991, in a report on military operations to liberate Kuwait submitted to the UN Security Council, Saudi Arabia specified that the Royal Saudi Forces only targeted military objectives and avoided "civilian targets and populated areas, in order not to inflict harm on civilians and civilian installations".⁹⁹

107. The Report on the Practice of Syria asserts that Syria considers Article 57 AP I to be part of customary international law.¹⁰⁰

108. In 1991, in two reports submitted to the UN Security Council on operations in the Gulf War, the UK made assurances that the instructions issued to UK pilots were to avoid causing civilian casualties as far as possible.¹⁰¹ In a subsequent report, the UK reiterated that "pilots have clear instructions to minimize civilian casualties" and stated that "on a number of occasions, attacks have not been pressed home because pilots were not completely satisfied they could meet these conditions".¹⁰²

109. In 1991, in reply to a question in the House of Lords concerning the use of conventional weapons against nuclear facilities, chemical weapons plants and dumps, and petrochemical enterprises situated in towns or cities, the UK Minister of State, FCO, stated that "international law requires that, in planning an attack on any military objective, account is taken of certain principles. These include the [principle] that civilian losses, whether of life or property, should be avoided or minimised so far as practicable."¹⁰³

110. In 1991, during a debate in the UN Security Council concerning the Gulf War, the UK deplored civilian casualties but reiterated that coalition forces had been strictly instructed to strive to keep such casualties to a minimum.¹⁰⁴

⁹⁶ Report on the Practice of Malaysia, 1997, Interviews with members of the Malaysian armed forces and Ministry of Home Affairs, Chapter 1.4.

⁹⁷ Report on the Practice of Malaysia, 1997, Chapter 1.3.

⁹⁸ Netherlands, Lower House of Parliament, Memorandum in response to the report on the ratification of the Additional Protocols, 1985–1986 Session, Doc. 18 277 (R 1247), No. 6, 16 December 1985, p. 7, § 17.

⁹⁹ Saudi Arabia, Report on military operations to liberate Kuwait, annexed to Letter dated 21 February 1991 to the President of the UN Security Council, UN Doc. S/22259, 23 February 1991, p. 2.

¹⁰⁰ Report on the Practice of Syria, 1997, Chapter 1.6.

¹⁰¹ UK, Letter dated 21 January 1991 to the President of the UN Security Council, UN Doc. S/22115, 21 January 1991, p. 1; Letter dated 28 January 1991 to the President of the UN Security Council, UN Doc. S/22156, 28 January 1991, p. 1.

¹⁰² UK, Letter dated 13 February 1991 to the President of the UN Security Council, UN Doc. S/22218, 13 February 1991, p. 1.

¹⁰³ UK, House of Lords, Statement by the Minister of State, FCO, 4 February 1991, *Hansard*, Vol. 525, Written Answers, col. 37.

¹⁰⁴ UK, Statement before the UN Security Council, UN Doc. S/PV.2977, 14 February 1991.

111. In 1991, in reply to a question in the House of Lords concerning military operations during the Gulf War, the UK Parliamentary Under-Secretary of State of the Ministry of Defence wrote that:

It is Allied policy . . . to make every possible effort to minimise civilian casualties. This is entirely in accordance with the rules of war and the Geneva Convention. The extraordinary measures that Allied air forces have taken to avoid causing civilian casualties demonstrate clearly that Allied military commanders are working strictly within this policy.¹⁰⁵

112. It is reported that in 1952, during the Korean War, a US General gave the instruction “to attack specific military targets at Pyongyang and to make every effort to avoid needless civilian casualties”.¹⁰⁶

113. In 1966, in the context of the Vietnam War, the US Department of Defense stated that “all possible care is taken to avoid civilian casualties”.¹⁰⁷

114. On 30 December 1966, in reply to an inquiry from a member of the US House of Representatives requesting a restatement of US policy on targeting in North Vietnam, a US Deputy Assistant Secretary of Defense wrote that “all reasonable care is taken to avoid civilian casualties”.¹⁰⁸

115. In 1972, the General Counsel of the US Department of Defense stated that:

A review of the operating authorities and rules of engagements for all of our forces in Southeast Asia, in air as well as ground and sea operations, by my office reveals that not only are such operations in conformity with this basic rule [that the loss of life and damage to property must not be out of proportion to the military advantage to be gained], but that in addition, extensive constraints are imposed to avoid if at all possible the infliction of casualties on noncombatants and the destruction of property other than that related to the military operations in carrying out military objectives.¹⁰⁹

116. In 1986, in the context of US attacks on Libyan targets, the US stated that:

The United States exercised great care in restricting its military response to terrorist-related targets. It took every possible precaution to avoid civilian casualties and to limit collateral damage. . . . In carrying out this action, the United States

¹⁰⁵ UK, House of Lords, Statement by the Parliamentary Under-Secretary of State for Defence, 27 February 1991, *Hansard*, Vol. 526, Written Answers, col. 52.

¹⁰⁶ Robert F. Futrell, *The United States Air Force in Korea 1950–1953*, Office of Air Force History, US Air Force, Washington, D.C., Revised edition, 1983, p. 515.

¹⁰⁷ US, Department of Defense, Statement on targeting policy in Vietnam, 26 December 1966, reprinted in Marjorie Whiteman, *Digest of International Law*, Vol. 10, Department of State Publication 8367, Washington, D.C., 1968, p. 427.

¹⁰⁸ US, Letter from Deputy Assistant Secretary of Defense Goulding to US Representative Ogden Reid from New York, 30 December 1966, reprinted in Marjorie Whiteman, *Digest of International Law*, Vol. 10, Department of State Publication 8367, Washington, D.C., 1968, p. 428.

¹⁰⁹ US, Letter from J. Fred Buzhardt, General Counsel of the Department of Defense, to Senator Edward Kennedy, Chairman of the Subcommittee on Refugees of the Committee on the Judiciary, 22 September 1972, *AJIL*, Vol. 67, 1973, pp. 122–124.

took every possible precaution to avoid civilian casualties and to limit collateral damage.¹¹⁰

117. In 1987, the Deputy Legal Adviser of the US Department of State stated that “we support the principle that all practicable precautions, taking into account military and humanitarian considerations, be taken in the conduct of military operations to minimize incidental death, injury, and damage to civilians and civilian objects”.¹¹¹

118. In 1991, in response to an ICRC memorandum on the applicability of IHL in the Gulf region, the US Department of the Army stated that:

The obligation of distinguishing combatants and military objectives from civilians and civilian objects is a shared responsibility of the attacker, defender, and the civilian population as such. An attacker must exercise reasonable precautions to minimize incidental or collateral injury to the civilian population, consistent with mission accomplishment and allowable risk to the attacking force.¹¹²

119. In 1991, in a report submitted to the UN Security Council on operations in the Gulf War, the US stated that “the military actions initiated by the United States and other States co-operating with the Government of Kuwait... are directed strictly at military and strategic targets and every effort has been made to minimize civilian casualties”.¹¹³ In another such report, the US stressed that “allied aircraft involved in these attacks are taking every precaution to avoid civilian casualties. These pilots are in fact placing themselves in greater danger in order to minimize collateral damage and civilian casualties.”¹¹⁴ In a subsequent report, the US reiterated that “coalition forces have taken every precaution to minimize collateral damage to civilian facilities”.¹¹⁵

120. In 1991, in a diplomatic note to Iraq concerning operations in the Gulf War, the US stated that “hostilities must be conducted in a manner so as to minimize injury to civilians”.¹¹⁶

121. In 1992, in its final report to Congress on the conduct of the Gulf War, the US Department of Defense stated that:

¹¹⁰ US, Letter dated 14 April 1986 to the President of the UN Security Council, UN Doc. S/17990, 14 April 1986.

¹¹¹ US, Remarks of Michael J. Matheson, Deputy Legal Adviser, US Department of State, The Sixth Annual American Red Cross-Washington College of Law Conference on International Humanitarian Law: A Workshop on Customary International Law and the 1977 Protocols Additional to the 1949 Geneva Conventions, *American University Journal of International Law and Policy*, Vol. 2, 1987, pp. 426–427.

¹¹² US, Message from the Department of the Army to the legal adviser of the US Army forces deployed in the Gulf, 11 January 1991, § 8(E), Report on US Practice, 1997, Chapter 1.6.

¹¹³ US, Letter dated 17 January 1991 to the President of the UN Security Council, UN Doc. S/22090, 17 January 1991, p. 2.

¹¹⁴ US, Letter dated 30 January 1991 to the President of the UN Security Council, UN Doc. S/22173, 30 January 1991, p. 1.

¹¹⁵ US, Letter dated 8 February 1991 to the President of the UN Security Council, UN Doc. S/22216, 13 February 1991, p. 1.

¹¹⁶ US, Department of State, Diplomatic Note to Iraq, Washington, 19 January 1991, annexed to Letter dated 21 January 1991 to the President of the UN Security Council, UN Doc. S/22122, 21 January 1991, p. 2.

An attacker must exercise reasonable precautions to minimize incidental or collateral injury to the civilian population or damage to civilian objects, consistent with mission accomplishment and allowable risk to the attacking forces . . . As correctly stated in Article 51(8) of Protocol I, a nation confronted with callous actions by its opponent (such as the use of "human shields") is not released from its obligation to exercise reasonable precaution to minimize collateral injury to the civilian population or damage to civilian objects. This obligation was recognized by Coalition forces in the conduct of their operations . . . As frequently noted during the conduct of the conflict, exceptional care was devoted to minimize collateral damage to civilian population and property.¹¹⁷

122. In 1992, a legal review by the US Department of the Air Force of the legality of extended range anti-armour munition stated that, while legal as such, "care should also be taken [when using such munition] to ensure that the possibility of collateral civilian casualties is minimized, and that it is always used with a neutralizing mechanism".¹¹⁸

123. In 1993, in its report to Congress on the protection of natural and cultural resources during times of war, the US Department of Defense stated that:

The obligation to take reasonable measures to minimize damage to natural resources and cultural property is shared by both an attacker and a defender. A number of steps can be taken by an attacker in order to minimize collateral damage to natural resources or cultural property . . . [During the Gulf War,] the U.S. and its Coalition partners in Desert Storm recognized that they were fighting in the "cradle of civilization" and took extraordinary measures to minimize damage to cultural property . . . Other steps were taken to minimize collateral damage. Although intelligence collection involves utilization of very scarce resources, these resources were used to look for cultural property in order to properly identify it. Target intelligence officers identified the numerous pieces of cultural property or cultural property sites in Iraq; a "no-strike" target list was prepared, placing known cultural property off limits from attack, as well as some otherwise legitimate targets if attack on the latter might place nearby cultural property at risk of damage.¹¹⁹

124. In 1998, when announcing the missile attacks against targets in Afghanistan and Sudan, the US President stated that "every possible effort to minimize the loss of innocent life" had been made. The Chairman of the Joint Chiefs of Staff noted that the attacks were carried out at night time in order to minimize the incidental loss of civilian life and the President's National Security Adviser stated that the government had verified that no night shift was at work at the chemical plant bombed in Sudan. The Defense Secretary stressed that the possibility of an airborne plume of toxic chemicals from the

¹¹⁷ US, Department of Defense, Final Report to Congress on the Conduct of the Persian Gulf War, 10 April 1992, Appendix O, The Role of the Law of War, *ILM*, Vol. 31, 1992, pp. 625, 627 and 644.

¹¹⁸ US, Department of the Air Force, The Judge Advocate General, Legal Review: Extended Range Antiarmor Munition (ERAM), 16 April 1992, § 9.

¹¹⁹ US, Department of Defense, Report to Congress on International Policies and Procedures Regarding the Protection of Natural and Cultural Resources During Times of War, 19 January 1993, pp. 203–205.

Sudanese plant had been taken into account in an effort to minimise civilian casualties.¹²⁰

125. The Report on US Practice states that:

The *opinio juris* of the United States is that measures to minimize civilian casualties and damage must be undertaken to the extent that military necessities permit under the circumstances ruling at the time. The measures might include warnings, care in selecting targets, weapons and methods of attack and, especially against targets in inhabited areas, breaking off attacks that may not be sufficiently accurate.¹²¹

126. The Report on the Practice of Zimbabwe states that the provisions of Article 57 AP I would be regarded as customary by Zimbabwe because of its adoption of the Geneva Conventions Amendment Act which incorporates AP I into Zimbabwe's law and practice.¹²²

III. Practice of International Organisations and Conferences

United Nations

127. UN General Assembly Resolution 2675 (XXV), adopted in 1970, states that "in the conduct of military operations, every effort should be made to spare civilian populations from the ravages of war, and all necessary precautions should be taken to avoid injury, loss or damage to civilian populations".¹²³

128. In a resolution adopted in 1987, the UN Commission on Human Rights called on the government of El Salvador and the insurgent forces to take all measures to avoid civilian deaths and injuries when conducting military operations, including when landmines were used.¹²⁴

Other International Organisations

129. In a resolution concerning the Gulf War adopted in 1991, the Parliamentary Assembly of the Council of Europe expressed its full support for the coalition's action and commended the instructions given to minimise civilian casualties.¹²⁵

130. During its air campaign against the FRY in 1999, NATO frequently stated that it had taken every possible precaution to prevent collateral damage to civilians and civilian objects.¹²⁶

¹²⁰ US, Presidential Address, 20 August 1998; Press Conference by Secretary of Defense, 20 August 1998, *YIHL*, Vol. 2, 1999, p. 423.

¹²¹ Report on US Practice, 1997, Chapter 1.6.

¹²² Report on the Practice of Zimbabwe, 1998, Chapter 1.6.

¹²³ UN General Assembly, Res. 2675 (XXV), 9 December 1970, § 3.

¹²⁴ UN Commission on Human Rights, Res. 1987/51, 11 March 1987, § 4.

¹²⁵ Council of Europe, Parliamentary Assembly, Res. 954, 29 January 1991, § 3.

¹²⁶ NATO, Press Conferences of 25–27 and 29–31 March 1999, 3, 7–9, 15, 16, 20, 27, 29 and 30 April 1999, 2, 9, 15, 16, 21 and 26 May 1999 and 1 June 1999.

International Conferences

131. The 26th International Conference of the Red Cross and Red Crescent in 1995 adopted a resolution on protection of the civilian population in period of armed conflict in which it called upon parties to conflict “to take all feasible precautions to avoid, in their military operations, all acts liable to destroy or damage water sources and systems of water supply, purification and distribution solely or primarily used by civilians”.¹²⁷

IV. Practice of International Judicial and Quasi-judicial Bodies

132. In its judgement in the *Kupreškić case* in 2000, the ICTY Trial Chamber stated that Article 57 AP I was now part of customary international law, not only because it specified and fleshed out general pre-existing norms, but also because it did not appear to be contested by any State, including those who had not ratified the Protocol.¹²⁸ With reference to the Martens Clause, the Trial Chamber held that:

The prescriptions of . . . [Article 57] (and of the corresponding customary rules) must be interpreted so as to construe as narrowly as possible the discretionary power to attack belligerents and, by the same token, so as to expand the protection accorded to civilians.¹²⁹

133. In 1997, in its report concerning the events at La Tablada in Argentina, the IACiHR referred to the obligation to take precautions to avoid or minimise incidental damage. The case dealt with an attack by some 40 persons on military barracks of the armed forces of Argentina and the subsequent counter-attack. The Commission found that common Article 3 of the 1949 Geneva Conventions and other rules relevant to the conduct of internal hostilities were applicable. The Commission stated that customary law imposes an obligation to take precautions to avoid or minimise loss of civilian life and damage to civilian property that may occur as a consequence of attacks on military targets.¹³⁰

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

134. To fulfil its task of disseminating IHL, the ICRC has delegates around the world teaching armed and security forces that:

Constant care shall be taken to spare the civilian population, civilian persons and civilian objects. The purpose of such care is primarily to avoid and in any event

¹²⁷ 26th International Conference of the Red Cross and Red Crescent, Geneva, 3–7 December 1995, Res. II, § F(b).

¹²⁸ ICTY, *Kupreškić case*, Judgement, 14 January 2000, § 524.

¹²⁹ ICTY, *Kupreškić case*, Judgement, 14 January 2000, § 525.

¹³⁰ IACiHR, *Case 11.137 (Argentina)*, Report, 18 November 1997, § 177.

to minimize civilian casualties and damages (e.g. consideration of populated areas, possibilities of shelter, movements of civilian persons, important civilian objects, different danger according to time of the day).¹³¹

135. In a Memorandum on the Applicability of International Humanitarian Law sent in 1990 to all States party to the Geneva Conventions in the context of the Gulf War, the ICRC stated that “the following general rules are recognized as binding on any party to an armed conflict: . . . all feasible precautions must be taken to avoid loss of civilian life or damage to civilian objects”.¹³²

136. In a communication to the press in 1993, the ICRC enjoined the parties to the conflict in Somalia “to take all feasible precautions to avoid civilian casualties or damage to civilian objects”.¹³³

137. In 1994, in a Memorandum on Respect for International Humanitarian Law in Angola, the ICRC stated that “all feasible precautions shall be taken to avoid injuries, loss and damage to the civilian population”.¹³⁴

138. In 1994, in a Memorandum on Compliance with International Humanitarian Law by the Forces Participating in Opération Turquoise in the Great Lakes region, the ICRC stated that “all feasible precautions shall be taken to avoid injury or losses inflicted on the civilian population and damage to civilian objects”.¹³⁵

139. In 1995, the ICRC asked a State to ensure that civilians would not be affected by the military operations it was engaged in by taking all necessary precautions to that end.¹³⁶

140. In a statement following NATO’s air strikes against the FRY in 1999, the ICRC stated that “it is an obligation under international humanitarian law to avoid civilian casualties as far as possible”.¹³⁷

141. In a communication to the press issued in 2001 after two bombs were dropped on an ICRC compound in Kabul, the ICRC stated that “international humanitarian law obliges the parties to the conflict . . . to take all the precautions needed to avoid harming civilians”.¹³⁸

142. In a communication to the press issued in 2001 in the context of the conflict in Afghanistan, the ICRC stated that “in the course of military operations,

¹³¹ Frédéric de Mulinen, *Handbook on the Law of War for Armed Forces*, ICRC, Geneva, 1987, § 388, see also § 457.

¹³² ICRC, Memorandum on the Applicability of International Humanitarian Law, 14 December 1990, § II, *IRRC*, No. 280, 1991, pp. 24–25.

¹³³ ICRC, Communication to the Press No. 93/17, Somalia: ICRC appeals for compliance with international humanitarian law, 17 June 1993.

¹³⁴ ICRC, Memorandum on Respect for International Humanitarian Law in Angola, 8 June 1994, § II, *IRRC*, No. 320, 1997, p. 503.

¹³⁵ ICRC, Memorandum on Compliance with International Humanitarian Law by the Forces Participating in Opération Turquoise, 23 June 1994, § II, reprinted in Marco Sassòli and Antoine A. Bouvier, *How Does Law Protect in War?*, ICRC, Geneva, 1999, p. 1308.

¹³⁶ ICRC archive document.

¹³⁷ ICRC, Statement: The Balkan conflict and respect for international humanitarian law, 26 April 1999, *IRRC*, No. 834, 1999, pp. 408–411.

¹³⁸ ICRC, Communication to the Press No. 01/43, Afghanistan: ICRC warehouse bombed in Kabul, 16 October 2001.

all parties are obliged to take every feasible precaution to avoid civilian casualties and damage to civilian infrastructure".¹³⁹

VI. Other Practice

143. In 1992, in the context of the conflict in Rwanda, the FPR stated that its tactics aimed specifically at minimising human losses.¹⁴⁰

144. Rule A8 of the Rules of International Humanitarian Law Governing the Conduct of Hostilities in Non-international Armed Conflicts, adopted in 1990 by the Council of the IHL, provides that:

The general rule to distinguish between combatants and civilians and the prohibition of attacks against the civilian population as such or against individual civilians implies, in order to be effective, that all feasible precautions have to be taken to avoid injury, loss or damage to the civilian population.

The commentary on this rule quotes UN General Assembly Resolution 2675 (XXV) of 1970 and considers that compliance with common Article 3 of the 1949 Geneva Conventions requires, by inference, that precautions in attack be taken. As to which specific precautions have to be taken in non-international armed conflict, the commentary notes that Article 57 AP I provides useful guidance on this matter.¹⁴¹

145. In its comments on the Declaration of Minimum Humanitarian Standards submitted to the UN Secretary-General in 1995, the IHL stated that "any declaration on minimum humanitarian standards should be based on principles... of *jus cogens*, expressing basic humanitarian consideration[s] which are recognized to be universally binding". According to the IHL, this includes the principle that "all precautionary measures that are feasible in case of attack should be undertaken, so as to avoid unnecessary injury, loss or damage".¹⁴²

146. In its report on the NATO bombings in the FRY issued in 2000, Amnesty International concluded that it believed that "in the course of Operation Allied Force, civilian deaths could have been significantly reduced if NATO forces had fully adhered to the laws of war". The report added that in several cases, "including the attacks on displaced civilians in Djakovica and Koriša, insufficient precautions were taken to minimize civilian casualties". The report further considered that:

¹³⁹ ICRC, Communication to the Press No. 01/47, Afghanistan: ICRC calls on all parties to the conflict to respect international humanitarian law, 24 October 2001.

¹⁴⁰ FPR, Communiqué de presse, Brussels, 28 February 1992.

¹⁴¹ IHL, Rules of International Humanitarian Law Governing the Conduct of Hostilities in Non-international Armed Conflicts, Rule A8 and Commentary, *IRRC*, No. 278, 1990, pp. 394–395.

¹⁴² IHL, Comments on the Declaration of Minimum Humanitarian Standards submitted to the UN Secretary-General, §§ 1 and 13, reprinted in UN Doc. E/CN.4/1996/80, Report of the Secretary-General prepared pursuant to Commission resolution 1995/29, 28 November 1995, pp. 8–9.

Aspects of the Rules of Engagement, specifically the requirement that NATO aircraft fly above 15,000 feet, made full adherence to international humanitarian law virtually impossible. According to NATO officials, changes were made to the Rules of Engagement, including lifting the 15,000 foot rule, following the 14 April 1999 attack near Djakovica and the 30 May 1999 bombing of Varvarin Bridge. These changes were a recognition that existing precautions did not afford sufficient protection to civilians.¹⁴³

Feasibility of precautions in attack

Note: *For practice concerning the feasibility of precautions to be taken in the use of booby-traps, see Chapter 28. For practice concerning the feasibility of precautions in the use of landmines, see Chapter 29. For practice concerning the feasibility of precautions in the use of incendiary weapons, see Chapter 30.*

I. Treaties and Other Instruments

Treaties

147. Upon accession to AP I, Algeria stated that the term “feasible” must be interpreted as referring to “precautions and measures which are feasible in view of the circumstances and the information and means available at the time”.¹⁴⁴

148. Upon ratification of AP I, Belgium declared that, “in view of the travaux préparatoires . . . ‘feasible precautions’ [are] those that can be taken in the circumstances prevailing at the moment, which include military considerations as much as humanitarian ones”.¹⁴⁵

149. Upon ratification of AP I, Canada stated that “the word ‘feasible’ means that which is practicable or practically possible, taking into account all circumstances ruling at the time, including humanitarian and military considerations”.¹⁴⁶

150. Upon ratification of AP I, France stated that it considered that the term “feasible” as used in AP I meant “that which can be realised or which is possible in practice, taking into account all circumstances ruling at the time, including humanitarian and military considerations”.¹⁴⁷

151. Upon ratification of AP I, Germany stated that it understood the word “feasible” to mean “that which is practicable or practically possible, taking into account all circumstances ruling at the time, including humanitarian and military considerations”.¹⁴⁸

¹⁴³ Amnesty International, *NATO/Federal Republic of Yugoslavia: “Collateral Damage” or Unlawful Killings? Violations of the Laws of War by NATO during Operation Allied Force*, AI Index EUR 70/18/00, London, June 2000, p. 25.

¹⁴⁴ Algeria, Interpretative declarations made upon accession to AP I, 16 August 1989, § 1.

¹⁴⁵ Belgium, Interpretative declarations made upon ratification of AP I, 20 May 1986, § 3.

¹⁴⁶ Canada, Reservations and statements of understanding made upon ratification of AP I, 20 November 1990, § 5.

¹⁴⁷ France, Reservations and declarations made upon ratification of AP I, 11 April 2001, § 3.

¹⁴⁸ Germany, Declarations made upon ratification of AP I, 14 February 1991, § 2.

152. Upon ratification of AP I, Ireland stated that “the word ‘feasible’ means that which is practicable or practically possible, taking into account all circumstances at the time, including humanitarian and military considerations”.¹⁴⁹

153. Upon ratification of AP I, Italy declared that “the word ‘feasible’ means that which is practicable or practically possible, taking into account all circumstances ruling at the time, including humanitarian and military considerations”.¹⁵⁰

154. Upon ratification of AP I, the Netherlands declared that “the word ‘feasible’ is to be understood as practicable or practically possible taking into account all circumstances ruling at the time, including humanitarian and military considerations”.¹⁵¹

155. Upon ratification of AP I, Spain interpreted the term “feasible” as meaning that “the matter in question is feasible or possible in practice, taking into account all the circumstances prevailing at the time, including humanitarian and military aspects”.¹⁵²

156. In its declaration made upon signature and in a reservation made upon ratification of AP I, Switzerland specified that Article 57(2) applied only to the ranks of commanding officers at the battalion or group level and those of higher ranks.¹⁵³

157. Upon signature of AP I, the UK stated that “the word ‘feasible’ means that which is practicable or practically possible, taking into account all circumstances at the time including those relevant to the success of military operations”.¹⁵⁴

158. Upon ratification of AP I, the UK stated that it understood the term “feasible” as used in the Protocol to mean “that which is practicable or practically possible, taking into account all circumstances ruling at the time, including humanitarian and military considerations”.¹⁵⁵ The UK further stated that the obligation mentioned in Article 57(2)(b) AP I only applied to “those who have the authority and practical possibility to cancel or suspend the attack”.¹⁵⁶

Other Instruments

159. No practice was found.

¹⁴⁹ Ireland, Declarations and reservations made upon ratification of AP I, 19 May 1999, § 6.

¹⁵⁰ Italy, Declarations made upon ratification of AP I, 27 February 1986, § 2.

¹⁵¹ Netherlands, Declarations made upon ratification of AP I, 26 June 1987, § 2.

¹⁵² Spain, Interpretative declarations made upon ratification of AP I, 21 April 1989, § 3.

¹⁵³ Switzerland, Declaration made upon signature of AP I, 12 December 1977, § 1; Reservations made upon ratification of AP I, 17 February 1982, § 1.

¹⁵⁴ UK, Declarations made upon signature of AP I, 12 December 1977, § b.

¹⁵⁵ UK, Reservations and declarations made upon ratification of AP I, 28 January 1998, § b.

¹⁵⁶ UK, Reservations and declarations made upon ratification of AP I, 28 January 1998, § o.

II. National Practice

Military Manuals

160. Argentina's Law of War Manual states that "feasible precautions are those which are practicable or practically possible taking into account all circumstances prevailing at the time, including humanitarian and military considerations".¹⁵⁷

161. Australia's Defence Force Manual defines feasible precautions as "precautions which are practicable or practically possible taking into account all circumstances ruling at the time, including humanitarian and military considerations".¹⁵⁸

162. Canada's LOAC Manual, with respect to the standard of care to be applied to target verification, precautions in the choice of means and methods of attack and the assessment of the effects of an attack, states that:

Commanders, planners and staff officers will not be held to a standard of perfection in reaching their decisions.

Commanders, planners and staff officers are required to take all "feasible" steps to verify that potential targets are legitimate targets. However, such decisions will be based on the "circumstances ruling at the time". Consideration must be paid to the honest judgement of responsible commanders, based on the information reasonably available to them at the relevant time, taking fully into account the urgent and difficult circumstances under which such judgements are usually made.

The test for determining whether the required standard of care has been met is an objective one: Did the commander, planner or staff officer do what a reasonable person would have done in the circumstances?¹⁵⁹

163. The Military Manual of the Netherlands states that:

The extent to which commanders and their staff can be held accountable for compliance with these rules [on precautions in attack] is determined by three factors: freedom of choice of means and methods, availability of information [and] available time. The higher the level [of command] the stricter the required compliance is.¹⁶⁰

164. New Zealand's Military Manual emphasises that the obligation to verify targets, to choose means and methods of attack in order to avoid, and in any event to minimise, civilian losses and damage to civilian objects and the obligation to refrain from deciding to launch an attack which may be expected to cause disproportionate collateral damage is incumbent upon "those who plan or decide upon an attack". The manual considers that:

This obligation presupposes that the measures are to be taken by a level which possesses a formalised planning process and a substantial degree of discretion

¹⁵⁷ Argentina, *Law of War Manual* (1989), § 4.20.

¹⁵⁸ Australia, *Defence Force Manual* (1994), p. xxiv.

¹⁵⁹ Canada, *LOAC Manual* (1999), pp. 4-3/4-4, §§ 25-27.

¹⁶⁰ Netherlands, *Military Manual* (1993), p. V-11.

concerning methods by which medium-term objectives are to be attained. It is unlikely that the proper level would normally be below a divisional or equivalent level of headquarters.¹⁶¹

With respect to the notion of “feasible” precautions, the manual specifies that “feasible” means “that which is practicable or practically possible, taking into account all circumstances at the time, including those relevant to the success of the military operations”.¹⁶²

National Legislation

165. No practice was found.

National Case-law

166. No practice was found.

Other National Practice

167. At the CDDH, Austria considered that the precautions envisaged in Article 57 AP I

could only be taken at a higher level of military command, in other words by the high command. Junior military personnel could not be expected to take all the precautions prescribed, particularly that of ensuring respect for the principle of proportionality during an attack.¹⁶³

168. At the CDDH, Canada stated that the word “feasible” when used in AP I, for example, in Article 57 and 58, “refers to what is practicable or practically possible, taking into account all circumstances existing at the relevant time, including those circumstances relevant to the success of military operations”.¹⁶⁴

169. At the CDDH, the FRG stated that the word “feasible” in Article 57 AP I should be interpreted “as meaning what is practicable or practically possible, taking into account all circumstances at the time, including those relevant to the success of military operations”.¹⁶⁵

170. At the CDDH, India explained its vote on Article 57 AP I as follows:

India voted in favour of this article on the clear understanding that it will apply in accordance with the limits of capability, practical possibility and feasibility of each Party to the conflict. As the capability of Parties to a conflict to make distinction will depend upon the means and methods available to each Party generally or in particular situations, this article does not require a Party to undertake to do something which is not within its means or methods or its capability. In its practical application, a Party would be required to do whatever is practical and possible.¹⁶⁶

¹⁶¹ New Zealand, *Military Manual* (1992), § 518(2).

¹⁶² New Zealand, *Military Manual* (1992), § 518(4).

¹⁶³ Austria, Statement at the CDDH, *Official Records*, Vol. VI, CDDH/SR.42, 27 May 1977, p. 212, § 46.

¹⁶⁴ Canada, Statement at the CDDH, *Official Records*, Vol. VI, CDDH/SR.42, 27 May 1977, p. 224.

¹⁶⁵ FRG, Statement at the CDDH, *Official Records*, Vol. VI, CDDH/SR.42, 27 May 1977, p. 226.

¹⁶⁶ India, Statement at the CDDH, *Official Records*, Vol. VI, CDDH/SR.42, 27 May 1977, p. 228.

171. At the CDDH, Italy stated that the term “feasible” in Article 57 AP I “indicates that the obligations it imposes are conditional on the actual circumstances really allowing the proposed precautions to be taken, on the basis of the available information and the imperative needs of national defence”.¹⁶⁷

172. At the CDDH, the Netherlands stated that “the word ‘feasible’ when used in Protocol I, for example in Articles 50 and 51 [57 and 58], should in any particular case be interpreted as referring to that which was practicable or practically possible, taking into account all circumstances at the time”.¹⁶⁸

173. At the CDDH, the representative of Switzerland was critical of the wording of Article 57 AP I because it lacked clarity, specifically the words “those who plan or decide upon an attack” in the chapeau of Article 57(2). He stated that this

ambiguous wording might well place a burden or responsibility on junior military personnel which ought normally to be borne by those of higher rank. The obligations set out in [Article 57 AP I] could concern the high commands only – the higher grades of the military hierarchy, and it was thus that Switzerland would interpret that provision.¹⁶⁹

174. At the CDDH, Turkey stated that the word “feasible” in Article 57 AP I should be interpreted as “related to what was practicable, taking into account all the circumstances at the time and those relevant to the success of military operations”.¹⁷⁰

175. At the CDDH, the US stated that:

The word “feasible” when used in draft Protocol I, for example in Articles 50 and 51 [57 and 58], refers to that which is practicable or practically possible, taking into account all circumstances at the time, including those relevant to the success of military operations.¹⁷¹

III. Practice of International Organisations and Conferences

United Nations

176. No practice was found.

Other International Organisations

177. No practice was found.

¹⁶⁷ Italy, Statement at the CDDH, *Official Records*, Vol. VI, CDDH/SR.42, 27 May 1977, p. 231.

¹⁶⁸ Netherlands, Statement at the CDDH, *Official Records*, Vol. VI, CDDH/SR.42, 27 May 1977, p. 214, § 61.

¹⁶⁹ Switzerland, Statement at the CDDH, *Official Records*, Vol. VI, CDDH/SR.42, 27 May 1977, p. 212, § 43.

¹⁷⁰ Turkey, Statement at the CDDH, *Official Records*, Vol. VI, CDDH/SR.42, 27 May 1977, p. 211, § 41.

¹⁷¹ US, Statement at the CDDH, *Official Records*, Vol. VI, CDDH/SR.42, 27 May 1977, p. 241.

International Conferences

178. The Rapporteur of the Working Group at the CDDH reported that:

Certain words [in draft Article 50 (57) AP I] created problems, particularly the choice between “feasible” and “reasonable” . . . The Rapporteur understands “feasible”, which was the term chosen by the Working Group, to mean that which is practicable, or practically possible. “Reasonable” struck many representatives as too subjective a term.¹⁷²

IV. Practice of International Judicial and Quasi-judicial Bodies

179. In its final report to the ICTY Prosecutor in 2000, the Committee Established to Review the NATO Bombing Campaign Against the Federal Republic of Yugoslavia stated that:

The obligation to do everything feasible is high but not absolute . . . Both the commander and the aircrew actually engaged in operations must have some range of discretion to determine which available resources shall be used and how they shall be used. Further, a determination that inadequate efforts have been made to distinguish between military objectives and civilians or civilian objects should not necessarily focus exclusively on a specific incident. If precautionary measures have worked adequately in a very high percentage of cases then the fact they have not worked well in a small number of cases does not necessarily mean they are generally inadequate.¹⁷³

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

180. To fulfil its task of disseminating IHL, the ICRC has delegates around the world teaching armed and security forces the rule that:

The commander shall take all feasible precautions. “Feasible precautions” are those precautions which are practicable, taking into account the tactical situation (that is all circumstances ruling at the time, including humanitarian and military considerations).¹⁷⁴

VI. Other Practice

181. No practice was found.

¹⁷² CDDH, *Official Records*, Vol. XV, CDDH/III/264/Rev.1, Report to Committee III on the Work of the Working Group submitted by the Rapporteur, 13 March 1975, p. 353.

¹⁷³ ICTY, Final Report to the Prosecutor by the Committee Established to Review the NATO Bombing Campaign Against the Federal Republic of Yugoslavia, The Hague, 14 June 2000, § 29.

¹⁷⁴ Frédéric de Mulinen, *Handbook on the Law of War for Armed Forces*, ICRC, Geneva, 1987, § 365.

Information required for deciding upon precautions in attack

I. Treaties and Other Instruments

Treaties

182. Upon ratification (or signature) of AP I by Algeria, Australia, Belgium, Canada, Egypt, Germany, Ireland, Italy, Netherlands, New Zealand, Spain and UK made statements to the effect that military commanders and others responsible for planning, deciding upon, or executing attacks necessarily have to reach their decisions on the basis of their assessment of the information from all sources, which is available to them at the relevant time. These statements are quoted in Chapter 4 and are not repeated here.

183. Upon ratification of AP I, Austria stated that “Article 57, paragraph 2, of Protocol I will be applied on the understanding that, with respect to any decision taken by a military commander, the information actually available at the time of the decision is determinative”.¹⁷⁵ It further stated that:

For the purposes of judging any decision taken by a military commander, Articles 85 and 86 of Protocol I will be applied on the understanding that military imperatives, the reasonable possibility of recognizing them and the information actually available at the time that decision was taken, are determinative.¹⁷⁶

Other Instruments

184. Paragraph 46(a) of the 1994 San Remo Manual states that “those who plan, decide upon or execute an attack must take all feasible measures to gather information which will assist in determining whether or not objects which are not military objectives are present in an area of attack”.

II. National Practice

Military Manuals

185. Australia’s Defence Force Manual states that:

All reasonable precautions must be taken to avoid injury, loss or damage to civilians and civilian objects and locations. It is therefore important to obtain accurate intelligence before mounting an attack . . . Accordingly, the best possible intelligence is required concerning:

- a. concentrations of civilians;
- b. civilians who may be in the vicinity of military objectives;
- c. the nature of built-up areas such as towns, communities, shelters, etc.;
- d. the existence and nature of important civilian objects and specifically protected objects; and
- e. the environment.¹⁷⁷

¹⁷⁵ Austria, Reservations made upon ratification of AP I, 13 August 1982, § 1.

¹⁷⁶ Austria, Reservations made upon ratification of AP I, 13 August 1982, § 4.

¹⁷⁷ Australia, *Defence Force Manual* (1994), §§ 548 and 549.

The manual also refers to the declarations made by Australia upon ratification of AP I to the effect that “military commanders and others responsible for planning, deciding upon, or executing attacks, necessarily have to reach their decisions on the basis of their assessment of the information from all sources, which is available to them at the relevant time”.¹⁷⁸

186. Benin’s Military Manual states that “military commanders must inform themselves about concentrations of civilian persons, important civilian objects and specially protected facilities, the natural environment and the civilian environment of military objectives”.¹⁷⁹

187. Canada’s LOAC Manual states that:

Decisions will be based on the “circumstances ruling at the time”. Consideration must be paid to the honest judgement of responsible commanders, based on the information reasonably available to them at the relevant time, taking fully into account the urgent and difficult circumstances under which such judgements are usually made.¹⁸⁰

188. Croatia’s Commanders’ Manual requires that “the commander shall keep himself informed on concentrations of civilian persons, important civilian objects and specifically protected establishments”.¹⁸¹

189. Ecuador’s Naval Manual states that:

The commander must decide, in light of all the facts known or reasonably available to him, including the need to conserve resources and complete the mission successfully, whether to adopt an alternative method of attack, if reasonably available, to reduce civilian casualties and damage.¹⁸²

190. France’s LOAC Summary Note states that:

Commanders are responsible for the consequences for civilians of the military actions they take. They must, prior to any action, obtain a maximum of information concerning the nature and the location of protected objects (medical units, cultural objects, installations containing dangerous forces) and concerning any concentration of civilians.¹⁸³

191. Italy’s LOAC Elementary Rules Manual requires that “the commander shall keep himself informed on concentrations of civilian persons, important civilian objects and specifically protected establishments”.¹⁸⁴

192. Madagascar’s Military Manual states that “the commander must seek information concerning concentrations of civilian persons, important civilian objects and specifically protected establishments”.¹⁸⁵

¹⁷⁸ Australia, *Defence Force Manual* (1994), Chapter 5, Annex A.

¹⁷⁹ Benin, *Military Manual* (1995), Fascicule III, p. 12.

¹⁸⁰ Canada, *LOAC Manual* (1999), pp. 4-3/4-4, § 26.

¹⁸¹ Croatia, *Commanders’ Manual* (1992), § 44, see also § 31.

¹⁸² Ecuador, *Naval Manual* (1989), § 8.1.2.1.

¹⁸³ France, *LOAC Summary Note* (1992), § 5.2.

¹⁸⁴ Italy, *LOAC Elementary Rules Manual* (1991), § 44, see also § 31.

¹⁸⁵ Madagascar, *Military Manual* (1994), Fiche No. 6-O, § 12, see also Fiche No. 5-O, § 31.

193. New Zealand's Military Manual, with respect to the standard by which to judge the duty to take all feasible precautions, specifies that "any subsequent evaluation of conduct must focus on all the circumstances, including humanitarian and military considerations, as they appeared to decision makers at the time, rather than against an absolute standard".¹⁸⁶

194. Nigeria's Military Manual provides that "the commander, through his intelligence network shall get information on the circumstance of the military relevancy of the zone, specifically protected zones or objects in his area of operations".¹⁸⁷

195. Spain's LOAC Manual states that:

Information is one of the basic pillars on which a commander must base his decisions. A commander needs information about the presence of protected persons and objects in the zone of operation, the nature and location of medical establishments, the location of cultural and religious objects, nuclear power plants, concentrations of civilian persons, movements of populations, etc.¹⁸⁸

196. Sweden's IHL Manual states that the obligations to take precautions in attack "apply only as far as available resources for collection and processing of information permit". The manual adds that "a planning commander must, to be able to decide upon an attack, have access to the best possible information about the objective. The decision should be based upon the information available to the commander at the time of deciding."¹⁸⁹

197. Togo's Military Manual states that "military commanders must inform themselves about concentrations of civilian persons, important civilian objects and specially protected facilities, the natural environment and the civilian environment of military objectives".¹⁹⁰

198. The US Naval Handbook states that:

The commander must decide, in light of all the facts known or reasonably available to him, including the need to conserve resources and complete the mission successfully, whether to adopt an alternative method of attack, if reasonably available, to reduce civilian casualties and damage.¹⁹¹

National Legislation

199. No practice was found.

National Case-law

200. No practice was found.

¹⁸⁶ New Zealand, *Military Manual* (1992), § 518(4).

¹⁸⁷ Nigeria, *Military Manual* (1994), p. 43, § 14.

¹⁸⁸ Spain, *LOAC Manual* (1996), Vol. I, § 2.3.b.(5), see also § 5.3.b.

¹⁸⁹ Sweden, *IHL Manual* (1991), Section 3.2.1.5, pp. 70–71.

¹⁹⁰ Togo, *Military Manual* (1996), Fascicule III, p. 12.

¹⁹¹ US, *Naval Handbook* (1995), § 8.1.2.1.

Other National Practice

201. In an explanatory memorandum submitted to the German parliament in 1990 in the context of the ratification procedure of the Additional Protocols, the German government stated that:

Article 57 [AP I] contains high requirements for military commanders. They can only evaluate the situation on the basis of facts at their disposal during the planning and execution of an attack. Military commanders cannot be held responsible on the basis of facts they did not know, and could not have known, and which became only clear afterwards.¹⁹²

202. In 1992, in its final report to Congress on the conduct of the Gulf War, the US Department of Defense stated that:

In reviewing an incident such as the attack of the Al-'Amariyah bunker, the law of war recognizes the difficulty of decision making amid the confusion of war. Leaders and commanders necessarily have to make decisions on the basis of their assessment of the information reasonably available to them at the time, rather than what is determined in hindsight.¹⁹³

III. Practice of International Organisations and Conferences

203. No practice was found.

IV. Practice of International Judicial and Quasi-judicial Bodies

204. In its final report to the ICTY Prosecutor in 2000, the Committee Established to Review the NATO Bombing Campaign Against the Federal Republic of Yugoslavia stated that:

A military commander must set up an effective intelligence gathering system to collect and evaluate information concerning potential targets. The commander must also direct his forces to use available technical means to properly identify targets during operations.¹⁹⁴

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

205. To fulfil its task of disseminating IHL, the ICRC has delegates around the world teaching armed and security forces that:

¹⁹² Germany, Lower House of Parliament, Explanatory memorandum on the Additional Protocols to the Geneva Conventions, *BT-Drucksache* 11/6770, 22 March 1990, p. 113.

¹⁹³ US, Department of Defense, Final Report to Congress on the Conduct of the Persian Gulf War, 10 April 1992, Appendix O, The Role of the Law of War, *ILM*, Vol. 31, 1992, p. 626.

¹⁹⁴ ICTY, Final Report to the Prosecutor by the Committee Established to Review the NATO Bombing Campaign Against the Federal Republic of Yugoslavia, The Hague, 14 June 2000, § 29.

To fulfil his mission, the commander needs appropriate information about the enemy and the environment. To comply with the law of war, information must include:

- a) concentrations of civilian persons;
- b) civilian surroundings of military objectives;
- c) nature of built up areas (towns, villages, shelters, etc.);
- d) existence and nature of important civilian objects, particularly of specifically protected objects;
- e) natural environment.¹⁹⁵

VI. Other Practice

206. In its report on the NATO bombings in the FRY issued in 2000, Amnesty International, after commenting on the lack of precautions taken by NATO, concluded that “the apparent preeminence given by NATO to intelligence in the planning phase rather than throughout the conduct of an attack, and serious mistakes in intelligence gathering, seem to have led to unlawful deaths”.¹⁹⁶

B. Target Verification

I. Treaties and Other Instruments

Treaties

207. Article 57(2)(a) AP I provides that, with respect to attacks, the following precautions shall be taken:

Those who plan or decide upon an attack shall:

- i) do everything feasible to verify that the objectives to be attacked are neither civilians nor civilian objects and are not subject to special protection but are military objectives within the meaning of paragraph 2 of Article 52 and that it is not prohibited by the provisions of this Protocol to attack them.

Article 57 AP I was adopted by 90 votes in favour, none against and 4 abstentions.¹⁹⁷

208. Article 7 of the 1999 Second Protocol to the 1954 Hague Convention states that:

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

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

¹⁹⁵ Frédéric de Mulinen, *Handbook on the Law of War for Armed Forces*, ICRC, Geneva, 1987, § 436, see also § 459.

¹⁹⁶ Amnesty International, *NATO/Federal Republic of Yugoslavia: “Collateral Damage” or Unlawful Killings? Violations of the Laws of War by NATO during Operation Allied Force*, AI Index EUR 70/18/00, London, June 2000, p. 26.

¹⁹⁷ CDDH, *Official Records*, Vol. VI, CDDH/SR.42, 27 May 1977, p. 211.

Other Instruments

209. Article 8 of the 1956 New Delhi Draft Rules states that “the person responsible for ordering or launching an attack shall, first of all: (a) make sure that the objective, or objectives, to be attacked are military objectives within the meaning of the present rules, and are duly identified”.

210. Paragraph 6 of the 1991 Memorandum of Understanding on the Application of IHL between Croatia and the SFRY requires that hostilities be conducted in accordance with Article 57 AP I.

211. Paragraph 2.5 of the 1992 Agreement on the Application of IHL between the Parties to the Conflict in Bosnia and Herzegovina requires that hostilities be conducted in accordance with Article 57 AP I.

212. Paragraph 46(b) of the 1994 San Remo Manual provides that “in the light of the information available to them, those who plan, decide upon, or execute an attack shall do everything feasible to ensure that attacks are limited to military objectives”.

*II. National Practice**Military Manuals*

213. Argentina’s Law of War Manual states that “those who plan or decide upon an attack shall, as far as possible, verify that the objectives to be attacked are not civilians, nor civilian objects, nor subject to special protection”.¹⁹⁸

214. Australia’s Defence Force Manual states that “everything feasible [must be done] to verify that objects being attacked are military objectives”.¹⁹⁹

215. Belgium’s Teaching Manual for Soldiers considers that an object can be attacked only when it can reasonably be considered to be a military objective and states that armed forces should not shoot first and check later.²⁰⁰

216. Benin’s Military Manual states that “all necessary measures must be taken to verify that the target to be destroyed is a military objective”.²⁰¹

217. Cameroon’s Instructors’ Manual requires that “those who plan or decide upon an attack do everything that is practically possible to verify that the targets to be attacked are military objectives”.²⁰²

218. Canada’s LOAC Manual states that “commanders, planners and staff officers have . . . to do everything feasible to verify that the objectives to be attacked are in fact legitimate targets and are not entitled to special protection under the LOAC”.²⁰³

¹⁹⁸ Argentina, *Law of War Manual* (1989), § 4.07(1).

¹⁹⁹ Australia, *Defence Force Manual* (1994), § 556(d); see also *Commanders’ Guide* (1994), § 957(a).

²⁰⁰ Belgium, *Teaching Manual for Soldiers* (undated), p. 21.

²⁰¹ Benin, *Military Manual* (1995), Fascicule III, p. 11, see also Fascicule II, p. 6.

²⁰² Cameroon, *Instructors’ Manual* (1992), p. 82, see also p. 110 (naval warfare) and 113 (air warfare).

²⁰³ Canada, *LOAC Manual* (1999), p. 4-3, § 24(a).

- 219.** Croatia's LOAC Compendium imposes a duty to "verify the military character of objectives and targets".²⁰⁴
- 220.** Croatia's Commanders' Manual requires that "the military character of the objective shall be verified by reconnaissance and target identification".²⁰⁵
- 221.** Ecuador's Naval Manual states that "all reasonable precautions must be taken to ensure that only military objectives are targeted".²⁰⁶
- 222.** France's LOAC Manual provides that those who plan or decide upon an attack must "verify that the objectives to be attacked are neither civilians nor civilian objects".²⁰⁷
- 223.** Germany's Military Manual states that "before engaging an objective, every responsible military leader shall verify the military nature of the objective to be attacked".²⁰⁸
- 224.** Hungary's Military Manual imposes a duty to "verify the military character of objectives and targets".²⁰⁹
- 225.** Israel's Manual on the Laws of War states that "in any attack it is imperative to verify that the attack will be directed against a specific military target".²¹⁰
- 226.** Italy's LOAC Elementary Rules Manual requires that "the military character of the objective shall be verified by reconnaissance and target identification".²¹¹
- 227.** Kenya's LOAC Manual requires that "everything feasible must be done to verify that the assigned target is a military objective".²¹²
- 228.** Madagascar's Military Manual requires that "the military character of an objective or target must be verified by reconnaissance and target identification".²¹³
- 229.** The Military Manual of the Netherlands states that "during the selection of targets and the preparation of attacks, it must be verified that the objectives to be attacked are neither civilians nor civilian objects but are military objectives".²¹⁴
- 230.** New Zealand's Military Manual states that "those who plan or decide upon an attack shall do everything feasible to verify that the objectives to be attacked are neither civilians nor civilian objects and are not subject to special protection but are military objectives".²¹⁵

²⁰⁴ Croatia, *LOAC Compendium* (1991), p. 43.

²⁰⁵ Croatia, *Commanders' Manual* (1992), § 50, see also § 66.

²⁰⁶ Ecuador, *Naval Manual* (1989), § 8.1.

²⁰⁷ France, *LOAC Manual* (2001), p. 98.

²⁰⁸ Germany, *Military Manual* (1992), § 457.

²⁰⁹ Hungary, *Military Manual* (1992), p. 69.

²¹⁰ Israel, *Manual on the Laws of War* (1998), p. 37.

²¹¹ Italy, *LOAC Elementary Rules Manual* (1991), § 52, see also § 66.

²¹² Kenya, *LOAC Manual* (1997), Précis No. 4, p. 1.

²¹³ Madagascar, *Military Manual* (1994), Fiche No. 6-O, § 23.

²¹⁴ Netherlands, *Military Manual* (1993), p. V-11.

²¹⁵ New Zealand, *Military Manual* (1992), § 518(1).

- 231.** Nigeria's Military Manual states that "in the conduct of their attack, members of the armed forces shall only direct their attack at military objectives which must have been identified as such, clearly designated and assigned".²¹⁶ The manual specifies that "the military character of the objectives and targets must be verified and precaution taken not to attack non-military objectives like merchant ships, civilian aircraft etc".²¹⁷
- 232.** The Joint Circular on Adherence to IHL and Human Rights of the Philippines states that "preparation fires may be delivered only against confirmed hostile positions prior to an attack or offensive action subject to the approval/direction of the brigade/equivalent level commander".²¹⁸
- 233.** Spain's LOAC Manual requires that "the military character of the objective shall be verified by reconnaissance and target identification".²¹⁹
- 234.** Sweden's IHL Manual states that "the responsible commander shall verify that the attack is really directed against a military objective and not against [a] civilian population or civilian objects".²²⁰
- 235.** According to Switzerland's Basic Military Manual, "only specific and duly identified military objectives may be attacked".²²¹
- 236.** Togo's Military Manual states that "all necessary measures must be taken to verify that the target to be destroyed is a military objective".²²²
- 237.** The UK LOAC Manual states that "everything feasible must be done to verify that the target is a military objective".²²³
- 238.** The US Rules of Engagement for the Vietnam War stated that "all possible means will be employed to limit the risk to the lives and property of friendly forces and civilians. In this respect, a target must be clearly identified as hostile prior to making a decision to place fire on it."²²⁴
- 239.** The US Air Force Pamphlet states that:

Those who plan or decide upon an attack must do everything feasible to verify that the objectives to be attacked are neither civilians nor civilian objects and not subject to special protection but are military objectives and that it is permissible to attack them.²²⁵

- 240.** The US Naval Handbook states that "all reasonable precautions must be taken to ensure that only military objectives are targeted".²²⁶
- 241.** The YPA Military Manual of the SFRY (FRY) states that "it is permitted to directly attack and bombard only military objectives. Before undertaking

²¹⁶ Nigeria, *Military Manual* (1994), p. 43, § 14.

²¹⁷ Nigeria, *Military Manual* (1994), p. 45, § 16(a).

²¹⁸ Philippines, *Joint Circular on Adherence to IHL and Human Rights* (1991), § 2(c)(3).

²¹⁹ Spain, *LOAC Manual* (1996), Vol. I, § 10.8.e.(2), see also §§ 10.8.f.(1) and 2.3.b.(1).

²²⁰ Sweden, *IHL Manual* (1991), Section 3.2.1.5, p. 70.

²²¹ Switzerland, *Basic Military Manual* (1987), Article 28.

²²² Togo, *Military Manual* (1996), Fascicule III, p. 11, see also Fascicule II, p. 6.

²²³ UK, *LOAC Manual* (1981), Section 4, p. 13, § 4(a).

²²⁴ US, *Rules of Engagement for the Vietnam War* (1971), § 6(a).

²²⁵ US, *Air Force Pamphlet* (1976), § 5-3(c)(1)(b)(i)(a). ²²⁶ US, *Naval Handbook* (1995), § 8.1.

an attack, it is necessary to determine whether the objective to be attacked is identified as a military objective."²²⁷

National Legislation

242. Under Ireland's Geneva Conventions Act as amended, any "minor breach" of AP I, including violations of Article 57(2)(a)(i) AP I, is a punishable offence.²²⁸

243. Under Norway's Military Penal Code as amended, "anyone who contravenes or is accessory to the contravention of provisions relating to the protection of persons or property laid down in . . . the two additional protocols to [the Geneva] Conventions . . . is liable to imprisonment".²²⁹

National Case-law

244. No practice was found.

Other National Practice

245. The Report on the Practice of Egypt considers target verification to be an absolute obligation.²³⁰

246. On the basis of an interview with a senior officer of the armed forces, the Report on the Practice of Indonesia states that the Indonesian armed forces normally observe the precautions listed in Article 57 AP I.²³¹

247. The Report on the Practice of Iran notes, with respect to the Iran–Iraq War, that "Iranian authorities claimed that they did take all feasible precautions to verify that the objectives to be attacked were neither civilians nor civilian objects".²³²

248. On the basis of a reply by Iraq's Ministry of Defence to a questionnaire, the Report on the Practice of Iraq lists, among the precautions required in attack, the duty to ascertain the purely military nature of a target before taking any action against it.²³³

249. According to the Report on the Practice of Israel, "in principle, the IDF recognizes a general obligation to verify the military nature of a target during pre-attack planning phases".²³⁴

250. The Report on the Practice of Jordan notes that a booklet on the LOAC prepared by the ICRC is used by military commanders. The booklet gives a

²²⁷ SFRY (FRY), *YPA Military Manual* (1988), § 72(1).

²²⁸ Ireland, *Geneva Conventions Act as amended* (1962), Section 4(1) and (4).

²²⁹ Norway, *Military Penal Code as amended* (1902), § 108(b).

²³⁰ Report on the Practice of Egypt, 1997, Chapter 1.6.

²³¹ Report on the Practice of Indonesia, 1997, Interview with a senior officer of the Indonesian armed forces, Chapter 1.6.

²³² Report on the Practice of Iran, 1997, Chapter 1.6.

²³³ Report on the Practice of Iraq, 1998, Reply by the Iraqi Ministry of Defence to a questionnaire, July 1997, Chapter 1.6.

²³⁴ Report on the Practice of Israel, 1997, Answers to additional questions on Chapter 1.6.

list of principles to apply in military action, among which is the obligation to verify the military nature of an objective prior to the attack.²³⁵

251. According to the Report on the Practice of Malaysia, the obligation to verify that targets are indeed military objectives forms part of Malaysian practice.²³⁶

252. According to the government of the Netherlands, commanders have to take all the precautionary measures required by Article 57 AP I when carrying out an attack.²³⁷

253. The Report on the Practice of Syria asserts that Syria considers Article 57 AP I to be part of customary international law.²³⁸

254. In a report submitted to the UN Security Council on operations in the Gulf War, the UK asserted that UK commanders were briefed on the “locations and significance of sites of religious and cultural importance in Iraq” and that operations would take this information into account.²³⁹

255. The Report on US Practice refers to an instance recorded during the Vietnam War in the early 1970s when a possible storage facility for air defence missiles, which would normally have been a high-priority target, was removed from the target list because it was “in a heavily populated area on the edge of Hanoi and the intelligence which indicated that it might be a storage facility was somewhat speculative”.²⁴⁰

256. The Report on the Practice of Zimbabwe states that the provisions of Article 57 AP I would be regarded as customary by Zimbabwe because of its adoption of the Geneva Conventions Amendment Act which incorporates API into Zimbabwe’s law and practice.²⁴¹

III. Practice of International Organisations and Conferences

United Nations

257. No practice was found.

Other International Organisations

258. During the air campaign against the FRY in 1999, NATO stated on various occasions that the targets attacked were exclusively military. According to

²³⁵ Report on the Practice of Jordan, 1997, Answers to additional questions on Chapter 1.6.

²³⁶ Report on the Practice of Malaysia, 1997, Answers to additional questions on Chapter 1.6.

²³⁷ Netherlands, Lower House of Parliament, Memorandum in response to the report on the ratification of the Additional Protocols, 1985–1986 Session, Doc. 18 277 (R 1247), No. 6, 16 December 1985, p. 7, § 17.

²³⁸ Report on the Practice of Syria, 1997, Chapter 1.6.

²³⁹ UK, Letter dated 21 January 1991 to the President of the UN Security Council, UN Doc. S/22115, 21 January 1991, p. 1; see also Letter dated 13 February 1991 to the President of the UN Security Council, UN Doc. S/22218, 13 February 1991, p. 1.

²⁴⁰ Report on US Practice, 1997, Chapter 1.6, referring to James R. McCarthy and George B. Allison, *Linebacker II: A View From the Rock*, US Air Force Southeast Asia Monograph Series, Volume VI, Monograph 8, 1979, pp. 97–98.

²⁴¹ Report on the Practice of Zimbabwe, 1998, Chapter 1.6.

NATO, the targets were carefully selected and continuously assessed to avoid collateral damage.²⁴²

International Conferences

259. No practice was found.

IV. Practice of International Judicial and Quasi-judicial Bodies

260. In its judgement in the *Kupreškić case* in 2000, the ICTY Trial Chamber stated that Article 57 AP I was now part of customary international law, not only because it specified and fleshed out general pre-existing norms, but also because it did not appear to be contested by any State, including those who had not ratified the Protocol.²⁴³ With reference to the Martens Clause, the Trial Chamber held that:

The prescriptions of . . . [Article 57] (and of the corresponding customary rules) must be interpreted so as to construe as narrowly as possible the discretionary power to attack belligerents and, by the same token, so as to expand the protection accorded to civilians.²⁴⁴

261. In its final report to the ICTY Prosecutor in 2000, the Committee Established to Review the NATO Bombing Campaign Against the Federal Republic of Yugoslavia stated that:

In determining whether or not the mens rea requirement [intention or recklessness, for the offence of unlawful attack under Article 3 of the ICTY Statute] has been met, it should be borne in mind that commanders deciding on an attack have duties:

- a) to do everything practicable to verify that the objectives to be attacked are military objectives.²⁴⁵

Regarding the 15,000 feet minimum flying altitude adopted by NATO for part of the campaign, the Committee stated that "NATO air commanders have a duty to take practicable measures to distinguish military objectives from civilians and civilian objectives".²⁴⁶

²⁴² NATO, Press Conferences of 25 and 26 March 1999, 3 and 9 April 1999, 15 and 21 May 1999.

²⁴³ ICTY, *Kupreškić case*, Judgement, 14 January 2000, § 524.

²⁴⁴ ICTY, *Kupreškić case*, Judgement, 14 January 2000, § 525.

²⁴⁵ ICTY, Final Report to the Prosecutor by the Committee Established to Review the NATO Bombing Campaign Against the Federal Republic of Yugoslavia, The Hague, 14 June 2000, § 28.

²⁴⁶ ICTY, Final Report to the Prosecutor by the Committee Established to Review the NATO Bombing Campaign Against the Federal Republic of Yugoslavia, The Hague, 14 June 2000, § 56.

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

262. To fulfil its task of disseminating IHL, the ICRC has delegates around the world teaching armed and security forces the following rules:

The attack may only be directed at a specific military objective. The military objective must be identified as such and clearly designated and assigned. The attack shall be limited to the assigned military objective. The precautions to be taken in targeting are equivalent to those to be respected in the choice of a military objective.

In combat action the military character of the objectives and targets must be verified.²⁴⁷

263. In an appeal issued in October 1973, the ICRC urged all the belligerents in the conflict in the Middle East (Egypt, Iraq, Israel and Syria) to observe forthwith, in particular, the provisions of, *inter alia*, Article 50(1)(a) of draft AP I, which stated in part that “those who plan or decide upon an attack shall ensure that the objectives to be attacked are duly identified as military objectives” (Proposal I). All governments concerned replied favourably.²⁴⁸

VI. Other Practice

264. No practice was found.

C. Choice of Means and Methods of Warfare

Note: For practice concerning precautions to be taken in the use of booby-traps, see Chapter 28. For practice concerning precautions to be taken in the use of landmines, see Chapter 29. For practice concerning precautions to be taken in the use of incendiary weapons, see Chapter 30.

I. Treaties and Other Instruments

Treaties

265. Article 57(2)(a)(ii) AP I provides that, with respect to attacks, the following precautions shall be taken:

Those who plan or decide upon an attack shall . . . take all feasible precautions in the choice of means and methods of attack with a view to avoiding, and in any event to minimizing, incidental loss of civilian life, injury to civilians and damage to civilian objects.

²⁴⁷ Frédéric de Mulinen, *Handbook on the Law of War for Armed Forces*, ICRC, Geneva, 1987, §§ 428, 434 and 454.

²⁴⁸ ICRC, *The International Committee's Action in the Middle East*, *IRRC*, No. 152, 1973, pp. 584–585.

Article 57 AP I was adopted by 90 votes in favour, none against and 4 abstentions.²⁴⁹

266. Article 7 of the 1999 Second Protocol to the 1954 Hague Convention states that:

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

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

Other Instruments

267. Article 9 of the 1956 New Delhi Draft Rules states that:

All possible precautions shall be taken, both in the choice of the weapons and methods to be used, and in the carrying out of an attack, to ensure that no losses or damage are caused to the civilian population in the vicinity of the objective, or to its dwellings, or that such losses or damage are at least reduced to a minimum.

In particular, in towns and other places with a large civilian population, which are not in the vicinity of military or naval operations, the attack shall be conducted with the greatest degree of precision. It must not cause losses or destruction beyond the immediate surroundings of the objective attacked.

268. Paragraph 6 of the 1991 Memorandum of Understanding on the Application of IHL between Croatia and the SFRY requires that hostilities be conducted in accordance with Article 57 AP I.

269. Paragraph 2.5 of the 1992 Agreement on the Application of IHL between the Parties to the Conflict in Bosnia and Herzegovina requires that hostilities be conducted in accordance with Article 57 AP I.

270. Paragraph 46(c) of the 1994 San Remo Manual provides that those who plan, decide upon or execute an attack shall "take all feasible precautions in the choice of methods and means in order to avoid or minimize collateral casualties or damage".

II. National Practice

Military Manuals

271. Argentina's Law of War Manual states that:

Those who plan or decide upon an attack shall, as far as possible, take all precautions in the choice of means and methods of attack in order to minimize the loss of civilian life, injury to civilians and damage to civilian objects which the attack may incidentally cause.²⁵⁰

²⁴⁹ CDDH, *Official Records*, Vol. VI, CDDH/SR.42, 27 May 1977, p. 211.

²⁵⁰ Argentina, *Law of War Manual* (1989), § 4.07(1).

272. Australia's Defence Force Manual specifies that "all feasible precautions [must be taken], in the choice of means and methods of attack, to minimise collateral damage".²⁵¹ With respect to precision guided weapons, the manual specifies that:

The existence of precision guided weapons... in a military inventory does not mean that they must necessarily be used in preference to conventional weapons even though the latter may cause collateral damage. In many cases, conventional weapons may be used to bomb legitimate military targets without violating LOAC requirements. It is a command decision as to which weapon to use; this decision will be guided by the basic principles of LOAC: military necessity, unnecessary suffering and proportionality.²⁵²

273. Benin's Military Manual states that "precautions must be taken in the choice of weapons and methods of combat in order to avoid civilian losses and damage to civilian objects".²⁵³ The manual specifies that "the direction and the moment of an attack must be chosen so as to reduce civilian losses and damage to civilian objects as much as possible".²⁵⁴

274. Cameroon's Instructors' Manual considers that:

The general rule [to spare civilians and civilian objects] implies the duty to choose and to use means of combat with a view to avoiding civilian losses and damage to civilian objects or with a view to minimising civilian losses and damage to civilian objects which are unavoidable.²⁵⁵

275. Canada's LOAC Manual states that "commanders, planners and staff officers have . . . to take all feasible precautions in the choice of means and methods of attack to avoid, and in any event to minimize, collateral civilian damage".²⁵⁶

276. Croatia's Commanders' Manual requires that "to restrict civilian casualties and damages, the means of combat and weapons shall be adapted to the target".²⁵⁷

277. Croatia's LOAC Compendium states that "where there are tactically equivalent alternatives, the directions, time, objectives and targets of attack shall be chosen so as to cause the least damage to persons and objects".²⁵⁸

278. Ecuador's Naval Manual requires that:

The commander must decide, in light of all the facts known or reasonably available to him, including the need to conserve resources and complete the mission

²⁵¹ Australia, *Defence Force Manual* (1994), § 556(e); see also *Commanders' Guide* (1994), § 957(b).

²⁵² Australia, *Defence Force Manual* (1994), § 834; see also *Commanders' Guide* (1994), §§ 317 and 1024.

²⁵³ Benin, *Military Manual* (1995), Fascicule III, p. 11.

²⁵⁴ Benin, *Military Manual* (1995), Fascicule III, p. 14.

²⁵⁵ Cameroon, *Instructors' Manual* (1992), p. 95.

²⁵⁶ Canada, *LOAC Manual* (1999), p. 4-3, § 24(b).

²⁵⁷ Croatia, *Commanders' Manual* (1992), § 53, see also § 45.

²⁵⁸ Croatia, *LOAC Compendium* (1991), p. 41.

successfully, whether to adopt an alternative method of attack, if reasonably available, to reduce civilian casualties and damage.²⁵⁹

279. France's LOAC Manual provides that those who plan or decide upon an attack shall "take all precautions which are practically possible in the choice of means and methods of attack with a view to avoiding, and in any event to minimising, loss of civilian life".²⁶⁰

280. Germany's Military Manual states that "before engaging an objective, every responsible military leader shall . . . choose means and methods minimizing incidental injury and damage to civilian life and objects".²⁶¹

281. Hungary's Military Manual states that "where there are tactically equivalent alternatives, the directions, time, objectives and targets of attack shall be chosen so as to cause the least damage to persons and objects".²⁶²

282. Israel's Manual on the Laws of War states that "one should plan the means of attack in a way that will prevent, or at least reduce, the injury to the civilian population".²⁶³

283. Italy's LOAC Elementary Rules Manual requires that "to restrict civilian casualties and damages, the means of combat and weapons shall be adapted to the target".²⁶⁴

284. Kenya's LOAC Manual states that "in the choice of weapons or methods of combat, care must be taken to avoid incidental loss or damage to civilians or civilian objects".²⁶⁵ The manual specifies that:

The direction and the moment of the attack shall be chosen so as to limit civilian casualties and damage (e.g. attack of factory after normal working hours).

The precautions to be taken in targeting for particular weapons and fire units are equivalent to those to be respected in the choice of a military objective. The tactical result expected (e.g. destruction, neutralization) and the destructive power of the ammunition used (quantity, ballistic data, precision, point or area covered, possible effects on the environment) should especially be taken into account.²⁶⁶

285. Madagascar's Military Manual states that "in order to minimise civilian losses and damage to civilian objects, means of combat and weapons shall be appropriate to the objective".²⁶⁷

286. The Military Manual of the Netherlands requires that "precautionary measures be taken in the choice of means and methods of attack in order to

²⁵⁹ Ecuador, *Naval Manual* (1989), § 8.1.2.1.

²⁶⁰ France, *LOAC Manual* (2001), p. 89; see also *LOAC Teaching Note* (2000), p. 2 and *LOAC Summary Note* (1992), § 5.2.

²⁶¹ Germany, *Military Manual* (1992), § 457.

²⁶² Hungary, *Military Manual* (1992), p. 66, see also p. 54.

²⁶³ Israel, *Manual on the Laws of War* (1998), p. 39.

²⁶⁴ Italy, *LOAC Elementary Rules Manual* (1991), § 53, see also § 45.

²⁶⁵ Kenya, *LOAC Manual* (1997), Précis No. 4, p. 1.

²⁶⁶ Kenya, *LOAC Manual* (1997), Précis No. 4, p. 8.

²⁶⁷ Madagascar, *Military Manual* (1994), Fiche No. 6-O, § 24.

ensure that collateral damage (loss of civilian life and damage to civilian objects) is reduced to the maximum extent possible".²⁶⁸

287. New Zealand's Military Manual states that:

Those who plan or decide upon an attack shall . . . take all feasible precautions in the choice of means and methods of attack with a view to avoiding, and in any event to minimizing, incidental loss of civilian life, injury to civilians and damage to civilian objects.²⁶⁹

288. The Joint Circular on Adherence to IHL and Human Rights of the Philippines states that:

The use of aerial/naval and artillery/mortar fires for interdiction and harassment especially when the fire missions are unobserved and near populated areas and when civilian casualties/material damages are likely to be incurred is strictly prohibited. . . Air strikes may be used under judicious circumstances. Targets shall be carefully evaluated by the close air support commander for approval by the Area Commander. During an actual engagement where the security of an AFP/PNP unit or critical installation/facility is threatened and time is of the essence, the commander of the engaged unit, on his own authority, may selectively apply available fire support means to defend his unit or position, however exercising utmost care to prevent or minimize civilian casualties/material damage.²⁷⁰

289. Spain's LOAC Manual requires that "means and methods of attack must be chosen in order to minimise collateral damage to the civilian population and to civilian objects".²⁷¹

290. Sweden's IHL Manual states that, after target verification, "the next step is for the attacker to select weapons and methods of attack such that unintentional civilian losses and damage to civilian property may be avoided as far as possible".²⁷²

291. Togo's Military Manual states that "precautions must be taken in the choice of weapons and methods of combat in order to avoid civilian losses and damage to civilian objects".²⁷³ The manual specifies that "the direction and the moment of an attack must be chosen so as to reduce civilian losses and damage to civilian objects as much as possible".²⁷⁴

292. The UK LOAC Manual states that "in the choice of weapons or methods of combat, care must be taken to avoid incidental loss or damage to civilians or civilian objects".²⁷⁵

²⁶⁸ Netherlands, *Military Manual* (1993), p. V-11.

²⁶⁹ New Zealand, *Military Manual* (1992), § 518(1).

²⁷⁰ Philippines, *Joint Circular on Adherence to IHL and Human Rights* (1991), § 2(c).

²⁷¹ Spain, *LOAC Manual* (1996), Vol. I, § 2.3.b.(2).

²⁷² Sweden, *IHL Manual* (1991), Section 3.2.1.5, p. 71.

²⁷³ Togo, *Military Manual* (1996), Fascicule III, p. 11.

²⁷⁴ Togo, *Military Manual* (1996), Fascicule III, p. 14.

²⁷⁵ UK, *LOAC Manual* (1981), Section 4, p. 13, § 4(b).

293. The US Air Force Pamphlet states that:

Those who plan or decide upon an attack must take all feasible precautions in the choice of means and methods of attack with a view to avoiding, and in any event to minimizing, incidental loss of civilian life, injury to civilians, and damage to civilian objects.²⁷⁶

294. The US Naval Handbook requires that:

The commander must decide, in light of all the facts known or reasonably available to him, including the need to conserve resources and complete the mission successfully, whether to adopt an alternative method of attack, if reasonably available, to reduce civilian casualties and damage.²⁷⁷

295. The YPA Military Manual of the SFRY (FRY) states that a means of attack proportionate to the importance of the objective should be selected if a civilian population is in the immediate vicinity.²⁷⁸

National Legislation

296. Under Ireland's Geneva Conventions Act as amended, any "minor breach" of AP I, including violations of Article 57(2)(a)(ii) AP I, is a punishable offence.²⁷⁹

297. Under Norway's Military Penal Code as amended, "anyone who contravenes or is accessory to the contravention of provisions relating to the protection of persons or property laid down in . . . the two additional protocols to [the Geneva] Conventions . . . is liable to imprisonment".²⁸⁰

National Case-law

298. No practice was found.

Other National Practice

299. On the basis of an interview with a senior officer of the armed forces, the Report on the Practice of Indonesia states that the Indonesian armed forces normally observe the precautions listed in Article 57 AP I.²⁸¹

300. The Report on the Practice of Iran states, with reference to the Iran-Iraq War, that "Iran claimed that . . . the time of the attack was chosen in a way that the least casualties to civilians would be inflicted. In Iran's view, low damage for Iraqi civilians was the proof of this claim."²⁸²

²⁷⁶ US, *Air Force Pamphlet* (1976), § 5-3(c)(1)(b)(i)(b).

²⁷⁷ US, *Naval Handbook* (1995), § 8.1.2.1.

²⁷⁸ SFRY (FRY), *YPA Military Manual* (1988), § 72(2).

²⁷⁹ Ireland, *Geneva Conventions Act as amended* (1962), Section 4(1) and (4).

²⁸⁰ Norway, *Military Penal Code as amended* (1902), § 108(b).

²⁸¹ Report on the Practice of Indonesia, 1997, Interview with a senior officer of the Indonesian armed forces, Chapter 1.6.

²⁸² Report on the Practice of Iran, 1997, Chapter 1.6.

301. On the basis of a reply by Iraq's Ministry of Defence to a questionnaire, the Report on the Practice of Iraq states that it appears from the practice of the Iraqi armed forces during the Iran–Iraq War that “each target has its own special weapon”.²⁸³

302. The Report on the Practice of Israel states that:

During the pre-attack planning phases, the IDF incorporates all feasible precautions in order to ensure, as far as possible, that incidental civilian loss, injury or damage is minimized. These measures include: detailed and continuous assessment of all available information in relation to the target; use of best available ammunition or weapon systems which enable minimizing incidental damage; and timing of the attack to minimize, as far as possible, incidental damage.²⁸⁴

303. The Report on the Practice of Japan refers to a statement made by Japan at the CDDH to the effect that “those who planned an attack by incendiary weapons were required to weigh carefully beforehand whether some other means of attack could be used in order to minimize civilian casualties”.²⁸⁵

304. According to the Report on the Practice of Malaysia, the obligation to choose means and methods of warfare with a view to avoiding or minimising incidental loss of civilian life and damage to civilian objects forms part of Malaysian practice.²⁸⁶

305. According to the government of the Netherlands, commanders have to take all the precautionary measures required by Article 57 AP I when carrying out an attack.²⁸⁷

306. The Report on the Practice of Syria asserts that Syria considers Article 57 AP I to be part of customary international law.²⁸⁸

307. In 1991, in a report submitted to the UN Security Council on operations in the Gulf War, the UK stated that “attacks have been directed exclusively at military objectives, using precision weapons wherever possible, particularly in areas where there may be civilians near the targets”.²⁸⁹

308. In 1991, during a debate in the UN Security Council on the Gulf War, the UK stated that all targets were carefully selected and that precision weapons were used wherever possible.²⁹⁰

309. In 1991, during a news briefing concerning the Gulf War, the US Secretary of Defense stated that:

²⁸³ Report on the Practice of Iraq, 1998, Reply by the Iraqi Ministry of Defence to a questionnaire, July 1997, Chapter 1.5.

²⁸⁴ Report on the Practice of Israel, 1997, Chapter 1.6, see also Chapter 1.3.

²⁸⁵ Report on the Practice of Japan, 1998, Chapter 1.6, referring to Statement by Japan at the CDDH, *Official Records*, Vol. XVI, CDDH/IV/SR.27, 19 May 1976, p. 279, § 24.

²⁸⁶ Report on the Practice of Malaysia, 1997, Answers to additional questions on Chapter 1.6.

²⁸⁷ Netherlands, Lower House of Parliament, Memorandum in response to the report on the ratification of the Additional Protocols, 1985–1986 Session, Doc. 18 277 (R 1247), No. 6, 16 December 1985, p. 7, § 17.

²⁸⁸ Report on the Practice of Syria, 1997, Chapter 1.6.

²⁸⁹ UK, Letter dated 13 February 1991 to the President of the UN Security Council, UN Doc. S/22218, 13 February 1991, p. 1.

²⁹⁰ UK, Statement before the UN Security Council, UN Doc. S/PV.2977, 16 February 1991.

Iraq, on the other hand, has chosen to launch a highly inaccurate weapon – the SCUD missile – at major population centers, with no certainty about where the SCUDs will land. In contrast, we have carefully chosen our targets and we've bombed them with precision.²⁹¹

310. In 1992, in its final report to Congress on the conduct of the Gulf War, the US Department of Defense stated that:

Coalition forces took several steps to minimize the risk of injury to noncombatants. To the degree possible and consistent with allowable risk to aircraft and aircrews, aircraft and munitions were selected so that attacks on targets within populated areas would provide the greatest possible accuracy and the least risk to civilian objects and the civilian population . . . One reason for the maneuver plan adopted for the ground campaign was that it avoided populated areas, where Coalition and Iraqi civilian casualties and damage to civilian objects necessarily would have been high. This was a factor in deciding against an amphibious assault into Kuwait City . . . Iraqi units remaining in Kuwait City would cause the Coalition to engage in military operations in urban terrain, a form of fighting that is costly to attacker, defender, innocent civilians, and civilian objects. The decision was made to permit Iraqi forces to leave Kuwait City and engage them in the unpopulated area to the north.²⁹²

311. In 1993, in its report to Congress on the protection of natural and cultural resources during times of war, the US Department of Defense stated that:

A number of steps can be taken by an attacker in order to minimize collateral damage to natural resources or cultural property. Many of these come in the design and development of weapons, weapon systems, and target intelligence, target acquisition, or weapons delivery systems. Each of these systems is enhanced by the quality of training provided [to] personnel responsible for their operation. U.S. efforts to develop, acquire, and utilize weapon systems such as the F-117 aircraft, the laser-guided bomb, and the Tomahawk missile are illustrative of the degree to which the armed services have sought precision in their military operations in order to minimize collateral damage . . . To the degree possible and consistent with allowable risks to aircraft and aircrews, [during the Gulf War] aircraft and munitions were selected so that attacks on targets in proximity to cultural objects would provide the greatest possible accuracy and the least risk of collateral damage to the cultural property.²⁹³

312. The Report on the Practice of Zimbabwe states that the provisions of Article 57 AP I would be regarded as customary by Zimbabwe because of its adoption of the Geneva Conventions Amendment Act which incorporates API into Zimbabwe's law and practice.²⁹⁴

²⁹¹ US, News Briefing by the US Secretary of Defense and the Chairman of the Joint Chiefs of Staff, Washington, 23 January 1991, annexed to Letter dated 25 January 1991 to the President of the UN Security Council, UN Doc. S/22168, 29 January 1991, p. 3.

²⁹² US, Department of Defense, Final Report to Congress on the Conduct of the Persian Gulf War, 10 April 1992, Appendix O, The Role of the Law of War, *ILM*, Vol. 31, 1992, pp. 622 and 643.

²⁹³ US, Department of Defense, Report to Congress on International Policies and Procedures Regarding the Protection of Natural and Cultural Resources During Times of War, 19 January 1993, pp. 203 and 205.

²⁹⁴ Report on the Practice of Zimbabwe, 1998, Chapter 1.6.

III. Practice of International Organisations and Conferences

United Nations

313. No practice was found.

Other International Organisations

314. During the air campaign against the FRY in 1999, NATO expressly stated that it looked specifically at the weapon to be used against a specific target:

Once we've done that [target identification] we then look at the sort of weapons that we use. We try and make sure that we use a specific weapon which is specialised and is the best possible weapon to use against that specific target.²⁹⁵

315. With respect to the air campaign against the FRY in 1999, the Secretary-General of NATO declared that "international law and public opinion" required the use of precision weapons.²⁹⁶

International Conferences

316. No practice was found.

IV. Practice of International Judicial and Quasi-judicial Bodies

317. In its judgement in the *Kupreškić case* in 2000, the ICTY Trial Chamber stated that Article 57 AP I was now part of customary international law, not only because it specified and fleshed out general pre-existing norms, but also because it did not appear to be contested by any State, including those who had not ratified the Protocol.²⁹⁷ With reference to the Martens Clause, the Trial Chamber held that:

The prescriptions of . . . [Article 57] (and of the corresponding customary rules) must be interpreted so as to construe as narrowly as possible the discretionary power to attack belligerents and, by the same token, so as to expand the protection accorded to civilians.²⁹⁸

318. In its final report to the ICTY Prosecutor in 2000, the Committee Established to Review the NATO Bombing Campaign Against the Federal Republic of Yugoslavia stated that:

The military worth of the target would need to be considered in relation to the circumstances prevailing at the time. If there is a choice of weapons or methods of

²⁹⁵ NATO, Press Conference by Nato Spokesperson Jamie Shea and Air Commodore David Wilby, Brussels, 3 April 1999, p. 11.

²⁹⁶ Vago Muradian, Robertson: "Europe Must Spend More Wisely to Achieve Gains", *Defense Daily*, 8 December 1999, p. 6, cited in Stuart W. Belt, Missiles over Kosovo: Emergence, Lex Lata, of a Customary Norm Requiring the Use of Precision Munition in Urban Areas, *Naval Law Review*, Vol. 47, 2000, p. 165.

²⁹⁷ ICTY, *Kupreškić case*, Judgement, 14 January 2000, § 524.

²⁹⁸ ICTY, *Kupreškić case*, Judgement, 14 January 2000, § 525.

attack available, a commander should select those which are most likely to avoid, or at least minimize, incidental damage. In doing so, however, he is entitled to take account of factors such as stocks of different weapons and likely future demands, the timeliness of attack and risks to his own forces. In determining whether or not the *mens rea* requirement [intention or recklessness, for the offence of unlawful attack under Article 3 of the ICTY Statute] has been met, it should be borne in mind that commanders deciding on an attack have duties:

- ...
- b) to take all practicable precautions in the choice of methods and means of warfare with a view to avoiding or, in any event to minimizing, incidental civilian casualties or civilian property damage.²⁹⁹

319. In its judgement in *Ergi v. Turkey* in 1998, the ECtHR held that:

The responsibility of the State is not confined to circumstances where there is significant evidence that misdirected fire from agents of the State has killed a civilian. It may also be engaged where they fail to take all feasible precautions in the choice of means and methods of a security operation mounted against an opposing group with a view to avoiding and, in any event, to minimising, incidental loss of civilian life.³⁰⁰

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

320. To fulfil its task of disseminating IHL, the ICRC has delegates around the world teaching armed and security forces the following rules:

The means of combat shall be chosen and used so as to:

- a) avoid civilian casualties and damage;
- b) minimize in any event unavoidable casualties and damage.

The direction and the moment of the attack shall be chosen so as to limit civilian casualties and damage (e.g. attack of factory after normal working hours).

Targets for particular weapons and fire units shall be determined and assigned with the same precautions as to military objectives, specially taking into account the tactical result expected (e.g. destruction, neutralization) and the destructive power of the ammunition used (quantity, ballistic data, precision, point or area covering, possible effects on the environment).³⁰¹

321. In an appeal launched in October 1973, the ICRC urged all the belligerents in the conflict in the Middle East (Egypt, Iraq, Israel and Syria) to observe forthwith, in particular, the provisions of, *inter alia*, Article 50(2) of draft API, which stated that “all necessary precautions shall be taken in the choice of

²⁹⁹ ICTY, Final Report to the Prosecutor by the Committee Established to Review the NATO Bombing Campaign Against the Federal Republic of Yugoslavia, The Hague, 14 June 2000, §§ 21 and 28.

³⁰⁰ ECtHR, *Ergi v. Turkey*, Judgement, 28 July 1998, § 79, see also § 80.

³⁰¹ Frédéric de Mulinen, *Handbook on the Law of War for Armed Forces*, ICRC, Geneva, 1987, §§ 393, 432 and 433.

weapons and methods of attack so as not to cause losses in civilian lives and damage to civilian objects in the immediate vicinity of military objectives to be attacked". All governments concerned replied favourably.³⁰²

VI. Other Practice

322. In 1994, in a letter to the government of Yemen, Human Rights Watch stated that "the rules of war also require that you take all feasible precautions in the choice of tactics and weapons with a view to avoiding or minimizing such civilian losses".³⁰³

323. In 1994, officials from a separatist entity stated to the ICRC that it had ordered its troops not to bombard targets located within 500 metres of civilian dwellings.³⁰⁴

324. On the basis of replies by army officers to a questionnaire, the Report on the Practice of Rwanda refers to the practice of the FPR of avoiding, on occasion, the use of heavy weaponry during the fighting in Kigali in order to spare homes.³⁰⁵

D. Assessment of the Effects of Attacks

Note: For practice concerning disproportionate attacks, see Chapter 4.

I. Treaties and Other Instruments

Treaties

325. Article 57(2)(a)(iii) AP I provides that, with respect to attacks, the following precautions shall be taken:

Those who plan or decide upon an attack shall . . . refrain from deciding to launch any attack which may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated.

Article 57 AP I was adopted by 90 votes in favour, none against and 4 abstentions.³⁰⁶

326. Article 7 of the 1999 Second Protocol to the 1954 Hague Convention states that:

³⁰² ICRC, *The International Committee's Action in the Middle East*, *IRRC*, No. 152, 1973, pp. 584–585.

³⁰³ Human Rights Watch, Letter to the government of Yemen, New York, 19 May 1994.

³⁰⁴ ICRC archive document.

³⁰⁵ Report on the Practice of Rwanda, 1997, Replies by Rwandan army officers to a questionnaire, Chapter 1.6.

³⁰⁶ CDDH, *Official Records*, Vol. VI, CDDH/SR.42, 27 May 1977, p. 211.

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

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

Other Instruments

327. Article 8(b) of the 1956 New Delhi Draft Rules states that:

The person responsible for ordering or launching an attack shall, first of all:

- ...
- (b) take into account the loss and destruction which the attack, even if carried out with the precautions prescribed under Article 9, is liable to inflict upon the civilian population. He is required to refrain from the attack if, after due consideration, it is apparent that the loss and destruction would be disproportionate to the military advantage anticipated.

328. Paragraph 6 of the 1991 Memorandum of Understanding on the Application of IHL between Croatia and the SFRY requires that hostilities be conducted in accordance with Article 57 AP I.

329. Paragraph 2.5 of the 1992 Agreement on the Application of IHL between the Parties to the Conflict in Bosnia and Herzegovina requires that hostilities be conducted in accordance with Article 57 AP I.

330. Paragraph 46(d) of the 1994 San Remo Manual provides that “an attack shall not be launched if it may be expected to cause collateral casualties or damage which would be excessive in relation to the concrete and direct military advantage anticipated from the attack as a whole”.

II. National Practice

Military Manuals

331. Argentina’s Law of War Manual states that:

Those who plan or decide upon an attack shall, as far as possible, abstain from deciding to launch an attack . . . if it becomes apparent that the attack may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated.³⁰⁷

332. Australia’s Defence Force Manual states that those responsible for deciding upon an attack must refrain from “launching any attack which may be

³⁰⁷ Argentina, *Law of War Manual* (1989), § 4.07(1).

expected to cause collateral injury, or collateral damage, which would be excessive in relation to the concrete and direct military advantage anticipated".³⁰⁸

333. Belgium's Law of War Manual states that "everything possible must be done to avoid incidental damage to civilian objects and loss of civilian life: when this damage and this loss appears to be excessive in relation to the anticipated military advantage, the attack must not take place".³⁰⁹

334. Benin's Military Manual states that "precautions must be taken in order to minimise civilian losses and damage to civilian objects. These precautions include respect for the rules of proportionality."³¹⁰

335. Cameroon's Instructors' Manual considers that "the principle of proportionality rests on the prohibition to launch attacks which will cause losses to civilian populations and damage to civilian objects which are excessive in relation to the anticipated military advantage".³¹¹

336. Canada's LOAC Manual states that:

Commanders, planners and staff officers have...to refrain from launching any attack which may be expected to cause collateral civilian damage which would be excessive in relation to the concrete and direct military advantage anticipated (proportionality test).³¹²

337. Ecuador's Naval Manual requires that:

Naval commanders must take all reasonable precautions...In each instance, the commander must determine whether incidental injuries and collateral damage would be excessive, on the basis of an honest and reasonable estimate of the facts available to him.³¹³

338. France's LOAC Manual provides that:

Those who plan or decide upon an attack shall...refrain from deciding to launch any attack which may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated.³¹⁴

339. Germany's Military Manual requires that:

Before engaging an objective, every responsible military leader shall...refrain from launching any attack which may be expected to cause incidental injury and damage to civilian life and objects which would be excessive in relation to the concrete and direct military advantage anticipated.³¹⁵

³⁰⁸ Australia, *Defence Force Manual* (1994), § 556(f); see also *Commanders' Guide* (1994), § 957(c).

³⁰⁹ Belgium, *Law of War Manual* (1983), p. 28.

³¹⁰ Benin, *Military Manual* (1995), Fascicule II, p. 6.

³¹¹ Cameroon, *Instructors' Manual* (1992), p. 83.

³¹² Canada, *LOAC Manual* (1999), p. 4-3, § 24.

³¹³ Ecuador, *Naval Manual* (1989), § 8.1.2.1.

³¹⁴ France, *LOAC Manual* (2001), p. 49, see also p. 89.

³¹⁵ Germany, *Military Manual* (1992), § 457.

340. Israel's Manual on the Laws of War states that "the commander is required to refrain from an attack that is expected to inflict harm on the civilian population that is disproportionate to the expected military gain".³¹⁶

341. The Military Manual of the Netherlands states that "during the selection of targets and the preparation of attacks, an attack must be renounced if it can be expected that it may cause damage which is excessive in relation to the anticipated military advantage".³¹⁷

342. New Zealand's Military Manual states that:

Those who plan or decide upon an attack shall . . . refrain from deciding to launch any attack which may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated.³¹⁸

343. According to Nigeria's Military Manual, "precaution shall be taken to minimise civilian casualties and damage and the precaution comprises the respect for the rule of proportionality (civilian casualties not being excessive in relation to the military advantage anticipated)".³¹⁹

344. Spain's LOAC Manual requires that:

It shall not be decided to launch an attack when, from the information available at the time of the decision, it may be expected to cause damage to civilian persons and/or objects which would be excessive in relation to the concrete and direct military advantage anticipated from the attack as a whole and not only from isolated parts thereof.³²⁰

345. Sweden's IHL Manual states that:

If the attack may be expected to entail such large losses in human life, injury to civilians or damage to civilian property, or a combination of these, that they may be judged excessive in relation to the anticipated concrete and direct advantage, the commander shall refrain from attacking.³²¹

346. Togo's Military Manual states that "precautions must be taken in order to minimise civilian losses and damage to civilian objects. These precautions include respect for the rules of proportionality."³²²

347. The US Air Force Pamphlet states that:

Those who plan or decide upon an attack must refrain from deciding to launch any attack which may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated.³²³

³¹⁶ Israel, *Manual on the Laws of War* (1998), p. 40.

³¹⁷ Netherlands, *Military Manual* (1993), p. V-11.

³¹⁸ New Zealand, *Military Manual* (1992), § 518(1).

³¹⁹ Nigeria, *Military Manual* (1994), p. 45, § 16(b).

³²⁰ Spain, *LOAC Manual* (1996), Vol. I, § 2.5.b.

³²¹ Sweden, *IHL Manual* (1991), Section 3.2.1.5, p. 71.

³²² Togo, *Military Manual* (1996), Fascicule II, p. 6.

³²³ US, *Air Force Pamphlet* (1976), § 5-3(c)(1)(b)(i)(c).

348. The US Naval Handbook requires that:

Naval commanders must take all reasonable precautions... In each instance, the commander must determine whether incidental injuries and collateral damage would be excessive, on the basis of an honest and reasonable estimate of the facts available to him.³²⁴

349. The YPA Military Manual of the SFRY (FRY) states that "an attack undertaken with disproportionate means on a military objective of lesser importance in an urban settlement, which would lead to big casualties among the civilian population, is contrary to the international law of war".³²⁵

National Legislation

350. Under Ireland's Geneva Conventions Act as amended, any "minor breach" of AP I, including violations of Article 57(2)(a)(iii) AP I, is a punishable offence.³²⁶

351. Under Norway's Military Penal Code as amended, "anyone who contravenes or is accessory to the contravention of provisions relating to the protection of persons or property laid down in... the two additional protocols to [the Geneva] Conventions... is liable to imprisonment".³²⁷

National Case-law

352. No practice was found.

Other National Practice

353. On the basis of an interview with a senior officer of the armed forces, the Report on the Practice of Indonesia states that the Indonesian armed forces normally observe the precautions listed in Article 57 AP I.³²⁸

354. According to the Report on the Practice of Iraq, the target should not induce the use of excessive force because the possible harm to civilians or undue damage to their possessions might exceed the specific military purpose. On the basis of a press conference given by the President of Iraq in 1980, the report considers that this means acting with only the degree of force necessary to achieve the specific military objective. The aim is to give due regard to humanitarian requirements and to lessen civilian suffering.³²⁹

³²⁴ US, *Naval Handbook* (1995), § 8.1.2.1.

³²⁵ SFRY (FRY), *YPA Military Manual* (1988), § 72(2).

³²⁶ Ireland, *Geneva Conventions Act as amended* (1962), Section 4(1) and (4).

³²⁷ Norway, *Military Penal Code as amended* (1902), § 108(b).

³²⁸ Report on the Practice of Indonesia, 1997, Interview with a senior officer of the Indonesian armed forces, Chapter 1.6.

³²⁹ Report on the Practice of Iraq, 1998, Chapter 1.5, referring to Press Conference of the President, 10 November 1980, *Encyclopedia of the Iraqi-Iranian War*, Vol. I, p. 318.

355. According to the government of the Netherlands, commanders have to take all the precautionary measures required by Article 57 AP I when carrying out an attack.³³⁰

356. The Report on the Practice of Syria asserts that Syria considers Article 57 AP I to be part of customary international law.³³¹

357. In 1991, in reply to a question in the House of Lords concerning the use of conventional weapons against nuclear facilities, chemical weapons plants and dumps, and petrochemical enterprises situated in towns or cities, the UK Minister of State, FCO, stated that:

International law requires that, in planning an attack on any military objective, account is taken of certain principles. These include the [principle] . . . that an attack should not be launched if it can be expected to cause civilian losses which would be disproportionate to the military advantage expected from the attack as a whole.³³²

358. In 1991, in response to a question in the Defence Committee of the UK House of Commons on whether or not there were occasions during the Gulf War when he decided that it would not be appropriate for the Royal Air Force to attack a particular target, Air Vice Marshal Wratten stated that:

Yes, there were such occasions. In particular, when we were experiencing collateral damage, such as it was, and some of the targets were in locations where with any weapon system malfunction severe collateral damage would have resulted inevitably, then there were one or two occasions that I chose not to go against those targets, but they were very few and far between and they were not – and this is the most important issue – in my judgment and in the judgment of the Americans of a critical nature, that is to say, they were not fundamental to the timely achievement of the victory. Had that been the case, then regrettably, irrespective of what collateral damage might have resulted, one would have been responsible and had a responsibility for accepting those targets and for going against them.³³³

359. In 1992, in its final report to Congress on the conduct of the Gulf War, the US Department of Defense stated that “some targets were specifically avoided because the value of destruction of each target was outweighed by the potential risk to nearby civilians or, as in the case of certain archaeological and religious sites, to civilian objects”.³³⁴

360. The Report on the Practice of Zimbabwe states that the provisions of Article 57 AP I would be regarded as customary by Zimbabwe because of

³³⁰ Netherlands, Lower House of Parliament, Memorandum in response to the report on the ratification of the Additional Protocols, 1985–1986 Session, Doc. 18 277 (R 1247), No. 6, 16 December 1985, p. 7, § 17.

³³¹ Report on the Practice of Syria, 1997, Chapter 1.6.

³³² UK, House of Lords, Statement by the Minister of State, FCO, 4 February 1991, *Hansard*, Vol. 525, Written Answers, col. 37.

³³³ UK, Statement of Air Vice Marshall Wratten, Minutes of Evidence taken before the Defence Committee, 22 May 1991, p. 38, § 274.

³³⁴ US, Department of Defense, Final Report to Congress on the Conduct of the Persian Gulf War, 10 April 1992, Appendix O, The Role of the Law of War, *ILM*, Vol. 31, 1992, p. 622.

its adoption of the Geneva Conventions Amendment Act, which incorporates AP I into Zimbabwe's law and practice.³³⁵

III. Practice of International Organisations and Conferences

361. No practice was found.

IV. Practice of International Judicial and Quasi-judicial Bodies

362. In its judgement in the *Kupreškić case* in 2000, the ICTY Trial Chamber stated that Article 57 AP I was now part of customary international law, not only because it specified and fleshed out general pre-existing norms, but also because it did not appear to be contested by any State, including those who had not ratified the Protocol.³³⁶ With reference to the Martens Clause, the Trial Chamber held that:

The prescriptions of . . . [Article 57] (and of the corresponding customary rules) must be interpreted so as to construe as narrowly as possible the discretionary power to attack belligerents and, by the same token, so as to expand the protection accorded to civilians.³³⁷

363. In its final report to the ICTY Prosecutor in 2000, the Committee Established to Review the NATO Bombing Campaign Against the Federal Republic of Yugoslavia stated that:

In determining whether or not the *mens rea* requirement [intention or recklessness, for the offence of unlawful attack under Article 3 of the ICTY Statute] has been met, it should be borne in mind that commanders deciding on an attack have duties:

- ...
- c) to refrain from launching attacks which may be expected to cause disproportionate civilian casualties or civilian property damage.³³⁸

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

364. To fulfil its task of disseminating IHL, the ICRC has delegates around the world teaching armed and security forces that:

When planning actions that could endanger civilian persons and objects, the same extent of care and precautions which are to be taken in the conduct of operations

³³⁵ Report on the Practice of Zimbabwe, 1998, Chapter 1.6.

³³⁶ ICTY, *Kupreškić case*, Judgement, 14 January 2000, § 524.

³³⁷ ICTY, *Kupreškić case*, Judgement, 14 January 2000, § 525.

³³⁸ ICTY, Final Report to the Prosecutor by the Committee Established to Review the NATO Bombing Campaign Against the Federal Republic of Yugoslavia, The Hague, 14 June 2000, §§ 21 and 28.

must be also taken at this stage. The precautions comprise respect for the rule of proportionality.³³⁹

365. In an appeal issued in October 1973, the ICRC urged all the belligerents in the conflict in the Middle East (Egypt, Iraq, Israel and Syria) to observe forthwith, in particular, the provisions of, *inter alia*, Article 50(1)(a) of draft AP I, which stated in part that:

Those who plan or decide upon an attack shall ensure that the objectives to be attacked . . . may be attacked without incidental losses in civilian lives and damage to civilian objects in their vicinity being caused or that at all events those losses or damage are not disproportionate to the direct and substantial military advantage anticipated. [Proposal I]

All governments concerned replied favourably.³⁴⁰

VI. Other Practice

366. Following NATO's air campaign in the FRY in 1999, Human Rights Watch criticised NATO's decision to attack the Novi Sad bridge and six other bridges in which civilian deaths occurred. According to Human Rights Watch, these bridges were road bridges and most were urban or town bridges that were not major routes of communications. As a result, "the risk in terms of civilian casualties in attacking urban bridges, or in attacking during daylight hours, is 'excessive in relation to the concrete and direct military advantage anticipated,' the standard of proportionality codified in Protocol I, art. 57".³⁴¹

E. Control during the Execution of Attacks

I. Treaties and Other Instruments

Treaties

367. Article 57(2)(b) AP I provides that, with respect to attacks, the following precautions shall be taken:

An attack shall be cancelled or suspended if it becomes apparent that the objective is not a military one or subject to special protection or that the attack may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated.

³³⁹ Frédéric de Mulinen, *Handbook on the Law of War for Armed Forces*, ICRC, Geneva, 1987, §§ 390 and 458.

³⁴⁰ ICRC, *The International Committee's Action in the Middle East*, *IRRC*, No. 152, 1973, pp. 584–585.

³⁴¹ Human Rights Watch, *Civilian Deaths in the NATO Air Campaign*, New York, 7 February 2000, p. 11.

Article 57 AP I was adopted by 90 votes in favour, none against and 4 abstentions.³⁴²

368. Article 7 of the 1999 Second Protocol to the 1954 Hague Convention provides that:

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

- ...
- (d) cancel or suspend an attack if it becomes apparent:
 - (i) that the objective is cultural property protected under Article 4 of the Convention;
 - (ii) that the attack may be expected to cause incidental damage to cultural property protected under Article 4 of the Convention which would be excessive in relation to the concrete and direct military advantage anticipated.

Other Instruments

369. Article 9 of the 1956 New Delhi Draft Rules states that:

All possible precautions shall be taken, both in the choice of the weapons and methods to be used, and in the carrying out of an attack, to ensure that no losses or damage are caused to the civilian population in the vicinity of the objective, or to its dwellings, or that such losses or damage are at least reduced to a minimum.

In particular, in towns and other places with a large civilian population, which are not in the vicinity of military or naval operations, the attack shall be conducted with the greatest degree of precision. It must not cause losses or destruction beyond the immediate surroundings of the objective attacked.

The person responsible for carrying out the attack must abandon or break off the operation if he perceives that the conditions set forth above cannot be respected.

370. Paragraph 6 of the 1991 Memorandum of Understanding on the Application of IHL between Croatia and the SFRY requires that hostilities be conducted in accordance with Article 57 AP I.

371. Paragraph 2.5 of the 1992 Agreement on the Application of IHL between the Parties to the Conflict in Bosnia and Herzegovina requires that hostilities be conducted in accordance with Article 57 AP I.

372. Paragraph 46(d) of the 1994 San Remo Manual provides that "an attack shall be cancelled or suspended as soon as it becomes apparent that the collateral casualties or damage would be excessive".

II. National Practice

Military Manuals

373. Argentina's Law of War Manual states that:

Those who plan or decide upon an attack shall, as far as possible, ... suspend or cancel an attack if it becomes apparent that the attack may be expected to cause

³⁴² CDDH, *Official Records*, Vol. VI, CDDH/SR.42, 27 May 1977, p. 211.

incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated.³⁴³

374. Australia's Commanders' Guide provides that "an attack must be cancelled or suspended if it becomes apparent that the target is not a legitimate military objective and excessive collateral damage would occur in relation to the direct military advantage".³⁴⁴

375. Australia's Defence Force Manual provides an example of the obligation to cancel an attack when the object is not a military objective or is subject to special protection:

For example, aircrew may be ordered to bomb what the mission planner believes to be a command and control centre. If, in the course of the mission, the command and control centre is displaying an unbriefed symbol of protection, eg Red Cross symbol, then aircrew must refrain from completing their attack. The Red Cross symbol indicates the facility is a protected installation and is immune from attack unless intelligence, or higher authority, determines that the facility has lost its protected status because the emblem is being misused.³⁴⁵

376. According to Belgium's Law of War Manual, an attack must be cancelled "if the military advantage is inferior to the damage".³⁴⁶

377. Benin's Military Manual states that "an attack shall be cancelled or suspended if it becomes apparent that the objective, aim or target is not military".³⁴⁷

378. Cameroon's Instructors' Manual requires that:

An attack shall be cancelled or suspended if it becomes apparent that the objective is not a military one or subject to special protection or that the attack may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated.³⁴⁸

379. Canada's LOAC Manual provides that:

An attack must be cancelled or suspended if it becomes apparent that the objective is not a legitimate target, or that the attack may be expected to cause collateral civilian damage which would be excessive in relation to the concrete and direct military advantage anticipated.³⁴⁹

³⁴³ Argentina, *Law of War Manual* (1989), § 4.07(1).

³⁴⁴ Australia, *Commanders' Guide* (1994), § 957(d).

³⁴⁵ Australia, *Defence Force Manual* (1994), § 832.

³⁴⁶ Belgium, *Law of War Manual* (1983), p. 29.

³⁴⁷ Benin, *Military Manual* (1995), Fascicule III, p. 14.

³⁴⁸ Cameroon, *Instructors' Manual* (1992), p. 83.

³⁴⁹ Canada, *LOAC Manual* (1999), p. 4-4, § 28, see also p. 4-3, § 18 (proportionality test) and p. 7-5, § 50 (air to land operations).

380. Colombia's Basic Military Manual states that "an attack shall be suspended or cancelled if it appears that it will cause superfluous damage to civilians and civilian objects regarding the expected military advantage."³⁵⁰

381. Croatia's Commanders' Manual requires that "if in the course of an attack the target or the objective appears not to be military, the commander shall deviate or cancel the attack".³⁵¹

382. France's LOAC Manual states that "the law of armed conflict obliges commanders to take precautionary measures in the preparation *and* execution of attacks in order to limit their effects and to make sure they have no indiscriminate effects".³⁵² (emphasis added)

383. Germany's Military Manual provides that "an attack shall be suspended if it becomes apparent that the objective is not a military one or is subject to special protection or that the attack may be expected to cause excessive incidental loss of civilian life or damage".³⁵³

384. Hungary's Military Manual requires that "during operations, adjustments shall be made according to the tactical situation".³⁵⁴

385. Italy's LOAC Elementary Rules Manual requires that "if in the course of an attack the target or the objective appears not to be military, the commander shall deviate or cancel the attack".³⁵⁵

386. Kenya's LOAC Manual provides that "the attack shall be deviated or cancelled if the objective or target appears not to be military".³⁵⁶ The manual further specifies that "if the resulting loss or damage of a military operation would be excessive in relation to the concrete and direct military advantage excepted, the operation must be cancelled or suspended".³⁵⁷

387. Madagascar's Military Manual states that "a commander must suspend or cancel an attack if, in the course of the attack, it becomes apparent that the target or objective is not a military one".³⁵⁸

388. The Military Manual of the Netherlands states that:

Once an attack has been launched the issue of cancellation or suspension may arise. In principle, the same rules apply as to the refraining from deciding to launch an attack in the preparation phase.

The extent to which commanders and their possible staff will be held accountable to comply with these rules depends on three factors:

- Freedom of choice of means and methods.
- Availability of information.
- Available time.

³⁵⁰ Colombia, *Basic Military Manual* (1995), p. 47.

³⁵¹ Croatia, *Commanders' Manual* (1992), § 56.

³⁵² France, *LOAC Manual* (2001), p. 28. ³⁵³ Germany, *Military Manual* (1992), § 457.

³⁵⁴ Hungary, *Military Manual* (1992), p. 58.

³⁵⁵ Italy, *LOAC Elementary Rules Manual* (1991), § 56.

³⁵⁶ Kenya, *LOAC Manual* (1997), Précis No. 4, p. 9.

³⁵⁷ Kenya, *LOAC Manual* (1997), Précis No. 4, p. 1.

³⁵⁸ Madagascar, *Military Manual* (1994), Fiche No. 6-O, § 27.

The higher the level [of command] the stricter the application of these rules can be required.³⁵⁹

389. New Zealand's Military Manual states that:

An attack shall be cancelled or suspended if it becomes apparent that the objective is not a military one or is subject to special protection or that the attack may be excepted to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated.³⁶⁰

The manual considers, however, that:

In practice, it is extremely difficult to stop an attack. The obligation does not extend below the levels of commanders who have the authority and practical possibility to do so; say a commander of a battalion group. The obligation is in any event subject to the knowledge principle . . . which means that its application will be rare.³⁶¹

390. Spain's LOAC Manual states that "if in the course of an attack the objective appears not to be military, the commander shall deviate or cancel the attack".³⁶² The manual further states that:

An attack must be suspended or cancelled when, from the information available at the time of the execution of the attack, it may be expected to cause damage to civilian persons and/or objects which would be excessive in relation to the military advantage anticipated from the attack as a whole.³⁶³

391. Sweden's IHL Manual states that:

Even after a decision to attack has been made by a senior commander, the attack can be cancelled or suspended . . . in the following cases:

- a. the objective proves not to be a military one, or to be entitled to special protection. An example of this is where military vehicles are being used as ambulances.
- b. If it can be expected that the attack will cause such large unintentional civilian losses and damage that these would be excessive in relation to the anticipated and direct military advantage. In this case, the proportionality rule must thus be reapplied at a later stage. The feasibility of doing this depends to a large degree on the type of attack involved. For example, to require an assessment according to the proportionality rule from an individual aircraft pilot is probably unrealistic.³⁶⁴

³⁵⁹ Netherlands, *Military Manual* (1993), p. V-11.

³⁶⁰ New Zealand, *Military Manual* (1992), § 518(1).

³⁶¹ New Zealand, *Military Manual* (1992), § 518(5).

³⁶² Spain, *LOAC Manual* (1996), Vol. I, § 10.8.e.(2).

³⁶³ Spain, *LOAC Manual* (1996), Vol. I, § 2.5.c.

³⁶⁴ Sweden, *IHL Manual* (1991), Section 3.2.1.5, p. 72.

392. Switzerland's Basic Military Manual states that "if the military advantage is disproportionate to the damage, [commanding officers at the battalion or group level, and those of higher ranks,] must cancel or suspend the attack".³⁶⁵

393. Togo's Military Manual states that "an attack shall be cancelled or suspended if it becomes apparent that the objective, aim or target is not military".³⁶⁶

394. The UK LOAC Manual states that "if the resulting loss or damage would be excessive in relation to the concrete and direct military advantage expected, the operation must be cancelled or suspended".³⁶⁷

395. The US Air Force Pamphlet states that:

An attack must be cancelled or suspended if it becomes apparent that the objective is not a military one, or that it is subject to special protection or that the attack may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof which would be excessive in relation to the concrete and direct military advantage anticipated.³⁶⁸

National Legislation

396. Under Ireland's Geneva Conventions Act as amended, any "minor breach" of AP I, including violations of Article 57(2)(b) AP I, is a punishable offence.³⁶⁹

397. Under Norway's Military Penal Code as amended, "anyone who contravenes or is accessory to the contravention of provisions relating to the protection of persons or property laid down in . . . the two additional protocols to [the Geneva] Conventions . . . is liable to imprisonment".³⁷⁰

National Case-law

398. No practice was found.

Other National Practice

399. The Report on the Practice of Egypt states that a planned attack must be suspended or terminated if it becomes clear that in spite of the precautions taken, the loss inflicted upon civilians or protected objects would be disproportionate to the foreseen military advantage.³⁷¹

400. On the basis of an interview with a senior officer of the armed forces, the Report on the Practice of Indonesia states that the Indonesian armed forces normally observe the precautions listed in Article 57 AP I.³⁷²

³⁶⁵ Switzerland, *Basic Military Manual* (1987), Article 29(2).

³⁶⁶ Togo, *Military Manual* (1996), Fascicule III, p. 14.

³⁶⁷ UK, *LOAC Manual* (1981), Section 4, p. 13, § 4(b).

³⁶⁸ US, *Air Force Pamphlet* (1976), § 5-3(c)(1)(b)(ii).

³⁶⁹ Ireland, *Geneva Conventions Act as amended* (1962), Section 4(1) and (4).

³⁷⁰ Norway, *Military Penal Code as amended* (1902), § 108(b).

³⁷¹ Report on the Practice of Egypt, 1997, Chapter 1.6.

³⁷² Report on the Practice of Indonesia, 1997, Interview with a senior officer of the Indonesian armed forces, Chapter 1.6.

401. On the basis of a reply by Iraq's Ministry of Defence to a questionnaire, the Report on the Practice of Iraq states that during the Iran–Iraq War, Iraqi pilots refrained from striking listed targets that appeared to be civilian objects. These pilots were not held responsible for the apparent failure to follow their orders.³⁷³

402. According to the Report on the Practice of Israel, "in principle, the IDF will endeavour to suspend or cancel an attack if it becomes apparent that the objective is not of a military nature or will result in excessive incidental loss of civilian life".³⁷⁴

403. The Report on the Practice of Jordan notes that a booklet on the LOAC prepared by the ICRC is used by military commanders. The booklet refers to the obligation to suspend or cancel an attack if the objective is not of a military nature.³⁷⁵

404. According to the Report on the Practice of Malaysia, the obligation to cancel or suspend an attack under the circumstances indicated in Article 57(2)(b) AP I forms part of Malaysian practice.³⁷⁶

405. According to the government of the Netherlands, commanders have to take all the precautionary measures required by Article 57 AP I when carrying out an attack.³⁷⁷

406. The Report on the Practice of Syria asserts that Syria considers Article 57 AP I to be part of customary international law.³⁷⁸

407. In 1991, in a report submitted to the UN Security Council on operations in the Gulf War, the UK stated that on a number of occasions attacks had not been "pressed home" because pilots were not completely satisfied that the order to avoid damage to sites of religious or cultural significance would be met.³⁷⁹

408. The Report on US Practice notes that "during the 12-day bombardment campaign of 1972, the crews of B-52 heavy bombers took a number of steps to minimize civilian casualties in the heavily-populated Hanoi and Haiphong areas".³⁸⁰ A published account of these events states that:

The instructions to the RNs [radar navigators] were that if they were not 100 percent sure of their aiming point, "then don't drop; bring the bombs back" ... We had been briefed not to make any evasive maneuvers on the bomb run so that the radar navigator would be positive he was aiming at the right target. If he was not

³⁷³ Report on the Practice of Iraq, 1998, Reply by the Iraqi Ministry of Defence to a questionnaire, July 1997, Chapter 1.6.

³⁷⁴ Report on the Practice of Israel, 1997, Answers to additional questions on Chapter 1.6.

³⁷⁵ Report on the Practice of Jordan, 1997, Chapter 1.6.

³⁷⁶ Report on the Practice of Malaysia, 1997, Answers to additional questions on Chapter 1.6.

³⁷⁷ Netherlands, Lower House of Parliament, Memorandum in response to the report on the ratification of the Additional Protocols, 1985–1986 Session, Doc. 18 277 (R 1247), No. 6, 16 December 1985, p. 7, § 17.

³⁷⁸ Report on the Practice of Syria, 1997, Chapter 1.6.

³⁷⁹ UK, Letter dated 13 February 1991 to the President of the UN Security Council, UN Doc. S/22218, 13 February 1991, p. 1.

³⁸⁰ Report on US Practice, 1997, Chapter 1.6.

absolutely sure he had the right target, we were to withhold our bombs and then jettison them into the ocean on our way back to Guam. We did not want to hit anything but military targets. Precision bombing was the object of our mission. The crews were briefed this way and they followed their instructions.³⁸¹

409. In 1991, during a news briefing concerning the Gulf War, the US Secretary of Defense stated that “the pilots of the allied air forces have operated in accordance with clear instructions to launch weapons only when they are certain they’ve selected the right targets under correct conditions”.³⁸²

410. In 1992, in its final report to Congress on the conduct of the Gulf War, the US Department of Defense stated that:

Where required, attacking aircraft were accompanied by support mission aircraft to minimize attacking aircraft aircrew distraction from their assigned mission. Aircrews attacking targets in populated areas were directed not to expend their munitions if they lacked positive identification of their targets. When this occurred, aircrews dropped their bombs on alternate targets or returned to base with their weapons.³⁸³

411. In 1993, in its report to Congress on the protection of natural and cultural resources during times of war, the US Department of Defense stated that “aircrews attacking targets in proximity to cultural property were directed not to expend their munitions if they lacked positive identification of their targets”.³⁸⁴

412. The Report on the Practice of Zimbabwe states that the provisions of Article 57 AP I would be regarded as customary by Zimbabwe because of its adoption of the Geneva Conventions Amendment Act which incorporates AP I into Zimbabwe’s law and practice.³⁸⁵

III. Practice of International Organisations and Conferences

United Nations

413. No practice was found.

Other International Organisations

414. During the NATO air campaign against the FRY in 1999, NATO stated that when pilots could not be certain of hitting a certain target with accuracy,

³⁸¹ James R. McCarthy and George B. Allison, *Linebacker II: A View From the Rock*, US Air Force Southeast Asia Monograph Series, Volume VI, Monograph 8, 1979, pp. 46–47, 50 and 59–64.

³⁸² US, News Briefing by the US Secretary of Defense and the Chairman of the Joint Chiefs of Staff, Washington, 23 January 1991, annexed to Letter dated 25 January 1991 to the President of the UN Security Council, UN Doc. S/22168, 29 January 1991, p. 3.

³⁸³ US, Department of Defense, Final Report to Congress on the Conduct of the Persian Gulf War, 10 April 1992, Appendix O, The Role of the Law of War, *ILM*, Vol. 31, 1992, p. 622.

³⁸⁴ US, Department of Defense, Report to Congress on International Policies and Procedures Regarding the Protection of Natural and Cultural Resources During Times of War, 19 January 1993, p. 205.

³⁸⁵ Report on the Practice of Zimbabwe, 1998, Chapter 1.6.

they were instructed not even to attempt to do so, in order to avoid collateral damage.³⁸⁶

International Conferences

415. No practice was found.

IV. Practice of International Judicial and Quasi-judicial Bodies

416. In its judgement in the *Kupreškić case* in 2000, the ICTY Trial Chamber stated that Article 57 AP I was now part of customary international law, not only because it specified and fleshed out general pre-existing norms, but also because it did not appear to be contested by any State, including those who had not ratified the Protocol.³⁸⁷ With reference to the Martens Clause, the Trial Chamber held that:

The prescriptions of . . . [Article 57] (and of the corresponding customary rules) must be interpreted so as to construe as narrowly as possible the discretionary power to attack belligerents and, by the same token, so as to expand the protection accorded to civilians.³⁸⁸

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

417. In an appeal issued in October 1973, the ICRC urged all the belligerents in the conflict in the Middle East (Egypt, Iraq, Israel and Syria) to observe forthwith, in particular, the provisions of, *inter alia*, Article 50(1)(b) of draft AP I, which stated that:

Those who launch an attack shall, if possible, cancel or suspend it if it becomes apparent that the objective is not a military one or that incidental losses in civilian lives and damage to civilian objects would be disproportionate to the direct and substantial advantage anticipated.

All governments concerned replied favourably.³⁸⁹

418. In a statement following NATO's air strikes against the FRY in 1999, the ICRC recalled that:

According to international humanitarian law, the parties to the conflict must take every feasible precaution when carrying out attacks. This includes aborting missions if it becomes clear that the objective is not military in nature or that the attack

³⁸⁶ NATO, Press Conference, 27 March 1999.

³⁸⁷ ICTY, *Kupreškić case*, Judgement, 14 January 2000, § 524.

³⁸⁸ ICTY, *Kupreškić case*, Judgement, 14 January 2000, § 525.

³⁸⁹ ICRC, The International Committee's Action in the Middle East, *IRRC*, No. 152, 1973, pp. 584–585.

may be expected to cause incidental loss of civilian life that would be excessive in relation to the military advantage anticipated.³⁹⁰

VI. *Other Practice*

419. In its report on the NATO bombings of the FRY issued in 2000, Amnesty International concluded that “civilian deaths could have been significantly reduced if NATO forces had fully adhered to the laws of war. NATO did not always meet its legal obligations in selecting targets and in choosing means and methods of attack.” For instance, the report stated, in certain attacks, “including the Grdelica railroad bridge, the automobile bridge in Lužane, and Varvarin bridge, NATO forces failed to suspend their attack after it was evident that they had struck civilians, in contravention of Article 57(2)(b) of Protocol I”.³⁹¹

F. Advance Warning

Note: For practice concerning warnings when using booby-traps, see Chapter 28. For practice concerning warnings when using landmines, see Chapter 29.

I. *Treaties and Other Instruments*

Treaties

420. Article 26 of the 1899 HR provides that “the commander of an attacking force, before commencing a bombardment, except in the case of an assault, should do all he can to warn the authorities”.

421. Article 26 of the 1907 HR provides that “the officer in command of an attacking force must, before commencing a bombardment, except in cases of assault, do all in his power to warn the authorities”.

422. According to Article 6 of the 1907 Hague Convention (IX), “if the military situation permits, the commander of the attacking naval force, before commencing the bombardment, must do his utmost to warn the authorities”.

423. Article 57(2)(c) AP I provides that, with respect to attacks, the following precautions shall be taken: “effective advance warning shall be given of attacks which may affect the civilian population, unless circumstances do not permit”. Article 57 AP I was adopted by 90 votes in favour, none against and 4 abstentions.³⁹²

³⁹⁰ ICRC, Statement: The Balkan conflict and respect for international humanitarian law, 26 April 1999, *IRRC*, No. 834, 1999, p. 410.

³⁹¹ Amnesty International, *NATO/Federal Republic of Yugoslavia: “Collateral Damage” or Unlawful Killings? Violations of the Laws of War by NATO during Operation Allied Force*, AI Index EUR 70/18/00, London, June 2000, p. 25.

³⁹² CDDH, *Official Records*, Vol. VI, CDDH/SR.42, 27 May 1977, p. 211.

Other Instruments

424. Article 19 of the 1863 Lieber Code states that “commanders, whenever admissible, inform the enemy of their intention to bombard a place, so that the noncombatants, and especially the women and children, may be removed before the bombardment commences”.

425. Article 16 of the 1874 Brussels Declaration states that “if a town or fortress, agglomeration of dwellings, or village, is defended, the officer in command of an attacking force must, before commencing a bombardment, except in assault, do all in his power to warn the authorities”.

426. Article 33 of the 1880 Oxford Manual states that “the commander of an attacking force, save in cases of open assault, shall, before undertaking a bombardment, make every due effort to give notice thereof to the local authorities”.

427. Article 8(c) of the 1956 New Delhi Draft Rules states that the person responsible for ordering or launching an attack shall, first of all, “whenever the circumstances allow, warn the civilian population in jeopardy, to enable it to take shelter”.

428. Paragraph 6 of the 1991 Memorandum of Understanding on the Application of IHL between Croatia and the SFRY requires that hostilities be conducted in accordance with Article 57 AP I.

429. Paragraph 2.5 of the 1992 Agreement on the Application of IHL between the Parties to the Conflict in Bosnia and Herzegovina requires that hostilities be conducted in accordance with Article 57 AP I.

*II. National Practice**Military Manuals*

430. Argentina’s Law of War Manual states that “those who plan or decide upon an attack shall, as far as possible, . . . give an effective advance warning of attacks which may affect the civilian population, unless circumstances do not permit”.³⁹³

431. Australia’s Defence Force Manual requires that:

When a planned attack is likely to affect the civilian population, those making the attack are required to give, if practicable, effective advance warning of the attack to the authorities or civilian population. This requirement must obviously be applied in a commonsense manner in light of all other factors. If the proposed action is likely to be seriously compromised by a warning then there is no requirement to provide any warning.³⁹⁴

432. Belgium’s Law of War Manual states that “the civilian population shall be given advance warning before an attack (or bombardment), unless surprise is a crucial element for the success of the attack”.³⁹⁵

³⁹³ Argentina, *Law of War Manual* (1989), § 4.07(1); see also *Law of War Manual* (1969), § 1.012.

³⁹⁴ Australia, *Defence Force Manual* (1994), § 551, see also §§ 425, 733 and 924.

³⁹⁵ Belgium, *Law of War Manual* (1983), p. 29.

433. Benin's Military Manual states that "if the tactical situation allows for it, a timely warning must be given in case of attacks which may affect the civilian population".³⁹⁶

434. Cameroon's Instructors' Manual requires that "effective advance warning shall be given of attacks which may affect the civilian population, unless circumstances do not permit".³⁹⁷

435. Canada' LOAC Manual states that:

An effective advance warning shall be given of attacks which may affect the civilian population, unless circumstances do not permit such a warning to be given. For tactical reasons, an attacking force may not give a warning in order to maintain the element of surprise.³⁹⁸

436. Croatia's Commanders' Manual requires that "when the mission permits, appropriate warning shall be given to civilian populations endangered by the direction of attack or by their proximity to military objectives".³⁹⁹

437. Ecuador's Naval Manual states that:

When circumstances permit, advance warning should be given of attacks that might endanger noncombatants in the vicinity. Such warnings are not required, however, if mission accomplishment requires the element of surprise or the security of the attacking forces would be otherwise compromised.⁴⁰⁰

The manual specifies that "warnings may be general rather than specific lest the bombarding force or the success of its mission be placed in jeopardy".⁴⁰¹

438. France's LOAC Summary Note states that "if the military mission allows for it, appropriate warning must be given to the civilian population to give it time to seek shelter".⁴⁰²

439. Germany's Military Manual states that "before engaging an objective, every responsible military leader shall give the civilian population advance warning of attacks which may affect it, unless circumstances do not permit".⁴⁰³

440. Italy's IHL Manual provides that "except in case of military necessity, the commander of an attacking force, before commencing bombardment, must do his utmost to warn the local authorities".⁴⁰⁴

441. Italy's LOAC Elementary Rules Manual requires that "when the mission permits, appropriate warning shall be given to civilian populations endangered by the direction of attack or by their proximity to military objectives".⁴⁰⁵

³⁹⁶ Benin, *Military Manual* (1995), Fascicule III, p. 11, see also Fascicule III, p. 14 and Fascicule II, p. 7.

³⁹⁷ Cameroon, *Instructors' Manual* (1992), p. 82.

³⁹⁸ Canada, *LOAC Manual* (1999), p. 4-4, § 29.

³⁹⁹ Croatia, *Commanders' Manual* (1992), § 54, see also § 67.

⁴⁰⁰ Ecuador, *Naval Manual* (1989), § 11.2, see also § 8.5.2.

⁴⁰¹ Ecuador, *Naval Manual* (1995), § 8.5.2.

⁴⁰² France, *LOAC Summary Note* (1992), § 1.4.

⁴⁰³ Germany, *Military Manual* (1992), § 457, see also §§ 414, 447 and 453.

⁴⁰⁴ Italy, *IHL Manual* (1991), Vol. I, § 18.

⁴⁰⁵ Italy, *LOAC Elementary Rules Manual* (1991), § 54, see also § 67.

442. Kenya's LOAC Manual provides that:

When the tactical situation permits, effective advance warning shall be given of attacks which may affect the civilian population (e.g. infantry fire to encourage civilian persons to seek shelter, discharge of leaflets from aircraft). The advance warning given shall allow the defender to take safeguard measures and to give appropriate information.⁴⁰⁶

443. Madagascar's Military Manual states that "whenever the mission allows for it, an appropriate warning must be given to the civilian population put in danger by the direction of an attack or by the objectives and targets which have been chosen".⁴⁰⁷

444. The Military Manual of the Netherlands states that "whenever circumstances permit, advance warning must be given of an attack which may affect the civilian population".⁴⁰⁸

445. The Aide-Mémoire for IFOR Commanders of the Netherlands states that:

A warning must be given before opening fire if operational circumstances permit. A few examples of situations in which it is permitted to open fire without warning are:

- a. if you or someone in your immediate vicinity are the subject of an armed attack; or
- b. if warning enhances the risk of death or serious injury for you or any other person.⁴⁰⁹

446. New Zealand's Military Manual states that "effective advance warning shall be given of attacks which may affect the civilian population, unless circumstances do not permit".⁴¹⁰

447. Nigeria's Military Manual provides that "where the tactical situation permits, effective advance warning shall be given of attacks which may affect [the] civilian population. This could be done by warning shots or discharge of leaflets from an aircraft."⁴¹¹

448. South Africa's LOAC Manual recalls that "in terms of Article 57 [AP I] there is a general requirement to provide a warning before an attack if civilians are present. An exception to the rule is if surprise is a key element of attack."⁴¹²

449. Spain's LOAC Manual requires that "whenever circumstances permit, warning must be given of any attack that may affect the civilian population".⁴¹³

⁴⁰⁶ Kenya, *LOAC Manual* (1997), Précis No. 4, p. 8, see also Précis No. 4, p. 2.

⁴⁰⁷ Madagascar, *Military Manual* (1994), Fiche No. 6-O, § 25, see also Fiche No. 7-O, § 12, Fiche No. 5-SO, § B and Fiche No. 9-SO, § C.

⁴⁰⁸ Netherlands, *Military Manual* (1993), p. V-12.

⁴⁰⁹ Netherlands, *Aide-Mémoire for IFOR Commanders* (1995), § 5.

⁴¹⁰ New Zealand, *Military Manual* (1992), § 518(1).

⁴¹¹ Nigeria, *Military Manual* (1994), p. 44, § 14, see also p. 45, § 16(c) and *Manual on the Laws of War* (undated), § 13.

⁴¹² South Africa, *LOAC Manual* (1996), § 28(g).

⁴¹³ Spain, *LOAC Manual* (1996), Vol. I, § 2.3.b.(2), see also § 10.8.e.(2) and f.(1)

450. Sweden's IHL Manual states that "should it be impossible to suspend or cancel the attack, excessive losses among the civilian population may possibly be avoided by giving the civilian population advance warning".⁴¹⁴

451. According to Switzerland's Basic Military Manual, "during every attack, commanding officers at the battalion or group level, and those of higher ranks, shall take care that the civilian population is warned if possible".⁴¹⁵

452. Togo's Military Manual states that "if the tactical situation allows for it, a timely warning must be given in case of attacks which may affect the civilian population".⁴¹⁶

453. The UK Military Manual states that:

If military exigencies permit, and unless surprise is considered to be an essential element of success, the commander of an attacking force must do all in his power to warn the authorities of a defended place before commencing a bombardment. There is, however, no obligation to give notice of an intended assault. Should there be no civilians left in the area, no such notice is required.⁴¹⁷

454. The UK LOAC Manual states that "effective advance warning must be given of attacks which may affect the civilian population, unless circumstances do not permit".⁴¹⁸

455. The US Field Manual requires that "the officer in command of an attacking force must, before commencing a bombardment, except in cases of assault, do all in his power to warn the authorities".⁴¹⁹

456. The US Air Force Pamphlet states that "effective advance warning shall be given of attacks which may affect the civilian population unless circumstances do not permit".⁴²⁰ The Pamphlet specifies that:

The practice of states recognizes that warnings need not always be given. General warnings are more frequently given than specific warnings, lest the attacking force or the success of its mission be jeopardized. Warnings are relevant to the protection of the civilian population and need not be given when they are unlikely to be affected by the attack.⁴²¹

457. The US Naval Handbook states that:

When circumstances permit, advance warning should be given of attacks that might endanger noncombatants in the vicinity. Such warnings are not required, however, if mission accomplishment requires the element of surprise or the security of the attacking forces would be otherwise compromised.⁴²²

⁴¹⁴ Sweden, *IHL Manual* (1991), Section 3.2.1.5, p. 72.

⁴¹⁵ Switzerland, *Basic Military Manual* (1987), Article 29(1).

⁴¹⁶ Togo, *Military Manual* (1996), Fascicule III, p. 11, see also Fascicule III, p. 14 and Fascicule II, p. 7.

⁴¹⁷ UK, *Military Manual* (1958), § 291; see also *LOAC Manual* (1981), Section 4, pp. 13–14, § 4(c).

⁴¹⁸ UK, *LOAC Manual* (1981), Section 4, pp. 13–14, § 4(c).

⁴¹⁹ US, *Field Manual* (1956), § 43. ⁴²⁰ US, *Air Force Pamphlet* (1976), § 5-3(c)(1)(b)(iii).

⁴²¹ US, *Air Force Pamphlet* (1976), § 5-3(c)(2)(d).

⁴²² US, *Naval Handbook* (1995), § 11.2, see also § 8.5.2.

The Handbook specifies that “warnings may be general rather than specific lest the bombarding force or the success of its mission be placed in jeopardy”.⁴²³

458. The YPA Military Manual of the SFRY (FRY) states that:

When allowed by military necessity, the commander of units bombarding a defended place in which there are civilians or attacking military objectives putting the civilian population at risk should previously inform the population of the impending bombardment or attack so that it can evacuate. The competent commander shall be freed from this obligation if the bombardment undertaken is aimed at supporting units attacking a defended place in order to capture it, if information on the impending bombardment would jeopardise the military operation in question.⁴²⁴

National Legislation

459. The Report on the Practice of India refers to several pieces of legislation which provide that warning must be given before use of force for the maintenance of public order.⁴²⁵

460. Under Ireland’s Geneva Conventions Act as amended, any “minor breach” of AP I, including violations of Article 57(2)(c) AP I, is a punishable offence.⁴²⁶

461. Italy’s Law of War Decree as amended states that “except in case of military necessity, the commander of an attacking force, before commencing bombardment, must do his utmost to warn the local authorities”.⁴²⁷

462. Italy’s Wartime Military Penal Code punishes a commander who “omits, except where so required by military necessity, to take all possible steps to inform enemy authorities before commencing bombardment”.⁴²⁸

463. Under Norway’s Military Penal Code as amended, “anyone who contravenes or is accessory to the contravention of provisions relating to the protection of persons or property laid down in . . . the two additional protocols to [the Geneva] Conventions . . . is liable to imprisonment”.⁴²⁹

National Case-law

464. No practice was found.

Other National Practice

465. The Report on the Practice of China includes an example of a warning issued by the PLA in order to protect local residents living on islands near the front.⁴³⁰

⁴²³ US, *Naval Handbook* (1995), § 8.5.2.

⁴²⁴ SFRY (FRY), *YPA Military Manual* (1988), § 80.

⁴²⁵ Report on the Practice of India, 1997, Chapter 1.6, referring to *Armed Forces (Special Powers) Act* (1958), *Punjab Disturbed Areas Act* (1983), *Armed Forces (Punjab and Chandigarh) Special Powers Act* (1983) and *Armed Forces (Jammu and Kashmir) Special Powers Act* (1990).

⁴²⁶ Ireland, *Geneva Conventions Act as amended* (1962), Section 4(1) and (4).

⁴²⁷ Italy, *Law of War Decree as amended* (1938), Article 50.

⁴²⁸ Italy, *Wartime Military Penal Code* (1941), Article 178.

⁴²⁹ Norway, *Military Penal Code as amended* (1902), § 108(b).

⁴³⁰ Report on the Practice of China, 1997, Chapter 1.6.

466. The Report on the Practice of Egypt finds that warnings do not discharge the attacker from taking all necessary precautions towards the civilian population.⁴³¹

467. The instructions given to the French armed forces for the conduct of Opération Mistral, simulating a military operation under the right of self-defence or a mandate of the UN Security Council, state that “an individual warning must be given prior to any attack against a civilian ship or aircraft approaching or entering an exclusive or similar zone, to the extent that the tactical situation permits”.⁴³²

468. On the basis of an interview with a senior officer of the armed forces, the Report on the Practice of Indonesia states that the Indonesian armed forces normally observe the precautions listed in Article 57 AP I.⁴³³

469. According to the Report on the Practice of Iran, during the Iran–Iraq War:

The Iranian authorities have followed a steady practice of warning the civilian population of the cities before attacking. In this regard, before each bombardment, statements of the war information center or military communiqués were issued which asked the civilian population to leave the cities. Usually the name of the cities to be attacked were listed, and the civilians were asked to take refuge to four holy cities of Karbala, Najaf, Kazemein and Samera.⁴³⁴

The report concludes that “the *opinio juris* of Iran is supportive of precautions in attack, and in practice the warnings can be considered as application of these precautions”.⁴³⁵

470. The Report on the Practice of Iraq states that the issuing of prior public warnings to civilian populations has become established practice. It cites the examples of a general warning given by the President of Iraq to Iranian citizens, warnings issued by the General Command of the Iraqi armed forces to ships not to approach the zones of military operation in the Gulf and warning raids by Iraqi planes over Iranian cities.⁴³⁶

471. In a briefing in 1982, the Israeli Ministry of Foreign Affairs declared that all precautions had been taken by Israeli forces by giving an effective advance warning through the distribution of leaflets and appeals to the civilian

⁴³¹ Report on the Practice of Egypt, 1997, Chapter 1.6.

⁴³² France, Etat-major de la Force d'Action Rapide, Ordres pour l'Opération Mistral, 1995, Section 5.

⁴³³ Report on the Practice of Indonesia, 1997, Interview with a senior officer of the Indonesian armed forces, Chapter 1.6.

⁴³⁴ Report on the Practice of Iran, 1997, Chapter 1.6.

⁴³⁵ Report on the Practice of Iran, 1997, Chapter 1.6.

⁴³⁶ Report on the Practice of Iraq, 1998, Chapter 1.6, referring to Press Conference by the Iraqi President, 10 November 1980, *Encyclopedia of the Iraqi–Iranian War*, Vol. I, p. 318, Military Communiqué No. 692, 29 April 1982, Military Communiqué No. 730, 2 June 1982, Military Communiqué No. 743, 7 June 1982, Military Communiqué No. 779, 17 July 1982, Military Communiqué No. 910, 21 November 1982, Speech of the President at the Iraqi Digla Secondary School in Kuwait, 6 February 1984 and Military Communiqué No. 1603, 29 September 1984.

population via radio and loudspeakers so that they could leave the operational zone temporarily.⁴³⁷

472. On 13 October 2000, Israeli helicopters carried out an air-strike on a Palestinian police station in Rammallah in retaliation for the killing of two Israeli soldiers the previous day. After the attack, a senior IDF officer said that the military had made every effort to avoid casualties, warning the Palestinian police to evacuate their posts three hours before the strike. Warning shots were also fired minutes before the actual attack to warn off those who had not understood the earlier message.⁴³⁸

473. The Report on the Practice of Israel states that:

The issue of "effective advance warning" is somewhat complicated. Unfortunately, due to current practices in the region, in which attacking forces are shielded within civilian populated localities (especially as regards the activities of the terrorist organizations in Lebanon), Israel is forced, quite often, to return fire at targets situated in close vicinity to civilians. Obviously, issuing advance warning of such counter fire is unfeasible from both military and logical perspectives (not only is time of an essence in such cases, but the civilian population is already all too aware of the fact that hostilities are taking place in their immediate area) . . . Nevertheless, Israel and the IDF have, on several occasions in the past, made public advance warnings to the civilian population in Lebanon of impending hostilities. Such instances include the 1982 operation "Peace for Galilee", during which the IDF dropped leaflets over cities in the vicinity of which hostilities were expected, thereby enabling those elements of the population uninvolved in the conflict to vacate the area beforehand. Similar practices were adopted by Israel in other Lebanese-related operations over the years . . . Israel has found that the use of advance warnings to the civilian population is feasible only prior to the commencement of hostilities in a general area, or in cases in which the elements of surprise or speed of response play no significant part.⁴³⁹

474. The Report on the Practice of Jordan notes that a booklet on LOAC prepared by the ICRC is used by military commanders. The booklet refers to the obligation to give an effective advance warning prior to an attack.⁴⁴⁰

475. On the basis of interviews with members of the armed forces and the Ministry of Home Affairs, the Report on the Practice of Malaysia states that:

There are no written laws which require precautions to be taken in attack. However, during the communist insurgency, the imposition of curfews and announcements by the Department of Information to inform civilians to remain indoors or not

⁴³⁷ Israel, Ministry of Foreign Affairs, Department of Information, Briefing 342/18.7.82/3.10.108, 18 July 1982.

⁴³⁸ Israel, Press briefing by the Director-General of Science, Culture and Sports, Coordinator of Information Policy and the Head of the IDF Operation Branch, Jerusalem, 13 October 2000; Suzanne Goldenberg, "Israel launches rocket attacks after frantic mob murders soldiers", *The Guardian*, 13 October 2000.

⁴³⁹ Report on the Practice of Israel, 1997, Chapter 1.6.

⁴⁴⁰ Report on the Practice of Jordan, 1997, Chapter 1.6.

to enter certain areas during certain periods served as an indirect warning to the civilian population.⁴⁴¹

476. According to the government of the Netherlands, commanders have to take all the precautionary measures required by Article 57 AP I when carrying out an attack.⁴⁴²

477. It has been reported that, during the conflict in Chechnya, Russia dropped leaflets throughout Grozny, ordering all Chechens to leave the city within five days. The leaflets stated that “those who remain will be viewed as terrorists and bandits. They will be destroyed by artillery and aviation. There will be no more talks. All those who do not leave the city will be destroyed.” A Russian general told reporters that the leaflets were a humanitarian warning meant to protect civilians, not an ultimatum.⁴⁴³

478. The Report on the Practice of Syria asserts that Syria considers Article 57 AP I to be part of customary international law.⁴⁴⁴

479. It is reported that, during the war in the South Atlantic, UK forces gave prior notice of their intention to bomb Goose Green and specified that such notice was given in accordance with the relevant laws.⁴⁴⁵

480. During the Second World War, before the atomic bomb was dropped on Hiroshima, the US reportedly warned Japanese authorities that certain towns could be heavily bombed and that civilians should be evacuated. Similar warnings were reportedly issued in the European theatre of war.⁴⁴⁶

481. It is reported that, during the Korean War, US forces planned that “several days prior to the attack planes would drop leaflets over Pyongyang warning civilians to stay away from military installations of any kind”.⁴⁴⁷

482. In 1987, the Deputy Legal Adviser of the US Department of State stated that the US supported the requirement that “effective advance warning be given of attacks which may affect the civilian population, unless circumstances do not permit”.⁴⁴⁸

⁴⁴¹ Report on the Practice of Malaysia, 1997, Interviews with members of the Malaysian armed forces and Ministry of Home Affairs, Chapter 1.6.

⁴⁴² Netherlands, Lower House of Parliament, Memorandum in response to the report on the ratification of the Additional Protocols, 1985–1986 Session, Doc. 18 277 (R 1247), No. 6, 16 December 1985, p. 7, § 17.

⁴⁴³ Stephanie Kriner, “Weak and Hungry Chechens Forced to Flee Grozny”, DisasterRelief.org, 7 December 1999; see also *SIPRI Yearbook 2000*, Oxford University Press, 2000, pp. 176–177.

⁴⁴⁴ Report on the Practice of Syria, 1997, Chapter 1.6.

⁴⁴⁵ *War in the Falklands: the Campaign in Pictures*, Sunday Express Magazine Team, London, 1982, Report on UK Practice, 1997, Chapter 1.6.

⁴⁴⁶ Leslie C. Green, *The Contemporary Law of Armed Conflict*, Melland Schill Monographs in International Law, Manchester University Press, Manchester, 1993, p. 148.

⁴⁴⁷ Robert F. Futrell, *The United States Air Force in Korea 1950–1953*, Office of Air Force History, US Air Force, Washington, D.C., Revised edition, 1983, p. 516, see also p. 518.

⁴⁴⁸ US, Remarks of Michael J. Matheson, Deputy Legal Adviser, US Department of State, The Sixth Annual American Red Cross-Washington College of Law Conference on International Humanitarian Law: A Workshop on Customary International Law and the 1977 Protocols Additional to the 1949 Geneva Conventions, *American University Journal of International Law and Policy*, Vol. 2, 1987, p. 427.

483. In 1991, in response to an ICRC memorandum on the applicability of IHL in the Gulf region, the US Department of the Army stated that:

A warning need not be specific; it may be a blanket warning, delivered by leaflets and/or radio, advising the civilian population of an enemy nation to avoid remaining in proximity to military objectives. The “unless circumstances do not permit” recognizes the importance of the element of surprise. Where surprise is important to mission accomplishment and allowable risk to friendly forces, a warning is not required.⁴⁴⁹

484. In 1995, an opinion of a US army legal adviser on the legality of silencers/suppressors stated that:

There is no law of war requirement that a combatant must be “warned” before he or she is subject to the application of lawful, lethal force . . . [The opinion then cites Article 26 of the 1907 HR and refers to Article 6 of the 1907 Hague Convention (IX).] Article 57, paragraph 2(c) of Protocol I Additional to the 1949 Geneva Conventions of 8 June 1977 contains a more relaxed but similar requirement, updating the two 1907 provisions while reconciling the slight difference between them. Although not a party to this treaty, the United States regards this provision as a re-codification of customary international law. The warning requirement cited above was for the purpose of enabling the civilian population to take appropriate steps to protect themselves from the collateral effects of attack of military objectives, or otherwise from the effects of war; it is not an obligation to warn combatants of their imminent attack. The exception to the warning requirement, relieving a commander from the obligation in cases of assault (stated more generally as “unless circumstances do not permit” in the 1977 Additional Protocol I) recognizes the legitimate use of the fundamental military element of surprise in the attack of enemy military forces in order to reduce risk to the attacking force and to increase its chance for successful accomplishment of its mission.⁴⁵⁰

485. The Report on US Practice states that:

In U.S. practice, bombardment warnings have often been general in their terms, e.g. advising civilians to avoid war-supporting industries, in order not to alert the air defense forces of an impending attack on a specific target. Such was the case in the Korean War.⁴⁵¹

486. The Report on the Practice of Zimbabwe states that the provisions of Article 57 AP I would be regarded as customary by Zimbabwe because of its adoption of the Geneva Conventions Amendment Act which incorporates AP I into Zimbabwe’s law and practice.⁴⁵²

⁴⁴⁹ US, Message from the Department of the Army to the legal adviser of the US Army forces deployed in the Gulf, 11 January 1991, § 8(I), Report on US Practice, 1997, Chapter 1.6.

⁴⁵⁰ US, Legality of Silencers/Suppressors, Memorandum for Chief, Operational Law, Headquarters, 101st Airborne Division (Air Assault), 9 June 1995, pp. 6–7.

⁴⁵¹ Report on US Practice, 1997, Chapter 1.6.

⁴⁵² Report on the Practice of Zimbabwe, 1998, Chapter 1.6.

487. During a non-international armed conflict in 1981, the ICRC noted that one of the armed forces involved apparently warned the population of an imminent aerial attack by dropping leaflets.⁴⁵³

488. In a meeting with the ICRC in 1996, the head of the armed forces of a State involved in a non-international armed conflict stated that shots were usually preceded by warnings.⁴⁵⁴

III. Practice of International Organisations and Conferences

United Nations

489. In 1996, in a report on UNIFIL in Lebanon, the UN Secretary-General stated that:

In the early morning of 11 April [1996], Israeli aircraft and artillery began an intensive bombardment of southern Lebanon as well as targets in the Beirut area and in the Bekaa valley... In the first few days of the operation, Israeli air force and artillery attacked selected targets, including the homes of persons suspected to be affiliated with Hizbullah. At the same time, an IDF-controlled radio station in southern Lebanon broadcast threats of further bombardments, set deadlines for the inhabitants to leave and stated that once the deadline had passed IDF would regard all who remained as legitimate targets. By 13 April, some 90 towns and villages, including Tyre and villages north of the Litani river, had thus been placed under threat. As a result of these threats and the Israeli bombardment, about a quarter of the inhabitants, more than 100,000, left UNIFIL's area of operation and Tyre. Around 5,000 persons sought refuge inside UNIFIL positions and at its logistic base in Tyre. Given the large number of inhabitants who remained behind, IDF did not in fact treat the whole area as a free-fire zone.⁴⁵⁵

Other International Organisations

490. No practice was found.

International Conferences

491. No practice was found.

IV. Practice of International Judicial and Quasi-judicial Bodies

492. In its judgement in the *Kupreškić case* in 2000, the ICTY Trial Chamber stated that Article 57 AP I was now part of customary international law, not only because it specified and fleshed out general pre-existing norms, but also because it did not appear to be contested by any State, including those who had not ratified the Protocol.⁴⁵⁶ With reference to the Martens Clause, the Trial Chamber held that:

⁴⁵³ ICRC archive document. ⁴⁵⁴ ICRC archive document.

⁴⁵⁵ UN Secretary-General, Report on UNIFIL, UN Doc. S/1996/575, 20 July 1996, §§ 10–13.

⁴⁵⁶ ICTY, *Kupreškić case*, Judgement, 14 January 2000, § 524.

The prescriptions of . . . [Article 57] (and of the corresponding customary rules) must be interpreted so as to construe as narrowly as possible the discretionary power to attack belligerents and, by the same token, so as to expand the protection accorded to civilians.⁴⁵⁷

493. In its final report to the ICTY Prosecutor in 2000, the Committee Established to Review NATO's Bombing Campaign Against the Federal Republic of Yugoslavia stated, with respect to the attack on the Serbian radio and television building in Belgrade, that:

Although NATO alleged that it had made "every possible effort to avoid civilian casualties and collateral damage", some doubts have been expressed as to the specificity of the warning given to civilians by NATO of its intended strike, and whether the notice would have constituted "effective warning . . . of attacks which may affect the civilian population, unless circumstances do not permit" as required by Article 57(2) of Additional Protocol I. Evidence on this point is somewhat contradictory. On the one hand, NATO officials in Brussels are alleged to have told Amnesty International that they did not give a specific warning as it would have endangered the pilots. On this view, it is possible that casualties among civilians working at the RTS may have been heightened because of NATO's apparent failure to provide clear advance warning of the attack, as required by Article 57(2). On the other hand, foreign media representatives were apparently forewarned of the attack. As Western journalists were reportedly warned by their employers to stay away from the television station before the attack, it would also appear that some Yugoslav officials may have expected that the building was about to be struck . . . Although knowledge on the part of Yugoslav officials of the impending attack would not divest NATO of its obligation to forewarn civilians under Article 57(2), it may nevertheless imply that the Yugoslav authorities may be partially responsible for the civilian casualties resulting from the attack and may suggest that the advance notice given by NATO may have in fact been sufficient under the circumstances.⁴⁵⁸

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

494. To fulfil its task of disseminating IHL, the ICRC has delegates around the world teaching armed and security forces that "when the tactical situation permits, effective advance warning shall be given of attacks which may affect the civilian population (e.g. infantry fire to encourage civilian persons to seek shelter, discharge of leaflets from aircraft)".⁴⁵⁹

495. In an appeal issued in October 1973, the ICRC urged all the belligerents in the conflict in the Middle East (Egypt, Iraq, Israel and Syria) to observe forthwith, in particular, the provisions of, *inter alia*, Article 50(1)(c) of draft AP I,

⁴⁵⁷ ICTY, *Kupreškić case*, Judgement, 14 January 2000, § 525.

⁴⁵⁸ ICTY, Final Report to the Prosecutor by the Committee Established to Review the NATO Bombing Campaign Against the Federal Republic of Yugoslavia, The Hague, 14 June 2000, § 77.

⁴⁵⁹ Frédéric de Mulinen, *Handbook on the Law of War for Armed Forces*, ICRC, Geneva, 1987, § 436, see also § 459.

which stated in part that “whenever circumstances so permit, advance warning shall be given of attacks which may affect the civilian population”. All governments concerned replied favourably.⁴⁶⁰

VI. *Other Practice*

496. In 1985, in the context of the conflict in El Salvador, the FMLN warned all social sectors of the country that they should avoid “those places visited by military elements, both from the army of the puppet regime as well as foreign military personnel involved in repressive and genocidal activities against the popular revolutionary movement”, for these places would be considered military objectives. The FMLN also warned owners of property who leased it to foreign military advisers that their property would be considered military objectives.⁴⁶¹

497. In February 1993, the FPR in Rwanda reportedly warned the civilian population of Kibeho of an imminent assault, asking them to leave the town.⁴⁶²

498. With respect to UNOSOM’s military operations of 17 July 1993 in Somalia, MSF stated that:

The military operations did not confine themselves within the zone ordered evacuated by the United Nations. The NGO’s, but not the civilian population, were given warning to evacuate the outskirts surrounding the delineated sector. The fighting spread to the peripheries of the area where no orders had been given to evacuate: consequently, the civilian population north of Afgoi road was caught in the fighting.⁴⁶³

499. According to the Report on SPLM/A Practice, the SPLM/A has persistently warned civilians to evacuate the towns on which a siege or an attack is intended. During the 1984–1991 military operations, Radio SPLA issued warnings to the civilian populations living in villages in southern Sudan.⁴⁶⁴

500. In 1988, an armed opposition group asserted that, before launching an attack on a city, the civilian population would be invited to leave the city through predetermined exit points, but added that “those who won’t leave before the attack, will be responsible for their own fate”.⁴⁶⁵

501. In its report on the NATO bombing campaign against the FRY issued in 2000, Amnesty International stated that:

⁴⁶⁰ ICRC, *The International Committee’s Action in the Middle East*, *IRRC*, No. 152, 1973, pp. 584–585.

⁴⁶¹ Communication by the FMLN, June 1985, § 4, *Estudios Centroamericanos*, Universidad Centroamericana José Simeón Cañas, Vol. XL, Nos. 441–442, July–August 1985, p. 581.

⁴⁶² Association rwandaise pour la défense des droits de la personne et des libertés publiques, *Rapport sur les droits de l’homme au Rwanda, octobre 1992–octobre 1993*, Kigali, December 1993, p. 114.

⁴⁶³ MSF, *Communication on the violations of humanitarian law in Somalia during UNOSOM operations*, 20 July 1993, p. 2.

⁴⁶⁴ Report on SPLM/A Practice, 1998, Chapter 1.6. ⁴⁶⁵ ICRC archive document.

However, there was no warning from NATO that a specific attack on RTS [Serbian state radio and television] headquarters was imminent. NATO officials in Brussels told Amnesty International that they did not give a specific warning as it would have endangered the pilots.⁴⁶⁶

G. Target Selection

I. Treaties and Other Instruments

Treaties

502. Article 57(3) AP I states that “when a choice is possible between several military objectives for obtaining a similar military advantage, the objective to be selected shall be that the attack on which may be expected to cause the least danger to civilian lives and to civilian objects”. Article 57 AP I was adopted by 90 votes in favour, none against and 4 abstentions.⁴⁶⁷

Other Instruments

503. Article 8(a) of the 1956 New Delhi Draft Rules states that “when the military advantage to be gained leaves the choice open between several objectives, [the person responsible for ordering or launching an attack] is required to select the one, an attack on which involves least danger for the civilian population”.

504. Paragraph 6 of the 1991 Memorandum of Understanding on the Application of IHL between Croatia and the SFRY requires that hostilities be conducted in accordance with Article 57 AP I.

505. Paragraph 2.5 of the 1992 Agreement on the Application of IHL between the Parties to the Conflict in Bosnia and Herzegovina requires that hostilities be conducted in accordance with Article 57 AP I.

II. National Practice

Military Manuals

506. Australia’s Defence Force Manual states that:

Objects and axes of attack should be chosen to minimise collateral damage wherever possible. Where a similar military advantage may be gained by attacking any one of several military objectives, the attack should be made against the objective which is likely to cause the least collateral damage. The same principle applies to choosing axes of advance or attack where more than one practicable and reasonable axis is available.⁴⁶⁸

⁴⁶⁶ Amnesty International, *NATO/Federal Republic of Yugoslavia: “Collateral Damage” or Unlawful Killings? Violations of the Laws of War by NATO during Operation Allied Force*, AI Index EUR 70/18/00, London, June 2000, p. 47.

⁴⁶⁷ CDDH, *Official Records*, Vol. VI, CDDH/SR.42, 27 May 1977, p. 211.

⁴⁶⁸ Australia, *Defence Force Manual* (1994), § 552; see also *Commanders’ Guide* (1994), § 957(f).

507. Benin's Military Manual requires that "the military commander must choose the solution that represents the least danger for civilians and civilian objects".⁴⁶⁹

508. Canada's LOAC Manual states that:

The proportionality test must be used in the selection of any target. Proportionality and multiple targets: Where a choice is possible between several legitimate targets for obtaining a similar military advantage, the target to be selected shall be the one on which an attack would be expected to cause the least civilian casualties and damage to civilian objects.⁴⁷⁰

509. Croatia's LOAC Compendium gives the following instruction: "when your mission affords alternative objectives and targets, choose the course likely to cause minimum civilian casualties and damage".⁴⁷¹

510. Croatia's Commanders' Manual requires that "within tactically equivalent alternatives, the directions, objectives and targets of attack shall be chosen so as to cause the least civilian damage".⁴⁷²

511. France's LOAC Summary Note states that "the commander must select the tactical solution which will cause the least civilian losses and damage to civilian objects".⁴⁷³

512. Germany's Military Manual states that:

Before engaging an objective, every responsible military leader shall, when a choice is possible between several military objectives of equal importance, engage that objective the attack on which may be expected to cause the least incidental injury or damage.⁴⁷⁴

513. Hungary's Military Manual gives the following instruction: "When your mission affords alternative objectives and targets, choose the course likely to cause minimum civilian casualties and damage."⁴⁷⁵

514. Italy's LOAC Elementary Rules Manual requires that "within tactically equivalent alternatives, the directions, objectives and targets of attack shall be chosen so as to cause the least civilian damage".⁴⁷⁶

515. Kenya's LOAC Manual requires that "when a choice is possible between several military objectives for attaining a similar military advantage, the objective to be selected shall be that objective, the attack on which would cause the least danger to civilian persons and objects".⁴⁷⁷

516. Madagascar's Military Manual requires that "the military commander must choose the solution which will cause the least civilian losses and

⁴⁶⁹ Benin, *Military Manual* (1995), Fascicule III, p. 10.

⁴⁷⁰ Canada, *LOAC Manual* (1999), p. 4-3, §§ 18 and 19, see also p. 7-5, § 49 (air to land operations).

⁴⁷¹ Croatia, *LOAC Compendium* (1991), p. 43, see also p. 41.

⁴⁷² Croatia, *Commanders' Manual* (1992), § 50, see also § 66.

⁴⁷³ France, *LOAC Summary Note* (1992), § 5.2. ⁴⁷⁴ Germany, *Military Manual* (1992), § 457.

⁴⁷⁵ Hungary, *Military Manual* (1992), p. 69, see also p. 66.

⁴⁷⁶ Italy, *LOAC Elementary Rules Manual* (1991), § 50, see also § 66.

⁴⁷⁷ Kenya, *LOAC Manual* (1997), Précis No. 4, p. 8.

damage to civilian objects".⁴⁷⁸ In this respect, the manual specifies that "among tactically equivalent alternatives, the direction, objective, aim and target of an attack must be chosen in order to cause the least civilian damage possible".⁴⁷⁹

517. The Military Manual of the Netherlands states that "when a choice is possible between several military objectives for obtaining a similar military advantage, the objective to be selected shall be that the attack on which may be expected to cause the least danger to civilian lives and to civilian objects".⁴⁸⁰

518. New Zealand's Military Manual states that "when a choice is possible between several military objectives for obtaining a similar military advantage, the objective to be selected shall be that the attack on which may be expected to cause the least danger to civilian lives and to civilian objects".⁴⁸¹

519. Nigeria's Military Manual provides that "where there is a choice as to which of the general targets can be attacked, the objective to be selected shall be that which would cause the least danger to civilian persons and objects".⁴⁸²

520. Spain's LOAC Manual requires that "when a choice is possible between several military objectives for obtaining a similar military advantage, the objective to be selected shall be that the attack on which may be expected to cause the least danger to civilian lives and to civilian objects".⁴⁸³

521. Sweden's IHL Manual considers that:

In certain circumstances it is possible to reduce the risk to the civilian population and to civilian property if the military commander selects a different objective, from which he can achieve about the same military advantage as from the prime objective. In many situations, however, it is impossible to denote an alternative objective, for which reason the rule concerning second-line objectives has been given the reservation mentioned by way of introduction: "when a choice is possible".⁴⁸⁴

522. Togo's Military Manual requires that "the military commander must choose the solution that represents the least danger for civilians and civilian objects".⁴⁸⁵

523. The US Air Force Pamphlet states that "when a choice is possible between several military objectives for obtaining a similar military advantage, the objective to be selected shall be that which may be expected to cause the least danger to civilian lives and to civilian objects".⁴⁸⁶

524. The YPA Military Manual of the SFRY (FRY) provides that if there is a choice between several military objectives for obtaining the same military advantage, military commanders must select the one which represents the least

⁴⁷⁸ Madagascar, *Military Manual* (1994), Fiche No. 5-O, § 39.

⁴⁷⁹ Madagascar, *Military Manual* (1994), Fiche No. 6-O, § 21.

⁴⁸⁰ Netherlands, *Military Manual* (1993), p. V-11.

⁴⁸¹ New Zealand, *Military Manual* (1992), § 518(1).

⁴⁸² Nigeria, *Military Manual* (1994), pp. 43-44, § 14.

⁴⁸³ Spain, *LOAC Manual* (1996), Vol. I, § 4.4.b, see also §§ 2.3.b.(1), 10.8.e.(2) and 10.8.f.(1).

⁴⁸⁴ Sweden, *IHL Manual* (1991), Section 3.2.1.5, p. 72.

⁴⁸⁵ Togo, *Military Manual* (1996), Fascicule III, p. 10.

⁴⁸⁶ US, *Air Force Pamphlet* (1976), § 5-3(c)(1)(c).

potential risk for the civilian population, “provided this does not particularly increase the danger to members of the armed forces undertaking the attack”.⁴⁸⁷

National Legislation

525. Under Ireland’s Geneva Conventions Act as amended, any “minor breach” of AP I, including violations of Article 57(3) AP I, is a punishable offence.⁴⁸⁸

526. Under Norway’s Military Penal Code as amended, “anyone who contravenes or is accessory to the contravention of provisions relating to the protection of persons or property laid down in . . . the two additional protocols to [the Geneva] Conventions . . . is liable to imprisonment”.⁴⁸⁹

National Case-law

527. No practice was found.

Other National Practice

528. On the basis of an interview with a senior officer of the armed forces, the Report on the Practice of Indonesia states that the Indonesian armed forces normally observe the precautions listed in Article 57 AP I.⁴⁹⁰

529. The Report on the Practice of Iran states, with reference to the Iran–Iraq War, that “Iran claimed that targets . . . [were] chosen in a way that the least casualties to civilians would be inflicted. In Iran’s view, low damage for Iraqi civilians was the proof of this claim.”⁴⁹¹

530. According to the Report on the Practice of Israel, “in principle, when a choice is possible between several military objectives for obtaining a similar military advantage, the IDF will select the military target representing the least potential risk for the civilian population”.⁴⁹²

531. The Report on the Practice of Jordan notes that a booklet on the LOAC prepared by the ICRC is used by military commanders. The booklet refers to the obligation to choose a target in the light of the obligation to minimise damage to civilians or civilian objects.⁴⁹³

532. According to the Report on the Practice of Malaysia, the obligation to select, if a choice is available, the target representing the least potential risk for the civilian population forms part of Malaysian practice.⁴⁹⁴

⁴⁸⁷ SFRY (FRY), *YPA Military Manual* (1988), § 72(3).

⁴⁸⁸ Ireland, *Geneva Conventions Act as amended* (1962), Section 4(1) and (4).

⁴⁸⁹ Norway, *Military Penal Code as amended* (1902), § 108(b).

⁴⁹⁰ Report on the Practice of Indonesia, 1997, Interview with a senior officer of the Indonesian armed forces, Chapter 1.6.

⁴⁹¹ Report on the Practice of Iran, 1997, Chapter 1.6.

⁴⁹² Report on the Practice of Israel, 1997, Answers to additional questions on Chapter 1.6.

⁴⁹³ Report on the Practice of Jordan, 1997, Chapter 1.6.

⁴⁹⁴ Report on the Practice of Malaysia, 1997, Answers to additional questions on Chapter 1.6.

533. According to the government of the Netherlands, commanders have to take all the precautionary measures required by Article 57 AP I when carrying out an attack.⁴⁹⁵

534. The Report on the Practice of Syria asserts that Syria considers Article 57 AP I to be part of customary international law.⁴⁹⁶

535. On 16 April 1986, in the context of US attacks on Libyan targets, the US President stated that “these targets were carefully chosen, both for their direct linkage to Libyan support of terrorist activities and for the purpose of minimizing collateral damage and injury to innocent civilians”.⁴⁹⁷

536. In 1991, in response to an ICRC memorandum on the applicability of IHL in the Gulf region, the US Department of the Army stated that:

The language of Article 57(3) of Protocol I... is not part of customary law. The provision applies “when a choice is possible...;” it is not mandatory. An attacker may comply with it if it is possible to do so, subject to mission accomplishment and allowable risk, or he may determine that it is impossible to make such a determination.⁴⁹⁸

537. The Report on the Practice of Zimbabwe states that the provisions of Article 57 AP I would be regarded as customary by Zimbabwe because of its adoption of the Geneva Conventions Amendment Act, which incorporates API into Zimbabwe’s law and practice.⁴⁹⁹

III. Practice of International Organisations and Conferences

538. No practice was found.

IV. Practice of International Judicial and Quasi-judicial Bodies

539. In its judgement in the *Kupreškić case* in 2000, the ICTY Trial Chamber stated that Article 57 AP I was now part of customary international law, not only because it specified and fleshed out general pre-existing norms, but also because it did not appear to be contested by any State, including those who had not ratified the Protocol.⁵⁰⁰ With reference to the Martens Clause, the Trial Chamber held that:

⁴⁹⁵ Netherlands, Lower House of Parliament, Memorandum in response to the report on the ratification of the Additional Protocols, 1985–1986 Session, Doc. 18 277 (R 1247), No. 6, 16 December 1985, p. 7, § 17.

⁴⁹⁶ Report on the Practice of Syria, 1997, Chapter 1.6.

⁴⁹⁷ US, Identical letters dated 16 April 1986 from the US President to the Speaker of the House and the President of the Senate concerning US airstrikes against Libya on 14 April 1986, reprinted in Marian Nash (Leich), *Cumulative Digest of United States Practice in International Law, 1981–1988*, Department of State Publication 10120, Washington, D.C., 1993–1995, p. 3405.

⁴⁹⁸ US, Message from the Department of the Army to the legal adviser of the US Army forces deployed in the Gulf, 11 January 1991, § 8(H), Report on US Practice, 1997, Chapter 1.6.

⁴⁹⁹ Report on the Practice of Zimbabwe, 1998, Chapter 1.6.

⁵⁰⁰ ICTY, *Kupreškić case*, Judgement, 14 January 2000, § 524.

The prescriptions of . . . [Article 57] (and of the corresponding customary rules) must be interpreted so as to construe as narrowly as possible the discretionary power to attack belligerents and, by the same token, so as to expand the protection accorded to civilians.⁵⁰¹

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

540. To fulfil its task of disseminating IHL, the ICRC has delegates around the world teaching armed and security forces that:

When a choice is possible between several military objectives for obtaining a similar military advantage, the objective to be selected shall be that the attack on which would cause the least danger to civilian persons and objects.

...

To reduce civilian casualties and damage, equivalent alternative objectives and targets shall be selected whenever the mission given permits.⁵⁰²

541. In an appeal issued in October 1973, the ICRC urged all the belligerents in the conflict in the Middle East (Egypt, Iraq, Israel and Syria) to observe forthwith, in particular, the provisions of, *inter alia*, Article 50(3) of draft API, which stated that "when a choice is possible between several objectives, for obtaining a similar military advantage, the objective to be selected shall be that which will occasion the least danger to civilian lives and to civilian objects". All governments concerned replied favourably.⁵⁰³

VI. Other Practice

542. No practice was found.

⁵⁰¹ ICTY, *Kupreškić case*, Judgement, 14 January 2000, § 525.

⁵⁰² Frédéric de Mulinen, *Handbook on the Law of War for Armed Forces*, ICRC, Geneva, 1987, §§ 429 and 456.

⁵⁰³ ICRC, *The International Committee's Action in the Middle East*, *IRRC*, No. 152, 1973, pp. 584–585.

PRECAUTIONS AGAINST THE EFFECTS OF ATTACKS

A. General (practice relating to Rule 22)	§§ 1–69
Precautions to protect the civilian population, civilians and civilian objects	§§ 1–48
Feasibility of precautions against the effects of attacks	§§ 49–68
Information required for deciding upon precautions against the effects of attacks	§ 69
B. Location of Military Objectives outside Densely Populated Areas (practice relating to Rule 23)	§§ 70–132
C. Removal of Civilians and Civilian Objects from the Vicinity of Military Objectives (practice relating to Rule 24)	§§ 133–184

A. General

Precautions to protect the civilian population, civilians and civilian objects

Note: Practice concerning the duty to take feasible precautions to spare the civilian population and to avoid injury to civilians and damage to civilian objects – which could apply to operations in offence and/or defence – has been included in Chapter 5 and is not repeated here. This section contains practice on specific precautions against the effects of attacks not mentioned in sections B and C, as well as practice referring to such precautions in general without further specification. Although some practice on civil defence has been included, this subject is not dealt with exhaustively.

I. Treaties and Other Instruments

Treaties

1. Article 58(c) API states that the Parties to the conflict shall, to the maximum extent feasible, “take the other necessary precautions to protect the civilian population, individual civilians and civilian objects under their control against the dangers resulting from military operations”. Article 58 AP I was adopted by 80 votes in favour, none against and 8 abstentions.¹

¹ CDDH, *Official Records*, Vol. VI, CDDH/SR.42, 27 May 1977, p. 214.

2. Article 13(1) AP II provides that “the civilian population and individual civilians shall enjoy general protection against the dangers arising from military operations”. Article 13 AP II was adopted by consensus.²

3. Article 24(2) of draft AP II submitted by the ICRC to the CDDH provided that “constant care shall be taken, when conducting military operations, to spare the civilian population, civilians and civilian objects”.³ This provision was adopted in Committee III of the CDDH by 50 votes in favour, none against and 11 abstentions.⁴ Eventually, however, it was deleted in the plenary, because it failed to obtain the necessary two-thirds majority (36 in favour, 19 against and 36 abstentions).⁵

Other Instruments

4. Article 11 of the 1956 New Delhi Draft Rules states that “the Parties to the conflict shall, so far as possible, take all necessary steps to protect the civilian population subject to their authority from the dangers to which they would be exposed in attack”.

5. Paragraph 6 of the 1991 Memorandum of Understanding on the Application of IHL between Croatia and the SFRY requires that hostilities be conducted in accordance with Article 58 AP I.

6. Paragraph 2.5 of the 1992 Agreement on the Application of IHL between the Parties to the Conflict in Bosnia and Herzegovina requires that hostilities be conducted in accordance with Article 58 AP I.

7. Paragraph 36 of the 1994 CSCE Code of Conduct states that “the armed forces will take due care to avoid injury to civilians or their property”.

8. Section 5.4 of the 1999 UN Secretary-General’s Bulletin states that “in its area of operation, the United Nations force shall . . . take all necessary precautions to protect the civilian population, individual civilians and civilian objects against the dangers resulting from military operations”.

II. National Practice

Military Manuals

9. Argentina’s Law of War Manual states that “the parties to the conflict shall, to the extent possible, take the other necessary precautions to protect the civilian population, individual civilians and civilian objects under their control against the dangers resulting from military operations”.⁶

10. The Report on the Practice of Belgium states that “no practice was found concerning the protection of the civilian population against the effects of

² CDDH, *Official Records*, Vol. VII, CDDH/SR.52, 6 June 1977, p. 134.

³ CDDH, *Official Records*, Vol. I, Part Three, Draft Additional Protocols, June 1973, p. 40.

⁴ CDDH, *Official Records*, Vol. XIV, CDDH/III/SR.37, 4 April 1975, p. 390, § 13.

⁵ CDDH, *Official Records*, Vol. VII, CDDH/SR.52, 6 June 1977, p. 135.

⁶ Argentina, *Law of War Manual* (1989), § 4.07(2).

attacks in the Belgian military regulations” and refers to two internal regulations that “reveal a lack of concern for this issue”.⁷

11. Cameroon’s *Instructors’ Manual* provides that “in all military operations, whether in offence or defence, . . . areas of civilian habitation, civilian populations [and] . . . civilian objects must be protected”.⁸

12. Canada’s *LOAC Manual* states that:

To protect civilians, the parties to a conflict shall, to the maximum extent feasible . . . take other necessary precautions to protect the civilian population, individual civilians and civilian objects under their control against the dangers resulting from military operations.⁹

13. Croatia’s *Commanders’ Manual* states that:

To restrict civilian casualties and damage, the means of combat and weapons shall be adapted to the environment of the defence position . . . When the mission permits, appropriate information and warning shall be given of defence measures endangering civilian persons, so that they can behave accordingly in the event of combat action.¹⁰

14. Germany’s *Military Manual* states that “civil defence tasks are particularly warning . . . construction of shelters, and other measures to restore and maintain order”.¹¹

15. Italy’s *LOAC Elementary Rules Manual* states that:

To restrict civilian casualties and damage, the means of combat and weapons shall be adapted to the environment of the defence position . . . When the mission permits, appropriate information and warning shall be given of defence measures endangering civilian persons, so that they can behave accordingly in the event of combat action.¹²

16. Kenya’s *LOAC Manual* states that “when the tactical situations permits, defence measures which may affect civilian persons shall be announced by effective advance warning”.¹³

17. Madagascar’s *Military Manual* provides that in the conduct of all military operations, “constant care must be taken to spare the civilian population, as well as civilian objects”.¹⁴ The manual further specifies that:

In order to limit civilian casualties and damage, the means of combat and weapons shall be adapted to the environment of the defence position . . . When the mission

⁷ Report on the Practice of Belgium, 1997, Chapter 1.7, referring to *Regulations on Anti-tank Squads* (1986) and *Regulations on Light Infantryment* (1991).

⁸ Cameroon, *Instructors’ Manual* (1992), p. 150, § 532(2).

⁹ Canada, *LOAC Manual* (1999), p. 4-4, § 30(c).

¹⁰ Croatia, *Commanders’ Manual* (1992), §§ 58 and 61.

¹¹ Germany, *Military Manual* (1992), § 520.

¹² Italy, *LOAC Elementary Rules Manual* (1991), § 61.

¹³ Kenya, *LOAC Manual* (1997), Précis No. 4, p. 9.

¹⁴ Madagascar, *Military Manual* (1994), Fiche No. 6-O, § 11.

permits, information and effective warning must be given concerning defence measures which expose civilians to danger so that they can behave correctly during combat action.¹⁵

18. The Military Manual of the Netherlands provides that the parties to the conflict shall

endeavour to take other precautions to protect the civilian population, individual civilians and civilian objects against the dangers resulting from military operations... Such other precautions include, for example, the construction of shelter facilities and the mobilisation of civil defence organisations.¹⁶

19. New Zealand's Military Manual states that "the Parties to the conflict shall, to the maximum extent feasible, ... take the other necessary precautions to protect the civilian population, individual civilians and civilian objects under their control against the dangers resulting from military operations".¹⁷

20. Nigeria's Military Manual states that "similar to attack is the fact that defence measures which may affect civilian persons shall be announced in advance".¹⁸

21. Russia's Military Manual requires that commanders, in peacetime, "envisage all possible measures to protect the civilian population".¹⁹

22. Spain's LOAC Manual requires that "all necessary precautions be taken in order to protect civilians and civilian objects from the effects of attacks".²⁰

23. Sweden's IHL Manual refers to the obligation enshrined in Article 58(c) AP I to "take other precautionary measures for protecting the civilian population, civilian persons and civilian property". It notes that "these can include a number of different measures such as the erection of shelters, distribution of information and warnings, direction of traffic, guarding of civilian property and so on".²¹

24. Switzerland's Basic Military Manual specifies that "to the extent possible, that is, as far as the interests of Swiss national defence allow, ... other measures of protection of the civilian population must be taken".²²

25. The US Air Force Pamphlet states that:

As a corollary to the principle of general civilian immunity, the parties to a conflict should, to the maximum extent feasible, take necessary precautions to protect the civilian population, individual civilians, and civilian objects under their authority against the dangers resulting from military operations.²³

¹⁵ Madagascar, *Military Manual* (1994), Fiche No. 6-O, §§ 32 and 35.

¹⁶ Netherlands, *Military Manual* (1993), p. V-12, § 10.

¹⁷ New Zealand, *Military Manual* (1992), § 519(1)(c).

¹⁸ Nigeria, *Military Manual* (1994), p. 44, § 15.

¹⁹ Russia, *Military Manual* (1990), § 14(a).

²⁰ Spain, *LOAC Manual* (1996), Vol. I, § 4.5.a.(2).

²¹ Sweden, *IHL Manual* (1991), Section 3.2.1.5, p. 74.

²² Switzerland, *Basic Military Manual* (1987), Article 29(3).

²³ US, *Air Force Pamphlet* (1976), § 5-4(a).

National Legislation

26. Ireland's Geneva Conventions Act as amended provides that any "minor breach" of AP I, including violations of Article 58(c) AP I, as well as any "contravention" of AP II, including violations of Article 13(1) AP II, are punishable offences.²⁴

27. According to the Report on the Practice of Kuwait, great attention has been paid to the issue of precautions in Kuwait after the invasion by Iraq and this task has been given to the civil defence authorities. The report notes that, pursuant to Kuwait's Civil Defence Decree, this task includes the following measures: alerting the civilian population in case of aerial bombardment, preparation of public shelters and preparation and execution of evacuation plans.²⁵

28. Under Norway's Military Penal Code as amended, "anyone who contravenes or is accessory to the contravention of provisions relating to the protection of persons or property laid down in . . . the two additional protocols to [the Geneva] Conventions . . . is liable to imprisonment".²⁶

National Case-law

29. No practice was found.

Other National Practice

30. The Report on the Practice of Algeria states that, owing to the particular nature of the Algerian war of independence, no precise information could be found regarding the behaviour of Algerian combatants with respect to precautions against the effects of attacks. The report testifies, however, to their willingness to protect the civilian population "against the effects of attacks by the colonial army".²⁷

31. The Report on the Practice of Germany states that the precautions required against the effects of attacks have to be taken mainly by the civil defence. It quotes a representative of the Ministry of Internal Affairs, who said at an ICRC expert meeting in Geneva that Germany had an integrated system of assistance to cover both peacetime disaster control and civil defence in case of armed conflict.²⁸

32. The Report on the Practice of Indonesia states that members of the Indonesian armed forces should take all necessary precautions to protect the civilian population and civilian objects against the dangers resulting from hostilities.²⁹

33. The Report on the Practice of Iran notes that, following the escalation of the "war of the cities" during the Iran-Iraq War, "serious measures were adopted

²⁴ Ireland, *Geneva Conventions Act as amended* (1962), Section 4(1) and (4).

²⁵ Report on the Practice of Kuwait, 1997, Chapter 1.6 and 1.7, referring to *Civil Defence Decree* (1979), Article 2.

²⁶ Norway, *Military Penal Code as amended* (1902), § 108(b).

²⁷ Report on the Practice of Algeria, 1997, Chapter 1.7, referring to *El Moudjahid*, Vol. 1, p. 89.

²⁸ Report on the Practice of Germany, 1997, Chapter 1.7.

²⁹ Report on the Practice of Indonesia, 1997, Chapter 1.7.

by the authorities to protect the civilians", including: construction of shelters in public places; educating civilians through mass media about the precautions they should take during bombardments; the establishment of facilities for the civilians who fled the cities under attack; and the formation of units to deal with the effects of attacks with weapons of mass destruction on cities.³⁰

34. On the basis of the reply by Iraq's Ministry of Defence to a questionnaire, the Report on the Practice of Iraq cites the following examples of precautionary measures taken in Iraqi territory: providing civilians with devices for their protection from the consequences of certain weapons; early warning of the civilian population of imminent enemy military operations; and identification of civilian objects and antiquities.³¹

35. The Report on the Practice of Kuwait states that it is the *opinio juris* of Kuwait that "all States have a duty to adopt measures to eliminate/minimise the effects of war in order to protect humanity", including exceptional measures to protect civilians and to ensure the continuity of public services during the exceptional situation of war.³²

36. The Report on the Practice of Malaysia notes that the security forces act in conformity with international norms on protecting the civilian population against the dangers resulting from security operations, whether in an international or non-international armed conflict.³³

37. According to the Report on the Practice of Nigeria, although no practice exists regarding precautions against the effects of attacks, the duty to take such precautions is a part of customary international law.³⁴

38. According to the Report on the Practice of Rwanda, it is the *opinio juris* of Rwanda that precautions must be taken to protect civilians against the effects of attacks.³⁵

39. The Report on the Practice of Syria asserts that Syria considers Article 58 AP I to be part of customary international law.³⁶

40. In 1993, in its report to Congress on the protection of natural and cultural resources during times of war, the US Department of Defense stated that "the obligation to take reasonable measures to minimize damage to natural resources and cultural property is shared by both an attacker and a defender . . . The defender has certain responsibilities as well."³⁷

³⁰ Report on the Practice of Iran, 1997, Chapter 1.7.

³¹ Report on the Practice of Iraq, 1998, Reply by the Iraqi Ministry of Defence to a questionnaire, July 1997, Chapter 1.7.

³² Report on the Practice of Kuwait, 1997, Chapter 1.6 and 1.7.

³³ Report on the Practice of Malaysia, 1997, Chapter 1.7.

³⁴ Report on the Practice of Nigeria, 1997, Chapter 1.7.

³⁵ Report on the Practice of Rwanda, 1997, Chapter 1.7.

³⁶ Report on the Practice of Syria, 1997, Chapter 1.7.

³⁷ US, Department of Defense, Report to Congress on International Policies and Procedures Regarding the Protection of Natural and Cultural Resources During Times of War, 19 January 1993, p. 203.

41. The Report on the Practice of Zimbabwe states that the provisions of Article 58 AP I would be regarded as customary by Zimbabwe because of its adoption of the Geneva Conventions Amendment Act which incorporates AP I into Zimbabwe's law and practice.³⁸

III. Practice of International Organisations and Conferences

United Nations

42. General Assembly Resolution 2444 (XXIII), adopted in 1968, affirmed Resolution XXVIII of the 20th International Conference of the Red Cross and the basic humanitarian principle applicable in all armed conflicts laid down therein that "distinction must be made at all times between persons taking part in the hostilities and members of the civilian population to the effect that the latter be spared as much as possible".³⁹

43. General Assembly Resolution 2675 (XXV), adopted in 1970, states that "in the conduct of military operations, every effort should be made to spare civilian populations from the ravages of war, and all necessary precautions should be taken to avoid injury, loss or damage to civilian populations".⁴⁰

Other International Organisations

44. No practice was found.

International Conferences

45. The 20th International Conference of the Red Cross in 1965 adopted a resolution on the protection of civilian populations against the dangers of indiscriminate warfare in which it solemnly declared that:

All Governments and other authorities responsible for action in armed conflicts should conform at least to the following principles: ... that distinction must be made at all times between persons taking part in the hostilities and members of the civilian population to the effect that the latter be spared as much as possible.⁴¹

IV. Practice of International Judicial and Quasi-judicial Bodies

46. In its judgement in the *Kupreškić case* in 2000, the ICTY Trial Chamber noted that Article 58 AP I was now part of customary international law, not only because it specified and fleshed out general pre-existing norms, but also because it did not appear to be contested by any State, including those who

³⁸ Report on the Practice of Zimbabwe, 1998, Chapter 1.7.

³⁹ UN General Assembly, Res. 2444 (XXIII), 19 December 1968, § 1(c).

⁴⁰ UN General Assembly, Res. 2675 (XXV), 9 December 1970, § 3.

⁴¹ 20th International Conference of the Red Cross, Vienna, 2–9 October 1965, Res. XXVIII.

had not ratified the Protocol.⁴² With reference to the Martens Clause, the Trial Chamber held that:

The prescriptions of ... [Article 58] (and of the corresponding customary rules) must be interpreted so as to construe as narrowly as possible the discretionary power to attack belligerents and, by the same token, so as to expand the protection accorded to civilians.⁴³

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

47. No practice was found.

VI. Other Practice

48. According to the Report on SPLM/A Practice, the SPLM/A instructed the civilian population to dig trenches and shelters against aerial bombardments by the government of Sudan.⁴⁴

Feasibility of precautions against the effects of attacks

I. Treaties and Other Instruments

Treaties

49. Upon ratification (or signature) of AP I by Algeria, Belgium, Canada, France, Germany, Ireland, Italy, Netherlands, Spain and UK made statements to the effect that feasible precautions are those which are practicable or practically possible, taking into account all circumstances ruling at the time, including humanitarian and military considerations. These are quoted in Chapter 5, Section A, and are not repeated here.

50. Upon ratification of AP I, Austria stated that "in view of the fact that Article 58 of Protocol I contains the expression 'to the maximum extent feasible', subparagraphs (a) and (b) will be applied subject to the requirements of national defence".⁴⁵

51. Upon ratification of AP I, Switzerland stated that "considering that [Article 58 AP I] contains the expression 'to the maximum extent feasible', paragraphs (a) and (b) will be applied subject to the defence requirements of the national territory".⁴⁶

Other Instruments

52. No practice was found.

⁴² ICTY, *Kupreškić case*, Judgement, 14 January 2000, § 524.

⁴³ ICTY, *Kupreškić case*, Judgement, 14 January 2000, § 525.

⁴⁴ Report on SPLM/A Practice, 1998, Chapter 1.7.

⁴⁵ Austria, Reservations made upon ratification of AP I, 13 August 1982.

⁴⁶ Switzerland, Reservations made upon ratification of AP I, 17 February 1982, § 2.

*II. National Practice**Military Manuals*

53. Switzerland's Basic Military Manual specifies that precautions against the effects of attacks should be taken in order to protect civilians "to the extent possible, that is, as far as the interests of national defence allow".⁴⁷ It later states that "in case of doubt, the constraints of national defence prevail".⁴⁸

National Legislation

54. No practice was found.

National Case-law

55. No practice was found.

Other National Practice

56. At the CDDH, Cameroon considered that the obligations under Article 58 AP I "are not absolute, since they are to be fulfilled only 'to the maximum extent feasible', for no one is obliged to do the impossible".⁴⁹

57. At the CDDH, Canada stated that the word "feasible" when used in AP I, for example, in Article 57 and 58, "refers to what is practicable or practically possible, taking into account all circumstances existing at the relevant time, including those circumstances relevant to the success of military operations".⁵⁰

58. At the CDDH, the FRG stated that its understanding of the word "feasible" in Article 58 AP I was that it referred to "that which is practicable or practically possible, taking into account all circumstances at the time, including those relevant to the success of military operations".⁵¹

59. At the CDDH, Italy stated that:

The words "to the maximum extent feasible" at the beginning of [Article 58 AP I], however, clearly show the real aim of this rule: this is not a question of absolute obligations, but, on the contrary, of precepts that should be followed if, and to the extent that, the particular circumstances permit.⁵²

60. At the CDDH, the Netherlands stated that "the word 'feasible' when used in Protocol I, for example in Articles 50 and 51 [now Articles 57 and 58], should in any particular case be interpreted as referring to that which was

⁴⁷ Switzerland, *Basic Military Manual* (1987), Article 29(3).

⁴⁸ Switzerland, *Basic Military Manual* (1987), Article 151(3).

⁴⁹ Cameroon, Statement at the CDDH, *Official Records*, Vol. VI, CDDH/SR.42, 27 May 1977, p. 239.

⁵⁰ Canada, Statement at the CDDH, *Official Records*, Vol. VI, CDDH/SR.42, 27 May 1977, p. 224.

⁵¹ FRG, Statement at the CDDH, *Official Records*, Vol. VI, CDDH/SR.42, 27 May 1977, p. 226.

⁵² Italy, Statement at the CDDH, *Official Records*, Vol. VI, CDDH/SR.42, 27 May 1977, p. 232.

practicable or practically possible, taking into account all circumstances at the time".⁵³

61. At the CDDH, the UK:

expressed keen satisfaction at the adoption of [Article 58], which was designed to lend added strength to the protection already extended to civilian persons and objects of a civilian character by preceding articles. Nevertheless, in an armed conflict such protection could never be absolute; and that was reflected in the article through the expression "to the maximum extent feasible". According to the interpretation placed upon it by [the UK], the word "feasible", wherever it was employed in the Protocol, related to what was workable or practicable, taking into account all the circumstances at a given moment, and especially those which had a bearing on the success of military operations.⁵⁴

62. At the CDDH, the US stated that:

The word "feasible" when used in draft Protocol I, for example in Articles 50 and 51 [now Articles 57 and 58], refers to that which is practicable or practically possible, taking into account all circumstances at the time, including those relevant to the success of military operations.⁵⁵

III. Practice of International Organisations and Conferences

United Nations

63. No practice was found.

Other International Organisations

64. No practice was found.

International Conferences

65. The Rapporteur of the Working Group at the CDDH reported that:

Agreement [on draft Article 51 AP I (now Article 59)] was reached fairly quickly on this draft after it was revised to have the phrase "to the maximum extent feasible" modify all subparagraphs. This revision reflected the concern of a number of representatives that small and crowded countries would find it difficult to separate civilians and civilian objects from military objectives. Other representatives pointed out that even large countries would find such separation difficult or impossible to arrange, in many cases.⁵⁶

IV. Practice of International Judicial and Quasi-judicial Bodies

66. No practice was found.

⁵³ Netherlands, Statement at the CDDH, *Official Records*, Vol. VI, CDDH/SR.42, 27 May 1977, p. 214, § 61.

⁵⁴ UK, Statement at the CDDH, *Official Records*, Vol. VI, CDDH/SR.42, 27 May 1977, p. 214, §§ 58–59.

⁵⁵ US, Statement at the CDDH, *Official Records*, Vol. VI, CDDH/SR.42, 27 May 1977, p. 241.

⁵⁶ CDDH, *Official Records*, Vol. XV, CDDH/III/264/Rev.1, Report to Committee III on the Work of the Working Group submitted by the Rapporteur, 13 March 1975, p. 353.

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

67. To fulfil its task of disseminating IHL, the ICRC has delegates around the world teaching armed and security forces that “the commander shall take all feasible precautions. ‘Feasible precautions’ are those precautions which are practicable, taking into account the tactical situation (that is all circumstances ruling at the time, including humanitarian and military considerations).”⁵⁷

VI. Other Practice

68. No practice was found.

Information required for deciding upon precautions against the effects of attacks

69. In general, the practice in Chapter 5, Section A, concerning the information required to take decisions on precautions in attack is relevant *mutatis mutandis* to precautions against the effects of attacks and is not repeated here.

B. Location of Military Objectives outside Densely Populated Areas

Note: For practice on the removal of military objectives from the vicinity of medical units, see Chapter 7, section D. For practice on the use of human shields, see Chapter 32, section J.

I. Treaties and Other Instruments

Treaties

70. Article 58(b) AP I states that the parties to the conflict shall, to the maximum extent feasible, “avoid locating military objectives within or near densely populated areas”. Article 58 AP I was adopted by 80 votes in favour, none against and 8 abstentions.⁵⁸

71. Article 3 of the 1996 Israel-Lebanon Ceasefire Understanding states that the two parties commit to ensuring that “civilian populated areas and industrial and electrical installations will not be used as launching grounds for attacks”.

72. Article 8 of the 1999 Second Protocol to the 1954 Hague Convention provides that “the Parties to the conflict shall, to the maximum extent feasible: . . . b) avoid locating military objectives near cultural property”.

Other Instruments

73. Article 11 of the 1956 New Delhi Draft Rules states that “the Parties to the conflict shall, so far as possible, avoid the permanent presence of armed forces,

⁵⁷ Frédéric de Mulinen, *Handbook on the Law of War for Armed Forces*, ICRC, Geneva, 1987, § 365.

⁵⁸ CDDH, *Official Records*, Vol. VI, CDDH/SR.42, 27 May 1977, p. 214.

military material, mobile military establishments or installations, in towns or other places with a large civilian population”.

74. Paragraph 6 of the 1991 Memorandum of Understanding on the Application of IHL between Croatia and the SFRY requires that hostilities be conducted in accordance with Article 58 AP I.

75. Paragraph 2.5 of the 1992 Agreement on the Application of IHL between the Parties to the Conflict in Bosnia and Herzegovina requires that hostilities be conducted in accordance with Article 58 AP I.

76. Section 5.4 of the 1999 UN Secretary-General's Bulletin states that “in its area of operation, the United Nations force shall avoid, to the extent feasible, locating military objectives within or near densely populated areas”. It specifies, however, that “military installations and equipment of peacekeeping operations, as such, shall not be considered military objectives”.

II. National Practice

Military Manuals

77. Argentina's Law of War Manual states that “the parties to the conflict shall, to the extent possible, avoid locating military objectives within or near densely populated areas”.⁵⁹

78. Australia's Defence Force Manual states that:

Defences and defensive positions should also be sited, if practicable, to avoid or minimise collateral damage. Ideally, all military objectives, including defensive positions, should be sited outside heavily populated areas. As in offensive operations, where a location or object may be equally successfully defended from any one of several defensive positions, LOAC requires that the defence should be conducted from the position which would cause the least danger to civilians and civilian objects.⁶⁰

The manual requires commanders to refrain from “locating military objectives within or near densely-populated areas”.⁶¹

79. Benin's Military Manual states that “the belligerents must avoid locating their military installations in the vicinity of the civilian population”.⁶² The manual further specifies that:

Defence shall be organised, as far as possible, outside inhabited areas... When a choice is possible between several defence positions for obtaining an equivalent military advantage, the position to be selected shall be that which would cause less danger to civilian persons and objects... Military units, except medical units, shall move or stay preferably outside populated areas, when their presence, even temporary, could endanger civilian persons and objects. Even a temporary military presence can create a dangerous situation for the civilian areas and persons. Units

⁵⁹ Argentina, *Law of War Manual* (1989), § 4.07(2).

⁶⁰ Australia, *Defence Force Manual* (1994), § 553.

⁶¹ Australia, *Defence Force Manual* (1994), § 556(b).

⁶² Benin, *Military Manual* (1995), Fascicule III, p. 12.

located in or close to populated areas shall be so deployed as to create the least possible danger to civilian areas.⁶³

80. Canada's LOAC Manual states that "to protect civilians, the parties to a conflict shall, to the maximum extent feasible . . . avoid locating legitimate targets within or near densely populated areas".⁶⁴

81. Croatia's LOAC Compendium states that "where there are tactically equivalent alternatives, the defence position shall be chosen so as to cause the least danger to civilian persons and objects. Movements and/or halts of military units near civilian objects shall be limited to a minimum."⁶⁵

82. Croatia's Commanders' Manual states that:

57. Within tactically equivalent alternatives, the defence position shall be chosen so as to expose civilian persons and objects to the least danger.

...

63. Movement and stay during movement near civilian objects shall be restricted to the minimum duration possible.

64. The location of combat units shall be chosen so as to avoid the close vicinity of military objectives and civilian persons and objects.

65. In case of unavoidable close vicinity of military objectives and civilian persons and objects, the following principles shall guide the commander:

- a) in the vicinity of important concentrations of civilian persons and objects only smaller military objectives shall be placed;
- b) larger military objectives are to be placed in the vicinity of less important concentrations of civilian persons and of smaller civilian objects.⁶⁶

83. Ecuador's Naval Manual states that "any party to an armed conflict must separate military activities and installations from areas of noncombatant concentration".⁶⁷

84. Hungary's Military Manual states that "where there are tactically equivalent alternatives, the defence position shall be chosen so as to cause the least danger to civilian persons and objects. Movements and/or halts of military units near civilian objects must be limited to a minimum."⁶⁸

85. Israel's Manual on the Laws of War prohibits "mingling military targets among civilian objects, as for instance, a military force located within a village or a squad of soldiers fleeing into a civilian structure".⁶⁹

86. Italy's LOAC Elementary Rules Manual states that:

57. Within tactically equivalent alternatives, the defence position shall be chosen so as to expose civilian persons and objects to the least danger.

...

63. Movement and stay during movement near civilian objects shall be restricted to the minimum duration possible.

⁶³ Benin, *Military Manual* (1995), Fascicule III, p. 15.

⁶⁴ Canada, *LOAC Manual* (1999), p. 4-4, § 30(b). ⁶⁵ Croatia, *LOAC Compendium* (1991), p. 42.

⁶⁶ Croatia, *Commanders' Manual* (1992), §§ 57 and 63-65.

⁶⁷ Ecuador, *Naval Manual* (1989), § 11.2. ⁶⁸ Hungary, *Military Manual* (1992), pp. 67-68.

⁶⁹ Israel, *Manual on the Laws of War* (1998), p. 38.

64. The location of combat units shall be chosen so as to avoid the close vicinity of military objectives and civilian persons and objects.
65. In case of unavoidable close vicinity of military objectives and civilian persons and objects, the following principles shall guide the commander:
 - a) in the vicinity of important concentrations of civilian persons and objects only smaller military objectives shall be placed;
 - b) larger military objectives are to be placed in the vicinity of less important concentrations of civilian persons and of smaller civilian objects.⁷⁰

87. Kenya's LOAC Manual states that "the belligerents should avoid locating their military installations near the civilian population".⁷¹ The manual further specifies that:

Defence shall be organized primarily outside populated areas . . . When a choice is possible between several defence positions for obtaining a similar military advantage, the position to be selected shall be that which would cause the least danger to civilian persons and objects, if attacked . . . Military units, except medical units, shall move or stay preferably outside populated areas, when their presence, even temporary, could endanger civilian persons and objects. Movements which have to pass through or close to populated areas shall be executed rapidly. Interruptions of movements (e.g. regular stops after given periods of time, occasional stops) shall, when the tactical situation permits, take place outside populated areas or at least in less densely populated areas. Even a temporary military presence can create a dangerous situation for the civilian areas and persons. Units located in or close to populated areas shall be so deployed as to create the least possible danger to civilian areas (e.g. at least physical separation; appropriate distance between militarily used houses and other buildings). For a longer presence in civilian areas, additional danger reducing measures shall be taken by the competent commander (e.g. clear and, where necessary, marked limit of unit's location, restricted and regulated access to the location, relevant instructions to members of the unit and appropriate information to the civilian population).⁷²

88. Madagascar's Military Manual states that:

31. Among tactically equivalent defence positions, that position must be chosen which exposes civilian persons and objects the least to danger.
- ...
41. Movements (and stops during movements) in the vicinity of civilian objects shall be limited to the minimum.
42. The placement of combat units must be chosen in order to avoid proximity between military objectives and civilian objects.
43. In case of inevitable proximity between military objectives and civilian persons and objects, the commander must be guided by the following principles:
 - a) only small military objectives may be placed in the vicinity of important concentrations of civilian persons and objects;
 - b) larger military objectives must be placed in the vicinity of smaller concentrations of civilian persons and objects.⁷³

⁷⁰ Italy, *LOAC Elementary Rules Manual* (1991), §§ 57 and 63–65.

⁷¹ Kenya, *LOAC Manual* (1997), Précis No. 4, p. 2.

⁷² Kenya, *LOAC Manual* (1997), Précis No. 4, pp. 9–10.

⁷³ Madagascar, *Military Manual* (1994), Fiche No. 6-O, §§ 31 and 41–43.

89. The Military Manual of the Netherlands provides that one of the precautions against the effects of attacks consists of:

avoiding the placement of military objectives in or near densely populated areas . . . Although the physical separation of civilians and civilian objects from military objectives is an obvious measure for the protection of the population, it is nevertheless a measure that will often encounter great difficulties in densely populated areas. It is essential that the civilian population is not used as a human shield for military operations.⁷⁴

90. New Zealand's Military Manual states that "the Parties to the conflict shall, to the maximum extent feasible, . . . avoid locating military objectives within or near densely populated areas".⁷⁵

91. Nigeria's Military Manual states that:

As regards the conduct of defence, it shall be organised primarily outside populated areas . . . Similar to when conducting an attack, where a choice is possible between general defence positions, the position to be selected shall be that which would cause the least danger to civilian persons and objects . . . Movements and locations presupposes that military units, except medical units, shall move or stay preferably outside populated areas if their presence would endanger civilian persons and objects. Movements which have to pass through populated area[s] shall be executed rapidly. Where it becomes expedient to locate military units temporarily near populated areas, such units shall be deployed so as to create the least possible danger to civilian areas. For longer lasting military locations, additional danger reducing measures shall be taken by the competent commander.⁷⁶

92. Russia's Military Manual requires that commanders, in peacetime, "avoid deploying military objects in or near densely populated areas".⁷⁷

93. Spain's LOAC Manual lists among the required precautionary measures to be taken in defence the duty to "do everything possible to organise defence outside densely populated areas".⁷⁸ The manual further specifies that armed forces must "to the extent possible . . . avoid locating military objectives within densely populated areas".⁷⁹

94. Sweden's IHL Manual refers to the obligation enshrined in Article 58(b) API to "avoid locating military objectives within or near densely populated areas" and notes that "the expression 'endeavour' is not used in this case, which gives the rule greater force than that of Article 58(a)".⁸⁰

95. Switzerland's Basic Military Manual specifies that "to the extent possible, that is, as far as the interests of Swiss national defence allow, no military objective shall be placed within or in the vicinity of densely populated areas".⁸¹

⁷⁴ Netherlands, *Military Manual* (1993), p. V-12, § 10.

⁷⁵ New Zealand, *Military Manual* (1992), § 519(1)(b).

⁷⁶ Nigeria, *Military Manual* (1994), p. 44, § 15.

⁷⁷ Russia, *Military Manual* (1990), § 14(a).

⁷⁸ Spain, *LOAC Manual* (1996), Vol. I, § 2.3.b.(4).

⁷⁹ Spain, *LOAC Manual* (1996), Vol. I, § 4.5.a.(2).

⁸⁰ Sweden, *IHL Manual* (1991), Section 3.2.1.5, p. 74.

⁸¹ Switzerland, *Basic Military Manual* (1987), Article 29(3), see also Article 151(2)(b) and (3).

96. Togo's Military Manual states that "the belligerents must avoid locating their military installations in the vicinity of the civilian population".⁸² The manual further specifies that:

Defence shall be organised, as far as possible, outside inhabited areas... When a choice is possible between several defence positions for obtaining an equivalent military advantage, the position to be selected shall be that which would cause less danger to civilian persons and objects... Military units, except medical units, shall move or stay preferably outside populated areas, when their presence, even temporary, could endanger civilian persons and objects. Even a temporary military presence can create a dangerous situation for the civilian areas and persons. Units located in or close to populated areas shall be so deployed as to create the least possible danger to civilian areas.⁸³

97. The UK LOAC Manual provides that "the belligerents should endeavour to avoid siting their military installations near the civilian population".⁸⁴

98. The US Air Force Pamphlet states that:

As a corollary to the principle of general civilian immunity, the parties to a conflict should, to the maximum extent feasible, take necessary precautions to protect the civilian population, individual civilians, and civilian objects under their authority against the dangers resulting from military operations. Accordingly, they should endeavor... to avoid locating military objectives within or near densely populated areas. It is incumbent upon states, desiring to make protection of their own civilian population fully effective, to take appropriate measures to segregate and separate their military activities from the civilian population and civilian objects. Substantial military advantages may in fact be acquired by such separation.⁸⁵

With respect to the result of failure to separate military activities from civilian areas, the Pamphlet specifies that:

The failure of states to segregate and separate their own military activities, and particularly to avoid placing military objectives in or near populated areas and to remove such objects from populated areas, significantly and substantially weakens effective protection for their own population. A party to a conflict which places its own citizens in positions of danger by failing to carry out the separation of military activities from civilian activities necessarily accepts, under international law, the results of otherwise lawful attacks upon valid military objectives in their territory.⁸⁶

National Legislation

99. Under Ireland's Geneva Conventions Act as amended, any "minor breach" of AP I, including violations of Article 58(b) AP I, is a punishable offence.⁸⁷

⁸² Togo, *Military Manual* (1996), Fascicule III, p. 12.

⁸³ Togo, *Military Manual* (1996), Fascicule III, p. 15.

⁸⁴ UK, *LOAC Manual* (1981), Section 4, p. 14, § 4(d).

⁸⁵ US, *Air Force Pamphlet* (1976), § 5-4(a). ⁸⁶ US, *Air Force Pamphlet* (1976), § 5-4(b).

⁸⁷ Ireland, *Geneva Conventions Act as amended* (1962), Section 4(1) and (4).

100. Under Norway's Military Penal Code as amended, "anyone who contravenes or is accessory to the contravention of provisions relating to the protection of persons or property laid down in . . . the two additional protocols to [the Geneva] Conventions . . . is liable to imprisonment".⁸⁸

National Case-law

101. No practice was found.

Other National Practice

102. On the basis of an interview with a retired army general, the Report on the Practice of Botswana states that it is Botswana's practice to separate military camps from civilian areas.⁸⁹

103. The Report on the Practice of Colombia states that if the location of police units may generate danger for the civilian population, their redeployment is considered advisable.⁹⁰

104. According to the Report on the Practice of Egypt, Egypt considers that parties to a conflict are required to take precautions against the effects of attack, in particular to refrain from placing military objectives within or near populated areas.⁹¹

105. In 1996, the Monitoring Group on the Implementation of the 1996 Israel-Lebanon Ceasefire Understanding, consisting of France, Israel, Lebanon, Syria and the US, pleaded with combatants to respect the precautionary measure of separating military objectives from densely populated areas, re-emphasising that artillery fired from populated areas endangered civilians. The Monitoring Group also asked combatants to take all necessary precautions during military operations launched from the vicinity of populated areas.⁹²

106. The Report on the Practice of Iran notes that "in many Iranian cities, especially in Tehran, due to [the] expansion of city limits [over] the years, some garrisons are now located in the center of the cities".⁹³

107. In a message to the UN Secretary-General in 1984, the President of Iraq stated that "both parties should refrain from placing military concentrations in or near towns so that there will be no intermingling between during military operations".⁹⁴

⁸⁸ Norway, *Military Penal Code as amended* (1902), § 108(b).

⁸⁹ Report on the Practice of Botswana, 1998, Interview with a retired army general, Answers to additional questions on Chapter 1.1.

⁹⁰ Report on the Practice of Colombia, 1998, Chapter 1.7.

⁹¹ Report on the Practice of Egypt, 1997, Chapter 1.7.

⁹² Monitoring Group on the Implementation of the 1996 Israel-Lebanon Ceasefire Understanding, Fourth and fifth meetings, 22–25 September and 14–18 October 1996.

⁹³ Report on the Practice of Iran, 1997, Chapter 1.7.

⁹⁴ Iraq, Message from the President of Iraq, annexed to Letter dated 10 June 1984 to the UN Secretary-General, UN Doc. S/16610, 19 June 1984, p. 2.

108. In 1992, in a letter to the UN Secretary-General, Israel stated that:

Operating with cruel indifference to the fate of innocent Lebanese civilians, Hizbollah and other terrorist organizations continue to use civilian centres as bases of operation. Therein lies the true cause of the suffering of the civilian population of southern Lebanon.⁹⁵

109. According to the Report on the Practice of Israel, "the IDF endeavours, to the maximum extent possible, not to place military objectives within or in the vicinity of densely populated civilian areas". The report remarks, however, that demographic changes have sometimes caused certain long-standing military bases to end up in mainly civilian areas. The IDF General Headquarter in Tel Aviv is cited as an example.⁹⁶

110. The Report on the Practice of Jordan refers to the existence of "a legal obligation under Jordanian practice prohibiting the location of military objectives in densely populated areas".⁹⁷ The report considers it "regrettable that military installations are sometimes located in the vicinity of densely populated areas".⁹⁸

111. At the CDDH, in the explanation of its vote on Article 51 of draft AP I (now Article 58), South Korea stated with respect to sub-paragraph (b) that:

This provision does not constitute a restriction on a State's military installations on its own territory. We consider that military facilities necessary for a country's national defence should be decided on the basis of the actual needs and other considerations of that particular country. An attempt to regulate a country's requirements and the fulfilment of those requirements in this connexion would not conform to actualities.⁹⁹

112. The Report on the Practice of Kuwait states that, with the growth of populations and the development of towns, the Kuwaiti authorities find themselves obliged to remove military sites from urban agglomerations.¹⁰⁰

113. The Report on the Practice of Lebanon notes that, according to an advisor of the Ministry of Foreign Affairs, it is forbidden for resistance movements to maintain a military presence in populated areas. It is also prohibited to use such areas as the starting point of a military operation. The advisor thought that the same principles should also apply to Israel, whose military forces should remain outside the towns and villages.¹⁰¹

⁹⁵ Israel, Letter dated 27 January 1992 to the UN Secretary-General, UN Doc. S/23479, 27 January 1992, p. 2.

⁹⁶ Report on the Practice of Israel, 1997, Chapter 1.7.

⁹⁷ Report on the Practice of Jordan, 1997, Answers to additional questions on Chapter 1.7.

⁹⁸ Report on the Practice of Jordan, 1997, Chapter 1.7.

⁹⁹ South Korea, Statement at the CDDH, *Official Records*, Vol. VI, CDDH/SR.42, 27 May 1977, pp. 234-235.

¹⁰⁰ Report on the Practice of Kuwait, 1997, Chapter 1.7.

¹⁰¹ Report on the Practice of Lebanon, 1998, Interview with an advisor of the Lebanese Ministry of Foreign Affairs, Chapter 1.7.

114. The Report on the Practice of Malaysia considers that permanent and operational military camps may not be located within or near densely populated areas. The report notes, however, that at present, owing to the development of surrounding areas, many permanent and operational military camps are situated within or near densely populated areas.¹⁰²

115. The Report on the Practice of Syria asserts that Syria considers Article 58 AP I to be part of customary international law.¹⁰³

116. In reply to a question in the House of Lords with respect to the 1991 Gulf War, a UK government spokesman stated that:

The noble Lord asked if the bombing of civilians was not contrary to the Geneva Convention. The answer to that is no. We attacked targets accepted as legitimate in international law. Iraq's stationing of military targets in civilian areas was contrary to the rules of war.¹⁰⁴

117. In 1966, in the context of the Vietnam War, the US Department of Defense stated that:

It is impossible to avoid all damage to civilian areas, especially when the North Vietnamese deliberately emplace their air defense sites, their dispersed POL, their radar and other military facilities in the midst of populated areas, and, indeed, sometimes on the roofs of government buildings.¹⁰⁵

118. In 1966, in reply to an inquiry from a member of the US House of Representatives asking for a restatement of US policy on targeting in North Vietnam, a US Deputy Assistant Secretary of Defense wrote that "it is impossible to avoid all damage to civilian areas, particularly in view of the concerted effort of the North Vietnamese to emplace anti-aircraft and critical military targets among the civilian population".¹⁰⁶

119. In 1972, the General Counsel of the US Department of Defense stated that:

The principle [contained in paragraph 1(c) of UN General Assembly Resolution 2444 (XXIII) of 1969 that a distinction must be made at all times between persons taking part in the hostilities and members of the civilian population to the effect that the civilians be spared as much as possible] addresses primarily the Party exercising control over members of the civilian population. This principle recognizes the interdependence of the civilian community with the overall war effort of a modern society. But its application enjoins the party controlling the population to use its

¹⁰² Report on the Practice of Malaysia, 1997, Chapter 1.7.

¹⁰³ Report on the Practice of Syria, 1997, Chapter 1.7.

¹⁰⁴ UK, House of Lords, Statement by a government spokesman, 6 March 1991, *Hansard*, Vol. 526, col. 1485.

¹⁰⁵ US, Department of Defense, Statement on targeting policy in Vietnam, 26 December 1966, reprinted in Marjorie Whiteman, *Digest of International Law*, Vol. 10, Department of State Publication 8367, Washington, D.C., 1968, p. 427.

¹⁰⁶ US, Letter from Deputy Assistant Secretary of Defense Goulding to US Representative Ogden Reid from New York, 30 December 1966, reprinted in Marjorie Whiteman, *Digest of International Law*, Vol. 10, Department of State Publication 8367, Washington, D.C., 1968, p. 428.

best efforts to distinguish or separate its military forces and war making activities from members of the civilian population to the maximum extent feasible so that civilian casualties and damage to civilian objects incidental to attacks on military objectives, will be minimized as much as possible.¹⁰⁷

120. In 1991, in response to an ICRC memorandum on the applicability of IHL in the Gulf region, the US Department of the Army stated that:

The obligation of distinguishing combatants and military objectives from civilians and civilian objects is a shared responsibility of the attacker, defender, and the civilian population as such . . . A defender must exercise reasonable precaution to separate the civilian population and civilian objects from military objectives.¹⁰⁸

121. In 1991, in a report submitted to the UN Security Council on operations in the Gulf War, the US denounced Iraq for having “intentionally placed civilians at risk through its behaviour”. The report cited the following examples of such behaviour:

- (a) The Iraqi Government moved significant amounts of military weapons and equipment into civilian areas with the deliberate purpose of using innocent civilians and their homes as shields against attacks on legitimate military targets;
- (b) Iraqi fighter and bomber aircraft were dispersed into villages near the military airfields where they were parked between civilian houses and even placed immediately adjacent to important archaeological sites and historic treasures;
- (c) Coalition aircraft were fired upon by anti-aircraft weapons in residential neighbourhoods in various cities. In Baghdad, anti-aircraft sites were located on hotel roofs;
- (d) In one case, military engineering equipment used to traverse rivers, including mobile bridge sections, was located in several villages near an important crossing point. The Iraqis parked each vehicle adjacent to a civilian house.¹⁰⁹

122. In 1992, in its final report to Congress on the conduct of the Gulf War, the US Department of Defense stated that:

Historically, and from a common sense standpoint, the party controlling the civilian population has the opportunity and responsibility to minimize the risk to the civilian population through the separation of military objects from the civilian population . . . The defending party must exercise reasonable precautions to separate the civilian population and civilian objects from military objectives, and avoid placing military objectives in the midst of the civilian population.¹¹⁰

¹⁰⁷ US, Letter from J. Fred Buzhardt, General Counsel of the Department of Defense, to Senator Edward Kennedy, Chairman of the Subcommittee on Refugees of the Committee on the Judiciary, 22 September 1972, *AJIL*, Vol. 67, 1973, p. 123.

¹⁰⁸ US, Message from the Department of the Army to the legal adviser of the US Army forces deployed in the Gulf, 11 January 1991, § 8(E), Report on US Practice, 1997, Chapter 1.7.

¹⁰⁹ US, Letter dated 5 March 1991 to the President of the UN Security Council, UN Doc. S/22341, 8 March 1991, pp. 2–3.

¹¹⁰ US, Department of Defense, Final Report to Congress on the Conduct of the Persian Gulf War, 10 April 1992, Appendix O, The Role of the Law of War, *ILM*, Vol. 31, 1992, p. 625.

123. In 1993, in its report to Congress on the protection of natural and cultural resources during times of war, the US Department of Defense stated that:

The obligation to take reasonable measures to minimize damage to natural resources and cultural property is shared by both an attacker and a defender. . . . The defender has certain responsibilities as well, not the least of which is to take all reasonable measures to separate military objectives from civilian objects and the civilian population. Regrettably, in conflicts such as the Korean and Vietnam Wars, as well as the 1991 Persian Gulf War, the armed forces of the United States have faced opponents who have elected to use their civilian populations and civilian objects to shield military objectives from attack. Notwithstanding such actions, U.S. forces have taken reasonable measures to minimize collateral injury to civilians and damage to civilian objects while conducting their military operations, often at increased risk to U.S. personnel.¹¹¹

124. The Report on US Practice states that “it is the *opinio juris* of the United States that parties to a conflict should, to the maximum extent feasible, segregate and separate their military activities from the civilian population to protect the latter”.¹¹²

125. The Report on the Practice of Zimbabwe states that the provisions of Article 58 AP I would be regarded as customary by Zimbabwe because of its adoption of the Geneva Conventions Amendment Act which incorporates API into Zimbabwe’s law and practice.¹¹³

III. Practice of International Organisations and Conferences

United Nations

126. In 1991, in a special report on UNIFIL in Lebanon, the UN Secretary-General stated that:

Most of the above-described hostilities have taken place near IDF/DFP positions that are close to population centres and in areas where UNIFIL’s deployment overlaps the Israeli-Controlled Area (ICA). In order to reduce hostilities, to avoid further hardship to the civilian population and to prevent additional UNIFIL casualties, I have proposed to the Government of Israel that it withdraw IDF/DFP personnel from the most affected positions, which would then be taken over by UNIFIL. I am convinced that, as in the case of Tallet Huqban in October 1987 (S/19445), such a move would have a beneficial effect.¹¹⁴

The Secretary-General resubmitted his proposal to the Israeli government in 1992.¹¹⁵

¹¹¹ US, Department of Defense, Report to Congress on International Policies and Procedures Regarding the Protection of Natural and Cultural Resources During Times of War, 19 January 1993, p. 203.

¹¹² Report on US Practice, 1997, Chapter 1.7.

¹¹³ Report on the Practice of Zimbabwe, 1998, Chapter 1.7.

¹¹⁴ UN Secretary-General, Special report on UNIFIL, UN Doc. S/23255, 29 November 1991, § 9.

¹¹⁵ UN Secretary-General, Report on UNIFIL, UN Doc. S/24341, 21 July 1992, § 31.

Other International Organisations

127. No practice was found.

International Conferences

128. No practice was found.

IV. Practice of International Judicial and Quasi-judicial Bodies

129. In its judgement in the *Kupreškić case* in 2000, the ICTY Trial Chamber noted that Article 58 AP I was now part of customary international law, not only because it specified and fleshed out general pre-existing norms, but also because it did not appear to be contested by any State, including those who had not ratified the Protocol.¹¹⁶ With reference to the Martens Clause, the Trial Chamber held that:

The prescriptions of . . . [Article 58] (and of the corresponding customary rules) must be interpreted so as to construe as narrowly as possible the discretionary power to attack belligerents and, by the same token, so as to expand the protection accorded to civilians.¹¹⁷

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

130. To fulfil its task of disseminating IHL, the ICRC has delegates around the world teaching armed and security forces that:

439. Defence shall be organized primarily outside populated areas . . .

440. When a choice is possible between several defence positions for obtaining a similar military advantage, the position to be selected shall be that the defence of which would cause the least danger to civilian persons and objects.

...

446. When the tactical situation permits, defence measures which may affect civilian persons shall be announced by effective advance warning (e.g. for evacuation of specific houses or areas, for removal and shelter).

...

448. Military units, except medical units, shall move or stay preferably outside populated areas, when their presence, even temporary, could endanger civilian persons and objects.

449. Movements which have to pass through or close to populated areas shall be executed rapidly . . .

450. Interruptions of movement (e.g. regular stops after given periods of time, occasional stops) shall, when the tactical situation permits, take place outside populated areas or at least in less densely populated areas.

451. Even a temporary military presence can create a dangerous situation for the civilian areas and persons. Units located in or close to populated areas shall be so

¹¹⁶ ICTY, *Kupreškić case*, Judgement, 14 January 2000, § 524.

¹¹⁷ ICTY, *Kupreškić case*, Judgement, 14 January 2000, § 525.

deployed as to create the least possible danger to civilian areas (e.g. at least clear physical separation: appropriate distance between militarily used houses and other buildings).

452. For longer lasting locations in civilian areas, additional danger-reducing measures shall be taken by the competent commander (e.g. clear and where necessary marked limit of unit's location, restricted and regulated access to location, instructions to members of the unit and appropriate information to the civilian population).¹¹⁸

131. In an appeal issued in 1979 with respect to the conflict in Rhodesia/Zimbabwe, the ICRC specifically requested that the Patriotic Front "clearly separate civilian establishments, particularly refugee camps, from military installations".¹¹⁹

VI. Other Practice

132. In a resolution adopted during its Edinburgh Session in 1969, the Institute of International Law stated that "the provisions of the preceding paragraphs do not affect the application of the existing rules of international law which prohibit the exposure of civilian populations and of non-military objects to the destructive effects of military means".¹²⁰

C. Removal of Civilians and Civilian Objects from the Vicinity of Military Objectives

Note: For practice concerning the evacuation of the civilian population for security reasons, see Chapter 38, section A.

I. Treaties and Other Instruments

Treaties

133. Article 58(a) AP I states that the Parties to the conflict shall, to the maximum extent feasible, "without prejudice to Article 49 of the Fourth Convention, endeavour to remove the civilian population, individual civilians and civilian objects under their control from the vicinity of military objectives". Article 58 AP I was adopted by 80 votes in favour, none against and 8 abstentions.¹²¹

¹¹⁸ Frédéric de Mulinen, *Handbook on the Law of War for Armed Forces*, ICRC, Geneva, 1987, §§ 439, 440, 446, 448–452.

¹¹⁹ ICRC, Conflict in Southern Africa: ICRC appeal, 19 March 1979, § 7, *IRRC*, No. 209, 1979, p. 89.

¹²⁰ Institute of International Law, Edinburgh Session, Resolution on the Distinction between Military Objectives and Non-military Objects in General and Particularly the Problems Associated with Weapons of Mass Destruction, 9 September 1969, § 5.

¹²¹ CDDH, *Official Records*, Vol. VI, CDDH/SR.42, 27 May 1977, p. 214.

134. Article 8 of the 1999 Second Protocol to the 1954 Hague Convention provides that “the Parties to the conflict shall, to the maximum extent feasible: a) remove movable cultural property from the vicinity of military objectives or provide for adequate *in situ* protection”.

Other Instruments

135. Article 11 of the 1956 New Delhi Draft Rules states that:

The parties to the conflict shall, so far as possible, take all necessary steps to protect the civilian population subject to their authority from the dangers to which they would be exposed in attack – in particular by removing them from the vicinity of military objectives and from threatened areas. However, the rights conferred upon the population in the event of transfer or evacuation under Article 49 of the Fourth Geneva Convention of 12 August 1949 are expressly reserved.

136. Paragraph 6 of the 1991 Memorandum of Understanding on the Application of IHL between Croatia and the SFRY requires that hostilities be conducted in accordance with Article 58 AP I.

137. Paragraph 2.5 of the 1992 Agreement on the Application of IHL between the Parties to the Conflict in Bosnia and Herzegovina requires that hostilities be conducted in accordance with Article 58 AP I.

II. National Practice

Military Manuals

138. Argentina’s Law of War Manual states that “the parties to the conflict shall, to the extent possible, endeavour to remove the civilian population, individual civilians and civilian objects under their control from the vicinity of military objectives”.¹²²

139. Australia’s Defence Force Manual requires commanders to remove civilians and civilian objects under their control “from the vicinity of military objectives”.¹²³

140. Benin’s Military Manual states that “civilians must be evacuated from zones located in proximity to military objectives”.¹²⁴ The manual repeats this rule and gives some further specifications to the effect that: “civilian persons and objects must be separated from military objectives as far as possible . . . Civilian persons removed from the vicinity of military objectives shall be taken preferably to locations they know and which present no danger for them.”¹²⁵

141. Cameroon’s Instructors’ Manual provides that:

On the approach of the enemy or of combat towards zones of civilian habitation, the civilian population must be evacuated towards zones free of combat. The means and

¹²² Argentina, *Law of War Manual* (1989), § 4.07(2).

¹²³ Australia, *Defence Force Manual* (1994), § 556(a).

¹²⁴ Benin, *Military Manual* (1995), Fascicule III, p. 12.

¹²⁵ Benin, *Military Manual* (1995), Fascicule III, p. 15.

organisation of this evacuation are the responsibility of the national civilian and military authorities. All persons must be evacuated, with priority given to women and children.¹²⁶

142. According to Canada's LOAC Manual, "to protect civilians, the parties to a conflict shall, to the maximum extent feasible endeavour to remove the civilian population, individual civilians and civilian objects under their control from the vicinity of legitimate targets".¹²⁷

143. Croatia's Commanders' Manual states that "endangered civilian persons and objects shall be removed from military objectives".¹²⁸

144. Ecuador's Naval Manual states that "any party to an armed conflict must remove civilians and other noncombatants under its control from the vicinity of targets of likely enemy attacks".¹²⁹

145. France's LOAC Summary Note states that "civilians and civilian objects must be kept away from the dangers [resulting from military operations] and, if necessary, be removed from the vicinity of military objectives".¹³⁰ The manual specifies that "the commander organises the cooperation with the civilian authorities and sets the priorities, in particular with respect to the precautionary measures to be taken for the protection of civilian populations".¹³¹

146. Israel's Manual on the Laws of War states that "one should try and remove the civilian population from military targets".¹³²

147. Italy's LOAC Elementary Rules Manual states that "endangered civilian persons and objects shall be removed from military objectives".¹³³

148. Kenya's LOAC Manual states that "civilians should be removed from the vicinity of military objectives as far as possible".¹³⁴ The manual later repeats this rule and gives some additional specifications:

Civilian persons and objects shall be removed from military objectives. To that end, commanders shall seek the co-operation of the civilian authorities. . . Civilian persons removed from the vicinity of military objectives shall be taken preferably to locations they know and which present no danger for them. Civilian objects shall be removed primarily to locations outside the vicinity of military objectives.¹³⁵

149. Madagascar's Military Manual provides that "civilian persons and objects shall be removed from military objectives".¹³⁶

150. The Military Manual of the Netherlands provides that one of the precautions against the effects of attacks consists of:

¹²⁶ Cameroon, *Instructors' Manual* (1992), p. 67, § 242(1).

¹²⁷ Canada, *LOAC Manual* (1999), p. 4-4, § 30(a).

¹²⁸ Croatia, *Commanders' Manual* (1992), § 59.

¹²⁹ Ecuador, *Naval Manual* (1989), § 11.2.

¹³⁰ France, *LOAC Summary Note* (1992), § 1.4.

¹³¹ France, *LOAC Summary Note* (1992), § 5.2.

¹³² Israel, *Manual on the Laws of War* (1998), p. 39.

¹³³ Italy, *LOAC Elementary Rules Manual* (1991), § 59.

¹³⁴ Kenya, *LOAC Manual* (1997), Précis No. 4, p. 2.

¹³⁵ Kenya, *LOAC Manual* (1997), Précis No. 4, p. 9.

¹³⁶ Madagascar, *Military Manual* (1994), Fiche No. 6-O, § 33.

trying to evacuate the civilian population, individual civilians and civilian objects from the vicinity of military objectives . . . Although the physical separation of civilians and civilian objects from military objectives is an obvious measure for the protection of the population, it is nevertheless a measure that will often encounter great difficulties in densely populated areas. It is essential that the civilian population is not used as a human shield for military operations.¹³⁷

151. New Zealand's Military Manual states that "the Parties to the conflict shall, to the maximum extent feasible, endeavour to remove the civilian population, individual civilians and civilian objects under their control from the vicinity of military objectives".¹³⁸

152. Nigeria's Military Manual considers that one of the aims and objectives of the Geneva Conventions is "to evacuate and prevent that civilians and civilian objects in conflict zones are attacked".¹³⁹ The manual further specifies that "commander[s] shall seek the cooperation of civilians so as to remove them from [the vicinity of] military objectives".¹⁴⁰

153. Spain's LOAC Manual lists among the required precautionary measures to be taken in defence the duty "to remove, as far as possible, civilian persons or objects under military control from the vicinity of military objectives".¹⁴¹

154. Sweden's IHL Manual states that "the parties to the conflict shall endeavour to move the civilian population, civilian persons and civilian objects from the vicinity of military objectives".¹⁴²

155. Switzerland's Basic Military Manual provides that "to the extent possible, that is, as far as the interests of Swiss national defence allow, . . . civilians close to military objectives will be removed".¹⁴³

156. Togo's Military Manual states that "civilians must be evacuated from zones located in proximity to military objectives".¹⁴⁴ The manual repeats this rule and gives some further specifications to the effect that "civilian persons and objects must be separated from military objectives as far as possible . . . Civilian persons removed from the vicinity of military objectives shall be taken preferably to locations they know and which present no danger for them."¹⁴⁵

157. The UK LOAC Manual provides that "civilians should be removed from the vicinity of military objectives so far as possible".¹⁴⁶

158. The US Air Force Pamphlet states that:

As a corollary to the principle of general civilian immunity, the parties to a conflict should, to the maximum extent feasible, take necessary precautions to protect the

¹³⁷ Netherlands, *Military Manual* (1993), p. V-12, § 10.

¹³⁸ New Zealand, *Military Manual* (1992), § 519(1)(a).

¹³⁹ Nigeria, *Military Manual* (1994), p. 6, § 6(d).

¹⁴⁰ Nigeria, *Military Manual* (1994), p. 44, § 15.

¹⁴¹ Spain, *LOAC Manual* (1996), Vol. I, §§ 2.3.b.(4) and 4.5.a.(2).

¹⁴² Sweden, *IHL Manual* (1991), Section 3.2.1.5, p. 73.

¹⁴³ Switzerland, *Basic Military Manual* (1987), Article 29(3), see also Article 151(2)(a) and (3).

¹⁴⁴ Togo, *Military Manual* (1996), Fascicule III, p. 12.

¹⁴⁵ Togo, *Military Manual* (1996), Fascicule III, p. 15.

¹⁴⁶ UK, *LOAC Manual* (1981), Section 4, p. 14, § 4(d).

civilian population, individual civilians, and civilian objects under their authority against the dangers resulting from military operations. Accordingly, they should endeavor to remove civilians from the proximity of military objectives . . . It is incumbent upon states, desiring to make protection of their own civilian population fully effective, to take appropriate measures to segregate and separate their military activities from the civilian population and civilian objects. Substantial military advantages may in fact be acquired by such separation.¹⁴⁷

159. The US Naval Handbook states that “a party to an armed conflict has an affirmative duty to remove civilians under its control as well as the wounded, sick, shipwrecked, and prisoners of war from the vicinity of targets of likely enemy attacks”.¹⁴⁸

National Legislation

160. Under Ireland’s Geneva Conventions Act as amended, any “minor breach” of AP I, including violations of Article 58(a) AP I, is a punishable offence.¹⁴⁹

161. Under Norway’s Military Penal Code as amended, “anyone who contravenes or is accessory to the contravention of provisions relating to the protection of persons or property laid down in . . . the two additional protocols to [the Geneva] Conventions . . . is liable to imprisonment”.¹⁵⁰

National Case-law

162. No practice was found.

Other National Practice

163. According to the Report on the Practice of Egypt, Egypt considers that parties to a conflict are required to take precautions against the effects of attack, in particular the removal of the civilian population and civilian objects from the vicinity of military objectives.¹⁵¹

164. On the basis of the reply by Iraq’s Ministry of Defence to a questionnaire, the Report on the Practice of Iraq states that “the Iraqi Armed Forces undertook, in numerous instances, to evacuate the civilian population living inside the occupied territories, in order to safeguard them in the instances where counter attacks were expected to take place by the Iranian forces”. With respect to measures taken inside Iraqi territory, the report cites the following examples: construction of shelters and keeping civilians away from the areas of military operations.¹⁵²

165. The Report on the Practice of Jordan refers to the legal obligation to remove endangered civilian persons and objects from the vicinity of military

¹⁴⁷ US, *Air Force Pamphlet* (1976), § 5-4(a). ¹⁴⁸ US, *Naval Handbook* (1995), § 11.2.

¹⁴⁹ Ireland, *Geneva Conventions Act as amended* (1962), Section 4(1) and (4).

¹⁵⁰ Norway, *Military Penal Code as amended* (1902), § 108(b).

¹⁵¹ Report on the Practice of Egypt, 1997, Chapter 1.7.

¹⁵² Report on the Practice of Iraq, 1998, Reply by the Iraqi Ministry of Defence to a questionnaire, July 1997, Chapter 1.7.

targets. It gives the example of the evacuation of civilians from a dangerous zone (though not a military objective) when in 1968, Jordan ordered the evacuation of civilians who had fled the West Bank in 1967 and lived in areas between Jordan and Israel. The evacuation was aimed at protecting the civilians from intensive military operations.¹⁵³

166. The Report on the Practice of Kuwait states that in practice Kuwait has made every possible effort to remove the civilian population from the vicinity of military objectives. During the “crisis” in February 1998, the Kuwaiti authorities deemed the border area a possible theatre of military operations and evacuated civilians from the vicinity.¹⁵⁴

167. The Report on the Practice of Malaysia refers to the obligation to remove all civilians from the vicinity of military objectives.¹⁵⁵

168. The Report on the Practice of Syria asserts that Syria considers Article 58 AP I to be part of customary international law.¹⁵⁶

169. In 1972, the General Counsel of the US Department of Defense stated that:

The principle [contained in paragraph 1(c) of UN General Assembly Resolution 2444 (XXIII) of 1969 that a distinction must be made at all times between persons taking part in the hostilities and members of the civilian population to the effect that the civilians be spared as much as possible] addresses primarily the Party exercising control over members of the civilian population. This principle recognizes the interdependence of the civilian community with the overall war effort of a modern society. But its application enjoins the party controlling the population to use its best efforts to distinguish or separate its military forces and war making activities from members of the civilian population to the maximum extent feasible so that civilian casualties and damage to civilian objects incidental to attacks on military objectives, will be minimized as much as possible.¹⁵⁷

170. In 1991, in response to an ICRC memorandum on the applicability of IHL in the Gulf region, the US Department of the Army stated that:

The obligation of distinguishing combatants and military objectives from civilians and civilian objects is a shared responsibility of the attacker, defender, and the civilian population as such. An attacker must exercise reasonable precautions to minimize incidental or collateral injury to the civilian population, consistent with mission accomplishment and allowable risk to the attacking force. A defender must exercise reasonable precaution to separate the civilian population and civilian objects from military objectives. Civilians must exercise reasonable precaution to remove themselves from the vicinity of military objectives or military operations.

¹⁵³ Report on the Practice of Jordan, 1997, Chapter 1.7.

¹⁵⁴ Report on the Practice of Kuwait, 1997, Answers to additional questions on Chapter 1.7.

¹⁵⁵ Report on the Practice of Malaysia, 1997, Answers to additional questions on Chapter 1.7.

¹⁵⁶ Report on the Practice of Syria, 1997, Chapter 1.7.

¹⁵⁷ US, Letter from J. Fred Buzhardt, General Counsel of the Department of Defense, to Senator Edward Kennedy, Chairman of the Subcommittee on Refugees of the Committee on the Judiciary, 22 September 1972, *AJIL*, Vol. 67, 1973, p. 123.

The force that has control over the civilians has an obligation to place them in a safe place.¹⁵⁸

171. In 1992, in its final report to Congress on the conduct of the Gulf War, the US Department of Defense stated that:

Historically, and from a common sense standpoint, the party controlling the civilian population has the opportunity and responsibility to minimize the risk to the civilian population through the separation of military objects from the civilian population, evacuation of the civilian population from near immovable military objects, and development of air raid precautions . . . The defending party must exercise reasonable precautions to separate the civilian population and civilian objects from military objectives, and avoid placing military objectives in the midst of the civilian population.¹⁵⁹

In the report, the Department of Defense accused Iraq of having violated its obligations:

Iraqi authorities elected not to move civilians away from objects they knew were legitimate military targets, thereby placing those civilians at risk of injury incidental to Coalition attacks against these targets, notwithstanding the efforts by the Coalition to minimize risk to innocent civilians . . . The Government of Iraq elected not to take routine air-raid precautions to protect its civilian population. Civilians were not evacuated in any significant numbers from Baghdad, nor were they removed from proximity to legitimate military targets. There were air raid shelters for less than 1 percent of the civilian population of Baghdad . . . The Government of Iraq was aware of its law of war obligations. In the month preceding the Coalition air campaign, for example, a civil defense exercise was conducted, during which more than one million civilians were evacuated from Baghdad. No government evacuation program was undertaken during the Coalition air campaign.¹⁶⁰

172. In 1993, in its report to Congress on the protection of natural and cultural resources during times of war, the US Department of Defense stated that:

The obligation to take reasonable measures to minimize damage to natural resources and cultural property is shared by both an attacker and a defender . . . The defender has certain responsibilities as well, not the least of which is to take all reasonable measures to separate military objectives from civilian objects and the civilian population. Regrettably, in conflicts such as the Korean and Vietnam Wars, as well as the 1991 Persian Gulf War, the armed forces of the United States have faced opponents who have elected to use their civilian populations and civilian objects to shield military objectives from attack. Notwithstanding such actions, U.S. forces have taken reasonable measures to minimize collateral injury to civilians

¹⁵⁸ US, Message from the Department of the Army to the legal adviser of the US Army forces deployed in the Gulf, 11 January 1991, § 8(E), Report on US Practice, 1997, Chapter 1.7.

¹⁵⁹ US, Department of Defense, Final Report to Congress on the Conduct of the Persian Gulf War, 10 April 1992, Appendix O, The Role of the Law of War, *ILM*, Vol. 31, 1992, p. 625.

¹⁶⁰ US, Department of Defense, Final Report to Congress on the Conduct of the Persian Gulf War, 10 April 1992, Appendix O, The Role of the Law of War, *ILM*, Vol. 31, 1992, pp. 623 and 625–626.

and damage to civilian objects while conducting their military operations, often at increased risk to U.S. personnel.¹⁶¹

173. The Report on US Practice states that:

It is the *opinio juris* of the United States that parties to a conflict should, to the maximum extent feasible, segregate and separate their military activities from the civilian population to protect the latter. Alternatively, where feasible, it may be necessary to remove civilians from the vicinity of military operations in order to protect them from the effects of attacks.¹⁶²

174. The Report on the Practice of Zimbabwe states that the provisions of Article 58 AP I would be regarded as customary by Zimbabwe because of its adoption of the Geneva Conventions Amendment Act which incorporates AP I into Zimbabwe's law and practice.¹⁶³

III. Practice of International Organisations and Conferences

175. No practice was found.

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176. In its judgement in the *Kupreškić case* in 2000, the ICTY Trial Chamber noted that Article 58 AP I was now part of customary international law, not only because it specified and fleshed out general pre-existing norms, but also because it did not appear to be contested by any State, including those who had not ratified the Protocol.¹⁶⁴ With reference to the Martens Clause, the Trial Chamber held that:

The prescriptions of . . . [Article 58] (and of the corresponding customary rules) must be interpreted so as to construe as narrowly as possible the discretionary power to attack belligerents and, by the same token, so as to expand the protection accorded to civilians.¹⁶⁵

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

177. To fulfil its task of disseminating IHL, the ICRC has delegates around the world teaching armed and security forces that:

¹⁶¹ US, Department of Defense, Report to Congress on International Policies and Procedures Regarding the Protection of Natural and Cultural Resources During Times of War, 19 January 1993, p. 203.

¹⁶² Report on US Practice, 1997, Chapter 1.7.

¹⁶³ Report on the Practice of Zimbabwe, 1998, Chapter 1.7.

¹⁶⁴ ICTY, *Kupreškić case*, Judgement, 14 January 2000, § 524.

¹⁶⁵ ICTY, *Kupreškić case*, Judgement, 14 January 2000, § 525.

Civilian persons and objects shall be removed from military objectives. To that purpose commanders shall seek the cooperation of the civilian authorities . . . The removal of civilian persons from the vicinity of military objectives shall take place preferably to locations they know and which present no danger for them. The removal of civilian objects shall take place primarily to locations outside the vicinity of military objectives . . . When the tactical situation permits, effective advance warning shall be given (e.g. for the removal and/or shelter of civilian persons).¹⁶⁶

178. In an appeal issued in 1979 with respect to the conflict in Rhodesia/Zimbabwe, the ICRC specifically requested that the Patriotic Front “clearly separate civilian establishments, particularly refugee camps, from military installations”.¹⁶⁷

179. In 1993, the ICRC noted that a government involved in an armed conflict had helped to evacuate the civilians of a town under enemy shelling.¹⁶⁸

180. In 1994, in a Memorandum on Respect for International Humanitarian Law in Angola, the ICRC stated that:

All feasible precautions shall be taken to avoid injuries, loss and damage to the civilian population; . . . civilians must, in particular, be kept out of dangers resulting from military operations and . . . their evacuation shall be organized or facilitated, wherever required and insofar as the security situation permits.¹⁶⁹

181. In 1994, in a Memorandum on Compliance with International Humanitarian Law by the Forces Participating in Opération Turquoise in the Great Lakes region, the ICRC stated that:

All feasible precautions shall be taken to avoid injury or losses inflicted on the civilian population and damage to civilian objects; civilians must, in particular, be kept away from dangers resulting from military operations and their evacuation must be organized or facilitated where safety conditions so require or permit.¹⁷⁰

182. In a legal analysis in 1996, the ICRC considered that the forced settlement by a government of its nationals in an occupied territory could be considered a violation of the obligation to spare civilians from the effects of attacks, a principle of customary law contained in Articles 51 and 58 AP I according to the analysis, as the areas concerned were likely to be the subject of attacks by enemy forces.¹⁷¹

¹⁶⁶ Frédéric de Mulinen, *Handbook on the Law of War for Armed Forces*, ICRC, Geneva, 1987, §§ 439, 443, 444 and 449.

¹⁶⁷ ICRC, Conflict in Southern Africa: ICRC appeal, 19 March 1979, § 7, *IRRC*, No. 209, 1979, p. 89.

¹⁶⁸ ICRC archive document.

¹⁶⁹ ICRC, Memorandum on Respect for International Humanitarian Law in Angola, 8 June 1994, § II, *IRRC*, No. 320, 1997, pp. 503–504.

¹⁷⁰ ICRC, Memorandum on Compliance with International Humanitarian Law by the Forces Participating in Opération Turquoise, 23 June 1994, § II, reprinted in Marco Sassòli and Antoine A. Bouvier, *How Does Law Protect in War?*, ICRC, Geneva, 1999, p. 1308.

¹⁷¹ ICRC archive document.

VI. Other Practice

183. In a resolution adopted during its Edinburgh Session in 1969, the Institute of International Law stated that “the provisions of the preceding paragraphs do not affect the application of the existing rules of international law which prohibit the exposure of civilian populations and of non-military objects to the destructive effects of military means”.¹⁷²

184. According to the Report on SPLM/A Practice, the SPLM/A has on many occasions successfully warned and removed the civilian population to safe places when attacks by the Sudanese government were imminent. For example, in March 1993, it instructed a considerable number of minors to move away from the town of Pochalla.¹⁷³ In addition, according to the same report, it has been SPLM/A practice to establish camps for refugees and displaced civilian populations away from army encampments and barracks.¹⁷⁴

¹⁷² Institute of International Law, Edinburgh Session, Resolution on the Distinction between Military Objectives and Non-military Objects in General and Particularly the Problems Associated with Weapons of Mass Destruction, 9 September 1969, § 5.

¹⁷³ Report on SPLM/A Practice, 1998, Chapter 1.7.

¹⁷⁴ Report on SPLM/A Practice, 1998, Chapter 1.7.

PART II

**SPECIFICALLY PROTECTED PERSONS
AND OBJECTS**

MEDICAL AND RELIGIOUS PERSONNEL AND OBJECTS

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A. Medical Personnel

Respect for and protection of medical personnel

I. Treaties and Other Instruments

Treaties

1. Article 2 of the 1864 GC provides that:

Hospital and ambulance personnel, including the quarter-master's staff, the medical, administrative and transport services... shall have the benefit of the same neutrality [as military hospitals and ambulances] when on duty, and while there remain any wounded to be brought in or assisted.

2. Article 9 of the 1906 GC provides that:

The personnel charged exclusively with the removal, transportation, and treatment of the sick and wounded, as well as with the administration of sanitary formations and establishments . . . shall be respected and protected under all circumstances. If they fall into the hands of the enemy they shall not be considered as prisoners of war.

3. Article 10 of the 1906 GC provides that:

The personnel of volunteer aid societies, duly recognized and authorized by their own governments, who are employed in the sanitary formations and establishments of armies, are assimilated to the personnel contemplated in the preceding article, upon condition that the said personnel shall be subject to military laws and regulations. Each state shall make known to the other, either in time of peace or at the opening, or during the progress of hostilities, and in any case before actual employment, the names of the societies which it has authorized to render assistance, under its responsibility, in the official sanitary service of its armies.

4. Article 9 of the 1929 GC provides that:

The personnel engaged exclusively in the collection, transport and treatment of the wounded and sick, and in the administration of medical formations and establishments, . . . shall be respected and protected under all circumstances. If they fall into the hands of the enemy they shall not be treated as prisoners of war. Soldiers specially trained to be employed, in case of necessity, as auxiliary nurses or stretcher-bearers for the collection, transport and treatment of the wounded and sick, and furnished with a proof of identity, shall enjoy the same treatment as the permanent medical personnel if they are taken prisoners while carrying out these functions.

5. Article 10 of the 1929 GC provides that:

The personnel of Voluntary Aid Societies, duly recognized and authorized by their Government, who may be employed on the same duties as those of the personnel mentioned in the first paragraph of Article 9, are placed on the same footing as the personnel contemplated in that paragraph, provided that the personnel of such societies are subject to military law and regulations. Each High Contracting Party shall notify to the other, either in time of peace or at the commencement of or during the course of hostilities, but in every case before actually employing them, the names of the societies which it has authorized, under its responsibility, to render assistance to the regular medical service of its armed forces.

6. Article 24 GC I provides that:

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

7. Article 25 GC I provides that:

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

8. Article 26 GC I provides that:

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

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

9. Article 36 GC II provides that “medical and hospital personnel of hospital ships and their crews shall be respected and protected”.

10. Article 20, first paragraph, GC IV provides that:

Persons regularly and solely engaged in the operation and administration of civilian hospitals, including the personnel engaged in the search for, removal and transporting of and caring for wounded and sick civilians, the infirm and maternity cases, shall be respected and protected.

11. Article 8(c) AP I defines medical personnel as “those persons assigned, by a Party to the conflict, exclusively to . . . medical purposes . . . or to the administration of medical units or to the operation or administration of medical transports”. It adds that “such assignments may be either permanent or temporary”. The definition covers both military and civilian medical personnel. Article 8(c)(ii) requires that personnel of aid societies be duly recognised and authorised by a party to the conflict. Article 8 AP I was adopted by consensus.¹

12. Article 15(1) AP I provides that “civilian medical personnel shall be respected and protected”. Article 15 AP I was adopted by consensus.²

13. Article 9(1) AP II provides that “medical . . . personnel shall be respected and protected and shall be granted all available help for the performance of their duties”. Article 9 AP II was adopted by consensus.³

14. Article 11(f) of draft AP II submitted by the ICRC to the CDDH provided that:

¹ CDDH, *Official Records*, Vol. VI, CDDH/SR.37, 24 May 1977, p. 68.

² CDDH, *Official Records*, Vol. VI, CDDH/SR.37, 24 May 1977, p. 70.

³ CDDH, *Official Records*, Vol. VII, CDDH/SR.51, 3 June 1977, p. 112.

“medical personnel” means:

- (i) the medical personnel of the parties to the conflict, whether military or civilian, permanent or temporary, exclusively engaged in the operation or administration of medical units and means of medical transport, including their crews, and assigned *inter alia* to the search for, removal, treatment or transport of the wounded and sick;
- (ii) the civil defence medical personnel referred to in Article 30 and the medical personnel of the National Red Cross (Red Crescent, Red Lion and Sun) Societies referred to in Article 35.⁴

This proposal was amended and adopted by consensus in Committee II of the CDDH. The adopted text provided that:

“Medical personnel” means those persons assigned exclusively to the medical purposes enumerated in sub-paragraph (c) [the search for, collection, transportation, diagnosis or treatment – including first aid treatment – of the wounded, sick and shipwrecked, and for the prevention of disease] and also those persons assigned exclusively to the administration of medical units or to the operation or administration of medical transports. Such assignments may be either permanent or temporary. The term shall include:

- (i) medical personnel of a Party to the conflict, whether military or civilian, including those assigned to medical tasks of civil defence;
- (ii) medical personnel of Red Cross (Red Crescent, Red Lion and Sun) organizations recognized and authorized by a Party to the conflict;
- (iii) medical personnel of other aid societies recognized and authorized by a Party to the conflict and located within the territory of the High Contracting Party in whose territory an armed conflict is taking place.⁵

Eventually, however, Article 11(f) of draft AP II was deleted by consensus in the plenary.⁶

15. Upon signature of AP I and AP II, the US declared that “it is the understanding of the United States of America that the terms used in Part III of [AP II] which are the same as the terms defined in Article 8 [AP I] shall so far as relevant be construed in the same sense as those definitions”.⁷

Other Instruments

16. Article 13 of the 1880 Oxford Manual provides that:

Persons employed in hospitals and ambulances – including the staff for superintendence, medical service, administration and transport of wounded, as well as . . . the members and agents of relief associations which are duly authorized to assist the regular sanitary staff – are considered as neutral while so employed, and so long as there remain any wounded to bring in or to succour.

⁴ CDDH, *Official Records*, Vol. I, Part Three, Draft Additional Protocols, June 1973, p. 37.

⁵ CDDH, *Official Records*, Vol. XIII, CDDH/406/Rev.1, 17 March–10 June 1977, pp. 241 and 242.

⁶ CDDH, *Official Records*, Vol. VII, CDDH/SR.51, 3 June 1977, p. 109.

⁷ US, Declaration made upon signature of AP I and AP II, 12 December 1977, § B.

17. In the 1991 Hague Statement on Respect for Humanitarian Principles, the Presidents of the six republics of the former Yugoslavia reminded all the parties to the conflicts in Bosnia and Herzegovina and in Croatia that “all Red Cross personnel and medical personnel assisting civilian populations and persons hors de combat must be granted the necessary freedom of movement to achieve their tasks”.

18. Section 9.4 of the 1999 UN Secretary-General’s Bulletin provides that “the United Nations force shall in all circumstances respect and protect medical personnel exclusively engaged in the search for, transport or treatment of the wounded or sick”.

II. National Practice

Military Manuals

19. Argentina’s Law of War Manual (1969) restates Articles 24–26 GC I.⁸

20. Argentina’s Law of War Manual (1989) defines medical personnel with reference to Articles 24–25 GC I and Article 8 API.⁹ It states that “medical personnel, whether civilian or military, permanent or temporary, shall be protected and respected in all circumstances”. With respect to non-international armed conflicts in particular, the manual states that medical personnel “shall be respected, protected and assisted in the performance of their duties in favour of all wounded and sick without any discrimination”.¹⁰

21. Australia’s Commanders’ Guide provides that “civilian medical personnel are deemed to be protected persons under the Geneva Conventions . . . Military medical personnel . . . are also entitled to general protection under the Geneva Conventions.”¹¹

22. Australia’s Defence Force Manual states that “military and civilian medical personnel are protected persons”.¹² The manual defines medical personnel as follows:

Medical personnel are those persons, military or civilian, assigned exclusively to medical tasks or to the administration of medical units or the operation or administration of medical transports. Such assignment may be permanent or temporary. In addition to doctors, dentists, nurses, medical orderlies and hospital administrators attached to the forces of military and civilian establishments, medical personnel include:

- a. personnel of national Red Cross and other voluntary aid societies recognised and authorised by a party to the conflict;
- b. medical personnel attached to civil defence units; and

⁸ Argentina, *Law of War Manual* (1969), §§ 3.008–3.010.

⁹ Argentina, *Law of War Manual* (1989), § 2.10.

¹⁰ Argentina, *Law of War Manual* (1989), §§ 2.11 and 7.06.

¹¹ Australia, *Commanders’ Guide* (1994), §§ 614–615.

¹² Australia, *Defence Force Manual* (1994), § 963.

- c. any persons made available for humanitarian purposes by a neutral state, a recognised and authorised aid society of such a state, or an impartial international humanitarian organisation.¹³

23. Belgium's Law of War Manual defines medical personnel with reference to Articles 24–25 GC I and Article 8 AP I. The manual states that permanent medical personnel "shall be respected and protected at all times: they may not be made the object of attack but may not participate in hostilities either". According to the manual, temporary medical personnel "enjoy the same protection only when they perform medical functions".¹⁴

24. Belgium's Teaching Manual for Soldiers states that:

The protection accorded to the wounded would be illusory if the civilian and military medical services which are specifically set up to treat them could be attacked. Hence, medical services, identified by the Red Cross (or Red Crescent in certain countries), are not considered combatants or military objectives even if they wear the enemy uniform or bear its insignia. Enemy medical personnel... may not be attacked.¹⁵

25. Benin's Military Manual lists military and civilian medical personnel as specially protected persons.¹⁶ It states that "specially protected persons may not take a direct part in hostilities and must not be attacked. They shall be allowed to carry out their tasks as long as the tactical situation permits."¹⁷ It further states that military medical personnel must be respected.¹⁸

26. Bosnia and Herzegovina's Military Instructions provides that "it is prohibited to intentionally attack military medical personnel".¹⁹

27. Burkina Faso's Disciplinary Regulations provides that, under the laws and customs of war, soldiers in combat must respect medical personnel.²⁰

28. Cameroon's Disciplinary Regulations provides that, under the laws and customs of war, each soldier must respect medical personnel, "provided they wear the distinctive emblem and carry the special identity card defined by the Geneva Conventions".²¹

29. Cameroon's Instructors' Manual considers both military and civilian medical personnel as specially protected persons.²²

30. Canada's LOAC Manual defines medical personnel as follows:

"Medical personnel" are those persons, military or civilian, assigned exclusively to medical purposes or to the administration of medical units, or the operation

¹³ Australia, *Defence Force Manual* (1994), § 521.

¹⁴ Belgium, *Law of War Manual* (1983), pp. 47–48.

¹⁵ Belgium, *Teaching Manual for Soldiers* (undated), p. 17, see also p. 8.

¹⁶ Benin, *Military Manual* (1995), Fascicule I, p. 13.

¹⁷ Benin, *Military Manual* (1995), Fascicule III, p. 5, see also Fascicule II, p. 8.

¹⁸ Benin, *Military Manual* (1995), Fascicule II, p. 16.

¹⁹ Bosnia and Herzegovina, *Military Instructions* (1992), Item 15, § 3.

²⁰ Burkina Faso, *Disciplinary Regulations* (1994), Article 35(1).

²¹ Cameroon, *Disciplinary Regulations* (1975), Article 31.

²² Cameroon, *Instructors' Manual* (1992), p. 18, §§ 220–221.

or administration of medical transports. Such assignment may be permanent or temporary. In addition to doctors, dentists, nurses, medical orderlies, and hospital administrators, "medical personnel" includes personnel of national Red Cross and other voluntary aid societies recognized and authorized by a party to the conflict. The term also includes medical personnel attached to civil defence units, any persons made available for humanitarian purposes by a neutral state, a recognized and authorized aid society of such a state, or an impartial international humanitarian organization.²³

The manual states that "medical . . . personnel, both military and civilian, have protected status and thus shall not be attacked."²⁴ It further states that "humanitarian aid societies, such as the Red Cross or Red Crescent Societies, who on their own initiative, collect and care for the wounded, sick and shipwrecked, even in invaded or occupied areas, shall not be made the object of attack".²⁵ With respect to non-international armed conflicts in particular, the manual states that "medical . . . personnel are to be respected and protected at all times [and] receive all available aid to enable them to fulfil their duties".²⁶

31. Canada's Code of Conduct states that:

There are two categories of medical personnel: permanent and temporary. Permanent medical personnel include doctors, nurses and medical assistants who are engaged exclusively in the collection, transport or treatment of the sick or wounded, or in the prevention of disease; staff exclusively engaged in the administration of medical units and establishments; and chaplains attached to the armed forces. These people shall be respected and protected. They must not be attacked. . . . If captured, permanent medical personnel and chaplains, although detained, will continue to care for their sick and wounded. If there is no such medical requirement, they are to be released and returned to their own forces. Temporary medical personnel may be employed on a part-time basis as hospital orderlies or temporary stretcher bearers in the search for and collection, transport and treatment of the sick and wounded. Part-time medical personnel are protected when they are carrying out those duties and shall not be the object of attack Captured temporary medical personnel who are detained may be employed on medical duties. Unlike permanent medical personnel, temporary medical personnel do not have to be released to their side even if there is no medical requirement for their services.

...

Under the Law of Armed Conflict, the International Committee of the Red Cross (ICRC) has a special role and status. The ICRC may undertake to care for the wounded and sick. The ICRC is an independent humanitarian institution. As a neutral intermediary in the event of armed conflict it endeavours, on its own initiative or on the basis of the Geneva Conventions, to bring protection and assistance to the victims of armed conflict. Members of the ICRC wear the distinctive emblem. As such, they must be protected at all times.

...

NGOs such as CARE and Médecins Sans Frontières (Doctors Without Borders) might wear other recognizable symbols. The symbols used by CARE, MSF and other

²³ Canada, *LOAC Manual* (1999), p. 9-3, § 27.

²⁴ Canada, *LOAC Manual* (1999), p. 4-5, § 41.

²⁵ Canada, *LOAC Manual* (1999), p. 4-6, § 53.

²⁶ Canada, *LOAC Manual* (1999), p. 17-4, § 34.

NGOs do not benefit from international legal protection, although their work in favour of the victims of armed conflict must be respected. Upon recognition that they are providing care to the sick and wounded, NGOs are also to be respected.²⁷

32. Colombia's Circular on Fundamental Rules of IHL states that the protection due to the wounded and sick "also covers, as such, medical personnel".²⁸

33. Colombia's Basic Military Manual states that it is prohibited "to attack . . . medical and aid personnel".²⁹

34. Congo's Disciplinary Regulations provides that medical personnel must be respected.³⁰

35. Croatia's Commanders' Manual states that "specifically protected persons may not participate directly in hostilities and may not be attacked. They shall be allowed to perform their tasks, when the tactical situation permits." Such persons include military and civilian medical personnel.³¹

36. Croatia's Soldiers' Manual instructs soldiers to respect medical personnel.³²

37. The Military Manual of the Dominican Republic instructs soldiers not to attack medical personnel, but to protect them.³³

38. Ecuador's Naval Manual states that "medical personnel, including medical and dental officers, technicians and corpsmen, nurses, and medical service personnel, have special protected status when engaged exclusively in medical duties and may not be attacked".³⁴ The manual qualifies "deliberate attack upon . . . medical personnel" as a war crime.³⁵

39. El Salvador's Soldiers' Manual provides that "doctors, nurses and other medical . . . personnel who serve in hospitals or work for the Red Cross . . . shall be specially protected because they relieve, aid and comfort all victims without distinction between friend and foe".³⁶

40. France's Disciplinary Regulations as amended provides that soldiers in combat must respect and protect medical personnel.³⁷

41. France's LOAC Summary Note provides that "the specific immunity granted to certain persons and objects by the law of war [including the personnel of military and civilian medical services] must be strictly observed . . . They may not be attacked."³⁸

²⁷ Canada, *Code of Conduct* (2001), Rule 10, §§ 2-3, 7 and 9.

²⁸ Colombia, *Circular on Fundamental Rules of IHL* (1992), § 3.

²⁹ Colombia, *Basic Military Manual* (1995), p. 29, § 2.a.

³⁰ Congo, *Disciplinary Regulations* (1986), Article 32.

³¹ Croatia, *Commanders' Manual* (1992), §§ 7 and 12.

³² Croatia, *Soldiers' Manual* (1992), pp. 2 and 3.

³³ Dominican Republic, *Military Manual* (1980), p. 4.

³⁴ Ecuador, *Naval Manual* (1989), § 11.5. ³⁵ Ecuador, *Naval Manual* (1989), § 6.2.5.

³⁶ El Salvador, *Soldiers' Manual* (undated), p. 12.

³⁷ France, *Disciplinary Regulations as amended* (1975), Article 9 bis.

³⁸ France, *LOAC Summary Note* (1992), §§ 2.2 and 2.3.

42. France's LOAC Manual states that "the law of armed of conflicts provides special protection for the following persons: . . . medical personnel attached to armed forces [and] civilian medical personnel".³⁹

43. Germany's Military Manual defines military medical personnel with reference to the relevant provisions of the Geneva Conventions and AP I.⁴⁰ The manual provides that "civilian and military medical personnel are entitled to special protection. They shall neither be made the object of attack nor prevented from exercising their functions."⁴¹ The manual considers offences such as "wilful killing, mutilation, torture or inhumane treatment, including biological experiments, wilfully causing great suffering, serious injury to body or health" committed against medical personnel, to be grave breaches of IHL.⁴²

44. Hungary's Military Manual instructs soldiers to respect and protect permanent medical personnel.⁴³

45. Indonesia's Field Manual restates the rules on medical personnel found in Articles 24–26 GC I.⁴⁴

46. Indonesia's Air Force Manual provides that "a non-combatant is not a lawful military target in warfare. They consist of: a. members of the armed forces with special status such as . . . medical personnel."⁴⁵

47. Israel's Manual on the Laws of War states that:

It is prohibited to interfere with the administration of medical aid . . . In fact, this prohibition also covers the attack on medical personnel, paramedics and doctors in the battlefield itself. According to the Geneva Convention, medical teams are not part of the armed conflict. They are marked with distinctive identification signs, they do not carry arms, they do not cause injury and it is forbidden to harm them. It is prohibited to shoot a paramedic in the battlefield or to take him prisoner. The medical team is also restricted in that it does not take part in the hostilities, does not carry any weapons and is committed to administering medical aid also to the enemy's wounded. In actuality, this provision is not observed in the wars and confrontations waged in the Middle East, at least not in regard to medical teams in the field. They are not immune to harm, they are not identified by special identification symbols, they bear arms and take part in the fighting. This situation also exists in many other armies around the world, including the American army.⁴⁶

48. Italy's LOAC Elementary Rules Manual states that "specifically protected persons may not participate directly in hostilities and may not be attacked", including military and civilian medical personnel.⁴⁷

49. Kenya's LOAC Manual states that:

Medical personnel are those exclusively assigned to medical units and engaged in the search for, or the collection, transport or treatment of the wounded and sick, or

³⁹ France, *LOAC Manual* (2001), pp. 95–96.

⁴⁰ Germany, *Military Manual* (1992), § 625.

⁴¹ Germany, *Military Manual* (1992), § 624.

⁴² Germany, *Military Manual* (1992), § 1209.

⁴³ Hungary, *Military Manual* (1992), p. 19.

⁴⁴ Indonesia, *Field Manual* (1979), §§ 6–8.

⁴⁵ Indonesia, *Air Force Manual* (1990), § 24(a).

⁴⁶ Israel, *Manual on the Laws of War* (1998), pp. 32–33.

⁴⁷ Italy, *LOAC Elementary Rules Manual* (1991), §§ 7 and 12.

in the prevention of disease. They are to be respected, protected and not attacked. Military medical personnel who are captured during an international armed conflict are not prisoners of war. They may be "retained" for the sole purpose of providing medical care for POWs of their own forces... Military medical personnel who may have medical duties to perform on a temporary basis, e.g. stretcher bearers, may not be attacked while performing medical duties. On capture, they become POWs but are to be employed on medical duties if the need arises.⁴⁸

50. South Korea's Operational Law Manual states that military medical personnel must be protected.⁴⁹

51. Lebanon's Teaching Manual provides for respect for medical personnel, without distinguishing between military and civilian personnel.⁵⁰

52. Madagascar's Military Manual defines medical personnel as "those exclusively assigned to medical units and medical transports" whether military or civilian. Their tasks consist in "the search for, collection, transportation, diagnosis or treatment of the wounded, sick, and shipwrecked, or the prevention of disease".⁵¹ The manual states that "specifically protected persons may not participate directly in hostilities and may not be attacked. They shall be allowed to perform their tasks, when the tactical situation permits." Such persons include military and civilian medical personnel.⁵²

53. Mali's Army Regulations provides that, according to the laws and customs of war, soldiers in combat must respect medical personnel.⁵³

54. Morocco's Disciplinary Regulations provides that, according to the laws and customs of war, soldiers in combat must respect medical personnel.⁵⁴

55. The Military Manual of the Netherlands defines medical personnel with reference to Article 25 GC I and Article 8 AP I.⁵⁵ It states that "medical personnel... must be respected and protected".⁵⁶ With respect to non-international armed conflicts in particular, the manual states that "medical personnel... must be respected and protected and must receive aid to fulfil their tasks".⁵⁷

56. The Military Handbook of the Netherlands states that:

Medical personnel engaged temporarily or permanently in the care of the wounded and the sick must be able to fulfil their humanitarian tasks under all circumstances. Persons in charge of the administration and operation of medical units and material (for example administrative personnel, cooks and drivers) belong to the medical personnel. This personnel may not be attacked.⁵⁸

⁴⁸ Kenya, *LOAC Manual* (1997), Précis No. 3, p. 9.

⁴⁹ South Korea, *Operational Law Manual* (1996), p. 133.

⁵⁰ Lebanon, *Teaching Manual* (1997), p. 77.

⁵¹ Madagascar, *Military Manual* (1994), Fiche No. 3-SO, §§ B and C.

⁵² Madagascar, *Military Manual* (1994), Fiche No. 2-O, § 7 and Fiche No. 3-O, § 12.

⁵³ Mali, *Army Regulations* (1979), Article 36.

⁵⁴ Morocco, *Disciplinary Regulations* (1974), Article 25(1).

⁵⁵ Netherlands, *Military Manual* (1993), p. VI-4.

⁵⁶ Netherlands, *Military Manual* (1993), p. VI-4.

⁵⁷ Netherlands, *Military Manual* (1993), pp. XI-5 and XI-6.

⁵⁸ Netherlands, *Military Handbook* (1995), p. 7-40.

57. New Zealand's Military Manual provides that:

Medical personnel are those persons, military or civilian, assigned exclusively to medical purposes or to the administration of medical units or the operation or administration of medical transports, and such assignment may be permanent or temporary. In addition to doctors, dentists, nurses, medical orderlies, hospital administrators and the like, attached to the forces or military and civilian establishments, there are included the personnel of national Red Cross and other voluntary aid societies recognised and authorized by a Party to the conflict, medical personnel attached to civil defence units, and any persons made available for humanitarian purposes by a neutral State, a recognised and authorised aid society of such State, or an impartial international humanitarian organisation.

...

Protection and respect must be extended to persons regularly and solely engaged in the operation and administration of civilian hospitals. Included in this category are persons engaged in the search for, removal, transport and care of wounded and sick civilians, the infirm, and maternity cases.

Other persons engaged in the operation and administration of civilian hospitals are entitled to protection . . . while employed on their duties.⁵⁹

With respect to non-international armed conflict in particular, the manual states that "medical . . . personnel are to be respected and protected at all times, receiving all available aid to enable them to fulfil their duties".⁶⁰

58. Nicaragua's Military Manual states, with respect to international armed conflicts, that assistance to the wounded, sick and shipwrecked includes a requirement of "protection of permanent [medical] personnel assigned to the search, collection, transportation or treatment of the wounded and sick, the prevention of disease or the administration of [medical] units and establishments", as well as "respect for and protection of temporary [medical] personnel" and "respect for and protection of regular personnel of civilian hospitals".⁶¹

59. Nigeria's Manual on the Laws of War states that "medical personnel engaged exclusively in the search and collection of the wounded and sick and the prevention of disease, the staff engaged in the administration of hospitals and medical units . . . are also entitled to protection".⁶²

60. Nigeria's Military Manual provides that "specifically protected persons . . . recognised as such must be respected. Specifically protected persons are to be allowed to fulfil their activity unless the tactical situation does not permit".⁶³

61. Nigeria's Soldiers' Code of Conduct states that "medical personnel must be respected".⁶⁴

62. Nigeria's Operational Code of Conduct states that "hospital staff and patients should not be tampered with or molested".⁶⁵

⁵⁹ New Zealand, *Military Manual* (1992), §§ 1005(1) and 1109(3) and (4).

⁶⁰ New Zealand, *Military Manual* (1992), § 1818(2).

⁶¹ Nicaragua, *Military Manual* (1996), Article 14(4), (6) and (37).

⁶² Nigeria, *Manual on the Laws of War* (undated), § 33.

⁶³ Nigeria, *Military Manual* (1994), p. 45, § (f).

⁶⁴ Nigeria, *Soldiers' Code of Conduct* (undated), § 7.

⁶⁵ Nigeria, *Operational Code of Conduct* (1967), § 4(d).

63. Romania's *Soldiers' Manual* provides for respect for medical personnel.⁶⁶
 64. Russia's *Military Manual* states that attacks against medical personnel are a prohibited method of warfare.⁶⁷
 65. Senegal's *Disciplinary Regulations* provides that soldiers in combat must respect and protect medical personnel.⁶⁸
 66. South Africa's *LOAC Manual* provides that:

Medical . . . personnel of the parties to a conflict, whether military or civilian, are to be respected and protected. This protection is not a personal privilege but rather a natural consequence of the rules designed to ensure respect and protection for the victims of armed conflict. Protection is accorded to medical personnel to facilitate the humanitarian tasks assigned to them; the protection is therefore limited to those circumstances in which they are carrying out these tasks exclusively.

The manual points to the distinction between permanent and auxiliary medical personnel and restates Articles 24–25 GC I.⁶⁹

67. Spain's *LOAC Manual* defines medical personnel with reference to Article 8 AP I.⁷⁰ The manual states, with reference to the relevant provisions of the Geneva Conventions and both Additional Protocols, that "respect and protection" of medical personnel include the duty not to attack medical personnel, and the duty to defend, assist and support such personnel when needed. The manual further explains that:

It must be underlined that the protection of medical personnel is not a personal privilege but rather a corollary of the respect and protection due to the wounded and sick, who must be treated humanely in all circumstances. This means that the protection of medical personnel is not permanent but is only granted when such personnel are carrying out their humanitarian tasks. Medical personnel lose the special protection to which they are entitled if they commit acts of hostility. Such behaviour might even constitute perfidy if in so doing they take advantage of their medical position and the distinctive emblems.⁷¹

68. Sweden's *IHL Manual* considers that Article 15 AP I on the protection of medical personnel has the status of customary law.⁷²

69. Switzerland's *Basic Military Manual* states that "medical . . . personnel must be respected and protected in all circumstances. They may not be attacked or prevented from carrying out their duties." It defines medical personnel as including persons specially and exclusively assigned to the care of the wounded and sick, such as doctors, nurses and stretcher-bearers; administrative staff of medical units and establishments such as hospital administrators, drivers and cooks; chaplains and temporary medical personnel.⁷³

⁶⁶ Romania, *Soldiers' Manual* (1991), p. 32. ⁶⁷ Russia, *Military Manual* (1990), § 5(g).

⁶⁸ Senegal, *Disciplinary Regulations* (1990), Article 34(1).

⁶⁹ South Africa, *LOAC Manual* (1996), §§ 46–47.

⁷⁰ Spain, *LOAC Manual* (1996), Vol. I, § 9.2.a.(1).

⁷¹ Spain, *LOAC Manual* (1996), Vol. I, § 9.2.a.(2).

⁷² Sweden, *IHL Manual* (1991), Section 2.2.3, p. 18.

⁷³ Switzerland, *Basic Military Manual* (1987), Article 78(1) and commentary.

70. Togo's Military Manual lists military and civilian medical personnel as specially protected persons.⁷⁴ It states that "specially protected persons may not take a direct part in hostilities and must not be attacked. They shall be allowed to carry out their tasks as long as the tactical situation permits".⁷⁵ It further states that military medical personnel must be respected.⁷⁶

71. The UK Military Manual restates Articles 24–26 GC I.⁷⁷ It specifies that the duty to respect and protect means that medical personnel "must not knowingly be attacked, fired upon, or unnecessarily prevented from discharging their proper functions. The pure accidental killing or wounding of protected personnel when in or near the area of combat is not a legitimate cause for complaint."⁷⁸ The manual also restates Article 20 GC IV.⁷⁹

72. The UK LOAC Manual states that "medical personnel are those exclusively assigned to medical units. They are to be respected, protected and not attacked."⁸⁰

73. The US Field Manual grants respect and protection to both permanent and temporary medical personnel as provided for in Articles 24–25 GC I. The manual states that:

The respect and protection accorded personnel by Articles 19, 24, and 25 [GC I] mean that they must not knowingly be attacked, fired upon, or unnecessarily prevented from discharging their proper functions. The accidental killing or wounding of such personnel, due to their presence among or in proximity to combatant elements actually engaged, by fire directed at the latter, gives no just cause for complaint.⁸¹

Protection is also granted to the personnel of aid societies by reference to Article 26 GC I.⁸²

74. The US Air Force Pamphlet refers to the protection of medical personnel as set out in GC I.⁸³ It further states that "in addition to grave breaches of the Geneva Conventions of 1949, the following acts are representative of situations involving individual criminal responsibility: (1) deliberate attack on . . . medical . . . personnel".⁸⁴

75. The US Air Force Commander's Handbook provides that medical personnel, civilian or military, "should not be deliberately attacked, fired upon, or unnecessarily prevented from performing their medical duties. The same protection should also be given to any civilian or group of civilians trying to aid the sick and wounded after combat".⁸⁵

⁷⁴ Togo, *Military Manual* (1996), Fascicule I, p. 14.

⁷⁵ Togo, *Military Manual* (1996), Fascicule III, p. 5, see also Fascicule II, p. 8.

⁷⁶ Togo, *Military Manual* (1996), Fascicule II, p. 16.

⁷⁷ UK, *Military Manual* (1958), §§ 346–347 and 350.

⁷⁸ UK, *Military Manual* (1958), § 346, footnote 1. ⁷⁹ UK, *Military Manual* (1958), § 32.

⁸⁰ UK, *LOAC Manual* (1981), Section 6, p. 23, § 9(a).

⁸¹ US, *Field Manual* (1956), §§ 225–226. ⁸² US, *Field Manual* (1956), § 227.

⁸³ US, *Air Force Pamphlet* (1976), § 12-2(b). ⁸⁴ US, *Air Force Pamphlet* (1976), § 15-3(c)(1).

⁸⁵ US, *Air Force Commander's Handbook* (1980), § 3-2.

76. The US Naval Handbook states that “medical personnel, including medical and dental officers, technicians and corpsmen, nurses, and medical service personnel, have special protected status when engaged exclusively in medical duties and may not be attacked”.⁸⁶ The manual qualifies “deliberate attack upon . . . medical personnel” as a war crime.⁸⁷

77. The Annotated Supplement to the US Naval Handbook notes that “the United States supports the principle in [Article 15 AP I] that civilian medical . . . personnel be respected and protected and not be made the objects of attack”.⁸⁸

78. The YPA Military Manual of the SFRY (FRY) restates Articles 24–26 GC I and extends the protection of military medical personnel to civilian medical personnel.⁸⁹

National Legislation

79. Argentina’s Draft Code of Military Justice punishes any soldier who “uses violence against medical personnel, . . . against members of medical units or against members of aid societies”.⁹⁰

80. Bangladesh’s International Crimes (Tribunal) Act states that the “violation of any humanitarian rules applicable in armed conflicts laid down in the Geneva Conventions of 1949” is a crime.⁹¹

81. Under the Criminal Code of the Federation of Bosnia and Herzegovina, “murder, torture [or] inhuman treatment” of medical personnel are considered to be war crimes.⁹² The Criminal Code of the Republika Srpska contains the same provision.⁹³

82. Colombia’s Emblem Decree lists as persons who must be protected:

medical, paramedical and aid society personnel, members of the International Red Cross and Red Crescent Movement and persons who, permanently or temporarily, provide humanitarian services and transports of medicine, food and humanitarian aid in situations of armed conflict or natural disaster.⁹⁴

83. Under Colombia’s Penal Code, it is a punishable act to “hinder or prevent, at the occasion of and during armed conflict, medical, health and aid personnel . . . from carrying out the medical and humanitarian tasks assigned to them by the norms of International Humanitarian Law”.⁹⁵

⁸⁶ US, *Naval Handbook* (1995), § 11.5. ⁸⁷ US, *Naval Handbook* (1995), § 6.2.5.

⁸⁸ US, *Annotated Supplement to the Naval Handbook* (1997), § 11.5, footnote 31.

⁸⁹ SFRY (FRY), *YPA Military Manual* (1988), §§ 175–178 and 195, see also § 82 (conduct of hostilities).

⁹⁰ Argentina, *Draft Code of Military Justice* (1998), Article 292, introducing a new Article 876(3) in the *Code of Military Justice as amended* (1951).

⁹¹ Bangladesh, *International Crimes (Tribunal) Act* (1973), Section 3(2)(e).

⁹² Bosnia and Herzegovina, Federation, *Criminal Code* (1998), Article 155.

⁹³ Bosnia and Herzegovina, Republika Srpska, *Criminal Code* (2000), Article 434.

⁹⁴ Colombia, *Emblem Decree* (1998), Article 10.

⁹⁵ Colombia, *Penal Code* (2000), Article 153.

84. Under Croatia's Criminal Code, "the killing, torture or inhuman treatment" of medical personnel is a war crime.⁹⁶
85. Under El Salvador's Code of Military Justice, medical personnel must be respected.⁹⁷
86. The Draft Amendments to the Penal Code of El Salvador punish "anyone who, during an international or non-international conflict, attacks protected persons", defined as including medical personnel.⁹⁸
87. Under Estonia's Penal Code, "a person who kills, tortures, causes health damage to or takes hostage a member of a medical unit properly identified, or any other person attending to the sick or wounded persons" commits a war crime.⁹⁹
88. Under Ethiopia's Penal Code, "the killing, torture or inhuman treatment or other acts entailing direct suffering or physical or mental injury to . . . members of the medical or first-aid services" is punishable as a war crime.¹⁰⁰
89. Georgia's Criminal Code provides for the punishment of "wilful breaches of norms of international humanitarian law committed in an international or internal armed conflict . . . against medical . . . personnel".¹⁰¹
90. Ireland's Geneva Conventions Act as amended provides that any "minor breach" of the Geneva Conventions, including violations of Articles 24–26 GCI, 36 GC II and 20 GC IV, and of AP I, including violations of Article 15(1) AP I, as well as any "contravention" of AP II, including violations of Article 9(1) AP II, are punishable offences.¹⁰²
91. Italy's Law of War Decree as amended states that military medical personnel must be respected and protected "provided they are not committing acts of hostility".¹⁰³
92. Lithuania's Criminal Code as amended prohibits attacks against medical and civilian defence personnel, military or civilian hospitals, health centres, vehicles transporting the wounded and sick, and personnel of the ICRC or National Red Cross and Red Crescent Societies if protected by the distinctive emblems.¹⁰⁴
93. Nicaragua's Military Penal Code provides for the punishment of any soldier who "exercises violence against the personnel of medical . . . services, be they enemy or neutral, members of aid organizations and personnel affected to the services of [medical establishments]", provided that the protection due is not misused for hostile purposes.¹⁰⁵

⁹⁶ Croatia, *Criminal Code* (1997), Article 159.

⁹⁷ El Salvador, *Code of Military Justice* (1934), Article 69.

⁹⁸ El Salvador, *Draft Amendments to the Penal Code* (1998), Article entitled "Ataque a personas protegidas".

⁹⁹ Estonia, *Penal Code* (2001), § 102. ¹⁰⁰ Ethiopia, *Penal Code* (1957), Article 283(a).

¹⁰¹ Georgia, *Criminal Code* (1999), Article 411(2).

¹⁰² Ireland, *Geneva Conventions Act as amended* (1962), Section 4(1) and (4).

¹⁰³ Italy, *Law of War Decree as amended* (1938), Article 95.

¹⁰⁴ Lithuania, *Criminal Code as amended* (1961), Article 337.

¹⁰⁵ Nicaragua, *Military Penal Code* (1996), Article 57(2).

94. Nicaragua's Draft Penal Code punishes "anyone who, during an international or non-international conflict, attacks protected persons", defined as including medical personnel.¹⁰⁶

95. Under Norway's Military Penal Code as amended, "anyone who contravenes or is accessory to the contravention of provisions relating to the protection of persons or property laid down in... the Geneva Conventions of 12 August 1949...[and in] the two additional protocols to these Conventions... is liable to imprisonment".¹⁰⁷

96. Poland's Penal Code provides for the protection of medical personnel, including the medical personnel of authorised aid societies.¹⁰⁸

97. Romania's Penal Code provides for the punishment of anyone who "subjects to inhuman treatment... members of civil medical personnel... or subjects such persons to medical or scientific experiments".¹⁰⁹

98. Under Slovenia's Penal Code, "slaughter, torture [or] inhuman treatment" of medical personnel is a war crime.¹¹⁰

99. Spain's Military Criminal Code provides for the punishment of any soldier who "exercises violence against the personnel of medical... services, be they enemy or neutral, members of aid organizations and personnel affected to the services of [medical establishments]", provided that the protection due is not misused for hostile purposes.¹¹¹

100. Spain's Penal Code provides for the punishment of "anyone who should... exercise violence on health... personnel, or members of medical missions or rescue teams".¹¹²

101. Tajikistan's Criminal Code, in the section on "Serious violations of international humanitarian law", provides for the punishment of "wilful breaches of norms of international humanitarian law committed in an international or non-international armed conflict, against... medical... personnel".¹¹³

102. Ukraine's Criminal Code states that medical personnel are to be respected.¹¹⁴

103. Venezuela's Code of Military Justice as amended provides for the punishment of "those who carry out serious attacks against members of... medical services, be they enemy or neutral".¹¹⁵

104. Venezuela's Code of Military Justice as amended prohibits attacks on Red Cross and medical personnel.¹¹⁶

¹⁰⁶ Nicaragua, *Draft Penal Code* (1999), Article 449.

¹⁰⁷ Norway, *Military Penal Code as amended* (1902), § 108.

¹⁰⁸ Poland, *Penal Code* (1997), Article 123(1)(2).

¹⁰⁹ Romania, *Penal Code* (1968), Article 358.

¹¹⁰ Slovenia, *Penal Code* (1994), Article 375.

¹¹¹ Spain, *Military Criminal Code* (1985), Article 77(4).

¹¹² Spain, *Penal Code* (1995), Article 612(2).

¹¹³ Tajikistan, *Criminal Code* (1998), Article 403(2).

¹¹⁴ Ukraine, *Criminal Code* (2001), Article 414.

¹¹⁵ Venezuela, *Code of Military Justice as amended* (1998), Article 474(3).

¹¹⁶ Venezuela, *Code of Military Justice as amended* (1998), Article 474.

105. Under the Penal Code as amended of the SFRY (FRY), “murder, torture [or] inhuman treatment” of medical personnel is a war crime.¹¹⁷

National Case-law

106. No practice was found.

Other National Practice

107. The Report on the Practice of Algeria notes that no instances of attacks against medical personnel or objects by the ALN were reported during Algeria’s war of independence.¹¹⁸

108. According to the Report on the Practice of Chile, it is Chile’s *opinio juris* that the prohibition of attacks on medical personnel and objects is part of customary international law.¹¹⁹

109. In 1972, in a statement before the General Conference of UNESCO concerning US attacks in Vietnam, China criticised the US because it allegedly had “wantonly bombarded Vietnamese cities and villages, seriously destroyed many schools and cultural and sanitary facilities [and] killed a large number of teachers, students, patients and medical personnel”.¹²⁰

110. According to the Report on the Practice of China, it is China’s *opinio juris* that medical personnel shall be respected and protected.¹²¹

111. Under the instructions given to the French armed forces for the conduct of Opération Mistral, simulating a military operation under the right of self-defence or a mandate of the UN Security Council, medical personnel shall be protected.¹²²

112. At the CDDH, the FRG stated that it could not agree that “the definitions of Article 8 [AP I] could apply to the Geneva Conventions, but they should apply to the whole of [AP I], and not only to part II”.¹²³ The FRG also explained that the distinction between local and foreign non-Red Cross relief organisations was “to avoid the situation of an obscure private group from outside the country establishing itself as an aid society within the territory and then being recognized by the rebels”.¹²⁴

¹¹⁷ SFRY (FRY), *Penal Code as amended* (1976), Article 143.

¹¹⁸ Report on the Practice of Algeria, 1997, Chapter 2.7.

¹¹⁹ Report on the Practice of Chile, 1997, Chapter 2.7.

¹²⁰ China, Statement before the General Conference of UNESCO, 25 October 1972, *Selected Documents of the Chinese Delegation to the United Nations*, The People’s Press, Beijing, 1972, p. 239.

¹²¹ Report on the Practice of China, 1997, Chapter 2.7.

¹²² France, État-major de la Force d’Action Rapide, *Ordres pour l’Opération Mistral*, 1995, Section 6, § 62.

¹²³ FRG, Statement at the CDDH, *Official Records*, Vol. XI, CDDH/II/SR.4, 12 March 1974, p. 26, § 10.

¹²⁴ FRG, Statement at the CDDH, *Official Records*, Vol. XII, CDDH/II/SR.80, p. 270, § 16.

113. In a declaration in 1993, the German Federal Minister of Foreign Affairs condemned the killing of a German soldier belonging to UNTAC's medical personnel in Cambodia as a "cruel act of violence".¹²⁵

114. The Report on the Practice of Germany notes that the German Federal Armed Forces may incorporate medical staff into combat units, if they are needed, especially for special missions.¹²⁶

115. According to the Report on the Practice of the Iran, Iran accused Iraq on several occasions of attacking Iranian Red Crescent personnel during the Iran–Iraq war. Iran claimed that Iraq had violated IHL by committing these acts.¹²⁷

116. The Report on the Practice of Iraq refers to the protection afforded to medical personnel by the Geneva Conventions.¹²⁸ On the basis of the reply by Iraq's Ministry of Defence to a questionnaire, the report also states that the protection of relief personnel is "an absolute principle, without any restriction".¹²⁹

117. According to the Report on the Practice of Israel, the IDF does not have a policy of targeting the medical personnel of its adversaries. The report adds that the implementation of this policy is subject to such personnel being clearly recognisable and not participating in hostile activities. It further states that:

The IDF . . . has chosen to incorporate its front-line medical staff in its combat units. As a result, when participating in combat missions, front-line Israeli military medical personnel would not carry distinguishing marks and do not expect to be granted protected status in combat situations.¹³⁰

118. During the Iraqi occupation of Kuwait in 1990, Kuwait stated in a letter to the UN Secretary-General that "on the pretext that the staff had been lax in attending to the injured Iraqis, a number of the hospital staff were arrested, tortured and then executed". These acts were described as violations of "the most basic of human rights" and of GC IV.¹³¹

119. At the International Conference for the Protection of War Victims in 1993, Kuwait stated that "persons committing acts against [medical personnel] must be considered as war criminals".¹³²

120. According to the Report on the Practice of Kuwait, attacks against medical personnel are an offence under Kuwaiti law.¹³³

121. At the CDDH, New Zealand, supported by Austria, stated that the definitions provided by AP I could not be applied to the Geneva Conventions

¹²⁵ Germany, Declaration by the Federal Minister of Foreign Affairs, *Süddeutsche Zeitung*, 15 October 1993.

¹²⁶ Report on the Practice of Germany, 1997, Answers to additional questions on Chapter 2.7.

¹²⁷ Report on the Practice of Iran, 1997, Chapter 2.7.

¹²⁸ Report on the Practice of Iraq, 1998, Chapter 2.7.

¹²⁹ Report on the Practice of Iraq, 1998, Chapter 4.2.

¹³⁰ Report on the Practice of Israel, 1997, Chapter 2.7, referring to *Law of War Booklet* (1986), p. 7.

¹³¹ Kuwait, Letter dated 16 September 1990 to the UN Secretary-General, UN Doc. S/21777, 17 September 1990, p. 1.

¹³² Kuwait, Statement at the International Conference for the Protection of War Victims, Geneva, 30 August–1 September 1993.

¹³³ Report on the Practice of Kuwait, 1997, Chapter 2.7.

and considered that Committee II of the CDDH “was not competent to take a decision affecting the 1949 Geneva conventions”.¹³⁴

122. According to the Report on the Practice of Nigeria, it is Nigeria’s *opinio juris* that the prohibition of attacks on medical personnel and objects is part of customary international law.¹³⁵

123. An agreement, concluded in 1990 between several Philippine governmental departments, the National Police, and a group of NGOs involved in the delivery of medical services, provides for the protection of health workers from harassment and human rights violations. The preamble to the agreement states that the parties are adhering to generally accepted principles of IHL and human rights law.¹³⁶

124. The Report on the Practice of the Philippines notes that medical personnel are given protection when they are delivering health services.¹³⁷

125. On the basis of replies by army officers to a questionnaire, the Report on the Practice of Rwanda states that “military medical personnel must be protected”.¹³⁸ Medical personnel of aid societies were not specifically mentioned, but in reply to the question regarding the improper use of uniforms, an officer stated that the use of the “uniforms” of humanitarian organisations was prohibited since it endangered their staff.¹³⁹

126. A training video on IHL produced by the UK Ministry of Defence emphasises the duty to respect, and not to attack, medical personnel.¹⁴⁰

127. According to the Report on UK Practice, there is no practice of incorporating medical staff in combat units in the UK’s armed forces.¹⁴¹

128. At the CDDH, the US stated that Committee II of the CDDH “was not competent to take a decision to apply to the 1949 Geneva Conventions the terms defined in Article 8”.¹⁴²

129. In 1987, in submitting AP II to the US Senate for advice and consent to ratification, the US President expressed the view that “the obligations in Additional Protocol II are no more than a restatement of the rules of conduct

¹³⁴ New Zealand, Statement at the CDDH, *Official Records*, Vol. XI, CDDH/II/SR.4, 12 March 1974, p. 25, § 5.

¹³⁵ Report on the Practice of Nigeria, 1997, Chapter 2.7.

¹³⁶ Philippines, Memorandum of Agreement on the Delivery of Health Services between the Departments of Foreign Affairs, Justice, Local Government, National Defense and Health and the Philippines Alliance of Human Rights Advocates (PAHRA), the Free Legal Assistance Group (FLAG) and the Medical Action Group (MAG), 10 December 1990, preamble.

¹³⁷ Report on the Practice of the Philippines, 1997, Chapter 2.7.

¹³⁸ Report on the Practice of Rwanda, 1997, Replies by army officers to a questionnaire Chapter 2.7.

¹³⁹ Report on the Practice of Rwanda, 1997, Replies by army officers to a questionnaire, Chapter 2.7.

¹⁴⁰ UK, Ministry of Defence, Training Video: The Geneva Conventions, 1986, Report on UK Practice, 1997, Chapter 2.7.

¹⁴¹ Report on UK Practice, 1997, Chapter 2.7.

¹⁴² US, Statement at the CDDH, *Official Records*, Vol. XI, CDDH/II/SR.4, 12 March 1974, p. 25, § 4.

with which US military forces would almost certainly comply as a matter of national policy, constitutional and legal protections, and common decency".¹⁴³

130. In 1987, the Deputy Legal Adviser of the US Department of State affirmed that "we support the principle that medical and religious personnel must be respected and protected" as provided in Article 15 AP I.¹⁴⁴

131. In 1991, in a diplomatic note to Iraq concerning operations in the Gulf War, the US stated that medical personnel must be respected and protected at all times.¹⁴⁵

132. In 1996, the US Department of State qualified the killing of six ICRC medical aid workers in Chechnya as a "barbaric act" and condemned it "in the strongest possible terms".¹⁴⁶

133. In 1998, the Office of General Counsel of the US Department of Defence issued a memorandum on the subject of whether radio operators assigned to an air force medical unit could be issued with identification cards bearing the red cross and documenting their status as personnel "exclusively engaged in supporting a medical unit or establishment in performance of its medical mission" under Article 24 GC I. The memorandum concluded that "the administrative staff category would appear to be broad enough to cover radio operators, so long as they are exclusively engaged in supporting a medical unit or establishment in the performance of its medical mission".¹⁴⁷

134. According to the Report on US Practice, it is the *opinio juris* of the US that medical personnel are not to be knowingly attacked or unnecessarily prevented from performing their duties in either international or non-international armed conflicts. It adds that "customary practice has proceeded little beyond the specific rules of the Geneva Conventions, with a few exceptions". The report notes that there is no practice of incorporating medical staff in combat units in the armed forces.¹⁴⁸

135. In 1993, during a debate in the UN Security Council on the situation in the former Yugoslavia, Venezuela stated that those who had committed war crimes and crimes against humanity, including "attacks upon . . . medical personnel", had to be brought to justice.¹⁴⁹

¹⁴³ US, Message from the US President transmitting AP II to the US Senate for advice and consent to ratification, Treaty Doc. 100-2, 29 January 1987, Comment on Article 10.

¹⁴⁴ US, Remarks of Michael J. Matheson, Deputy Legal Adviser, US Department of State, The Sixth Annual American Red Cross-Washington College of Law Conference on International Humanitarian Law: A Workshop on Customary International Law and the 1977 Protocols Additional to the 1949 Geneva Conventions, *American University Journal of International Law and Policy*, Vol. 2, 1987, pp. 423-424.

¹⁴⁵ US, Department of State, Diplomatic Note to Iraq, Washington, 19 January 1991, annexed to Letter dated 21 January 1991 to the President of the UN Security Council, UN Doc. S/22122, 21 January 1991, Annex I, p. 2.

¹⁴⁶ US, Department of State, Daily Press Briefing, 17 December 1996.

¹⁴⁷ US, Department of Defence, Office of General Counsel, Memorandum for Defence Resources Activity, Subject: Geneva Convention Cards for Medical Personnel, 4 August 1998, *YIHL*, Vol. 2, 1999, p. 422.

¹⁴⁸ Report on US Practice, 1997, Chapter 2.7.

¹⁴⁹ Venezuela, Statement before the UN Security Council, UN Doc. S/PV.3269, 24 August 1993, p. 44.

136. Order No. 579 issued in 1991 by the YPA Chief of Staff instructs YPA units to “apply all means to prevent any attempt of . . . mistreatment of . . . religious and medical personnel”.¹⁵⁰

137. In 1991, in a document entitled “Examples of violations of the rules of international law committed by the so-called armed forces of Slovenia”, the Ministry of Defence of the SFRY (FRY) included as an example, the arrest of medical teams even though they were wearing the red cross emblem.¹⁵¹

138. The Report on the Practice of Zimbabwe states that the rule on the protection of medical personnel from attack is part of customary international law. In particular, it points out the customary status of Articles 15 and 16 AP I.¹⁵²

139. In 1991, in a letter to the ICRC, the President of a State denounced attacks against medical personnel by the opposing forces.¹⁵³

III. Practice of International Organisations and Conferences

United Nations

140. In a resolution adopted in 1984 on the situation of human rights in El Salvador, the UN General Assembly urged the government and the insurgent forces “to agree as early as possible to respect the medical personnel . . . as required by the Geneva Conventions”.¹⁵⁴

141. In a resolution adopted in 1985 on the situation of human rights in El Salvador, the UN General Assembly expressed its deep concern “at the fact that serious and numerous violations of human rights continue to take place in El Salvador owing above all to non-fulfilment of the humanitarian rules of war” and therefore recommended that the UN Special Representative for El Salvador “continue to observe and to inform the General Assembly and the Commission on Human Rights of the extent to which the contending parties are respecting those rules, particularly as regards humanitarian treatment and respect for . . . health personnel . . . of either party”.¹⁵⁵ This recommendation was reiterated in a subsequent resolution adopted in 1986.¹⁵⁶

142. In a resolution adopted in 1987 on the situation on human rights in El Salvador, the UN Commission on Human Rights requested that the UN Special Representative for El Salvador “continue to observe and inform the General Assembly and the Commission of the extent to which the contending parties are respecting the humanitarian rules of war, particularly as regards respect for . . . health personnel”.¹⁵⁷

¹⁵⁰ SFRY (FRY), Chief of General Staff of the YPA, Political Department, Order No. 579, 14 October 1991, § 2.

¹⁵¹ SFRY (FRY), Ministry of Defence, Examples of violations of the rules of international law committed by the so-called armed forces of Slovenia, July 1991, § 1(iii).

¹⁵² Report on the Practice of Zimbabwe, 1998, Chapter 2.7. ¹⁵³ ICRC archive document.

¹⁵⁴ UN General Assembly, Res. 39/119, 14 December 1984, § 9.

¹⁵⁵ UN General Assembly, Res. 40/139, 13 December 1985, § 3.

¹⁵⁶ UN General Assembly, Res. 41/157, 4 December 1986, § 4.

¹⁵⁷ UN Commission on Human Rights, Res. 1987/51, 11 March 1987, § 5.

143. In a resolution adopted in 1985 on the situation in El Salvador, the UN Sub-Commission on Human Rights recommended that the UN Special Representative for El Salvador “inform the Commission on whether both parties accept their obligation to respect the Geneva Conventions and to what extent they are truly observing them, specially in those aspects which refer to the protection of . . . the medical personnel of both parties”.¹⁵⁸

144. In 1994, in its final report on grave breaches of the Geneva Conventions and other violations of IHL committed in the former Yugoslavia, the UN Commission of Experts Established pursuant to Security Council Resolution 780 (1992) linked attacks on medical personnel to “ethnic cleansing”, regarding them as a coercive means to remove the population from certain areas.¹⁵⁹

145. In 1994, in its final report on grave violations of IHL in Rwanda, the UN Commission of Experts Established pursuant to Security Council Resolution 935 (1994) treated the cases of attacks on medical personnel no differently from attacks on civilians. It mostly referred to common Article 3 of the 1949 Geneva Conventions (acknowledging its customary status) and AP II.¹⁶⁰

146. In 1995, in a report on the conflict in Guatemala, the Director of MINUGUA recommended to the URNG that it “should issue precise instructions to its combatants to refrain from . . . endangering ambulances and duly identified health workers who assist such wounded persons”.¹⁶¹

147. In its report in 1993, the UN Commission on the Truth for El Salvador held that the summary execution of a Spanish doctor who had entered El Salvador to work as a doctor for the FMLN was a flagrant violation of IHL and human rights law. No indication was given as to what were the doctor’s activities, and the Commission made no mention of the special protected status of medical personnel.¹⁶² The Commission described the summary execution of a French nurse working in an FMLN hospital by a unit of the Salvadoran Air Force as a deliberate attack on medical personnel in violation of IHL.¹⁶³

Other International Organisations

148. In a resolution adopted in 1988 on the protection of humanitarian medical missions, the Parliamentary Assembly of the Council of Europe called on all States to respect “the right of medical personnel to be protected during their missions”. It recalled that the Additional Protocols afforded protection to medical personnel intervening in conflicts of a non-international nature. The

¹⁵⁸ UN Sub-Commission on Human Rights, Res. 1985/18, 29 August 1985, § 4.

¹⁵⁹ UN Commission of Experts Established pursuant to Security Council Resolution 780 (1992), Final report, UN Doc. S/1994/674, 27 May 1994, §§ 133–134.

¹⁶⁰ UN Commission of Experts Established pursuant to Security Council Resolution 935 (1994), Final report, UN Doc. S/1994/1405, 9 December 1994, §§ 73–92.

¹⁶¹ MINUGUA, Director, First report, UN Doc. A/49/856, 1 March 1995, Annex, § 194.

¹⁶² UN Commission on the Truth for El Salvador, Report, UN Doc. S/25500, 1 April 1993, Annex, pp. 89–92.

¹⁶³ UN Commission on the Truth for El Salvador, Report, UN Doc. S/25500, 1 April 1993, Annex, pp. 87–89.

Parliamentary Assembly further emphasised that the protected status applied only to medical personnel working under the aegis of the ICRC or to personnel employed by a State and that the application of these texts did not always cover cases of internal conflicts not recognised by the legal government.¹⁶⁴

149. Following the killing of six ICRC medical aid workers in Chechnya in December 1996, the OSCE Chairman stated that he was “horrified to learn of the atrocious crime which claimed the lives of six International Red Cross aid workers as they were sleeping” and strongly condemned “this act of violence . . . and terrorism”.¹⁶⁵

International Conferences

150. At the CDDH, the Working Group on the Protection of Medical Personnel considered in its report that the term “medical personnel” as used in AP II should include all the categories of personnel listed in Article 8(c) AP I.¹⁶⁶ However, the definition developed for AP II by Committee II, which took into account the specific aspects of non-international armed conflicts, provided that medical personnel included, *inter alia*, “medical personnel of other aid societies [other than Red Cross or Red Crescent organisations] recognised and authorised by a Party to the conflict and located within the territory of the High Contracting Party in whose territory an armed conflict is taking place”.¹⁶⁷ In this respect, the Drafting Committee stated that:

It had been necessary to specify that aid societies other than Red Cross organizations must be located within the territory of the High Contracting Party in whose territory the armed conflict was taking place in order to avoid the situation of an obscure private group from outside the country establishing itself as an aid society within the territory and being recognized by the rebels.¹⁶⁸

151. The Final Declaration adopted by the International Conference for the Protection of War Victims in 1993 urged all States to “make every effort” to protect medical personnel.¹⁶⁹

152. In a resolution on health and war adopted in 1995, the Conference of African Ministers of Health invited OAU member States “to do everything possible to protect medical personnel against pressure, threats and attempts on their lives”.¹⁷⁰

¹⁶⁴ Council of Europe, Parliamentary Assembly, Res. 904 (1988), 30 June 1988, § 14 and Annex, § 1.

¹⁶⁵ OSCE, Chairman in Office, Press Release 86/96, 17 December 1996.

¹⁶⁶ CDDH, *Official Records*, Vol. XIII, CDDH/II/269, 3 February–18 April 1975, p. 217.

¹⁶⁷ CDDH, *Official Records*, Vol. XIII, CDDH/235/Rev.1, Report of Committee II, 21 April–11 June 1976, p. 304.

¹⁶⁸ CDDH, *Official Records*, Vol. XII, CDDH/II/SR.80, 4 June 1976, p. 270, § 16.

¹⁶⁹ International Conference for the Protection of War Victims, Geneva, 30 August–1 September 1993, Final Declaration, § II (9), *ILM*, Vol. 33, 1994, p. 301.

¹⁷⁰ Conference of African Ministers of Health, Cairo, 26–28 April 1995, Res. 14 (V), § 5(c).

IV. Practice of International Judicial and Quasi-judicial Bodies

153. No practice was found.

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

154. The ICRC Commentary on the Additional Protocols, in the light of the fact that AP II provides no definition of medical personnel, states that “we should therefore refer, both for medical personnel and for religious personnel, to the definitions of these terms given in Article 8 (Terminology) of Protocol I”. The Commentary further specifies that:

4666. The term “Red Cross organizations” was used in order to cover not only the assistance available on the government side, but also groups or sections of the Red Cross on the other side which already existed, and even improvised organizations which might be set up during the conflict.

4667. Such was the intention of the negotiators, and this interpretation remains in the absence of definitions in the Protocol. It is supported not only by the above-mentioned work of the Conference, but also by Article 18 (Relief societies and relief actions), paragraph 1, which uses the term “Red Cross organizations” in this sense. As regards relief societies, it was considered necessary to specify that relief societies other than Red Cross organizations should be located within the territory of the Contracting Party where the armed conflict was taking place, to avoid private groups from outside the country establishing themselves by claiming the status of a relief society and then being recognized by the insurgents.

4668. In the absence of precise definition, the term “medical personnel” covers both permanent and temporary categories. The term “permanent medical personnel” means medical personnel exclusively assigned to medical purposes for a unspecified length of time, while “temporary medical personnel” are personnel exclusively assigned to medical purposes for limited periods.

4669. In both cases such assignment must be exclusive. It should be noted that such status is based on the functions carried out, and not on qualifications.¹⁷¹

155. To fulfil its task of disseminating IHL, the ICRC has delegates around the world teaching armed and security forces that:

64. “Medical personnel” means personnel assigned exclusively to medical activities, to the administration of medical establishments and to medical transportation.

...

78. The law of war grants the same status to civilian and military medical services... The provisions governing military medical personnel... apply equally to the corresponding categories of the civilian medical service.¹⁷²

¹⁷¹ Yves Sandoz *et al.* (eds.), *Commentary on the Additional Protocols*, ICRC, Geneva, 1987, §§ 4663 and 4666–4669.

¹⁷² Frédéric de Mulinen, *Handbook on the Law of War for Armed Forces*, ICRC, Geneva, 1987, §§ 64 and 78.

Delegates also teach that:

474. Specifically protected personnel . . . recognized as such must be respected.

475. Specifically protected personnel shall be allowed to fulfil their activity, unless the tactical situation does not permit . . . Their mission and genuine activity may be verified. Armed enemy personnel may be disarmed.¹⁷³

156. In 1978, in a letter to a National Society, the ICRC stated that civilian and military medical personnel, both permanent and temporary, “must be respected and protected in all circumstances”.¹⁷⁴

157. In a press release in 1978 the ICRC urgently appealed to the belligerents in Lebanon “to take measures immediately to ensure that hospitals and medical personnel may continue their work unimpeded and in safety”.¹⁷⁵

158. In a press release issued in 1991 in the context of the Gulf War, the ICRC reminded the parties to respect and protect medical personnel at all times.¹⁷⁶

159. In 1991, the Croatian Red Cross denounced attacks against medical personnel by the Yugoslav army.¹⁷⁷

160. In a press release in 1992, the ICRC urged the parties to the conflict in Nagorno-Karabakh to ensure that medical personnel were respected and protected.¹⁷⁸

161. In a press release in 1992, the ICRC enjoined the parties to the conflict in Afghanistan “to respect medical personnel”.¹⁷⁹

162. In a press release in 1992, the ICRC urged the parties to the conflict in Tajikistan “to make certain that medical personnel . . . are respected and protected”.¹⁸⁰

163. In a communication to the press in 1993, the ICRC appealed to the belligerents in the conflict in Georgia “to respect hospitals and medical personnel in all circumstances”.¹⁸¹

164. In 1994, in a letter to the authorities of a separatist entity, the ICRC recalled that medical personnel enjoy special protection under IHL and must therefore be respected in all circumstances.¹⁸²

¹⁷³ Frédéric de Mulinen, *Handbook on the Law of War for Armed Forces*, ICRC, Geneva, 1987, §§ 474–475.

¹⁷⁴ ICRC archive document.

¹⁷⁵ ICRC, Press Release No. 1341, Lebanon: ICRC appeals for truce, 2 October 1978.

¹⁷⁶ ICRC, Press Release No. 1658, Gulf War: ICRC reminds States of their obligations, 17 January 1991.

¹⁷⁷ Croatian Red Cross, Protest against repeated violations of the Geneva Conventions and Humanitarian Law in Vukovar, 22 November 1991.

¹⁷⁸ ICRC, Press Release No. 1670, Nagorno-Karabakh: ICRC calls for respect for humanitarian law, 12 March 1992.

¹⁷⁹ ICRC, Press Release No. 1712, Afghanistan: ICRC appeals for compliance with humanitarian rules, 5 May 1992; see also Press Release No. 1726, Afghanistan: New ICRC appeal for compliance with humanitarian rules, 14 August 1992 and Press Release No. 1764, Afghanistan: ICRC calls for respect for the civilian population, 8 February 1994.

¹⁸⁰ ICRC, Press Release, Tajikistan: ICRC urges respect for humanitarian rules, ICRC Dushanbe, 23 November 1992.

¹⁸¹ ICRC, Communication to the Press No. 93/32, Conflict in Georgia: ICRC action, 22 September 1993.

¹⁸² ICRC archive document.

165. In a declaration issued in 1994 in the context of the conflict between the Mexican government and the EZLN, the Mexican Red Cross stated that “protection must be extended to health personnel in general and, in particular, to Mexican Red Cross personnel . . . Health personnel as well as Mexican Red Cross personnel must be deemed to be neutral and must therefore not be attacked.”¹⁸³

166. In a press release in 1994, the ICRC appealed to the parties to the internal armed conflict in Yemen to respect and facilitate the work of first-aiders from the Yemeni Red Crescent Society and of ICRC delegates.¹⁸⁴

167. In 1994, in a Memorandum on Respect for International Humanitarian Law in Angola, the ICRC stated that medical personnel “shall be protected and respected”.¹⁸⁵

168. In a press release in 1994, the ICRC urged the parties to the conflict in Chechnya “to ensure that medical personnel . . . are respected and protected”.¹⁸⁶

169. In a press release in 1995, the ICRC expressed concern about an attack on a hospital in Burundi, which it regarded as a grave breach of IHL, and reminded the belligerents that all medical personnel must be respected.¹⁸⁷

170. In a press release in 2000, following allegations that the Palestine Red Crescent Society had been targeted in shooting incidents, the ICRC stated that “any attacks . . . on those medical personnel . . . indeed constitute a grave violation of International Humanitarian Law”.¹⁸⁸

171. In a communication to the press issued in 2000 in connection with the hostilities in the Near East, the ICRC stated that:

Members of the medical services must be respected and protected. They must be allowed to circulate unharmed so that they can discharge their humanitarian duties. All those who take part in the confrontations must respect the medical services, whether deployed by the armed forces, civilian facilities, the Palestine Red Crescent Society or the Magen David Adom in Israel.¹⁸⁹

172. In a communication to the press in 2001, the ICRC, deeply concerned by the situation in Afghanistan, urged the warring parties to “ensure the safety of medical personnel”.¹⁹⁰

¹⁸³ Mexican Red Cross, Declaración de Cruz Roja Mexicana en torno a los acontecimientos que se han presentado en el Chiapas a partir del 1o. enero de 1994, 3 January 1994, § 2(C).

¹⁸⁴ ICRC, Press Release No. 1773, Fighting in Yemen, 9 May 1994.

¹⁸⁵ ICRC, Memorandum on Respect for International Humanitarian Law in Angola, 8 June 1994, § III, *IRRC*, No. 320, 1997, p. 504.

¹⁸⁶ ICRC, Press Release No. 1793, Chechnya: ICRC urges respect for humanitarian rules, 28 November 1994; see also Communication to the Press No. 96/10, Chechen conflict: ICRC appeal, 8 March 1996 and Communication to the Press No. 96/27, Russian Federation/Chechnya: ICRC calls on Federal Authorities to extend ultimatum, 21 August 1996.

¹⁸⁷ ICRC, Press Release No. 50, Burundi: Grenade lands in hospital room, 13 December 1995.

¹⁸⁸ ICRC, Press Release, Israel and the Occupied Territories: Respect for medical personnel, ICRC Tel Aviv, 1 November 2000.

¹⁸⁹ ICRC, Communication to the Press No. 00/42, ICRC appeal to all involved in the violence in the Near East, 21 November 2000.

¹⁹⁰ ICRC, Communication to the Press No. 01/47, Afghanistan: ICRC calls on all parties to conflict to respect international humanitarian law, 24 October 2001.

VI. Other Practice

173. In 1980, an armed opposition group agreed to be bound by the obligation to protect medical personnel and objects displaying the red cross emblem.¹⁹¹ In 1983, it told the ICRC that it had issued orders to its combatants not to direct attacks against religious and medical personnel and objects.¹⁹² It described the kidnappings of a priest and a doctor as “errors”.¹⁹³

174. In several reports on violations of the laws of war and on human rights in Nicaragua between 1985 and 1988, Americas Watch noted attacks against medical personnel by the armed opposition.¹⁹⁴ In one such report, it mentioned an incident in which civilian medical personnel were kidnapped by the *contras*. Two of them were taken over to Honduras and held and maltreated for several days. Miskito Indians were tried and convicted as accomplices in the kidnapping. They were later granted an amnesty.¹⁹⁵ In the same report, Americas Watch also stated that doctors who worked in the countryside had been targeted for abduction and that several foreign physicians had been murdered.¹⁹⁶

175. In 1988, in the context of the conflict in Angola, UNITA expressed concern about the premeditated targeting of medical personnel by governmental forces. It deplored the fact that the Geneva Conventions had no validity in guerrilla warfare.¹⁹⁷

176. In 1989, in a report on violations of the laws of war in Angola, Africa Watch stated that the targeting of medical personnel was unlawful.¹⁹⁸

177. In a report in 1989, Medical Action Group (MAG), a Philippine NGO, reported threats, harassment and physical abuse of health workers.¹⁹⁹

178. The Declaration of Minimum Humanitarian Standards, adopted by an expert meeting convened by the Institute for Human Rights of Åbo Akademi University in Turku/Åbo, Finland in 1990, states that “medical . . . personnel shall be respected and protected and shall be granted all available help for the performance of their duties”.²⁰⁰

179. Rule A5 of the Rules of International Humanitarian Law Governing the Conduct of Hostilities in Non-international Armed Conflicts, adopted in 1990

¹⁹¹ ICRC archive document. ¹⁹² ICRC archive document. ¹⁹³ ICRC archive documents.

¹⁹⁴ Americas Watch, *Violations of the Laws of War by Both Sides in Nicaragua: 1981–1985*, New York, March 1985, pp. 81–83; *Human Rights in Nicaragua: 1985–1986*, New York, March 1986, p. 105; *Human Rights in Nicaragua: August 1987–August 1988*, New York, August 1988, pp. 94–95.

¹⁹⁵ Americas Watch, *Violations of the Laws of War by Both Sides in Nicaragua: 1981–1985*, New York, March 1985, p. 74.

¹⁹⁶ Americas Watch, *Violations of the Laws of War by Both Sides in Nicaragua: 1981–1985*, New York, March 1985, pp. 80–82.

¹⁹⁷ “Comments of a UNITA official”, *Allgemeine Zeitung*, 21 March 1988.

¹⁹⁸ Africa Watch, *Angola: Violations of the Laws of War by Both Sides*, New York, April 1989, pp. 147–148.

¹⁹⁹ Aurora A. Parong, *Total War: A Threat to People’s Health and Lives*, Medical Action Group (MAG), Philippines, 1989, p. 4, § 5.

²⁰⁰ Declaration of Minimum Humanitarian Standards, adopted by an expert meeting convened by the Institute for Human Rights, Åbo Akademi University, Turku/Åbo, 30 November–2 December 1990, Article 14(1), *IRRC*, No. 282, 1991, p. 335.

by the Council of the IIHL, provides that “the obligation to respect and protect medical . . . personnel . . . in the conduct of military operations is a general rule applicable in non-international armed conflicts”.²⁰¹

Equipment of medical personnel with light individual weapons

I. Treaties and Other Instruments

Treaties

180. Article 8(1) of the 1906 GC lists among the conditions not depriving mobile sanitary formations and fixed establishments of the protection guaranteed by Article 6 of the Convention the fact “that the personnel of a formation or establishment is armed and uses its arms in self defense or in defense of its sick and wounded”.

181. Article 8(1) of the 1929 GC lists among the conditions not depriving mobile medical formations and fixed establishments of the protection guaranteed by Article 6 of the Convention the fact “that the personnel of the formation or establishment is armed, and that they use the arms in their own defence or in that of the sick and wounded in charge”.

182. Article 22(1) GC I lists among the conditions not depriving fixed establishments and mobile medical units of the protection guaranteed by Article 19 GC I the fact “that the personnel of the unit or establishment are armed, and that they use the arms in their own defence, or in that of the wounded and sick in their charge”.

183. Under Article 13(2)(a) AP I, the fact that “the personnel of the unit are equipped with light individual weapons for their own defence or for that of the wounded and sick in their charge” shall not be considered as an act harmful to the enemy, depriving a medical unit of its protected status. Article 13 AP I was adopted by consensus.²⁰²

184. Article 17(2) and (3)(a) of draft AP II adopted by consensus in Committee II of the CDDH provided that:

2. The protection to which medical units and transports are entitled shall not cease unless they are used to commit, outside their humanitarian function, acts harmful to the adverse Party.
- ...
3. The following shall not be considered as harmful acts:
 - (a) that the personnel of the unit or the transport are equipped with light individual weapons for their own defence or for that of the wounded and sick for whom they are responsible.²⁰³

²⁰¹ IIHL, Rules of International Humanitarian Law Governing the Conduct of Hostilities in Non-international Armed Conflicts, Rule A5, *IRRC*, No. 278, 1990, p. 391.

²⁰² CDDH, *Official Records*, Vol. VI, CDDH/SR. 37, 24 May 1977, p. 70.

²⁰³ CDDH, *Official Records*, Vol. XIII, CDDH/221/Rev.1, 3 February–18 April 1975, p. 130, § 170 and p. 197.

Eventually, however, subparagraph (3) was deleted from Article 17 of draft AP II, which was then adopted by consensus in the plenary meeting of the CDDH.²⁰⁴

Other Instruments

185. No practice was found.

II. National Practice

Military Manuals

186. Argentina's Law of War Manual lists among the conditions not depriving fixed establishments and mobile medical units of their protection "the fact that the personnel of the unit or establishment are armed and use their arms in their own defence or in that of the wounded and sick in their charge".²⁰⁵

187. Australia's Commanders' Guide provides that military medical personnel lose their protection "if they engage in acts harmful to the enemy . . . Protection will not be lost if medical members act in self-defence. Defensive weapons such as side-arms may be carried."²⁰⁶

188. Australia's Defence Force Manual states that medical personnel "are protected so long as they do not participate in hostilities. The carriage of light individual weapons for self-defence or for defence of wounded or sick in their care is not considered participation."²⁰⁷

189. Belgium's Law of War Manual states that "medical personnel may carry arms but only to defend themselves or the patients in their charge".²⁰⁸

190. Belgium's Teaching Manual for Soldiers provides that "the prohibition to attack hospitals remains applicable even if . . . its personnel carry light individual weapons for their own defence or for the defence of the wounded in their charge, the establishment or material".²⁰⁹

191. Benin's Military Manual states that "the use of weapons by medical personnel and by sentries of military medical establishments and transports is subject to regulation (e.g. in case of self-defence)".²¹⁰

192. Cameroon's Instructors' Manual states that "the weapons carried by medical personnel must be of such a nature as to avoid any confusion with combatants".²¹¹

193. Canada's LOAC Manual lists among the conditions not depriving medical units of their protection the fact "that the personnel of the medical unit are armed for their own defence or that of the wounded and sick in their charge".²¹²

²⁰⁴ CDDH, *Official Records*, Vol. VII, CDDH/SR.51, 3 June 1977, p. 113.

²⁰⁵ Argentina, *Law of War Manual* (1969), § 3.007.

²⁰⁶ Australia, *Commanders' Guide* (1994), § 615.

²⁰⁷ Australia, *Defence Force Manual* (1994), § 521, see also §§ 911 and 964.

²⁰⁸ Belgium, *Law of War Manual* (1983), p. 48.

²⁰⁹ Belgium, *Teaching Manual for Soldiers* (undated), pp. 18–19.

²¹⁰ Benin, *Military Manual* (1995), Fascicule II, p. 16.

²¹¹ Cameroon, *Instructors' Manual* (1992), p. 87, § 142.

²¹² Canada, *LOAC Manual* (1999), p. 4-9, § 91(a).

194. Canada's Code of Conduct provides that "personnel of a medical unit or establishment may be armed with small arms and may use those arms in defence of themselves or of the wounded and sick under their charge".²¹³

195. Ecuador's Naval Manual provides that:

Possession of small arms for self-protection, for the protection of the wounded and sick, and for protection from marauders and others violating the law of armed conflict does not disqualify medical personnel from protected status. Medical personnel may not use such arms against enemy forces acting in conformity with the law of armed conflict.²¹⁴

196. France's LOAC Summary Note provides that personnel of military and civilian medical service "may not take a direct part in hostilities [and] they may only be equipped with individual arms for their own protection".²¹⁵

197. Germany's Military Manual provides that "medical personnel may be equipped with individual weapons for the protection of the wounded, sick and shipwrecked in their charge as well as for their own protection. Individual weapons are pistols, submachine guns and rifles".²¹⁶

198. Kenya's LOAC Manual states that "medical personnel may carry and use small arms for their self-defence and for the defence of the wounded and sick in their care".²¹⁷

199. The Military Manual of the Netherlands provides that:

Medical personnel may be armed with pistols, sub-machine guns and rifles, but not with machine guns or other weapons that have to be handled by more than one person, or with weapons that are meant for use against material objects, such as missile launchers and other anti-tank weapons, nor with fragmentation hand grenades and the like.²¹⁸

200. The Military Handbook of the Netherlands states that "medical personnel may not in any way take part in hostilities, but they may be armed. They may, however, only use these weapons to defend themselves or the wounded and sick in their care and not, for example, to prevent being captured by the enemy".²¹⁹

201. Nigeria's Manual on the Laws of War states that the protection of medical establishments is not forfeited "merely because medical personnel are armed for self-defence".²²⁰

202. South Africa's LOAC Manual provides that "medical personnel must abstain from all acts of hostility or they lose their protection. They are authorised

²¹³ Canada, *Code of Conduct* (2001), Rule 10, § 6.

²¹⁴ Ecuador, *Naval Manual* (1989), § 11.5. ²¹⁵ France, *LOAC Summary Note* (1992), § 2.3.

²¹⁶ Germany, *Military Manual* (1992), § 631, see also §§ 315 and 619.

²¹⁷ Kenya, *LOAC Manual* (1997), Précis No. 3, p. 9.

²¹⁸ Netherlands, *Military Manual* (1993), p. VI-5.

²¹⁹ Netherlands, *Military Handbook* (1995), pp. 7-40/7-41.

²²⁰ Nigeria, *Manual on the Laws of War* (undated), § 36.

to carry only light arms and have the right to use them only for their own defence or for that of the wounded or sick for whom they are responsible."²²¹

203. Spain's LOAC Manual states that military medical personnel "may carry arms for self-defence and for the defence of the wounded, sick and shipwrecked. They may not use them to avoid being taken prisoner. Using these arms in combat will terminate the protection to which they are entitled."²²²

204. Switzerland's Basic Military Manual states that "medical personnel may be armed with light weapons for its own defence".²²³

205. Togo's Military Manual states that "the use of weapons by medical personnel and by sentries of military medical establishments and transports is subject to regulation (e.g. in case of self-defence)".²²⁴

206. The UK Military Manual lists among the conditions not depriving hospitals and mobile medical units of their protection the fact that "the personnel are armed, and use their arms for their own defence or for the defence of the wounded and sick".²²⁵

207. The UK LOAC Manual provides that "medical personnel may carry and use small arms for their self-defence and for the defence of the wounded and sick in their care".²²⁶

208. The US Field Manual states that:

Although medical personnel may carry arms for self-defence, they may not employ such arms against enemy forces acting in conformity with the law of war. These arms are for their personal defense and for the protection of the wounded and sick under their charge against marauders and other persons violating the law of war.²²⁷

209. The US Air Force Commander's Handbook states that "medical personnel are permitted to carry arms solely to protect themselves and their patients against unlawful attack".²²⁸

210. The US Naval Handbook states that:

Possession of small arms for self-protection, for the protection of the wounded and sick, and for protection from marauders and others violating the law of armed conflict does not disqualify medical personnel from protected status. Medical personnel may not use such arms against enemy forces acting in conformity with the law of armed conflict.²²⁹

211. The Annotated Supplement to the US Naval Handbook notes that "there was no agreement at the [CDDH] as to what "light individual weapons" for

²²¹ South Africa, *LOAC Manual* (1996), § 48.

²²² Spain, *LOAC Manual* (1996), Vol. I, § 4.5.b.(1)(b), see also § 9.6.b.(2).

²²³ Switzerland, *Basic Military Manual* (1987), Article 78(2), see also Article 83, commentary.

²²⁴ Togo, *Military Manual* (1996), Fascicule II, p. 16. ²²⁵ UK, *Military Manual* (1958), § 352.

²²⁶ UK, *LOAC Manual* (1981), Section 6, p. 23, § 9(b). ²²⁷ US, *Field Manual* (1956), § 223(b).

²²⁸ US, *Air Force Commander's Handbook* (1980), § 3-2(d).

²²⁹ US, *Naval Handbook* (1995), § 11.5.

self-defence and for the defence of patients meant, although a number of military experts agreed with the British proposal (see *infra*).²³⁰

212. The YPA Military Manual of the SFRY (FRY) provides that military medical personnel may carry light weapons for their self-defence. Such personnel is authorised to engage in armed resistance against enemy armed forces directly and deliberately attacking, in spite of warning, and against marauders.²³¹

National Legislation

213. Bangladesh's International Crimes (Tribunal) Act states that the "violation of any humanitarian rules applicable in armed conflicts laid down in the Geneva Conventions of 1949" is a crime.²³²

214. Ireland's Geneva Conventions Act as amended provides that any "minor breach" of the Geneva Conventions, including violations of Articles 19 GCI and 22 GC II, and of AP I, including violations of Article 13(2)(a) AP I, are punishable offences.²³³

215. Under Norway's Military Penal Code as amended, "anyone who contravenes or is accessory to the contravention of provisions relating to the protection of persons or property laid down in . . . the Geneva Conventions of 12 August 1949 . . . [and in] the two additional protocols to these Conventions . . . is liable to imprisonment".²³⁴

216. Sweden's Total Defence Ordinance relating to IHL provides that "those assigned in war time to the armed forces health and medical services may only carry light personal arms".²³⁵

National Case-law

217. No practice was found.

Other National Practice

218. At the CDDH, Hungary stated that "the proposal that civilian medical units should be armed was a new one which his delegation was not prepared to endorse fully at that stage, although it did not wish to exclude it completely".²³⁶

219. According to the Report on the Practice of India, "medical and religious personnel are also authorised to wear their personal arms for their individual safety".²³⁷

²³⁰ US, *Annotated Supplement to the Naval Handbook* (1997), § 11.5, footnote 32.

²³¹ SFRY (FRY), *YPA Military Manual* (1988), §§ 171–172.

²³² Bangladesh, *International Crimes (Tribunal) Act* (1973), Section 3(2)(e).

²³³ Ireland, *Geneva Conventions Act as amended* (1962), Section 4(1) and (4).

²³⁴ Norway, *Military Penal Code as amended* (1902), § 108.

²³⁵ Sweden, *Total Defence Ordinance relating to IHL* (1990), Section 10, p. 181.

²³⁶ Hungary, Statement at the CDDH, *Official Records*, Vol. XI, CDDH/SR.14, 7 March 1974, p. 128, § 67.

²³⁷ Report on the Practice of India, 1997, Answers to additional questions on Chapter 2.7.

220. The Report on the Practice of Kuwait states that medical personnel is authorised to defend itself.²³⁸

221. On the basis of an interview with an officer of the armed forces, the Report on the Practice of the Philippines, members of the medical corps are not allowed to carry arms, except when in garrison, "because they become the target of the enemy".²³⁹

222. In a plenary meeting of the CDDH, the representative of the USSR stated that he:

thought the deletion of paragraph 3 [of Article 17 of draft AP II] would enormously complicate matters for medical personnel in actual combat conditions. If, for instance, an army doctor disarmed a wounded soldier and failed to throw away the weapon, would he thereby forfeit his right to protection? He appealed to the representative of Pakistan to restore paragraph 3.²⁴⁰

223. The Report on UK Practice refers to a letter from an army lawyer who, after consultation with the medical-legal department, confirmed that medical personnel may carry a weapon for the purposes of self-defence and defence of their patients only. He also noted that, during the Gulf War, a certain commander of a field hospital would not allow any weapons at all within the hospital confines, even for self-defence.²⁴¹

224. At the CDDH, the US "agreed that the carrying of arms by civilian medical personnel . . . should not be considered as harmful, but in occupied territories or in areas in which fighting was taking place, the right of the party in control of the area to disarm such personnel should be reserved".²⁴²

225. According to the Report on US Practice, it is the *opinio juris* of the US that "[medical] personnel and medical vehicles may be armed, but in international armed conflicts, they may use their weapons only in self-defence and in defence of their patients against marauders and against those enemy forces that do not respect their protected status".²⁴³

III. Practice of International Organisations and Conferences

226. No practice was found.

²³⁸ Report on the Practice of Kuwait, 1997, Chapter 2.7.

²³⁹ Report on the Practice of the Philippines, 1997, Interview with an officer of the armed forces, Chapter 2.7.

²⁴⁰ USSR, Statement at the CDDH, *Official Records*, Vol. VII, CDDH/SR.51, 3 June 1977, p. 113, § 45.

²⁴¹ Report on UK Practice, 1997, Letter from an army lawyer, 3 March 1998, Chapter 2.7.

²⁴² US, Statement at the CDDH, *Official Records*, Vol. XI, CDDH/SR.14, 7 March 1974, p. 128, § 66.

²⁴³ Report on US Practice, 1997, Chapter 2.7.

IV. Practice of International Judicial and Quasi-judicial Bodies

227. No practice was found.

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

228. The ICRC's Commentary on the Additional Protocols, on the interpretation of the expression "light individual weapons", states that:

This expression was not defined, but it appears from the discussions in Committee II... that it refers to weapons which are generally carried and used by a single individual. Thus not only hand weapons such as pistols are permitted, but also rifles or even sub-machine guns. On the other hand, machine guns and any other heavy arms which cannot easily be transported by an individual and which have to be operated by a number of people are prohibited. Thus it is evident that the level of acceptance is quite high. However, this is the case above all to prevent the unit's right to protection from being suppressed too easily.²⁴⁴

229. To fulfil its task of disseminating IHL, the ICRC has delegates around the world teaching armed and security forces that "medical personnel may be armed with light individual weapons for their own protection or for that of the wounded and sick in their charge".²⁴⁵

VI. Other Practice

230. No practice was found.

B. Medical Activities**Respect for medical ethics***I. Treaties and Other Instruments**Treaties*

231. Article 18, third paragraph, GC I provides that "no one may ever be molested or convicted for having nursed the wounded or sick".

232. Article 16 AP I provides that:

1. Under no circumstances shall any person be punished for carrying out medical activities compatible with medical ethics, regardless of the person benefiting therefrom.
2. Persons engaged in medical activities shall not be compelled to perform acts or to carry out work contrary to medical ethics or to other medical rules designed for the benefit of the wounded and sick or to the provisions of the

²⁴⁴ Yves Sandoz *et al.* (eds.), *Commentary on the Additional Protocols*, ICRC, Geneva, 1987, § 563.

²⁴⁵ Frédéric de Mulinen, *Handbook on the Law of War for Armed Forces*, ICRC, Geneva, 1987, § 76.

Conventions or of this Protocol, or to refrain from performing acts or carrying out work required by those rules and provisions.

Article 16 AP I was adopted by consensus.²⁴⁶

233. Article 10 AP II provides that:

1. Under no circumstances shall any person be punished for having carried out medical activities compatible with medical ethics, regardless of the person benefiting therefrom.
2. Persons engaged in medical activities shall neither be compelled to perform acts or to carry out work contrary to, nor be compelled to refrain from acts required by, the rules of medical ethics or other rules designed for the benefit of the wounded and sick, or this Protocol.

Article 10 AP II was adopted by consensus.²⁴⁷

Other Instruments

234. No practice was found.

II. National Practice

Military Manuals

235. Argentina's Law of War Manual provides, with respect to non-international armed conflicts in particular, that:

No one shall be punished for having carried out a medical activity in conformity with medical ethics, whatever the circumstances or beneficiaries of this activity. No one shall be compelled to perform acts contrary to medical ethics or to refrain from acts required by medical ethics.²⁴⁸

236. Australia's Defence Force Manual provides that:

Medical personnel, military or civilian, cannot be compelled to give preferential treatment to any sick or wounded person, except on medical grounds, nor may they be compelled to carry out any act incompatible with their humanitarian mission or medical ethics. No person may be punished for carrying out medical activities in accordance with medical ethics, regardless of the nationality or status of the person treated.²⁴⁹

237. Canada's LOAC Manual states that:

Medical personnel cannot be required to provide preferential treatment to any sick or wounded person except on medical grounds. They may not be compelled to carry out any act incompatible with their humanitarian mission or medical ethics. Furthermore, no one may be punished for carrying out their medical activities in

²⁴⁶ CDDH, *Official Records*, Vol. VI, CDDH/SR.37, 24 May 1977, p. 70.

²⁴⁷ CDDH, *Official Records*, Vol. VII, CDDH/SR.51, 3 June 1977, p. 112.

²⁴⁸ Argentina, *Law of War Manual* (1989), § 7.06.

²⁴⁹ Australia, *Defence Force Manual* (1994), § 967.

accordance with medical ethics, regardless of the nationality or status of the person treated".²⁵⁰

With respect to non-international armed conflict in particular, the manual states that:

34. In accordance with general medical practice, medical personnel may not be required to give priority to any person except for medical reasons. . . . [They] may not be compelled to perform any action incompatible with their humanitarian mission.
35. Medical aid is to be offered to all without distinction. Persons may not be punished for carrying out any medical activities compatible with their own medical ethics. Medical personnel may not be compelled to perform acts contrary to, or refrain from acts, required by their medical ethics or other rules for the protection of the sick, wounded or shipwrecked.²⁵¹

238. The Military Manual of the Netherlands restates the prohibition to violate medical ethics found in Article 16 AP I.²⁵² With respect to non-international armed conflicts in particular, the manual states that:

[Medical personnel] may not be compelled to perform tasks which are incompatible with their humanitarian mission. Medical personnel may not be required to give priority to any person, except on medical grounds. Nobody may be punished for having carried out medical acts which are compatible with medical ethics, regardless of the persons who benefited from those acts.²⁵³

239. New Zealand's Military Manual provides that:

Medical personnel, military or civilian, cannot be required to afford preferential treatment to any sick or wounded person, except on medical grounds; nor may they be compelled to carry out any act incompatible with their humanitarian mission or medical ethics. No person may be punished for carrying out his medical activities in accordance with medical ethics, regardless of the nationality or status of the person treated.²⁵⁴

With respect to non-international armed conflicts in particular, the manual states that "in accordance with general medical practice, medical personnel may not be required to give priority to any person except for medical reasons. . . . They may not be compelled to perform any action incompatible with their humanitarian mission."²⁵⁵

240. Senegal's IHL Manual states that:

No one shall be punished for having carried out a humanitarian act in conformity with medical ethics.

²⁵⁰ Canada, *LOAC Manual* (1999), p. 9-3, § 29.

²⁵¹ Canada, *LOAC Manual* (1999), p. 17-4, §§ 34-35.

²⁵² Netherlands, *Military Manual* (1993), p. VI-4.

²⁵³ Netherlands, *Military Manual* (1993), p. XI-6.

²⁵⁴ New Zealand, *Military Manual* (1992), § 1005(2).

²⁵⁵ New Zealand, *Military Manual* (1992), § 1818(2).

Persons engaged in medical activities shall not be compelled:

1. to perform acts or to carry out work contrary to medical ethics; or
2. to refrain from performing acts or from carrying out work required by medical ethics.²⁵⁶

241. Spain's LOAC Manual provides, with reference to Articles 16 AP I and 10 AP II, that IHL imposes a duty on medical personnel "to respect the principles of medical ethics".²⁵⁷

242. The YPA Military Manual of the SFRY (FRY) states that:

No person may be punished for the performance of any medical duty compatible with medical ethics, regardless of the person benefiting therefrom. Medical personnel shall not be compelled to perform acts contrary to medical ethics or to refrain from performing acts dictated by medical ethics.²⁵⁸

National Legislation

243. Bangladesh's International Crimes (Tribunal) Act states that the "violation of any humanitarian rules applicable in armed conflicts laid down in the Geneva Conventions of 1949" is a crime.²⁵⁹

244. Ireland's Geneva Conventions Act as amended provides that any "minor breach" of the Geneva Conventions, including violations of Article 18 GCI, and of AP I, including violations of Article 16 AP I, as well as any "contravention" of AP II, including violations of Article 10 AP II, are punishable offences.²⁶⁰

245. Under Norway's Military Penal Code as amended, "anyone who contravenes or is accessory to the contravention of provisions relating to the protection of persons or property laid down in... the Geneva Conventions of 12 August 1949... [and in] the two additional protocols to these Conventions... is liable to imprisonment".²⁶¹

National Case-law

246. In the *Levy case* in 1968, the US Army Board of Review held that medical ethics could not excuse disobedience to the orders of a superior. An army doctor had pleaded that the order to train Green Berets paramedics was contrary to medical ethics, which forbade training unqualified personnel to perform treatment which should be done by a physician.²⁶²

²⁵⁶ Senegal, *IHL Manual* (1999), p. 17.

²⁵⁷ Spain, *LOAC Manual* (1996), Vol. I, § 9.2.a.(2), see also § 9.6.b.(2).

²⁵⁸ SFRY (FRY), *YPA Military Manual* (1988), § 197.

²⁵⁹ Bangladesh, *International Crimes (Tribunal) Act* (1973), Section 3(2)(e).

²⁶⁰ Ireland, *Geneva Conventions Act as amended* (1962), Section 4(1) and (4).

²⁶¹ Norway, *Military Penal Code as amended* (1902), § 108.

²⁶² US, United States Army Board of Review, *Levy case*, Judgement, 29 August 1968.

Other National Practice

247. The Report on UK Practice refers to a letter from an army lawyer in which it is stated that any interference with medical ethics by military authorities would be very unlikely. Medical personnel are members of their relevant professional bodies, and there would be a strong response if the Ministry of Defence or a commander were seeking to override medical ethics.²⁶³

248. In 1987, in submitting AP II to the US Senate for advice and consent to ratification, the US President recommended a reservation to Article 10 AP II to preclude the possibility that it might affect the administration of discipline of US military personnel.²⁶⁴

249. In its Country Report on Human Rights Practices for 1996, the US Department of State noted, in the section on Turkey and under the heading "Use of Excessive Force and Violations of Humanitarian Law in Internal Conflicts", that the provisions of the Turkish Penal Code and Anti-Terror Law prohibiting assistance to illegal organisations or armed groups were used extensively to prosecute health professionals who provided care to individuals suspected of being members of terrorist organisations.²⁶⁵ Commenting on this, the Report on US Practice states the principle that "during internal armed conflict, medical personnel should not be punished solely for treating the wounded".²⁶⁶

*III. Practice of International Organisations and Conferences**United Nations*

250. In a resolution adopted in 1989 on the situation of human rights in El Salvador, the UN General Assembly considered that under AP II "no one may be punished for carrying out medical activities compatible with medical ethics, regardless of the circumstances and the beneficiaries of such activities" and requested that "medical and health personnel shall under no circumstances be penalized for carrying out their activities".²⁶⁷

251. In a resolution adopted in 1990 on the situation of human rights in El Salvador, the UN Commission on Human Rights requested the parties to the conflict "in no circumstances to penalize medical and health personnel for carrying out their activities".²⁶⁸

252. In a resolution adopted in 1989, the UN Sub-Commission on Human Rights reminded the government of El Salvador that "under no circumstances may it punish the health personnel for carrying out their medical activities".²⁶⁹

²⁶³ Report on UK Practice, 1997, Letter from an army lawyer, 24 February 1998, Chapter 2.7.

²⁶⁴ US, Message from the US President transmitting AP II to the US Senate for advice and consent to ratification, Treaty Doc. 100-2, 29 January 1987, Comment on Article 10.

²⁶⁵ US, Department of State, Country Reports on Human Rights Practices for 1996: Turkey, US Government Printing Office, Washington, D.C., 1997, p. 1163.

²⁶⁶ Report on US Practice, 1997, Chapter 5.7.

²⁶⁷ UN General Assembly, Res. 44/165, 15 December 1989, preamble and § 5.

²⁶⁸ UN Commission on Human Rights, Res. 1990/77, 7 March 1990, § 10.

²⁶⁹ UN Sub-Commission on Human Rights, Res. 1989/9, 31 August 1989, § 4.

Other International Organisations

253. In a resolution adopted in 1988 on the protection of humanitarian medical missions, the Parliamentary Assembly of the Council of Europe stated that “[medical personnel] may not be punished or molested for having engaged in medical activity, whoever the beneficiaries of such care may be”. The Assembly also expressed the wish that the UN draw up a charter for the protection of medical missions. The proposed charter would include, *inter alia*, the following provisions: medical personnel may not be punished for having engaged in medical activity; medical personnel must scrupulously respect the rules of medical ethics and may not refrain from performing acts required by these rules; and the assistance must be based purely on medical criteria of a humanitarian kind.²⁷⁰

International Conferences

254. No practice was found.

IV. Practice of International Judicial and Quasi-judicial Bodies

255. No practice was found.

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

256. To fulfil its task of disseminating IHL, the ICRC has delegates around the world teaching armed and security forces that:

No person shall be punished for performing medical activities compatible with medical ethics.

Persons engaged in medical activities shall not be compelled:

- a) to perform acts or to carry out work contrary to medical ethics; or
- b) to refrain from performing acts or from carrying out work required by medical ethics.²⁷¹

VI. Other Practice

257. Pursuant to the WMA’s Rules Governing the Care of the Sick and Wounded, Particularly in Time of Conflict established in 1983, “the fulfilment of medical duties and responsibilities shall in no circumstance be considered an offence”.²⁷²

258. In 1990, in a report on the FMLN offensive in El Salvador in November 1989, the Instituto de Derechos Humanos de la Universidad Centroamericano stated that:

²⁷⁰ Council of Europe, Parliamentary Assembly, Res. 904, 30 June 1988, Appendix.

²⁷¹ Frédéric de Mulinen, *Handbook on the Law of War for Armed Forces*, ICRC, Geneva, 1987, § 217.

²⁷² WMA, Rules Governing the Care of the Sick and Wounded, Particularly in Time of Conflict, amended by the 35th World Medical Assembly, 1983, § B(3), quoted in Yves Sandoz *et al.* (eds.), *Commentary on the Additional Protocols*, ICRC, Geneva, 1987, p. 201, § 656, footnote 12.

Twelve members of the Lutheran Church, the majority of whom worked in medical assistance, were arrested and accused, among others, of providing medical assistance to the FMLN. Five workers of a clinic of the parish of Saint Francis of Assisi in Mejicanos were arrested by soldiers from the first infantry brigade; one of them is still disappeared. These facts constitute serious violations of Article 10 [AP II] which guarantees respect for medical personnel.²⁷³

259. The Declaration of Minimum Humanitarian Standards, adopted by an expert meeting convened by the Institute for Human Rights of Åbo Akademi University in Turku/Åbo, Finland in 1990, states that:

Medical and religious personnel . . . shall not be compelled to carry out tasks which are not compatible with their humanitarian missions. Under no circumstances shall any person be punished for having carried out medical activities compatible with the principles of medical ethics, regardless of the person benefiting there from.²⁷⁴

260. In 1994, in a report on medical practice in the context of internal armed conflict, the Peruvian Medical Federation for Human Rights detailed several instances in which doctors had been punished for providing medical assistance to members of the Sendero Luminoso (Shining Path) or to the MRTA. The report stated that:

A review of the opinions and judgments handed down in cases where charges of terrorism against physicians were based solely on the performance of a medical act reveals that the legal reasoning used by judges and public prosecutors is based on interpretation of the medical act as an act of collaboration with the terrorist organisation.

The report concluded that:

We must be firm in our position: the medical act, i.e. care given by the physician to the wounded or sick without distinction whatsoever, in observance of his professional principles and duties to protect human life, can in no way be considered an act of collaboration with subversives.²⁷⁵

²⁷³ Instituto de Derechos Humanos de la Universidad Centroamericana, "Los derechos humanos y la ofensiva del 11 de noviembre de 1989", *Estudios Centroamericanos*, Universidad Centroamericana José Simeón Cañas, Vol. XLV, Nos. 495-496, January-February 1990, p. 65; see also IDHUCA, Instituto de Derechos Humanos, Universidad Centroamericana José Simeón Cañas, *Los Derechos Humanos en El Salvador en 1990*, San Salvador, 1991, pp. 68-69.

²⁷⁴ Declaration of Minimum Humanitarian Standards, adopted by an expert meeting convened by the Institute for Human Rights, Åbo Akademi University, Turku/Åbo, 30 November-2 December 1990, Article 14, *IRRC*, No. 282, 1991, p. 335.

²⁷⁵ Federación Médica Peruana Asociación Pro Derechos Humanos, *Medical Practice in the Context of Internal Armed Conflict*, August 1994, quoted in Marco Sassòli and Antoine A. Bouvier (eds.), *How Does Law Protect in War?*, ICRC, Geneva, 1999, pp. 1376-1382.

Respect for medical secrecy

I. Treaties and Other Instruments

Treaties

261. Article 16(3) AP I provides that:

No person engaged in medical activities shall be compelled to give to anyone belonging either to an adverse Party, or to his own Party except as required by the law of the latter Party, any information concerning the wounded and sick who are, or who have been, under his care, if such information would, in his opinion, prove harmful to the patients concerned or to their families. Regulations for the compulsory notification of communicable diseases shall, however, be respected.

Article 16 AP I was adopted by consensus.²⁷⁶

262. Article 10 AP II provides that:

3. The professional obligations of persons engaged in medical activities regarding information which they may acquire concerning the wounded and sick under their care shall, subject to national law, be respected.
4. Subject to national law, no person engaged in medical activities may be penalized in any way for refusing or failing to give information concerning the wounded and sick who are, or who have been, under his care.

Article 10 AP II was adopted by consensus.²⁷⁷

Other Instruments

263. No practice was found.

II. National Practice

Military Manuals

264. Canada's LOAC Manual states, with respect to non-international armed conflict in particular, that "the professional obligations of medical personnel regarding information they acquire concerning the wounded and sick under their care must be respected, subject to the requirements of national law".²⁷⁸

265. Spain's LOAC Manual states, with reference to Articles 16 AP I and 10 AP II, that medical personnel have the following right:

Prohibition on being compelled to provide information concerning the wounded and sick in their care. This rule is absolute with respect to the relationship between medical personnel and enemy wounded or sick, but when the wounded or the sick are of their own side, they are subject to national law. A general exception is related to the compulsory provision of information regarding communicable diseases.²⁷⁹

²⁷⁶ CDDH, *Official Records*, Vol. VI, CDDH/SR.37, 24 May 1977, p. 70.

²⁷⁷ CDDH, *Official Records*, Vol. VII, CDDH/SR.51, 3 June 1977, p. 112.

²⁷⁸ Canada, *LOAC Manual* (1999), p. 17-4, § 36.

²⁷⁹ Spain, *LOAC Manual* (1996), Vol. I, § 9.2.a.(2), see also § 9.6.b.(2).

266. The YPA Military Manual of the SFRY (FRY) notes that “Yugoslav regulations establish an obligation for medical personnel to provide to competent authorities data on wounded, sick and shipwrecked to whom they have provided assistance”.²⁸⁰

National Legislation

267. Ireland’s Geneva Conventions Act as amended provides that any “minor breach” of AP I, including violations of Article 16(3) AP I, as well as any “contravention” of AP II, including violations of Article 10 AP II, are punishable offences.²⁸¹

268. Under Norway’s Military Penal Code as amended, “anyone who contravenes or is accessory to the contravention of provisions relating to the protection of persons or property laid down in . . . the two additional protocols to [the Geneva] Conventions . . . is liable to imprisonment”.²⁸²

National Case-law

269. No practice was found.

Other National Practice

270. At the CDDH, Cuba stated that “the performer of a medical action was free to decide whether or not to give information to a third party”.²⁸³

271. At the CDDH, Denmark stated that “the principle of non-denunciation of the wounded and sick had already been established in 1959 by the WMA, the International Committee of Military Medicine and Pharmacy and the ICRC”.²⁸⁴

272. At the CDDH, Denmark supported the view of the Netherlands (see *infra*), stating that “the provision of information by medical personnel should not be made compulsory to the detriment of underground movements”.²⁸⁵

273. At the CDDH, France stated that “physicians, who were also citizens, were deeply distressed by the obligation to report wounds caused by firearms in time of war. That did not apply to the obligation to report communicable diseases.”²⁸⁶

274. In the discussion at the CDDH on a proposal by Brazil, which purported to add “wounds by firearms, or other evidence related to a criminal offence” as a further exception, the Netherlands stated that “physicians should not be

²⁸⁰ SFRY (FRY), *YPA Military Manual* (1988), § 197.

²⁸¹ Ireland, *Geneva Conventions Act as amended* (1962), Section 4(1) and (4).

²⁸² Norway, *Military Penal Code as amended* (1902), § 108(b).

²⁸³ Cuba, Statement at the CDDH, *Official Records*, Vol. XI, CDDH/II/SR.16, 10 February 1975, p. 152, § 65.

²⁸⁴ Denmark, Statement at the CDDH, *Official Records*, Vol. XI, CDDH/II/SR.39, 20 March 1975, p. 422, § 21.

²⁸⁵ Denmark, Statement at the CDDH, *Official Records*, Vol. XI, CDDH/II/SR.16, 10 February 1975, p. 152, § 63.

²⁸⁶ France, Statement at the CDDH, *Official Records*, Vol. XI, CDDH/II/SR.16, 10 February 1975, p. 151, § 55.

obliged to denounce a member of a resistance movement who had wounded a member of the occupying forces".²⁸⁷

275. At the CDDH, Norway stated it "deeply regretted" the inclusion in Article 10 AP II of the words 'subject to national law' because it was unacceptable "that an international legal norm of the importance of [AP II] should be made subject to the national law of any country". It added that "it was unlikely that Norway would be able to ratify [AP II] if the words 'subject to national law' were maintained".²⁸⁸ Notwithstanding this statement, Norway ratified the two Additional Protocols in 1981 without making any reservation or declaration.

276. An Executive Order of the Philippines of 1987 provides that all medical practitioners must report to the authorities any person treated by them for wounds that are subject to the provisions of the Criminal Code relative to physical injuries, including those they suspect to belong to the insurgent forces.²⁸⁹

277. In 1987, in submitting AP II to the US Senate for advice and consent to ratification, the US President recommended a reservation to Article 10 AP II to make clear that military medical personnel could be required to disclose otherwise confidential information to appropriate authorities.²⁹⁰

III. Practice of International Organisations and Conferences

United Nations

278. No practice was found.

Other International Organisations

279. In a resolution adopted in 1988 on the protection of humanitarian medical missions, the Parliamentary Assembly of the Council of Europe stated that "no member of a medical staff may be compelled to provide information concerning the persons to whom he has given assistance with the exception of information concerning contagious diseases".²⁹¹

International Conferences

280. The Third International Congress on the Neutrality of Medicine in 1968 recommended that the principle of non-denunciation should be categorically recognised.²⁹²

²⁸⁷ Netherlands, Statement at the CDDH, *Official Records*, Vol. XI, CDDH/II/SR.16, 10 February 1975, p. 152, § 59.

²⁸⁸ Norway, Statement at the CDDH, *Official Records*, Vol. XI, CDDH/II/SR.46, 4 April 1975, p. 513, § 2.

²⁸⁹ Philippines, *Executive Order 212*, 1987.

²⁹⁰ US, Message from the US President transmitting AP II to the US Senate for advice and consent to ratification, Treaty Doc. 100-2, 29 January 1987, Comment on Article 10.

²⁹¹ Council of Europe, Parliamentary Assembly, Res. 904 (1988), 30 June 1988, Appendix XVI, § 3.

²⁹² Third International Congress on the Neutrality of Medicine, Medical-Legal Commission, Monaco, 17–20 April 1968, *Annales de Droit international médical*, No. 18, December 1968, pp. 74–76.

IV. Practice of International Judicial and Quasi-judicial Bodies

281. No practice was found.

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

282. To fulfil its task of disseminating IHL, the ICRC has delegates around the world teaching armed and security forces that:

No person engaged in medical activities (e.g. doctor, nurse) shall be compelled to give to anyone any information concerning the wounded and sick who are, or who have been, under his care, if such information would, in his opinion, prove harmful to the patients concerned or their families. However, information must be given when required:

- a) by the law of the Party to which the person engaged in medical activities belongs;
- b) by regulations for the compulsory notification of communicable diseases.²⁹³

VI. Other Practice

283. A report on Medical Secrecy during Armed Conflict prepared for the Fifty-third Conference of the International Law Association in 1968 recommended the following:

The Geneva Conventions should be complemented by a provision to the effect that the parties to the conflict must strictly respect medical secrecy and may not require medical and para-medical personnel, military or civilian, to denounce their patients – combatants from the adverse party.

The Conference endorsed this recommendation in a resolution adopted unanimously.²⁹⁴

284. The WMA's Regulations in Time of Armed Conflict established in 1983 state that "medical confidentiality must be preserved by the physician in the practice of his profession".²⁹⁵

285. The WMA's Rules Governing the Care of the Sick and Wounded, Particularly in Time of Conflict state that "the fulfilment of medical duties and responsibilities shall in no circumstance be considered an offence. The physician must never be prosecuted for observing professional confidentiality."²⁹⁶

²⁹³ Frédéric de Mulinen, *Handbook on the Law of War for Armed Forces*, ICRC, Geneva, 1987, § 218.

²⁹⁴ International Law Association, Report of the Fifty-third Conference, Buenos Aires, 25–31 August, 1968, pp. 548 and 573.

²⁹⁵ WMA, Regulations in Time of Armed Conflicts, amended by the 35th World Medical Assembly, 1983, § 5, quoted in Yves Sandoz *et al.* (eds.), *Commentary on the Additional Protocols*, ICRC, Geneva, 1987, pp. 200–201, § 656, footnote 11.

²⁹⁶ WMA, Rules Governing the Care of the Sick and Wounded, Particularly in Time of Conflict, amended by the 35th World Medical Assembly, 1983, § B(3), quoted in Yves Sandoz *et al.* (eds.), *Commentary on the Additional Protocols*, ICRC, Geneva, 1987, p. 201, § 656, footnote 12.

286. In a report in 1989, the Medical Action Group (MAG), a Philippine NGO, noted that a health worker was ordered to report all her treatment activities to the military or the *vigilantes*.²⁹⁷

C. Religious Personnel

I. Treaties and Other Instruments

Treaties

287. Article 2 of the 1864 GC provides that “chaplains shall have the benefit of the same neutrality [as military hospitals and ambulances] when on duty, and while there remain any wounded to be brought in or assisted”.

288. Article 9 of the 1906 GC provides that “chaplains attached to armies shall be respected and protected under all circumstances. If they fall into the hands of the enemy they shall not be considered as prisoners of war.”

289. Article 9 of the 1929 GC provides that “chaplains attached to armies shall be respected and protected under all circumstances. If they fall into the hands of the enemy they shall not be treated as prisoners of war.”

290. Article 24 GC I provides that “chaplains attached to the armed forces, shall be respected and protected in all circumstances”.

291. Article 36 GC II provides that “the religious... personnel of hospital ships... shall be respected and protected”.

292. According to Article 8(d) AP I:

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

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

Article 8 AP I was adopted by consensus.²⁹⁸

293. Article 15(5) AP I provides that “civilian religious personnel shall be respected and protected”. Article 15 AP I was adopted by consensus.²⁹⁹

294. In an explanatory memorandum on the ratification of the Additional Protocols, the government of the Netherlands made a declaration to the effect that “humanist counsellors” were entitled to the same protection as religious personnel.³⁰⁰

²⁹⁷ Aurora A. Parong, *Total War: A Threat to People’s Health and Lives*, Medical Action Group (MAG), Philippines, 1989, p. 3, Point 3.

²⁹⁸ CDDH, *Official Records*, Vol. VI, CDDH/SR.37, 24 May 1977, p. 68.

²⁹⁹ CDDH, *Official Records*, Vol. VI, CDDH/SR.37, 24 May 1977, p. 70.

³⁰⁰ Netherlands, Lower House of Parliament, Explanatory memorandum on the ratification of the Additional Protocols, 1983–1984 Session, Doc. 18 277 (R 1247), No. 3, p. 14.

295. Article 9(1) AP II provides that “religious personnel shall be respected and protected and shall be granted all available help for the performance of their duties”. Article 9 AP II was adopted by consensus.³⁰¹

296. Upon signature of AP I and AP II, the US declared that “it is the understanding of the United States of America that the terms used in Part III of [AP II] which are the same as the terms defined in Article 8 [AP I] shall so far as relevant be construed in the same sense as those definitions”.³⁰²

Other Instruments

297. Article 13 of the 1880 Oxford Manual provides that “chaplains . . . which are duly authorized to assist the regular sanitary staff – are considered as neutral while so employed, and so long as there remain any wounded to bring in or to succour”.

298. Section 9.4 of the 1999 UN Secretary-General’s Bulletin provides that “the United Nations force shall in all circumstances respect and protect . . . religious personnel”.

II. National Practice

Military Manuals

299. Argentina’s Law of War Manual (1969) states that “chaplains attached to the armed forces, shall be respected and protected in all circumstances”.³⁰³

300. Argentina’s Law of War Manual (1989), with reference to the relevant provisions of the Geneva Conventions and both Additional Protocols, provides that “the protective norms are applicable to civilian and military religious personnel”.³⁰⁴

301. Australia’s Commanders’ Guide states that “protected status is afforded to civilian and military religious personnel while engaged solely in meeting spiritual needs”.³⁰⁵

302. Australia’s Defence Force Manual states that:

Religious personnel are defined as those military or civilian personnel, who are exclusively engaged in their ministry and who are permanently or temporarily attached to one of the protagonists, their medical units or transports, or to a civil defence . . . Like medical personnel, chaplains may not be attacked but must be protected and respected. As with medical personnel, religious personnel do not become PW, unless their retention is required for the spiritual welfare of PW. They must be repatriated as early as possible.³⁰⁶

³⁰¹ CDDH, *Official Records*, Vol. VII, CDDH/SR.51, 3 June 1977, p. 112.

³⁰² US, Declaration made upon signature of AP I and AP II, 12 December 1977, § B.

³⁰³ Argentina, *Law of War Manual* (1969), § 3.008.

³⁰⁴ Argentina, *Law of War Manual* (1989), § 2.16.

³⁰⁵ Australia, *Commanders’ Guide* (1994), § 618.

³⁰⁶ Australia, *Defence Force Manual* (1994), § 983, see also §§ 522, 708 and 902.

- 303.** Belgium's Law of War Manual states that "religious personnel enjoy the same protection as [permanent] medical personnel".³⁰⁷
- 304.** Belgium's Teaching Manual for Soldiers provides that chaplains attached to the armed forces "do not participate in combat and, as a result, may not be attacked".³⁰⁸
- 305.** Benin's Military Manual lists military and civilian religious personnel as specially protected persons.³⁰⁹ It states that "specially protected persons may not take a direct part in hostilities and must not be attacked. They shall be allowed to carry out their tasks as long as the tactical situation permits."³¹⁰
- 306.** Cameroon's Instructors' Manual considers both military and civilian religious personnel as specially protected persons.³¹¹
- 307.** Canada's LOAC Manual states that "religious personnel, both military and civilian, have protected status and thus shall not be attacked".³¹² With respect to non-international armed conflict in particular, the manual states that "religious personnel are to be respected and protected at all times [and] receive all available aid to enable them to fulfil their duties".³¹³
- 308.** Croatia's Commanders' Manual states that "specifically protected persons may not participate directly in hostilities and may not be attacked. They shall be allowed to perform their tasks, when the tactical situation permits." Such persons include military religious personnel and religious personnel attached to the civilian medical service or to the civil defence service.³¹⁴
- 309.** Ecuador's Naval Manual states that "chaplains attached to the armed forces are entitled to the same protection as medical personnel".³¹⁵
- 310.** El Salvador's Soldiers' Manual provides that "religious personnel who serve in hospitals or work for the Red Cross... shall be specially protected because they relieve, aid and comfort all victims without distinction between friend and foe".³¹⁶
- 311.** France's LOAC Summary Note provides that "the specific immunity granted to certain persons and objects by the law of war [including military religious personnel and religious personnel of civilian medical units or civil defence] must be strictly observed... They may not be attacked."³¹⁷

³⁰⁷ Belgium, *Law of War Manual* (1983), p. 48.

³⁰⁸ Belgium, *Teaching Manual for Soldiers* (undated), p. 8.

³⁰⁹ Benin, *Military Manual* (1995), Fascicule I, p. 13.

³¹⁰ Benin, *Military Manual* (1995), Fascicule III, p. 5, see also Fascicule II, p. 8.

³¹¹ Cameroon, *Instructors' Manual* (1992), p. 19, § 222.

³¹² Canada, *LOAC Manual* (1999), p. 4-5, § 41, see also p. 9-3, § 28.

³¹³ Canada, *LOAC Manual* (1999), p. 17-4, § 34.

³¹⁴ Croatia, *Commanders' Manual* (1992), §§ 7 and 12.

³¹⁵ Ecuador, *Naval Manual* (1989), § 11.5.

³¹⁶ El Salvador, *Soldiers' Manual* (undated), p. 12.

³¹⁷ France, *LOAC Summary Note* (1992), §§ 2.2 and 2.3.

312. France's LOAC Manual states that "the law of armed of conflicts provides special protection for the following persons: . . . religious personnel attached to armed forces [and] civilian religious personnel".³¹⁸

313. Germany's Military Manual states that:

801. Chaplains are ministers of faith assigned to the armed forces of a state to provide spiritual care to the persons in their charge.

811. Chaplains shall be respected and protected in all circumstances. This shall apply:

- at any time throughout the duration of an armed conflict;
- at any place; and
- in any case in which chaplains are retained by the adversary, be it temporarily or for a prolonged period of time.

812. Chaplains as such are entitled to the protection provided by international law. Direct participation in rendering assistance to the victims of war (wounded, sick, shipwrecked, prisoners of war, protected civilians) is not required.

813. Unlike medical supplies, the articles used for religious purposes are not explicitly protected by international law. It is, however, in keeping with the tenor of the Geneva Conventions to respect the material required for religious purposes and not use it for alien ends.

...

816. Any attack directed against chaplains and any infringement of their rights constitutes a grave breach of international law, which shall be liable to criminal prosecution.

817. The fact that chaplains may be armed, and that they may use the arms in their own defence, or in that of the wounded, sick and shipwrecked shall not deprive them of the protection accorded to them by international law. They may use the arms only to repel attacks violating international law, but not to prevent capture.

818. The protection accorded to chaplains shall cease if they use their arms for any other purpose than that of self-protection and defending protected persons.

819. The only arms which may be used are weapons suited for self-defence and emergency aid (individual weapons).

820. In the Federal Republic of Germany chaplains are not armed.³¹⁹

314. Hungary's Military Manual states that "religious personnel have the same status as permanent medical personnel".³²⁰

315. Indonesia's Field Manual restates the rule on religious personnel found in Article 24 GC I.³²¹

316. Indonesia's Air Force Manual provides that "a non-combatant is not a lawful military target in warfare. They consist of: a. members of the armed forces with special status such as chaplains."³²²

³¹⁸ France, *LOAC Manual* (2001), pp. 95–96.

³¹⁹ Germany, *Military Manual* (1992), §§ 801, 811–813 and 816–820, see also § 315 ("chaplains are allowed to bear and use small arms").

³²⁰ Hungary, *Military Manual* (1992), p. 19.

³²¹ Indonesia, *Field Manual* (1979), § 6(c).

³²² Indonesia, *Air Force Manual* (1990), § 24(a).

317. Israel's Manual on the Laws of War states that "a provision similar to that applying to medical personnel exists also with regard to chaplains. They too do not take part in the hostilities, they may not be harmed and may not be taken prisoner."³²³

318. Italy's LOAC Elementary Rules Manual states that "specifically protected persons may not participate directly in hostilities and may not be attacked", including military religious personnel and religious personnel attached to the civilian medical service or to the civil defence service.³²⁴

319. Kenya's LOAC Manual states that the protection afforded to military medical personnel also applies to military religious personnel.³²⁵

320. South Korea's Operational Law Manual states that military religious personnel must be protected.³²⁶

321. Madagascar's Military Manual states that "specifically protected persons may not participate directly in hostilities and may not be attacked. They shall be allowed to perform their tasks, when the tactical situation permits." Such persons include military religious personnel and religious personnel attached to the civilian medical service or to the civil defence service.³²⁷

322. The Military Manual of the Netherlands states that "religious personnel must be respected and protected" and stresses that, according to the Netherlands, "humanist counsellors belong to religious personnel".³²⁸ With respect to non-international armed conflicts in particular, the manual states that "religious personnel must be respected and protected and must receive aid to fulfil their tasks".³²⁹

323. The Military Handbook of the Netherlands provides that "religious personnel enjoy the same protection as medical personnel".³³⁰

324. New Zealand's Military Manual states, with respect to non-international armed conflicts in particular, that "religious personnel are to be respected and protected at all times, receiving all available aid to enable them to fulfil their duties".³³¹

325. Nicaragua's Military Manual states, with respect to international armed conflicts, that assistance to the wounded, sick and shipwrecked includes a requirement of "respect for and protection of chaplains in all circumstances".³³²

326. Nigeria's Military Manual provides that "specifically protected persons . . . recognised as such must be respected. Specifically protected persons

³²³ Israel, *Manual on the Laws of War* (1998), p. 33.

³²⁴ Italy, *LOAC Elementary Rules Manual* (1991), §§ 7 and 12.

³²⁵ Kenya, *LOAC Manual* (1997), Précis No. 2, p. 15.

³²⁶ South Korea, *Operational Law Manual* (1996), p. 133.

³²⁷ Madagascar, *Military Manual* (1994), p. 75, § 6.

³²⁸ Netherlands, *Military Manual* (1993), p. VI-4.

³²⁹ Netherlands, *Military Manual* (1993), pp. XI-5 and XI-6.

³³⁰ Netherlands, *Military Handbook* (1995), p. 7-41.

³³¹ New Zealand, *Military Manual* (1992), § 1818(2).

³³² Nicaragua, *Military Manual* (1996), Article 14(5).

are to be allowed to fulfil their activity unless the tactical situation does not permit".³³³

327. Nigeria's Manual on the Laws of War provides that "military chaplains accompanying armed forces are also entitled to protection".³³⁴

328. South Africa's LOAC Manual provides that "religious personnel of the parties to a conflict, whether military or civilian, are to be respected and protected".³³⁵

329. Spain's LOAC Manual provides, with reference to Article 15 AP I, that "religious personnel, whether civilian or military, are governed by the same rules as medical personnel".³³⁶

330. Switzerland's Basic Military Manual states that "religious personnel must be respected and protected in all circumstances. They may not be attacked or prevented from carrying out their duties."³³⁷

331. Togo's Military Manual lists military and civilian religious personnel as specially protected persons.³³⁸ It states that "specially protected persons may not take a direct part in hostilities and must not be attacked. They shall be allowed to carry out their tasks as long as the tactical situation permits".³³⁹

332. The UK Military Manual states that "chaplains attached to armed forces enjoy all the privileges of the permanent medical personnel".³⁴⁰

333. The UK LOAC Manual provides that "chaplains attached to the armed forces have protected status and may not be attacked... They may not be armed."³⁴¹

334. The US Field Manual restates Article 24 GC I.³⁴²

335. The US Naval Handbook states that "chaplains attached to the armed forces are entitled to respect and protection".³⁴³

336. The Annotated Supplement to the US Naval Handbook notes that "the United States supports the principle in [Article 15 AP I] that civilian... religious personnel be respected and protected and not be made the objects of attack".³⁴⁴

337. The YPA Military Manual of the SFRY (FRY) provides that "military chaplains attached to the armed forces are equated to permanent medical personnel in terms of protection".³⁴⁵

³³³ Nigeria, *Military Manual* (1994), p. 45, § (f).

³³⁴ Nigeria, *Manual on the Laws of War* (undated), § 33.

³³⁵ South Africa, *LOAC Manual* (1996), § 46.

³³⁶ Spain, *LOAC Manual* (1996), Vol. I, § 4.5.b.(1)(b).

³³⁷ Switzerland, *Basic Military Manual* (1987), Article 78(1).

³³⁸ Togo, *Military Manual* (1996), Fascicule I, p. 14.

³³⁹ Togo, *Military Manual* (1996), Fascicule III, p. 5, see also Fascicule II, p. 8.

³⁴⁰ UK, *Military Manual* (1958), § 346, footnote 1.

³⁴¹ UK, *LOAC Manual* (1981), Section 6, p. 24, § 13.

³⁴² US, *Field Manual* (1956), § 67.

³⁴³ US, *Naval Handbook* (1995), § 11.5.

³⁴⁴ US, *Annotated Supplement to the Naval Handbook* (1997), § 11.5, footnote 31.

³⁴⁵ SFRY (FRY), *YPA Military Manual* (1988), § 177.

National Legislation

- 338.** Argentina's Draft Code of Military Justice punishes any soldier who "uses violence against . . . religious personnel".³⁴⁶
- 339.** Bangladesh's International Crimes (Tribunal) Act states that the "violation of any humanitarian rules applicable in armed conflicts laid down in the Geneva Conventions of 1949" is a crime.³⁴⁷
- 340.** Under Croatia's Criminal Code, "killing, torture or inhuman treatment" of religious personnel is a war crime.³⁴⁸
- 341.** The Draft Amendments to the Penal Code of El Salvador punish "anyone who, during an international or non-international conflict, attacks protected persons", defined as including religious personnel.³⁴⁹
- 342.** Under Estonia's Penal Code, "a person who kills, tortures, causes health damage to or takes hostage . . . a minister of religion" commits a war crime.³⁵⁰
- 343.** Georgia's Criminal Code provides for the punishment of "wilful breaches of norms of international humanitarian law committed in an international or internal armed conflict . . . against . . . religious personnel".³⁵¹
- 344.** Ireland's Geneva Conventions Act as amended provides that any "minor breach" of the Geneva Conventions, including violations of Articles 24 GC I and 36 GC II, and of AP I, including violations of Article 15 AP I, as well as any "contravention" of AP II, including violations of Article 9 AP II, are punishable offences.³⁵²
- 345.** Italy's Law of War Decree as amended provides that chaplains attached to the armed forces must be respected and protected "provided they are not committing acts of hostility".³⁵³
- 346.** Nicaragua's Military Penal Code provides for the punishment of any soldier who "exercises violence against the personnel of . . . religious services, be they enemy or neutral, members of aid organizations and personnel affected to the services of [religious establishments]", provided that the protection due is not misused for hostile purposes.³⁵⁴
- 347.** Nicaragua's Draft Penal Code punishes "anyone who, during an international or non-international conflict, attacks protected persons", defined as including religious personnel.³⁵⁵
- 348.** Under Norway's Military Penal Code as amended, "anyone who contravenes or is accessory to the contravention of provisions relating to the

³⁴⁶ Argentina, *Draft Code of Military Justice* (1998), Article 292, introducing a new Article 876(3) in the *Code of Military Justice as amended* (1951).

³⁴⁷ Bangladesh, *International Crimes (Tribunal) Act* (1973), Section 3(2)(e).

³⁴⁸ Croatia, *Criminal Code* (1997), Article 159.

³⁴⁹ El Salvador, *Draft Amendments to the Penal Code* (1998), Article entitled "Ataque a personas protegidas".

³⁵⁰ Estonia, *Penal Code* (2001), § 102. ³⁵¹ Georgia, *Criminal Code* (1999), Article 411(2).

³⁵² Ireland, *Geneva Conventions Act as amended* (1962), Section 4(1) and (4).

³⁵³ Italy, *Law of War Decree as amended* (1938), Article 95.

³⁵⁴ Nicaragua, *Military Penal Code* (1996), Article 57(2).

³⁵⁵ Nicaragua, *Draft Penal Code* (1999), Article 449.

protection of persons or property laid down in . . . the Geneva Conventions of 12 August 1949 . . . [and in] the two additional protocols to these Conventions . . . is liable to imprisonment".³⁵⁶

349. Under Poland's Penal Code, religious personnel are protected.³⁵⁷

350. Under Slovenia's Penal Code, "slaughter, torture [or] inhuman treatment" of religious personnel is a war crime.³⁵⁸

351. Spain's Military Criminal Code provides for the punishment of any soldier who "exercises violence against the personnel of . . . religious services, be they enemy or neutral, members of aid organizations and personnel affected to the services of [religious establishments]", provided that the protection due is not misused for hostile purposes.³⁵⁹

352. Spain's Penal Code provides for the punishment of "anyone who should . . . exercise violence on . . . religious personnel".³⁶⁰

353. Tajikistan's Criminal Code, in the section on "Serious violations of international humanitarian law", provides for the punishment of "wilful breaches of norms of international humanitarian law committed in an international or non-international armed conflict, against . . . religious personnel".³⁶¹

354. Under the Penal Code as amended of the SFRY (FRY), "murder, torture [or] inhuman treatment" of religious personnel is a war crime.³⁶²

National Case-law

355. No practice was found.

Other National Practice

356. According to the Report on the Practice of China, "China is of the opinion that . . . religious personnel . . . shall be respected and protected from attacks".³⁶³

357. The Report on the Practice of Iraq refers to the protection afforded to religious personnel by the Geneva Conventions.³⁶⁴

358. According to the Report on the Practice of Israel, the IDF does not have a policy of targeting the religious personnel of its adversaries. The report adds that the implementation of this policy is subject to such personnel being clearly recognisable and not participating in hostile activities.³⁶⁵

359. At the CDDH, the Netherlands proposed an amendment to include a new paragraph in Article 15 of draft AP I to the effect that "persons, attached to civilian medical units, who are giving not religious but other spiritual help,

³⁵⁶ Norway, *Military Penal Code as amended* (1902), § 108.

³⁵⁷ Poland, *Penal Code* (1997), Article 123(1). ³⁵⁸ Slovenia, *Penal Code* (1994), Article 375.

³⁵⁹ Spain, *Military Criminal Code* (1985), Article 77(4).

³⁶⁰ Spain, *Penal Code* (1995), Article 612(2).

³⁶¹ Tajikistan, *Criminal Code* (1998), Article 403(2).

³⁶² SFRY (FRY), *Penal Code as amended* (1976), Article 143.

³⁶³ Report on the Practice of China, 1997, Chapter 2.7.

³⁶⁴ Report on the Practice of Iraq, 1998, Chapter 2.7.

³⁶⁵ Report on the Practice of Israel, 1997, Chapter 2.7, referring to *Law of War Booklet* (1986), p. 7.

shall be protected and respected".³⁶⁶ The proposal was rejected by 13 votes in favour, 6 against and 29 abstentions.³⁶⁷

360. Based on replies by army officers to a questionnaire, the Report on the Practice of Rwanda states that military religious personnel must be protected. According to the report, no distinction is made between international and non-international conflicts.³⁶⁸

361. In 1987, the Deputy Legal Adviser of the US Department of State affirmed that "we support the principle that medical and religious personnel must be respected and protected" as provided in Article 15 AP I.³⁶⁹

362. According to the Report on US Practice, it is the *opinio juris* of the US that medical and religious personnel are not to be knowingly attacked or unnecessarily prevented from performing their duties in either international or non-international armed conflicts.³⁷⁰

363. Order No. 579 issued in 1991 by the YPA Chief of Staff instructs YPA units to "apply all means to prevent any attempt of . . . mistreatment of . . . religious and medical personnel".³⁷¹

364. According to the Report on the Practice of Zimbabwe, Zimbabwe regards the protection of religious personnel from attack as being a rule of customary international law.³⁷²

III. Practice of International Organisations and Conferences

United Nations

365. No practice was found.

Other International Organisations

366. In 1980, in a draft resolution included in a report on the situation in Bolivia, the Parliamentary Assembly of the Council of Europe stated that it was appalled by the inhuman treatment inflicted by the military government on certain ecclesiastical figures.³⁷³

³⁶⁶ Netherlands, Proposal of amendment to Article 15 of draft AP I submitted to the CDDH, *Official Records*, Vol. III, CDDH/II/216, 13 February 1975, p. 74.

³⁶⁷ CDDH, *Official Records*, Vol. XI, CDDH/II/SR.19, 13 February 1975, p. 184, § 65.

³⁶⁸ Report on the Practice of Rwanda, 1997, Replies by army officers to a questionnaire, Chapter 2.7.

³⁶⁹ US, Remarks of Michael J. Matheson, Deputy Legal Adviser, US Department of State, The Sixth Annual American Red Cross-Washington College of Law Conference on International Humanitarian Law: A Workshop on Customary International Law and the 1977 Protocols Additional to the 1949 Geneva Conventions, *American University Journal of International Law and Policy*, Vol. 2, 1987, p. 423.

³⁷⁰ Report on US Practice, 1997, Chapter 2.7.

³⁷¹ SFRY (FRY), Chief of General Staff of the YPA, Political Department, Order No. 579, 14 October 1991, § 2.

³⁷² Report on the Practice of Zimbabwe, 1998, Chapter 2.7.

³⁷³ Council of Europe, Parliamentary Assembly, Report on the situation in Bolivia (General policy of the Council of Europe), Draft resolution, Doc. 4620, 29 September 1980, § 5.

International Conferences

367. The Final Declaration adopted by the International Conference for the Protection of War Victims in 1993 urged all States to “make every effort” to protect religious personnel.³⁷⁴

IV. Practice of International Judicial and Quasi-judicial Bodies

368. No practice was found.

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

369. In the light of the fact that AP II provides no definition of medical personnel, the ICRC Commentary on the Additional Protocols states that “we should therefore refer, both for medical personnel and for religious personnel, to the definitions of these terms given in Article 8 (Terminology) of Protocol I”.³⁷⁵

370. To fulfil its task of disseminating IHL, the ICRC has delegates around the world teaching armed and security forces that:

81. “Religious personnel” means military or civilian persons, such as chaplains engaged exclusively in their ministry and attached:

- a) to the armed forces;
- b) to civilian medical service;
- c) to civil defence.

The attachment of religious personnel can be temporary.

82. The law of war grants the same status to military and civilian religious personnel . . .

83. The provisions governing medical personnel also apply to religious personnel.

...

474. Specifically protected personnel . . . recognized as such must be respected.

475. Specifically protected personnel shall be allowed to fulfil their activity, unless the tactical situation does not permit . . . Their mission and genuine activity may be verified. Armed enemy personnel may be disarmed.³⁷⁶

371. At the CDDH, the ICRC stated that:

As in certain armies burial was carried out by religious personnel, and since their performance of that duty was in accordance with the Geneva Conventions, that personnel must be covered and protected by the Conventions and the Protocols, in the same way as any other medical and religious personnel.³⁷⁷

³⁷⁴ International Conference for the Protection of War Victims, Geneva, 30 August–1 September 1993, Final Declaration, § II (9), *ILM*, Vol. 33, 1994, p. 301.

³⁷⁵ Yves Sandoz *et al.* (eds.), *Commentary on the Additional Protocols*, ICRC, Geneva, 1987, § 4663.

³⁷⁶ Frédéric de Mulinen, *Handbook on the Law of War for Armed Forces*, ICRC, Geneva, 1987, §§ 81–83 and 474–475.

³⁷⁷ ICRC, Statement at the CDDH, *Official Records*, Vol. XI, CDDH/II/SR.16, 6 February 1975, pp. 120–121, § 14.

372. In 1978, in a letter to a National Society, the ICRC stated that religious personnel attached to the armed forces are among those persons which “must be respected and protected in all circumstances”.³⁷⁸

373. In 1994, in a Memorandum on Respect for International Humanitarian Law in Angola, the ICRC stated that “religious personnel . . . shall be protected and respected”.³⁷⁹

VI. Other Practice

374. In 1980, an armed opposition group agreed to be bound by the obligation to protect medical personnel and objects displaying the red cross emblem.³⁸⁰ In 1983, it told the ICRC that it had issued orders to its forces not to direct attacks against religious and medical personnel and objects.³⁸¹ It described the kidnappings of a priest and a doctor as “errors”.³⁸²

375. Rule A5 of the Rules of International Humanitarian Law Governing the Conduct of Hostilities in Non-international Armed Conflicts, adopted in 1990 by the Council of the IIHL, provides that “the obligation to respect and protect . . . religious personnel . . . in the conduct of military operations is a general rule applicable in non-international armed conflicts”.³⁸³

376. The Declaration of Minimum Humanitarian Standards, adopted by an expert meeting convened by the Institute for Human Rights of Åbo Akademi University in Turku/Åbo, Finland in 1990, states that “religious personnel shall be respected and protected and shall be granted all available help for the performance of their duties”.³⁸⁴

D. Medical Units

Respect for and protection of medical units

I. Treaties and Other Instruments

Treaties

377. Article 27 of the 1899 HR provides that:

In sieges and bombardments all necessary steps should be taken to spare as far as possible . . . hospitals, and places where the sick and wounded are collected, provided they are not used at the same time for military purposes. The besieged should

³⁷⁸ ICRC archive document.

³⁷⁹ ICRC, Memorandum on Respect for International Humanitarian Law in Angola, 8 June 1994, § III, *IRRC*, No. 320, 1997, p. 504.

³⁸⁰ ICRC archive document. ³⁸¹ ICRC archive document. ³⁸² ICRC archive document.

³⁸³ IIHL, Rules of International Humanitarian Law Governing the Conduct of Hostilities in Non-international Armed Conflicts, Rule A5, *IRRC*, No. 278, 1990, p. 391.

³⁸⁴ Declaration of Minimum Humanitarian Standards, adopted by an expert meeting convened by the Institute for Human Rights, Åbo Akademi University, Turku/Åbo, 30 November–2 December 1990, Article 14(1), *IRRC*, No. 282, 1991, p. 335.

indicate these buildings or places by some particular and visible signs, which should previously be notified to the assailants.

378. Article 27 of the 1907 HR provides that:

In sieges and bombardments all necessary steps must be taken to spare, as far as possible, . . . hospitals, and places where the sick and wounded are collected, provided they are not being used at the time for military purposes. It is the duty of the besieged to indicate the presence of such buildings or places by distinctive and visible signs, which shall be notified to the enemy beforehand.

379. Article 19 GC I provides that:

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

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

380. Article 18 GC IV states that:

Civilian hospitals organized to give care to the wounded and sick, the infirm and maternity cases, may in no circumstances be the object of attack but shall at all times be respected and protected by the Parties to the conflict.

...

In view of the dangers to which hospitals may be exposed by being close to military objectives, it is recommended that such hospitals be situated as far as possible from such objectives.

381. Article 12 AP I provides that:

1. Medical units shall be respected and protected at all times and shall not be the object of attack.
2. Paragraph 1 shall apply to civilian medical units, provided that they:
 - a) belong to one of the Parties to the conflict;
 - b) are recognized and authorised by the competent authority of one of the Parties to the conflict; or
 - c) are authorized in conformity with Article 9, paragraph 2, of this Protocol or Article 27 of the First [Geneva] Convention.
3. The parties to the conflict are invited to notify each other of the location of their medical units. The absence of such notification shall not exempt any of the Parties from the obligation to comply with the provisions of paragraph 1.
4. Under no circumstances shall medical units be used in an attempt to shield military objectives from attack. Whenever possible, the Parties to the conflict shall ensure that medical units are so sited that attacks against military objectives do not imperil their safety.

Article 12 AP I was adopted by consensus.³⁸⁵

382. Under Article 11(1) AP II, “medical units and transports shall be respected and protected at all times and shall not be the object of attack”. Article 11 AP II was adopted by consensus.³⁸⁶

383. Upon signature of AP I and AP II, the US declared that “it is the understanding of the United States of America that the terms used in Part III of [AP II] which are the same as the terms defined in Article 8 [AP I] shall so far as relevant be construed in the same sense as those definitions”.³⁸⁷

384. Pursuant to Article 8(2)(b)(ix) and (e)(iv) of the 1998 ICC Statute, “intentionally directing attacks against . . . hospitals and places where the sick and the wounded are collected, provided they are not military objectives” constitutes a war crime in both international and non-international armed conflicts.

Other Instruments

385. Article 17 of the 1874 Brussels Declaration provides that:

In such cases [of bombardment of a defended town or fortress, agglomeration of dwellings, or village] all necessary steps must be taken to spare, as far as possible, . . . hospitals, and places where the sick and wounded are collected provided they are not being used at the time for military purposes.

It is the duty of the besieged to indicate the presence of such buildings by distinctive and visible signs to be communicated to the enemy beforehand.

386. Article 34 of the 1880 Oxford Manual provides that:

In case of bombardment all necessary steps must be taken to spare, if it can be done, . . . hospitals and places where the sick and wounded are gathered on the condition that they are not being utilized at the time, directly or indirectly, for defense.

It is the duty of the besieged to indicate the presence of such buildings by visible signs notified to the assailant beforehand.

387. Based on several documents supplying evidence of outrages committed during the First World War, the 1919 Report of the Commission on Responsibility lists violations of the laws and customs of war which should be subject to criminal prosecution, including the “deliberate bombardment of hospitals”.

388. Article 25 of the 1923 Hague Rules of Air Warfare provides that:

In bombardment by aircraft, all necessary steps must be taken by the commander to spare as far as possible . . . hospitals and other places where the sick and wounded are collected, provided such buildings, objects or places are not at the time used for military purposes. Such buildings, objects and places must by day be indicated by marks visible to aircraft . . .

³⁸⁵ CDDH, *Official Records*, Vol. VI, CDDH/SR.37, 24 May 1977, p. 69.

³⁸⁶ CDDH, *Official Records*, Vol. VII, CDDH/SR.51, 3 June 1977, p. 113.

³⁸⁷ US, Declaration made upon signature of AP I and AP II, 12 December 1977, § B.

A belligerent who desires to secure by night the protection for the hospitals and other privileged buildings above mentioned must take the necessary measures to render the special signs referred to sufficiently visible.

389. Paragraph 2.2 of the 1992 Agreement on the Application of IHL between the Parties to the Conflict in Bosnia and Herzegovina provides that “hospitals and other medical units . . . may in no circumstances be attacked, they shall at all times be respected and protected. They may not be used to shield combatants, military objectives or operations from attack”.

390. Section 9.3 of the 1999 UN Secretary-General’s Bulletin provides that “the United Nations force shall not attack medical establishments or mobile medical units. These shall at all times be respected and protected.”

391. The 2000 UNTAET Regulation No. 2000/15 establishes panels with exclusive jurisdiction over serious criminal offences, including war crimes. According to Section 6(1)(b)(ix) and (e)(iv), “intentionally directing attacks against . . . hospitals and places where the sick and the wounded are collected, provided they are not military objectives” constitutes a war crime in both international and non-international armed conflicts.

II. National Practice

Military Manuals

392. Argentina’s Law of War Manual (1969) restates Article 27 of the 1907 HR, Article 19 GC I and Article 18 GC IV.³⁸⁸

393. Argentina’s Law of War Manual (1989) states that “civilian and military medical units shall be respected and protected in all circumstances and may not be made the object of attack”.³⁸⁹ This rule is repeated with respect to non-international armed conflicts.³⁹⁰

394. Australia’s Commanders’ Guide provides that “civilian medical facilities . . . are not to be made the target of attack or unnecessarily destroyed. Military medical . . . facilities and equipment are also entitled to general protection under the Geneva Conventions.”³⁹¹

395. Australia’s Defence Force Manual states that “medical facilities on land . . . must be respected and protected at all times and must not be attacked . . . Medical units are establishments, whether military or civilian, organised for medical purposes, and may be fixed or mobile, permanent or temporary.”³⁹²

³⁸⁸ Argentina, *Law of War Manual* (1969), §§ 1.010, 3.007 and 4.004(1).

³⁸⁹ Argentina, *Law of War Manual* (1989), § 2.11, see also § 2.03.

³⁹⁰ Argentina, *Law of War Manual* (1989), § 7.07.

³⁹¹ Australia, *Commanders’ Guide* (1994), §§ 614–615.

³⁹² Australia, *Defence Force Manual* (1994), §§ 972–973, see also §§ 538 and 964.

396. Belgium's Law of War Manual provides that "medical units and material may not be made the object of attack under any circumstances, even when located near military buildings".³⁹³

397. Belgium's Teaching Manual for Soldiers states that:

The protection accorded to the wounded would be illusory if the civilian and military medical services which are specifically set up to treat them could be attacked. Hence, medical services, identified by the Red Cross (or Red Crescent in certain countries), are not considered combatants or military objectives even if they wear the enemy uniform or bear its insignia. Enemy medical . . . establishments and units may not be attacked.³⁹⁴

398. Benin's Military Manual lists the military and civilian medical services as specially protected objects.³⁹⁵ It states that "specially protected establishments shall remain untouched and no [armed] person may enter them. Their content and actual use may be checked through an inspection."³⁹⁶

399. Bosnia and Herzegovina's Military Instructions provides that "permanent medical facilities and mobile units of the medical services of armed forces must not be attacked, but have to be respected and protected".³⁹⁷

400. Burkina Faso's Disciplinary Regulations provides that, under the laws and customs of war, soldiers in combat must respect hospitals and places where the wounded and sick, civilian or military, are collected, as well as medical units, buildings and material.³⁹⁸

401. Cameroon's Disciplinary Regulations provides that, under the laws and customs of war, each soldier must respect medical units and establishments, as well as places where the wounded and sick, civilian or military, are collected.³⁹⁹

402. Canada's LOAC Manual provides that:

87. Medical units and establishments shall be respected, protected and shall not be the object of attack.
88. "Medical units" means establishments and other units, *whether military or civilian*, organized for medical duties. The term "medical units" is intended to have a broad meaning and includes:
 - a. hospitals and other similar units;
 - b. blood transfusion centres;
 - c. preventive medicine centres and institutes;
 - d. medical depots; and
 - e. the medical and pharmaceutical stores of such units.
89. Medical units may be fixed or mobile, permanent or temporary.⁴⁰⁰ [emphasis in original]

³⁹³ Belgium, *Law of War Manual* (1983), p. 48.

³⁹⁴ Belgium, *Teaching Manual for Soldiers* (undated), p. 17, see also p. 8.

³⁹⁵ Benin, *Military Manual* (1995), Fascicule I, p. 13.

³⁹⁶ Benin, *Military Manual* (1995), Fascicule II, p. 8.

³⁹⁷ Bosnia and Herzegovina, *Military Instructions* (1992), Item 15, § 1.

³⁹⁸ Burkina Faso, *Disciplinary Regulations* (1994), Article 35(1).

³⁹⁹ Cameroon, *Disciplinary Regulations* (1975), Article 31.

⁴⁰⁰ Canada, *LOAC Manual* (1999), p. 4-9, §§ 87-89, see also p. 9-4, §§ 35-36.

The manual further provides that “attacking a privileged or protected building” constitutes a war crime.⁴⁰¹ With respect to non-international armed conflicts in particular, the manual states that “medical units . . . are to be respected and protected at all times and not be made the object of attack”.⁴⁰²

403. Canada’s Code of Conduct provides that “fixed and mobile medical units and establishments shall not be attacked. . . . Such establishments and units should, if possible, be situated so that attacks against military objectives will not endanger them.”⁴⁰³

404. Colombia’s Circular on Fundamental Rules of IHL states that the protection due to the wounded and sick “also covers, as such, . . . medical establishments”.⁴⁰⁴

405. Colombia’s Basic Military Manual states that “attacks, misappropriation and destruction” of medical units constitutes a “grave breach”.⁴⁰⁵

406. Congo’s Disciplinary Regulations provides that hospitals, places where the wounded and sick, whether civilian or military, are collected and medical units, buildings and material must be respected.⁴⁰⁶

407. Croatia’s Commanders’ Manual states that “specifically protected objects may not become military objectives and may not be attacked”, including units of the military and civilian medical service.⁴⁰⁷

408. Croatia’s Soldiers’ Manual instructs soldiers to respect medical objects.⁴⁰⁸

409. The Military Manual of the Dominican Republic instructs soldiers not to attack medical establishments and field hospitals, but to protect them.⁴⁰⁹

410. Ecuador’s Naval Manual states that:

Medical establishments and units (both mobile and fixed), . . . and medical equipment and stores may not be deliberately bombarded. Belligerents are required to ensure that such medical facilities are, as far as possible, situated in such manner that attacks against military targets in the vicinity do not imperil their safety.⁴¹⁰

The manual qualifies “deliberate attack upon medical establishments” as a war crime.⁴¹¹

411. France’s Disciplinary Regulations as amended provides that soldiers in combat must respect and protect hospitals and places where the wounded and sick, civilian or military, are collected, as well as medical units, buildings and materials.⁴¹²

⁴⁰¹ Canada, *LOAC Manual* (1999), p. 16-4, § 21(d).

⁴⁰² Canada, *LOAC Manual* (1999), p. 17-4, § 34.

⁴⁰³ Canada, *Code of Conduct* (2001), Rule 10, § 4.

⁴⁰⁴ Colombia, *Circular on Fundamental Rules of IHL* (1992), § 3.

⁴⁰⁵ Colombia, *Basic Military Manual* (1995), p. 26, § 4, see also p. 29, § 2(a).

⁴⁰⁶ Congo, *Disciplinary Regulations* (1986), Article 32.

⁴⁰⁷ Croatia, *Commanders’ Manual* (1992), §§ 7 and 13, see also § 31 (search for information).

⁴⁰⁸ Croatia, *Soldiers’ Manual* (1992), pp. 2–3.

⁴⁰⁹ Dominican Republic, *Military Manual* (1980), p. 4.

⁴¹⁰ Ecuador, *Naval Manual* (1989), § 8.5.1.4. ⁴¹¹ Ecuador, *Naval Manual* (1989), § 6.2.5.

⁴¹² France, *Disciplinary Regulations as amended* (1975), Article 9 bis (1).

412. France's LOAC Summary Note provides that "the specific immunity granted to certain persons and objects by the law of war [including the material of military and civilian medical services] must be strictly observed . . . They may not be attacked."⁴¹³

413. France's LOAC Manual, with reference to Article 12 AP I, includes medical units among objects which are specifically protected by the law of armed conflict.⁴¹⁴

414. Germany's Military Manual provides that:

Fixed medical establishments . . . and mobile medical units of the medical service shall under no circumstances be attacked. Their unhampered employment shall be ensured at all times. As far as possible, medical establishments and units shall be sited or employed at an adequate distance to military objectives.⁴¹⁵

415. Germany's IHL Manual states that:

Fixed medical establishments . . . and mobile medical units of the medical service shall under no circumstance be attacked. Their unhampered employment shall be ensured at all times. As far as possible, medical establishments and units shall be sited or employed at an adequate distance to military objectives.⁴¹⁶

416. Hungary's Military Manual instructs soldiers to respect and protect medical establishments and equipment.⁴¹⁷

417. According to the Report on the Practice of Israel, Israel's Law of War Booklet grants protection to medical facilities as long as they are clearly recognisable as such and are not used for hostile activities.⁴¹⁸

418. Israel's Manual on the Laws of War states that:

The wounded are regarded as persons who have stopped taking part in the fighting and they shall not be harmed. Hence, it is prohibited to interfere with the administration of medical aid. This prohibition includes the ban on striking hospitals and medical facilities, whether civilian or military, as well as wounded-collection sites, medical warehouses, ambulances and so forth . . . In any event, it is absolutely forbidden to attack the enemy's medical facilities, military included, or the enemy's wounded.⁴¹⁹

419. Italy's IHL Manual states that "mobile medical units [and] fixed establishments of the medical service . . . must be respected and protected".⁴²⁰ It qualifies "attacks on medical units . . . which must be respected and protected at all times" as war crimes.⁴²¹

⁴¹³ France, *LOAC Summary Note* (1992), §§ 2.2 and 2.3.

⁴¹⁴ France, *LOAC Manual* (2001), p. 30.

⁴¹⁵ Germany, *Military Manual* (1992), § 612, see also § 616 (property of aid societies).

⁴¹⁶ Germany, *IHL Manual* (1996), § 503. ⁴¹⁷ Hungary, *Military Manual* (1992), p. 19.

⁴¹⁸ Report on the Practice of Israel, 1997, Chapter 2.7, referring to *Law of War Booklet* (1986), p. 7.

⁴¹⁹ Israel, *Manual on the Laws of War* (1998), p. 32.

⁴²⁰ Italy, *IHL Manual* (1991), Vol. I, § 14. ⁴²¹ Italy, *IHL Manual* (1991), Vol. I, § 85.

420. Italy's LOAC Elementary Rules Manual states that "specifically protected objects may not become military objectives and may not be attacked", including units of the military and civilian medical services.⁴²²

421. Kenya's LOAC Manual states that "protection from attack is given to fixed and mobile medical units . . . Medical units can be military or civilian and includes medical depots and pharmaceutical stores, as well as hospitals and treatment centres".⁴²³

422. South Korea's Operational Law Manual states that military medical facilities shall be protected.⁴²⁴

423. Lebanon's Army Regulations instructs combatants "to refrain from causing damage to hospitals and places where the sick and the wounded, civilian and military, are collected".⁴²⁵

424. Lebanon's Teaching Manual provides for respect for medical units.⁴²⁶

425. Madagascar's Military Manual states that "specifically protected objects may not become military objectives and may not be attacked", including units of the military and civilian medical services.⁴²⁷

426. Mali's Army Regulations provides that, under the laws and customs of war, soldiers in combat must respect hospitals and places where the wounded and sick, civilian or military, are collected, as well as medical units, buildings and material.⁴²⁸

427. Morocco's Disciplinary Regulations provides that, under the laws and customs of war, soldiers in combat must respect hospitals and places where the wounded and sick, civilian or military, are collected, as well as medical units, buildings and material.⁴²⁹

428. The Military Manual of the Netherlands states that:

Medical units must be respected and protected. They may not be attacked. Medical units may not be used under any circumstances to shield military objectives against attacks. The parties to the conflict must ensure, as far as possible, that medical units are located in such a way that attacks on military objectives do not endanger their safety.⁴³⁰

With respect to non-international armed conflicts in particular, the manual states that "medical units . . . must be respected and protected. They may not be attacked."⁴³¹

⁴²² Italy, *LOAC Elementary Rules Manual* (1991), §§ 7 and 13, see also § 31 (search for information).

⁴²³ Kenya, *LOAC Manual* (1997), Précis No. 3, p. 9.

⁴²⁴ South Korea, *Operational Law Manual* (1996), p. 133.

⁴²⁵ Lebanon, *Army Regulations* (1971), p. 7. ⁴²⁶ Lebanon, *Teaching Manual* (1997), p. 77.

⁴²⁷ Madagascar, *Military Manual* (1994), Fiche No. 2-O, § 7 and Fiche No. 3-O, § 13, see also Fiche No. 3-SO, § h and Fiche No. 2-T, § 27.

⁴²⁸ Mali, *Army Regulations* (1979), Article 36.

⁴²⁹ Morocco, *Disciplinary Regulations* (1974), Article 25(1).

⁴³⁰ Netherlands, *Military Manual* (1993), p. VI-5.

⁴³¹ Netherlands, *Military Manual* (1993), p. XI-6.

429. The Military Handbook of the Netherlands provides that “medical units (medical establishments, hospitals and first-aid posts) may not be attacked”.⁴³²

430. New Zealand’s Military Manual states that:

Medical establishments on land . . . must be respected and protected at all times and must not be attacked . . .

Medical units are establishments, whether military or civilian, organised for medical purposes, and may be fixed or mobile, permanent or temporary.

...

It is forbidden to attack civilian hospitals.⁴³³

The manual further states that “attacking a privileged or protected building” is a war crime recognised by the customary law of armed conflict.⁴³⁴ With respect to non-international armed conflicts in particular, the manual states that “medical units . . . are to be respected at all times and not made the object of attack”.⁴³⁵

431. Nicaragua’s Military Manual states, with respect to international armed conflicts, that assistance to the wounded, sick and shipwrecked includes a requirement of “respect for and protection of medical establishments and units” and “protection of civilian hospitals”.⁴³⁶

432. Nigeria’s Operational Code of Conduct provides that “hospitals . . . should not be tampered with or molested”.⁴³⁷

433. Nigeria’s Military Manual provides that “specifically protected . . . establishments . . . recognised as such must be respected. . . . Specifically protected establishments shall not be touched or entered, though they could be inspected to ascertain their contents and effective use”.⁴³⁸

434. Nigeria’s Manual on the Laws of War provides that “medical units and establishments are not to be attacked by the belligerents and must at all times be respected and protected. . . . Medical units and establishments must be located, if possible, in such places that attacks on military targets would not endanger their safety”.⁴³⁹ The manual qualifies “the bombardment of hospitals and other privileged buildings” as a war crime.⁴⁴⁰

435. Romania’s Soldiers’ Manual requires respect for medical units.⁴⁴¹

436. Russia’s Military Manual states that “attack, bombardment or destruction of medical facilities” is a prohibited method of warfare.⁴⁴² It further lists among the responsibilities of commanders in peacetime “to ensure that medical units,

⁴³² Netherlands, *Military Handbook* (1995), p. 7-40.

⁴³³ New Zealand, *Military Manual* (1992), §§ 1007(1) and (2) and 1109(1).

⁴³⁴ New Zealand, *Military Manual* (1992), 1703(5).

⁴³⁵ New Zealand, *Military Manual* (1992), § 1818(2).

⁴³⁶ Nicaragua, *Military Manual* (1996), Article 14(2) and (36).

⁴³⁷ Nigeria, *Operational Code of Conduct* (1967), § 4(d).

⁴³⁸ Nigeria, *Military Manual* (1994), p. 45, § (f).

⁴³⁹ Nigeria, *Manual on the Laws of War* (undated), § 36.

⁴⁴⁰ Nigeria, *Manual on the Laws of War* (undated), § 6.

⁴⁴¹ Romania, *Soldiers’ Manual* (1991), p. 32. ⁴⁴² Russia, *Military Manual* (1990), § 5(g).

establishments and facilities are located in such a way that their security will not be jeopardised during attacks against military objectives".⁴⁴³

437. Senegal's Disciplinary Regulations provides that soldiers in combat must respect and protect hospitals and places where the wounded and sick, civilian or military, are collected, as well as medical units, buildings and material.⁴⁴⁴

438. Senegal's IHL Manual states that "medical establishments (hospitals) must be protected and armed persons may not enter them. Their content and actual use may be checked through an inspection ordered by the person responsible for the maintenance of order."⁴⁴⁵

439. South Africa's LOAC Manual defines medical units in accordance with Article 8 AP I and states that "medical units shall at all times be respected and protected".⁴⁴⁶

440. Spain's LOAC Manual defines medical units in accordance with Article 8 AP I.⁴⁴⁷ The manual provides that "medical units must be respected and protected in all circumstances".⁴⁴⁸

441. Sweden's IHL Manual considers that Article 12 AP I on the protection of medical units has the status of customary law.⁴⁴⁹

442. Switzerland's Basic Military Manual provides that "military and civilian hospitals marked with the red cross emblem" must be respected and protected.⁴⁵⁰ The manual further provides that medical establishments and units of the medical service "shall be respected and protected. They shall not be attacked, nor harmed in any way, nor their functioning be impeded, even if they do not momentarily hold any wounded or sick".⁴⁵¹ The manual also states that "to the maximum extent possible, medical establishments shall be located at a safe distance from military objectives".⁴⁵² The manual qualifies the "intentional destruction of hospitals" as a war crime.⁴⁵³

443. Togo's Military Manual lists the military and civilian medical services as specially protected objects.⁴⁵⁴ It states that "specially protected establishments shall remain untouched and no [armed] person may enter them. Their content and actual use may be checked through an inspection."⁴⁵⁵

444. The UK Military Manual restates Article 27 of the 1907 HR.⁴⁵⁶ The manual notes, however, that:

⁴⁴³ Russia, *Military Manual* (1990), § 14.

⁴⁴⁴ Senegal, *Disciplinary Regulations* (1990), Article 34(1).

⁴⁴⁵ Senegal, *IHL Manual* (1999), p. 17.

⁴⁴⁶ South Africa, *LOAC Manual* (1996), §§ 57–59.

⁴⁴⁷ Spain, *LOAC Manual* (1996), Vol. I, § 4.5.b.(2)(b).

⁴⁴⁸ Spain, *LOAC Manual* (1996), Vol. I, §§ 9.2.b.(2).

⁴⁴⁹ Sweden, *IHL Manual* (1991), Section 2.2.3, p. 18.

⁴⁵⁰ Switzerland, *Basic Military Manual* (1987), Article 30(a).

⁴⁵¹ Switzerland, *Basic Military Manual* (1987), Article 82.

⁴⁵² Switzerland, *Basic Military Manual* (1987), Article 84.

⁴⁵³ Switzerland, *Basic Military Manual* (1987), Article 192, commentary.

⁴⁵⁴ Togo, *Military Manual* (1996), Fascicule I, p. 14.

⁴⁵⁵ Togo, *Military Manual* (1996), Fascicule II, p. 8.

⁴⁵⁶ UK, *Military Manual* (1958), §§ 290 and 300.

Accusations have frequently been made that the rule concerning immunity of hospitals has been deliberately disregarded during a siege. The complaints were often due to the fact that buildings used for medical purposes were scattered over the town and that they were thus liable to be struck by chance of erratic shots. It is therefore desirable that the sick and wounded should, if possible, be concentrated in one quarter, remote from the defences and the defending troops, or by arrangement with the besieger, in neutralised grounds.⁴⁵⁷

The manual further states that “it is forbidden to attack civilian hospitals”.⁴⁵⁸ It also states that “fixed medical establishments (hospitals) and mobile units of the medical service may in no circumstances be attacked. They must at all times be respected and protected.”⁴⁵⁹ The manual states that “in addition to the ‘grave breaches’ of the 1949 [Geneva] Conventions . . . the following are examples of punishable violations of the laws of war, or war crimes: . . . (o) bombardment of hospitals and other privileged buildings”.⁴⁶⁰

445. The UK LOAC Manual provides that “protection from attack is given to fixed and mobile medical units . . . Medical units can be military or civilian and include medical depots and pharmaceutical stores as well as hospitals and treatment centres.”⁴⁶¹

446. The US Field Manual restates Article 19 GC I.⁴⁶²

447. The US Air Force Pamphlet refers to the protection of medical units as set out in GC I.⁴⁶³ The manual further provides that “in addition to grave breaches of the Geneva Conventions of 1949, the following acts are representative of situations involving individual criminal responsibility: (1) deliberate attack on . . . medical establishments [and] units”.⁴⁶⁴

448. The US Air Force Commander’s Handbook provides that hospitals and aid stations “should not be deliberately attacked, fired upon, or unnecessarily prevented from performing their medical duties”.⁴⁶⁵

449. The US Instructor’s Guide states that “in addition to the grave breaches of the Geneva Conventions, the following acts are further examples of war crimes: . . . firing on facilities which are undefended and without military significance such as . . . hospitals”.⁴⁶⁶

450. The US Rules of Engagement for Operation Desert Storm state that “hospitals will be given special protection”.⁴⁶⁷

451. The US Naval Handbook states that:

Medical establishments and units (both mobile and fixed), . . . and medical equipment and stores may not be deliberately bombarded. Belligerents are required to

⁴⁵⁷ UK, *Military Manual* (1958), § 304.

⁴⁵⁸ UK, *Military Manual* (1958), § 30. ⁴⁵⁹ UK, *Military Manual* (1958), § 351.

⁴⁶⁰ UK, *Military Manual* (1958), § 626(o). ⁴⁶¹ UK, *LOAC Manual* (1981), Section 6, p. 23, § 8.

⁴⁶² US, *Field Manual* (1956), § 220(a). ⁴⁶³ US, *Air Force Pamphlet* (1976), § 12-2(b).

⁴⁶⁴ US, *Air Force Pamphlet* (1976), § 15-3(c)(1).

⁴⁶⁵ US, *Air Force Commander’s Handbook* (1980), § 3-2.

⁴⁶⁶ US, *Instructor’s Guide* (1985), p. 13.

⁴⁶⁷ US, *Rules of Engagement for Operation Desert Storm* (1991), § D.

ensure that such medical facilities are, as far as possible, situated in such manner that attacks against military targets in the vicinity do not imperil their safety.⁴⁶⁸

The manual qualifies “deliberate attack upon medical facilities” as a war crime.⁴⁶⁹

452. The YPA Military Manual of the SFRY (FRY) restates Article 19 GC I and extends the protection of military medical units to civilian medical establishments.⁴⁷⁰

National Legislation

453. Argentina’s Code of Military Justice as amended punishes “whoever attacks, without any necessity, hospitals . . . which are marked by the appropriate distinctive signs”.⁴⁷¹

454. Argentina’s Draft Code of Military Justice punishes any soldier who “wilfully violates the protection due to medical units . . . which are properly marked”.⁴⁷²

455. Australia’s War Crimes Act considers “any war crime within the meaning of the instrument of appointment of the Board of Inquiry [set up to investigate war crimes committed by enemy subjects]” as a war crime, including the deliberate bombardment of hospitals.⁴⁷³

456. Australia’s ICC (Consequential Amendments) Act incorporates in the Criminal Code the war crimes defined in the 1998 ICC Statute, including “attacking protected objects . . . [which] are not military objectives, [including] . . . hospitals or places where the sick and wounded are collected” in both international and non-international armed conflicts.⁴⁷⁴

457. Azerbaijan’s Criminal Code provides that “directing attacks . . . against hospitals, which are easily seen and distinguishable, and against places where the sick and wounded are collected, without any military necessity” constitutes a war crime in international and non-international armed conflicts.⁴⁷⁵

458. Bangladesh’s International Crimes (Tribunal) Act states that the “violation of any humanitarian rules applicable in armed conflicts laid down in the Geneva Conventions of 1949” is a crime.⁴⁷⁶

459. Under the Criminal Code of the Federation of Bosnia and Herzegovina, it is a war crime to order that “an attack be launched against objects specifically

⁴⁶⁸ US, *Naval Handbook* (1995), § 8.5.1.4. ⁴⁶⁹ US, *Naval Handbook* (1995), § 6.2.5.

⁴⁷⁰ SFRY (FRY), *YPA Military Manual* (1988), §§ 169 and 195, see also § 82 (conduct of hostilities).

⁴⁷¹ Argentina, *Code of Military Justice as amended* (1951), Article 746(2).

⁴⁷² Argentina, *Draft Code of Military Justice* (1998), Article 292, introducing a new Article 876(2) in the *Code of Military Justice as amended* (1951).

⁴⁷³ Australia, *War Crimes Act* (1945), Section 3.

⁴⁷⁴ Australia, *ICC (Consequential Amendments) Act* (2002), Schedule 1, §§ 268.46 and 268.80.

⁴⁷⁵ Azerbaijan, *Criminal Code* (1999), Article 116(8).

⁴⁷⁶ Bangladesh, *International Crimes (Tribunal) Act* (1973), Section 3(2)(e).

protected by international law” or to carry out such an attack.⁴⁷⁷ The Criminal Code of the Republika Srpska contains the same provision.⁴⁷⁸

460. Under Burundi’s Draft Law on Genocide, Crimes against Humanity and War Crimes, “intentionally directing attacks against . . . hospitals and places where the sick and wounded are collected, provided they are not military objectives” is a war crime in both international and non-international armed conflicts.⁴⁷⁹

461. Canada’s Crimes against Humanity and War Crimes Act provides that the war crimes defined in Article 8(2) of the 1998 ICC Statute are “crimes according to customary international law” and, as such, indictable offences under the Act.⁴⁸⁰

462. Chile’s Code of Military Justice provides for a prison sentence for “anyone who, contrary to instructions received, unnecessarily and maliciously attacks hospitals or poorhouses which are marked with signs employed for that purpose”.⁴⁸¹

463. China’s Law Governing the Trial of War Criminals provides that “deliberate bombing of hospitals” constitutes a war crime.⁴⁸²

464. Colombia’s Military Penal Code provides a prison sentence for “anyone who during military service and without proper cause . . . attacks hospitals or poorhouses which are properly marked”.⁴⁸³

465. Congo’s Genocide, War Crimes and Crimes against Humanity Act defines war crimes with reference to the categories of crimes set out in Article 8 of the 1998 ICC Statute.⁴⁸⁴

466. Under Croatia’s Criminal Code, “the launching of an attack against objects under special protection of international law” is a war crime.⁴⁸⁵

467. Under Cuba’s Penal Code, failure to respect the protected status under international law of establishments and other facilities organised for the wounded and the sick is an offence.⁴⁸⁶

468. The Code of Military Justice of the Dominican Republic provides for the punishment of any soldier who, “without necessity, attacks hospitals . . . which are recognizable by the signs established for such cases”.⁴⁸⁷

469. El Salvador’s Code of Military Justice provides for the protection of medical establishments and units.⁴⁸⁸

⁴⁷⁷ Bosnia and Herzegovina, Federation, *Criminal Code* (1998), Article 154(2).

⁴⁷⁸ Bosnia and Herzegovina, Republika Srpska, *Criminal Code* (2000), Article 433(2).

⁴⁷⁹ Burundi, *Draft Law on Genocide, Crimes against Humanity and War Crimes* (2001), Article 4(B)(i) and (D)(d).

⁴⁸⁰ Canada, *Crimes against Humanity and War Crimes Act* (2000), Section 4(1) and (4).

⁴⁸¹ Chile, *Code of Military Justice* (1925), Article 261.

⁴⁸² China, *Law Governing the Trial of War Criminals* (1946), Article 3(10).

⁴⁸³ Colombia, *Military Penal Code* (1999), Article 174.

⁴⁸⁴ Congo, *Genocide, War Crimes and Crimes against Humanity Act* (1998), Article 4.

⁴⁸⁵ Croatia, *Criminal Code* (1997), Article 158(2). ⁴⁸⁶ Cuba, *Penal Code* (1987), Article 123.

⁴⁸⁷ Dominican Republic, *Code of Military Justice* (1953), Article 201(2).

⁴⁸⁸ El Salvador, *Code of Military Justice* (1934), Article 69.

470. The Draft Amendments to the Penal Code of El Salvador punishes “anyone who, in the context of an international or non-international armed conflict, attacks or destroys...field hospitals or hospitals, without having taken adequate measures of protection and without imperative military necessity”.⁴⁸⁹

471. Under Estonia’s Penal Code, “an attack against...a medical institution or unit” is a war crime.⁴⁹⁰

472. Ethiopia’s Penal Code punishes anyone for “crimes against the wounded, sick or shipwrecked” who organises, orders or engages in “the destruction, rendering unserviceable or appropriation of supplies, installations or stores belonging to the medical or first-aid services, in a manner which is unlawful, arbitrary or disproportionate to the requirements of strict military necessity”.⁴⁹¹

473. Georgia’s Criminal Code provides for the punishment of “wilful breaches of norms of international humanitarian law committed in an international or internal armed conflict...against...medical units”.⁴⁹²

474. Germany’s Law Introducing the International Crimes Code punishes anyone who, in connection with an international or non-international armed conflict, “carries out an attack against...medical units and transport designated with the distinctive emblems of the Geneva Conventions...in conformity with international humanitarian law”.⁴⁹³

475. Guatemala’s Penal Code criminalises violations of the duties under international law in respect of hospitals or other places sheltering the wounded and sick.⁴⁹⁴

476. Under Iraq’s Military Penal Code, attacks on medical units are an offence.⁴⁹⁵

477. Ireland’s Geneva Conventions Act as amended provides that any “minor breach” of the Geneva Conventions, including violations of Articles 19 GC I and 18 GC IV, and of AP I, including violations of Article 12 AP I, as well as any “contravention” of AP II, including violations of Article 11(1) AP II, are punishable offences.⁴⁹⁶

478. Italy’s Law of War Decree as amended states that the establishments and material of the military medical service must be “respected and protected”.⁴⁹⁷

479. Lithuania’s Criminal Code as amended prohibits attacks against military or civilian hospitals and health centres.⁴⁹⁸

⁴⁸⁹ El Salvador, *Draft Amendments to the Penal Code* (1998), Article entitled “Destrucción de bienes e instalaciones de carácter sanitario”.

⁴⁹⁰ Estonia, *Penal Code* (2001), § 106. ⁴⁹¹ Ethiopia, *Penal Code* (1957), Article 283(b).

⁴⁹² Georgia, *Criminal Code* (1999), Article 411(2).

⁴⁹³ Germany, *Law Introducing the International Crimes Code* (2002), Article 1, § 11(1)(2).

⁴⁹⁴ Guatemala, *Penal Code* (1973), Article 378.

⁴⁹⁵ Iraq, *Military Penal Code* (1940), Article 115(b).

⁴⁹⁶ Ireland, *Geneva Conventions Act as amended* (1962), Section 4(1) and (4).

⁴⁹⁷ Italy, *Law of War Decree as amended* (1938), Article 95.

⁴⁹⁸ Lithuania, *Criminal Code as amended* (1961), Article 337.

- 480.** Mexico's Code of Military Justice as amended punishes anyone who attacks hospitals without any military necessity.⁴⁹⁹
- 481.** The Definition of War Crimes Decree of the Netherlands qualifies the "deliberate bombardment of hospitals" as a war crime.⁵⁰⁰
- 482.** Under the International Crimes Act of the Netherlands, "intentionally directing attacks against . . . hospitals and places where the sick and wounded are collected, provided they are not military objectives" is a crime, whether committed in an international or a non-international armed conflict.⁵⁰¹
- 483.** Under New Zealand's International Crimes and ICC Act, war crimes include the crimes defined in Article 8(2)(b)(ix) and (e)(iv) of the 1998 ICC Statute.⁵⁰²
- 484.** Nicaragua's Military Penal Code provides for the punishment of any soldier who "knowingly violates the protection due to medical establishments, medical mobile units, . . . and medical material . . . which are recognizable by the established signs or the character of which can unequivocally be distinguished from a distance", provided that the protection due is not misused for hostile purposes.⁵⁰³
- 485.** Nicaragua's Draft Penal Code punishes anyone who, during an international or internal armed conflict, "without having previously taken appropriate measures of protection and without any justification based on imperative military necessity, attacks or destroys . . . field and other hospitals . . . or property and installations of a medical character which are duly marked with the conventional signs of the red cross or the red crescent".⁵⁰⁴
- 486.** Under Norway's Military Penal Code as amended, "anyone who contravenes or is accessory to the contravention of provisions relating to the protection of persons or property laid down in . . . the Geneva Conventions of 12 August 1949 . . . [and in] the two additional protocols to these Conventions . . . is liable to imprisonment".⁵⁰⁵
- 487.** Peru's Code of Military Justice provides for the punishment of soldiers who, in times of armed conflict, "without any necessity attack hospitals recognizable by the emblems established to that end".⁵⁰⁶
- 488.** The Articles of War of the Philippines prohibits and punishes attacks on medical buildings.⁵⁰⁷
- 489.** Poland's Penal Code provides for the punishment of "any person who, during hostilities, attacks . . . a hospital".⁵⁰⁸

⁴⁹⁹ Mexico, *Code of Military Justice as amended* (1933), Article 209.

⁵⁰⁰ Netherlands, *Definition of War Crimes Decree* (1946), Article 1.

⁵⁰¹ Netherlands, *International Crimes Act* (2003), Articles 5(5)(p) and 6(3)(d).

⁵⁰² New Zealand, *International Crimes and ICC Act* (2000), Section 11(2).

⁵⁰³ Nicaragua, *Military Penal Code* (1996), Article 57(1).

⁵⁰⁴ Nicaragua, *Draft Penal Code* (1999), Article 468.

⁵⁰⁵ Norway, *Military Penal Code as amended* (1902), § 108.

⁵⁰⁶ Peru, *Code of Military Justice* (1980), Article 95(2).

⁵⁰⁷ Philippines, *Articles of War* (1938), Article 79.

⁵⁰⁸ Poland, *Penal Code* (1997), Article 122(1).

490. Under Portugal's Penal Code, "whoever, in violation of international humanitarian law, in a situation of war, armed conflict or occupation, destroys or damages establishments used for humanitarian purposes, without any justification based on military necessity" shall be punished.⁵⁰⁹

491. Romania's Penal Code provides for the punishment of:

the total or partial destruction of objects marked with the regular distinctive emblem, such as:

- a) buildings [and/or] any construction . . . that serves as hospitals,
- ...
- c) medical equipment warehouses.⁵¹⁰

492. Under Slovenia's Penal Code, "an attack on buildings specially protected under international law" is a war crime.⁵¹¹

493. Spain's Military Criminal Code provides for the punishment of any soldier who "knowingly violates the protection due to medical establishments, mobile medical units, . . . and medical material . . . which are recognizable by the established signs or the character of which can unequivocally be distinguished from a distance", provided that the protection due is not misused for hostile purposes.⁵¹²

494. Sweden's Penal Code as amended provides that:

A person guilty of a serious violation of a treaty or agreement with a foreign power or an infraction of a generally recognised principle or tenet relating to international humanitarian law concerning armed conflicts shall be sentenced for a crime against international law to imprisonment for at most four years. Serious violations shall be understood to include:

- ...
- (5) initiating an attack against establishments or installations which enjoy special protection under international law.⁵¹³

495. Tajikistan's Criminal Code, in the section on "Serious violations of international humanitarian law", provides for the punishment of "wilful breaches of norms of international humanitarian law committed in an international or non-international armed conflict, against . . . medical units".⁵¹⁴

496. Under Trinidad and Tobago's Draft ICC Act, it is a punishable offence to commit a war crime as defined in Article 8(2)(b)(ix) and (e)(iv) of the 1998 ICC Statute.⁵¹⁵

497. Ukraine's Criminal Code provides for the protection of medical establishments and units.⁵¹⁶

⁵⁰⁹ Poland, *Penal Code* (1997), Article 122(1).

⁵¹⁰ Romania, *Penal Code* (1968), Article 359.

⁵¹¹ Slovenia, *Penal Code* (1994), Article 374(2).

⁵¹² Spain, *Military Criminal Code* (1985), Article 77(3).

⁵¹³ Sweden, *Penal Code as amended* (1962), Chapter 22, § 6.

⁵¹⁴ Tajikistan, *Criminal Code* (1998), Article 403(2).

⁵¹⁵ Trinidad and Tobago, *Draft ICC Act* (1999), Section 5(1)(a).

⁵¹⁶ Ukraine, *Criminal Code* (2001), Article 414.

498. Under the UK ICC Act, it is a punishable offence to commit a war crime as defined in Article 8(2)(b)(ix) and (e)(iv) of the 1998 ICC Statute.⁵¹⁷

499. Under the US War Crimes Act as amended, violations of Article 27 of the 1907 HR are war crimes.⁵¹⁸

500. Uruguay's Military Penal Code as amended punishes military personnel, *equiparados* and even persons unconnected with the armed forces "for unjustified attacks on hospitals and asylums".⁵¹⁹

501. Venezuela's Code of Military Justice as amended provides for the punishment of "burning, destroying or attacking hospitals on land and on sea".⁵²⁰

502. Under the Penal Code as amended of the SFRY (FRY), "the launching of an attack on facilities that are specifically protected under international law" is a war crime.⁵²¹

National Case-law

503. No practice was found.

Other National Practice

504. According to the Report on the Practice of Angola, few violations of the rules found in AP I and AP II affording protection to the wounded and the sick were recorded in the conflict in Angola between 1975 and 1992. However, after the 1992 election and the resumption of hostilities, attacks on medical installations were more frequent. On the basis of eye-witness accounts, the report provides the following examples: the UNITA hospital in Luanda was attacked by government forces and the hospitals of Capanda and Lualaba were attacked by UNITA in 1992.⁵²²

505. In 1993, during a debate in the UN Security Council on the situation in the former Yugoslavia, Argentina stated that "the deliberate attacks on . . . hospitals" could not go on with impunity.⁵²³

506. In 1994, during a debate in the UN Security Council on the situation in the former Yugoslavia, Canada stated that:

The crimes committed in Goražde and elsewhere in Bosnia must not go unpunished. Those responsible for deliberate attacks on . . . hospitals . . . in violation of all the norms of international law, must be made to answer for their actions before the International Tribunal created for the purpose.⁵²⁴

⁵¹⁷ UK, *ICC Act* (2001), Sections 50(1) and 51(1) (England and Wales) and Section 58(1) (Northern Ireland).

⁵¹⁸ US, *War Crimes Act as amended* (1996), Section 2441(c)(2).

⁵¹⁹ Uruguay, *Military Penal Code as amended* (1943), Article 58(12).

⁵²⁰ Venezuela, *Code of Military Justice as amended* (1998), Article 474(1).

⁵²¹ SFRY (FRY), *Penal Code as amended* (1976), Article 143.

⁵²² Report on the Practice of Angola, 1998, Chapter 2.1.

⁵²³ Argentina, Statement before the UN Security Council, UN Doc. S/PV.3203, 20 April 1993, p. 57.

⁵²⁴ Canada, Statement before the UN Security Council, UN Doc. S/PV.3370, 27 April 1994, p. 29.

507. At the International Conference of the Red Cross in 1952, China denounced the bombardment of hospitals during the Korean War.⁵²⁵

508. In 1972, in a statement before the General Conference of UNESCO concerning US attacks in Vietnam, China criticised the US because it allegedly had “wantonly bombarded Vietnamese cities and villages, seriously destroyed many schools and cultural and sanitary facilities, killed a large number of teachers, students, patients and medical personnel”.⁵²⁶

509. According to the Report on the Practice of China, “China is of the opinion that . . . medical objects shall be respected and protected from attacks”.⁵²⁷

510. In a note submitted to the ICRC in 1967, Egypt accused Israel of “bombardment of hospitals and ambulances in spite of the distinct markings on them” in violation of Article 19 GC I and Articles 18 and 21 GC IV and condemned it as a “flagrant violation of the elementary principle of humanity, and a serious breach of the laws of war and the Geneva Conventions of 1949”.⁵²⁸

511. In its written statement submitted to the ICJ in the *Nuclear Weapons case* in 1995, Egypt declared that “according to the First and Second Geneva Conventions of 1949, it is prohibited to attack military establishments and mobile medical units of the Medical Service . . . in any circumstances”.⁵²⁹ In a further statement, it stated that it was prohibited to attack civilian hospitals.⁵³⁰

512. In 1994, during a debate in the UN Security Council on the situation in the former Yugoslavia, Finland stated that:

Even though there might have been provocations by the Bosnian Government forces, the merciless onslaught by the Serb forces against the safe area [of Goražde] – with the deliberate targeting of hospitals . . . – cannot be justified. On the contrary, it must be strongly condemned. The Serbs must realize that what they are doing is a blatant violation of basic humanitarian law, and those responsible for these atrocities will be held personally accountable.⁵³¹

513. In 1994, during a debate in the UN Security Council concerning the situation in Rwanda, France stated that the international community was faced with a “humanitarian catastrophe” to which it “could not fail to react”, and referred in particular to the fact that hospitals had not been spared by attacks.⁵³²

⁵²⁵ China, Statement of 30 July 1952 at the 18th International Conference of the Red Cross, Toronto, 26 July–7 August 1952, reprinted in *Documents on Foreign Affairs of the People's Republic of China*, World Knowledge Press, Beijing, Vol. 2, pp. 82–83.

⁵²⁶ China, Statement before the General Conference of UNESCO, 25 October 1972, *Selected Documents of the Chinese Delegation to the United Nations*, The People's Press, Beijing, 1972, p. 239.

⁵²⁷ Report on the Practice of China, 1997, Chapter 2.7.

⁵²⁸ Egypt, Note to the International Committee of the Red Cross, 7 July 1967, annexed to Letter dated 17 July 1967 to the UN Secretary-General, UN Doc. S/8064, 17 July 1967, § 2(a).

⁵²⁹ Egypt, Written statement submitted to the ICJ, *Nuclear Weapons case*, June 1995, p. 13, § 21.

⁵³⁰ Egypt, Written comments on other written statements submitted to the ICJ, *Nuclear Weapons case*, September 1995, p. 21, § 50.

⁵³¹ Finland, Statement before the UN Security Council, UN Doc. S/PV.3367, 21 April 1994, p. 34.

⁵³² France, Statement before the UN Security Council, UN Doc. S/PV.3377, 16 May 1994, p. 11.

514. Under the instructions given to the French armed forces for the conduct of Opération Mistral, simulating a military operation under the right of self-defence or a mandate of the UN Security Council, medical units shall be protected.⁵³³

515. In 1992, during a debate in the UN Security Council on the situation in the former Yugoslavia, Hungary stated that “it goes without saying that the international community cannot disregard the responsibility of those who violate international humanitarian law, who order attacks on . . . hospitals . . . to mention only a few examples of criminal atrocities”.⁵³⁴

516. According to the Report on the Practice of Iran, the Iranian authorities condemned attacks by Iraqi troops on civilian objects such as hospitals during the Iran–Iraq War.⁵³⁵ The report notes in particular that, during the “war of the cities”, hospitals were targeted on many occasions, and that Iran condemned such attacks, regarding them as being contrary to international conventions.⁵³⁶

517. In 1987, in a letter to the UN Secretary-General, Iraq complained of the bombardment by Iran of the hospital of the town of Dohuk which it deemed “in complete contradiction to the fundamental principles of humanitarian international law”. Iraq stated that “the international community long ago decided that hospitals and other medical centres were objectives against which any military activity whatsoever was prohibited”.⁵³⁷

518. According to the Report on the Practice of Israel, the IDF does not have a policy of targeting the medical facilities of its adversaries. The report adds that the implementation of this policy is subject to such facilities being clearly recognisable and not used for hostile activities.⁵³⁸

519. During the conflict in Jordan in 1970, Jordanian armed forces reportedly attacked hospitals harbouring rebels. The allegation was denied. According to the Report on the Practice of Jordan, Jordan’s position was that the conflict was governed by national law rather than by international law.⁵³⁹ It further states that according to Jordanian practice, medical units are generally not placed near military objectives.⁵⁴⁰

520. According to the Report on the Practice of Nigeria, Nigerian practice recognises the protection of medical objects from attack. The report states that

⁵³³ France, État-major de la Force d’Action Rapide, Ordres pour l’Opération Mistral, 1995, Section 6, § 62.

⁵³⁴ Hungary, Statement before the UN Security Council, UN Doc. S/PV.3106, 13 August 1992, p. 32.

⁵³⁵ Report on the Practice of Iran, 1997, Chapter 1.3.

⁵³⁶ Report on the Practice of Iran, 1997, Chapter 4.2.

⁵³⁷ Iraq, Letter dated 19 November 1987 to the UN Secretary-General, UN Doc. S/19282, 19 November 1987.

⁵³⁸ Report on the Practice of Israel, 1997, Chapter 2.7, referring to *Law of War Booklet* (1986), p. 7.

⁵³⁹ Report on the Practice of Jordan, 1997, Chapter 1.4.

⁵⁴⁰ Report on the Practice of Jordan, 1997, Chapter 2.7.

"Nigerian *opinio juris* . . . that the protection from attack of medical objects is a part of customary international law".⁵⁴¹

521. In 1980, during a debate in the UN Security Council concerning an attack on UNIFIL headquarters in southern Lebanon, Norway strongly condemned "the deliberate shelling on the United Nations field hospital, which under international law enjoys special protection. The fact that that hospital serves the civilian population as well makes the matter even more serious."⁵⁴²

522. In response to the Report of the International Commission of Inquiry on Human Rights Violations in Rwanda, the Rwandan government demanded that the forces opposing the RPF put an end to attacks on civilian objects, including hospitals.⁵⁴³

523. In 1980, during a debate in the UN Security Council concerning an attack on UNIFIL headquarters in southern Lebanon, Saudi Arabia stated that it considered the shelling of the UNIFIL hospital "most abhorrent".⁵⁴⁴

524. At the CDDH, the UK welcomed "the humanitarian advances made in such fields as . . . the extension of protection to a wider group of medical units".⁵⁴⁵

525. In 1980, during a debate in the UN Security Council concerning an attack on UNIFIL headquarters in southern Lebanon, the US stated that "on 12 April UNIFIL headquarters and the hospital at Naqoura were heavily shelled by militia artillery . . . These attacks must be brought to an end, once and for all."⁵⁴⁶

526. In 1987, in submitting AP II to the US Senate for advice and consent to ratification, the US President expressed the view that the obligations in AP II were "no more than a restatement of the rules of conduct with which US military forces would almost certainly comply as a matter of national policy, constitutional and legal protections, and common decency".⁵⁴⁷

527. In 1987, the Deputy Legal Adviser of the US Department of State affirmed that "we also support the principle that medical units, including properly authorized civilian medical units, be respected and protected at all times and not be the object of attacks".⁵⁴⁸

⁵⁴¹ Report on the Practice of Nigeria, 1997, Chapter 2.7.

⁵⁴² Norway, Statement before the UN Security Council, UN Doc. S/PV.2215, 15 April 1980, § 7.

⁵⁴³ Rwanda, President of the Republic, Statement by The Government of Rwanda concerning the Final Report of the International Commission of Inquiry on Human Rights Violations in Rwanda since 1 October 1990, Kigali, 7 April 1993.

⁵⁴⁴ Saudi Arabia, Statement before the UN Security Council, UN Doc. S/PV.2218, 24 April 1980, § 46.

⁵⁴⁵ UK, Statement at the CDDH, *Official Records*, Vol. VII, CDDH/SR.58, 9 June 1977, p. 302, § 114.

⁵⁴⁶ US, Statement before the UN Security Council, UN Doc. S/PV.2218, 24 April 1980, § 77.

⁵⁴⁷ US, Message from the US President transmitting AP II to the US Senate for advice and consent to ratification, Treaty Doc. 100-2, 29 January 1987, Comment on Article 10.

⁵⁴⁸ US, Remarks of Michael J. Matheson, Deputy Legal Adviser, US Department of State, The Sixth Annual American Red Cross-Washington College of Law Conference on International Humanitarian Law: A Workshop on Customary International Law and the 1977 Protocols

528. In 1992, in its final report to Congress on the conduct of the Gulf War, the US Department of Defense stated that:

Contrary to the admonishment against such conduct contained in [GC I and GC IV] and certain principles of customary law codified in AP I, the Government of Iraq placed military assets (personnel, weapons, and equipment) . . . next to protected objects (mosques, medical facilities, . . .) in an effort to protect them from attack. For this purpose, military supplies were stored in mosques . . . and hospitals in Iraq and Kuwait.⁵⁴⁹

529. In 1991, in a diplomatic note to Iraq concerning operations in the Gulf War, the US stated that medical facilities and hospital ships must be respected and protected at all times.⁵⁵⁰

530. In 1993, during a debate in the UN Security Council on the situation in the former Yugoslavia, Venezuela stated that those who had committed war crimes and crimes against humanity, including “attacks upon hospitals”, had to be brought to justice.⁵⁵¹

531. The Report on the Practice of Zimbabwe regards the rule on the protection of medical objects as being part of customary international law.⁵⁵²

532. In 1994, during a non-international armed conflict, the government of a State issued orders to its troops to remove military equipment from the immediate vicinity of hospitals.⁵⁵³ In a letter to the ICRC in 1994, the Chief of Staff of the State’s armed forces recalled his commitment not to place military objectives near hospitals or medical facilities and agreed not to place military weapons within a 500-metre perimeter around the ICRC hospital. He specified, however, that if the hospital was attacked by the armed opposition group, he would be obliged to deploy armed forces in the area and that, therefore, the obligation applied only as long as circumstances permitted.⁵⁵⁴

III. Practice of International Organisations and Conferences

United Nations

533. In a resolution adopted in 1980, the UN Security Council condemned “the deliberate shelling of the headquarters of [UNIFIL] and more particularly the field hospital, which enjoys special protection under international law”.⁵⁵⁵

Additional to the 1949 Geneva Conventions, *American University Journal of International Law and Policy*, Vol. 2, 1987, p. 423.

⁵⁴⁹ US, Department of Defense, Final Report to Congress on the Conduct of the Persian Gulf War, 10 April 1992, Appendix O, The Role of the Law of War, *ILM*, Vol. 31, 1992, p. 624.

⁵⁵⁰ US, Department of State, Diplomatic note to Iraq, Washington, 19 January 1991, annexed to Letter dated 21 January 1991 to the President of the UN Security Council, UN Doc. S/22122, 21 January 1991, Annex I, p. 2.

⁵⁵¹ Venezuela, Statement before the UN Security Council, UN Doc. S/PV.3269, 24 August 1993, p. 44.

⁵⁵² Report on the Practice of Zimbabwe, 1998, Chapter 2.7. ⁵⁵³ ICRC archive document.

⁵⁵⁴ ICRC archive document. ⁵⁵⁵ UN Security Council, Res. 467, 21 April 1980, § 3.

534. In a resolution adopted in 1992, the UN Security Council expressed “grave alarm at continuing reports of widespread violations of international humanitarian law occurring within the territory of the former Yugoslavia and especially in Bosnia and Herzegovina including . . . deliberate attacks on . . . hospitals”. The Council strongly condemned such violations and demanded that “all parties and others concerned in the former Yugoslavia, and all military forces in Bosnia and Herzegovina, immediately cease and desist from all breaches of international humanitarian law”.⁵⁵⁶

535. In a resolution adopted in 1992 on the situation in Somalia, the UN Security Council expressed its “grave alarm at the continuing reports of widespread violations of international humanitarian law, including deliberate attacks on medical and relief facilities” and condemned all these violations.⁵⁵⁷

536. In a resolution adopted in 1999, the UN Security Council strongly condemned “attacks on objects protected under international law” and called on all parties “to put an end to such practices”.⁵⁵⁸

537. In a resolution adopted in 1984 on the situation of human rights in El Salvador, the UN General Assembly urged the government and the insurgent forces “to agree as early as possible to respect . . . all military hospitals, as required by the Geneva Conventions”.⁵⁵⁹

538. In a resolution adopted in 1985 on the situation of human rights in El Salvador, the UN General Assembly expressed its deep concern “at the fact that serious and numerous violations of human rights continue to take place in El Salvador owing above all to non-fulfilment of the humanitarian rules of war”. It therefore recommended that the Special Representative for El Salvador “continue to observe and to inform the General Assembly and the Commission on Human Rights of the extent to which the contending parties are respecting those rules, particularly as regards humanitarian treatment and respect for . . . military hospitals of either party”.⁵⁶⁰ This recommendation was reiterated in a subsequent resolution in 1986.⁵⁶¹

539. In a resolution adopted in 1983, the UN Commission on Human Rights deplored an attack by occupying troops in Kampuchea against border encampments, including a hospital, as a violation of fundamental principles of humanitarianism and of the UN Charter.⁵⁶²

540. In a resolution adopted in 1987 on the situation on human rights in El Salvador, the UN Commission on Human Rights requested that the Special Representative for El Salvador “continue to observe and inform the General Assembly and the Commission of the extent to which the contending parties

⁵⁵⁶ UN Security Council, Res. 771, 13 August 1992, preamble and §§ 2 and 3.

⁵⁵⁷ UN Security Council, Res. 794, 3 December 1992, preamble and § 5.

⁵⁵⁸ UN Security Council, Res. 1265, 17 September 1999, § 2.

⁵⁵⁹ UN General Assembly, Res. 39/119, 14 December 1984, § 9.

⁵⁶⁰ UN General Assembly, Res. 40/139, 13 December 1985, § 3.

⁵⁶¹ UN General Assembly, Res. 41/157, 4 December 1986, § 4.

⁵⁶² UN Commission on Human Rights, Res. 1983/5, 15 February 1983, § 2.

are respecting the humanitarian rules of war, particularly as regards respect for . . . military hospitals of either side".⁵⁶³

541. In a resolution adopted in 1985 on the situation in El Salvador, the UN Sub-Commission on Human Rights recommended that the Special Representative for El Salvador "inform the Commission on whether both parties accept their obligation to respect the Geneva Conventions and to what extent they are truly observing them, specially in those aspects which refer to the protection of . . . military hospitals".⁵⁶⁴

542. In a resolution adopted in 1992, the UN Commission on Human Rights stated that it was "appalled at the continuing reports of widespread, massive and grave violations of human rights within the territory of the former Yugoslavia and especially in Bosnia and Herzegovina", including reports of deliberate attacks on hospitals.⁵⁶⁵

543. In a resolution adopted in 1989, the UN Sub-Commission on Human Rights expressed regret that "the Government of El Salvador . . . has attacked military hospitals".⁵⁶⁶

544. In 1992, in a report on the situation of human rights in the territory of the former Yugoslavia, the Special Rapporteur of the UN Commission on Human Rights concluded that hospitals had been deliberately attacked, even though the red cross emblem was clearly visible or the building was itself clearly visible from the positions held by the Bosnian Serbs.⁵⁶⁷ In another report in 1993, he stated that such attacks constituted a fundamental violation of the laws of war.⁵⁶⁸ In a further report in 1994, the Special Rapporteur noted that attacks on Goražde included numerous and clear violations of human rights and IHL, including the deliberate targeting of highly vulnerable targets such as hospitals.⁵⁶⁹

545. In its report in 1993, the UN Commission on the Truth for El Salvador regarded an attack on an FMLN mobile hospital by a unit of the Salvadoran Air Force as a violation of IHL.⁵⁷⁰

546. In 1994, in its final report on grave breaches of the Geneva Conventions and other violations of IHL committed in the former Yugoslavia, the UN Commission of Experts Established pursuant to Security Council Resolution

⁵⁶³ UN Commission on Human Rights, Res. 1987/51, 11 March 1987, § 5.

⁵⁶⁴ UN Sub-Commission on Human Rights, Res. 1985/18, 29 August 1985, § 4.

⁵⁶⁵ UN Commission on Human Rights, Res. 1992/S-1/1, 14 August 1992, preamble.

⁵⁶⁶ UN Sub-Commission on Human Rights, Res. 1989/9, 31 August 1989, preamble.

⁵⁶⁷ UN Commission on Human Rights, Special Rapporteur on the Situation of Human Rights in the Former Yugoslavia, Report, UN Doc. E/CN.4/1992/S-1/9, 28 August 1992, § 17.

⁵⁶⁸ UN Commission on Human Rights, Special Rapporteur on the Situation of Human Rights in the Former Yugoslavia, Third periodic report, UN Doc. E/CN.4/1994/6, 26 August 1993, § 25; see also Fifth periodic report, UN Doc. E/CN.4/1994/47, 17 November 1993, §§ 162–164.

⁵⁶⁹ UN Commission on Human Rights, Special Rapporteur on the Situation of Human Rights in the Former Yugoslavia, Seventh periodic report, UN Doc. E/CN.4/1995/4, 10 June 1994, §§ 8–11.

⁵⁷⁰ UN Commission on the Truth for El Salvador, Report, UN Doc. S/25500, 1 April 1993, Annex, pp. 87–89.

780 (1992) stated that one of the most frequently targeted sites was the Kosovo hospital in Sarajevo. The Commission regarded the attacks against and destruction of protected targets, such as hospitals, as evidence of a consistent and repeated pattern of grave breaches of the Geneva Conventions and other violations of IHL.⁵⁷¹ The Commission noted that attacks against hospitals and locations marked with the red cross or red crescent emblem were used as a coercive means to remove the population from strategic areas and were linked to practices of ethnic cleansing.⁵⁷²

547. In 1994, the Special Committee to investigate Israeli practices affecting the human rights of the Palestinian people and other Arabs in the occupied territories, referring to eye-witnesses, reported the incursion by the Israeli army into a Red Crescent hospital. According to the information, rocket launchers were put on the roof of the building and windows were used to fire from. The Special Committee also reported raids on hospitals.⁵⁷³

Other International Organisations

548. In 1985, a report on a draft resolution of the Parliamentary Assembly of the Council of Europe on the situation in Afghanistan stated that it had been noted in a report of the Special Rapporteur of the UN Commission on Human Rights that Soviet forces systematically bombed civilian hospitals. The report regarded these incidents as "violations of human rights".⁵⁷⁴

549. In 1996, in its opinion on Russia's application for membership, the Committee on Legal Affairs and Human Rights of the Parliamentary Assembly of the Council of Europe stated that "the recent attack on the Kislyar Hospital in Dagestan, even though it ended relatively peacefully, was an act of terrorism on the Chechen side, which has to be condemned most strongly".⁵⁷⁵

550. In a statement issued in 1990 concerning Liberia, the 12 EC member States called on the parties, "in conformity with international law and the most basic humanitarian principles, to safeguard from violence... places of refuge such as... hospitals, where defenceless civilians sought shelter".⁵⁷⁶

⁵⁷¹ UN Commission of Experts Established pursuant to Security Council Resolution Res. 780 (1992), Final report, UN Doc. S/1994/674, 27 May 1994, §§ 189–194.

⁵⁷² UN Commission of Experts Established pursuant to Security Council Resolution Res. 780 (1992), Final report, UN Doc. S/1994/674, 27 May 1994, §§ 133–34.

⁵⁷³ Special Committee to investigate Israeli practices affecting the human rights of the Palestinian people and other Arabs of the occupied territories established pursuant to UN General Assembly Res. 2443 (XXIII), 26th report covering the period from 27 August 1993 to 26 August 1994, UN Doc. A/49/511, 18 October 1994, §§ 316–317 and 728.

⁵⁷⁴ Council of Europe, Parliamentary Assembly, Report on the deteriorating situation in Afghanistan, Doc. 5495, 15 November 1985, §§ 16–17 and Appendix 1.

⁵⁷⁵ Council of Europe, Parliamentary Assembly, Committee on Legal Affairs and Human Rights, Opinion on Russia's application for membership of the Council of Europe, Doc. 7463, 18 January 1996, § 50.

⁵⁷⁶ EC, Statement 90/294 concerning Liberia, *European Political Cooperation Documentation Bulletin*, Vol. 6, 1990, p. 295.

International Conferences

551. The Final Declaration adopted by the International Conference for the Protection of War Victims in 1993 urged all States to “make every effort” to protect medical objects and installations.⁵⁷⁷

IV. Practice of International Judicial and Quasi-judicial Bodies

552. No practice was found.

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

553. To fulfil its task of disseminating IHL, the ICRC has delegates around the world teaching armed and security forces that:

65. “Medical establishment” means any establishment assigned exclusively to medical purposes. The term comprises in particular “hospitals, similar units of any size, blood transfusion centres, preventive medicine centres and institutes, medical transportation locations, medical depots and the medical and pharmaceutical stores of such establishments.

...
78. The law of war grants the same status to civilian and military medical services...the provisions governing military medical...establishments...apply equally to the corresponding categories of the civilian medical service.⁵⁷⁸

Delegates also teach that:

Specifically protected... establishments... recognized as such must be respected.

...
Specifically protected establishments shall remain untouched and shall not be entered. Their contents and effective use may be verified by inspection.⁵⁷⁹

554. In 1978, in a letter to a National Society, the ICRC indicated that civilian and military medical units, including civilian and military hospitals, first-aid posts and infirmaries, and collecting-points for the wounded are among those objects which “must be respected and protected in all circumstances”.⁵⁸⁰

555. In a press release in 1978, the ICRC urgently appealed to the belligerents in Lebanon “to take measures immediately to ensure that hospitals and medical personnel may continue their work unimpeded and in safety”.⁵⁸¹

⁵⁷⁷ International Conference for the Protection of War Victims, Geneva, 30 August–1 September 1993, Final Declaration, § II (9), *ILM*, Vol. 33, 1994, p. 301.

⁵⁷⁸ Frédéric de Mulinen, *Handbook on the Law of War for Armed Forces*, ICRC, Geneva, 1987, §§ 65 and 78.

⁵⁷⁹ Frédéric de Mulinen, *Handbook on the Law of War for Armed Forces*, ICRC, Geneva, 1987, §§ 474 and 476.

⁵⁸⁰ ICRC archive document.

⁵⁸¹ ICRC, Press Release No. 1341, Lebanon: ICRC appeals for truce, 2 October 1978.

556. In a press release issued in 1991 in the context of the Gulf War, the ICRC reminded the parties to the conflict to respect and protect medical establishments at all times.⁵⁸²

557. In a joint statement adopted in 1991, the Yugoslav Red Cross and the Hungarian Red Cross expressed their deep concern about “the protracting internal conflict in Yugoslavia” and urged the parties to the conflict “to refrain from armed actions against . . . sanitary establishments”.⁵⁸³

558. On several occasions in 1991, the Croatian Red Cross denounced attacks on medical objects by the Yugoslav army.⁵⁸⁴

559. In a press release in 1992, the ICRC reminded the parties to the conflict in Nagorno-Karabakh of their obligation to respect and protect medical establishments.⁵⁸⁵

560. In a press release in 1992, the ICRC enjoined the parties to the conflict in Afghanistan “to respect medical personnel and establishments”.⁵⁸⁶

561. In a press release in 1992, the ICRC appealed to all parties to the conflict in Bosnia and Herzegovina to instruct all combatants in the field to respect medical establishments.⁵⁸⁷

562. In a press release in 1992, the ICRC urged the parties to the conflict in Tajikistan “to make certain that medical . . . establishments are respected and protected”.⁵⁸⁸

563. In a press release in 1993 issued in the context of the conflict in Afghanistan, the ICRC stated that:

Four rockets were fired at the Karte Seh surgical hospital in Kabul of 16 April. The International Committee of the Red Cross (ICRC) strongly condemns this and any other attack on the civilian population or medical facilities. Last Friday's attack, which was launched during visiting hours, killed three people and injured 44. The injured, most of whom were relatives of patients, were treated on the spot. Following the attack, the ICRC immediately contacted the parties concerned and reminded them of their obligation under international humanitarian law to spare civilians and civilian property, in particular all medical facilities.⁵⁸⁹

⁵⁸² ICRC, Press Release No. 1658, Gulf War: ICRC reminds States of their obligations, 17 January 1991.

⁵⁸³ Yugoslav Red Cross and Hungarian Red Cross, Joint Statement, Subotica, 25 October 1991.

⁵⁸⁴ Croatian Red Cross, Protest against violation of IHL rules, 24 September 1991; Appeal to stop attacks on hospitals and medical personnel by the Yugoslav forces, 22 November 1991.

⁵⁸⁵ ICRC, Press Release No. 1670, Nagorno-Karabakh: ICRC calls for respect for humanitarian law, 12 March 1992.

⁵⁸⁶ ICRC, Press Release No. 1712, Afghanistan: ICRC appeals for compliance with humanitarian rules, 5 May 1992; see also Press Release No. 1724, Kabul: ICRC urges respect for civilians as medical facilities struggle to cope, 20 July 1992 and Press Release No. 1726, Afghanistan: New ICRC appeal for compliance with humanitarian rules, 14 August 1992.

⁵⁸⁷ ICRC, Press Release No. 1725, Bosnia and Herzegovina: ICRC issues solemn appeal to all parties to conflict, 13 August 1992.

⁵⁸⁸ ICRC, Press Release, Tajikistan: ICRC urges respect for humanitarian rules, ICRC Dushanbe, 23 November 1992.

⁵⁸⁹ ICRC, Press Release No. 1745, ICRC protests attack on Kabul hospital, 19 April 1993.

564. In a communication to the press in 1993, the ICRC stated that it had appealed to all parties to the conflict in Georgia "to respect hospitals and medical personnel in all circumstances".⁵⁹⁰

565. In a declaration issued in 1994 in the context of the conflict between the Mexican government and the EZLN, the Mexican Red Cross stated that "protection must be extended to health personnel in general and, in particular, to Mexican Red Cross personnel as well as their equipment [and] installations".⁵⁹¹

566. In 1994, in a Memorandum on the Respect for International Humanitarian Law in Angola, the ICRC stated that "hospitals, ambulances and other medical units... shall be protected and respected... Hospitals and medical units... shall not be the object of attack."⁵⁹²

567. In a press release in 1994, the ICRC reminded the parties to the conflict in Afghanistan that medical establishments "are entitled to special protection and must be respected in all circumstances".⁵⁹³

568. In a press release issued in 1994 in the context of the conflict in Bosnia and Herzegovina, the ICRC stated that "special protection must be given to Bihac hospital, where more than a thousand casualties are being cared for at present. This means that... no attacks must be directed against the hospital itself or the hospital compound."⁵⁹⁴

569. In a press release in 1994, the ICRC enjoined the parties to the conflict in Chechnya "to ensure that medical... establishments... are respected and protected".⁵⁹⁵

570. In a press release in 1995, the ICRC expressed concern about an attack on a hospital in Burundi, which it regarded as a grave breach of IHL, and reminded the belligerents that all medical units must be respected.⁵⁹⁶

571. In a communication to the press in 1996, the ICRC called on the parties to the conflict in Afghanistan "to avoid damage to any structure sheltering wounded or displaced people".⁵⁹⁷

⁵⁹⁰ ICRC, Communication to the Press No. 93/32, Conflict in Georgia: ICRC action, 22 September 1993.

⁵⁹¹ Mexican Red Cross, Declaración de la Cruz Roja Mexicana en torno a los acontecimientos que se han presentado en el estado de Chiapas a partir del 1º enero de 1994, 3 January 1994, § 2(C).

⁵⁹² ICRC, Memorandum on Respect for International Humanitarian Law in Angola, 8 June 1994, § III, *IRRC*, No. 320, 1997, p. 504.

⁵⁹³ ICRC, Press Release No. 1764, Afghanistan: ICRC calls for respect for the civilian population, 8 February 1994; see also Press Release No. 1783, Afghanistan: ICRC urges respect for the civilian population, 16 August 1994.

⁵⁹⁴ ICRC, Press Release No. 1792, Bihac: Urgent ICRC Appeal, 26 November 1994.

⁵⁹⁵ ICRC, Press Release No. 1793, Chechnya: ICRC urges respect for humanitarian rules, 28 November 1994; see also Communication to the Press No. 96/10, Chechen conflict: ICRC appeal, 8 March 1996 and Communication to the Press No. 96/27, Russian Federation/Chechnya: ICRC calls on Federal Authorities to extend ultimatum, 21 August 1996.

⁵⁹⁶ ICRC, Press Release No. 50, Burundi: Grenade lands in hospital room, 13 December 1995.

⁵⁹⁷ ICRC, Communication to the Press No. 96/29, Afghanistan: civilian population trapped in fighting, 26 September 1996.

572. In a press release in 2000, following allegations that the Palestine Red Crescent Society had been targeted in shooting incidents, the ICRC stated that “any attacks . . . on medical installations . . . indeed constitute a grave violation of IHL”.⁵⁹⁸

573. In a communication to the press issued in 2000 in connection with the hostilities in the Near East, the ICRC called “on all those involved in the violence to respect . . . hospitals and other medical establishments”.⁵⁹⁹

VI. Other Practice

574. In 1980, an armed opposition group agreed to be bound by the obligation to protect medical personnel and objects displaying the red cross emblem.⁶⁰⁰ In 1983, it told the ICRC that it had issued orders to its combatants not to direct attacks against religious and medical personnel and objects.⁶⁰¹

575. Witness for Peace, an NGO that attempted to document abuses by the *contras* during the conflict in Nicaragua, reported several attacks on health facilities between 1987 and 1988. In 1988, in a report on human rights in Nicaragua, Americas Watch denounced these incidents, “because health workers, including those assisting the forces in the conflict, are the object of special protection under international humanitarian law”.⁶⁰² In a previous report in 1986, Americas Watch had already denounced the destruction of a health centre and the theft of medicine by *contras*, commenting that it was unclear whether the building was destroyed intentionally or not, as it was next to other defended buildings that the rebels were trying to take. The report concluded, however, that “even if the destruction of the health center was involuntary, the theft of medicine and the mistreatment of the health workers constitute violations of medical neutrality”.⁶⁰³

576. In 1989, in a report on violations of the laws of war in Angola, Africa Watch stated that the targeting of medical objects was unlawful.⁶⁰⁴

577. Rule A5 of the Rules of International Humanitarian Law Governing the Conduct of Hostilities in Non-international Armed Conflicts, adopted in 1990 by the Council of the IHL, provides that “the obligation to respect and protect . . . medical units . . . in the conduct of military operations is a general rule applicable in non-international armed conflicts”.⁶⁰⁵

⁵⁹⁸ ICRC, Press Release, Israel and Occupied Territories: Respect for medical personnel, ICRC Tel Aviv, 1 November 2000.

⁵⁹⁹ ICRC, Communication to the Press No. 00/42, ICRC appeal to all involved in violence in the Near East, 21 November 2000.

⁶⁰⁰ ICRC archive document. ⁶⁰¹ ICRC archive document.

⁶⁰² Americas Watch, *Human Rights in Nicaragua: August 1987–August 1988*, New York, August 1988, pp. 124–125.

⁶⁰³ Americas Watch, *Human Rights in Nicaragua: 1985–1986*, New York, March 1986, pp. 108–109.

⁶⁰⁴ Africa Watch, *Angola: Violations of the Laws of War by Both Sides*, New York, April 1989, pp. 147–148.

⁶⁰⁵ IHL, Rules of International Humanitarian Law Governing the Conduct of Hostilities in Non-international Armed Conflicts, Rule A5, *IRRC*, No. 278, 1990, p. 391.

578. In 1991, an armed opposition group denied allegations that a hospital had been shelled. It stated that it had been ordered not to shell the compound in which the field hospital was located at any time and reiterated its intention not only to spare the facility, but to facilitate its supply of food and medicine.⁶⁰⁶

579. In 1993, a faction of an armed opposition group insisted that it had issued orders to its troops not to fire in the vicinity of hospitals and not to enter hospitals with weapons.⁶⁰⁷

580. In 1993, the Minister of Health of a separatist entity complained of a flight breaking the sound barrier over a hospital marked with the red cross, which caused damage, and of the shelling of a hospital.⁶⁰⁸

581. In 1994, in a letter to the ICRC, an armed opposition group reminded the ICRC of the necessity of evacuating its medical facility. The letter pointed out that an officer of a UN peacekeeping mission operating in the country had acknowledged that it was not possible to ensure the security of a medical unit situated so close to a military camp. The officer had added that the belligerents' obligations amounted to refraining from deliberate attacks on the unit only. The ICRC should thus choose a site that was not as close to military installations.⁶⁰⁹

582. An officer of a UN peacekeeping force complained about the shelling of an ICRC hospital by an armed opposition group in 1994. He emphasised that there was no military advantage to be gained from shelling positions near the ICRC hospital, as there was nothing of significant military importance nearby, that any mistake on the part of the gunners was likely to have international repercussions, and that the patients that were killed were non-combatants.⁶¹⁰

583. In a communication to the press in 1994, MSF stated that the government of Afghanistan had insisted that the attack that damaged the ICRC hospital had in no way been directed at it and that no party to the conflict would deliberately target a facility displaying the red cross emblem. MSF denounced, however, the indiscriminate shelling of hospitals in Kabul. It considered the incidents to be grave violations of the law of war and the right of the victims to safe health care.⁶¹¹

Loss of protection from attack

I. Treaties and Other Instruments

Treaties

584. Article 27 of the 1899 HR provides that:

In sieges and bombardments all necessary steps should be taken to spare as far as possible . . . hospitals, and places where the sick and wounded are collected, provided they are not used at the same time for military purposes.

⁶⁰⁶ ICRC archive document. ⁶⁰⁷ ICRC archive document.

⁶⁰⁸ ICRC archive documents. ⁶⁰⁹ ICRC archive document. ⁶¹⁰ ICRC archive document.

⁶¹¹ MSF-Switzerland, Communication to the Press concerning attacks on hospitals facilities in Afghanistan, 6 January 1994.

585. Article 27 of the 1907 HR provides that:

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

586. Article 21 GC I provides that:

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

587. Article 22 GC I provides that:

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

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

588. Article 19 GC IV provides that:

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

The fact that sick or wounded members of the armed forces are nursed in these hospitals, or the presence of small arms and ammunition taken from such combatants and not yet been handed to the proper service, shall not be considered to be acts harmful to the enemy.

589. Article 13 AP I provides that:

1. The protection to which civilian medical units are entitled shall not cease unless they are used to commit, outside their humanitarian function, acts harmful to the enemy. Protection may, however, cease only after a warning has been given setting, whenever appropriate, a reasonable time-limit, and after such warning has remained unheeded.

2. The following shall not be considered as acts harmful to the enemy:
 - a. that the personnel of the unit are equipped with light individual weapons for their own defence or for that of the wounded and sick in their charge;
 - b. that the unit is guarded by a picket or by sentries or by an escort;
 - c. that small arms and ammunition taken from the wounded and sick, and not yet handed to the proper service, are found in the units;
 - d. that members of the armed forces or other combatants are in the unit for medical reasons.

Article 13 AP I was adopted by consensus.⁶¹²

590. Article 11(2) AP II provides that:

The protection to which medical units and transports are entitled shall not cease unless they are used to commit hostile acts, outside their humanitarian function. Protection may, however, cease only after a warning has been given, setting, whenever appropriate, a reasonable time-limit, and after such warning has remained unheeded.

Article 11 AP II was adopted by consensus.⁶¹³

Other Instruments

591. Article 37 of the 1880 Oxford Manual states that “the neutrality of ambulances and hospitals ceases if they are guarded by a military force; this does not preclude the presence of police guard”.

592. Paragraph 2.2 of the 1992 Agreement on the Application of IHL between the Parties to the Conflict in Bosnia and Herzegovina provides that the protection of hospitals and other medical units, including medical transportation, shall not cease “unless they are used to commit military acts. However, the protection may only cease after due warning and a reasonable time limit to cease military activities.”

593. Section 9.3 of the 1999 UN Secretary-General’s Bulletin provides that the United Nations force shall at all times respect and protect medical establishments or mobile medical units, “unless they are used, outside their humanitarian functions, to attack or otherwise commit harmful acts against the United Nations force”.

II. National Practice

Military Manuals

594. Argentina’s Law of War Manual (1969) restates Articles 21–22 GC I and 19 GC IV.⁶¹⁴

595. Argentina’s Law of War Manual (1989) states that:

⁶¹² CDDH, *Official Records*, Vol. VI, CDDH/SR.37, 24 May 1977, p. 70.

⁶¹³ CDDH, *Official Records*, Vol. VII, CDDH/SR.51, 3 June 1977, p. 113.

⁶¹⁴ Argentina, *Law of War Manual* (1969), §§ 3.007 and 4.004(2).

The protection of medical units ceases only when they are used to commit acts hostile to the enemy, for example, the accommodation of healthy soldiers and the installation of observation posts, etc. The protection ceases only after a warning, setting a reasonable time-limit, has remained unheeded.⁶¹⁵

596. Australia's Commanders' Guide provides that:

Military medical personnel, facilities and equipment are also entitled to general protection under the Geneva Conventions. However, they may lose this protection if they engage in acts harmful to the enemy. Before the protection of medical personnel and facilities is lost, a warning will normally be provided and reasonable time allowed to permit cessation of improper activities. In extreme cases, overriding military necessity may preclude such a warning.⁶¹⁶

597. Australia's Defence Force Manual states that:

Military medical personnel, facilities and equipment are also entitled to general protection. However, they may lose this protection if they engage in acts harmful to the enemy. Before the protection of medical personnel and facilities is lost, a warning will normally be provided and reasonable time allowed to permit cessation of improper activities. In extreme cases, overriding military necessity may preclude such a warning.⁶¹⁷

598. Belgium's Teaching Manual for Soldiers provides that:

The prohibition to attack hospitals remains applicable even if it is guarded by sentries or its personnel carry light individual weapons for their own defence or for the defence of the wounded in their charge, the establishment or material. In order to ensure that friendly medical units enjoy the same protection, their use in support of combat operations (medical personnel taking part in hostilities, ambulances transporting weapons or combatants, armed troops housed in a hospital, etc.) should be avoided.⁶¹⁸

599. Bosnia and Herzegovina's Military Instructions provides that:

Medical facilities and units lose their right to protection when they offer resistance in order not to fall under the enemy's authority. They are allowed to put up armed and other kinds of resistance to the adversary, which, in spite of the warnings, attacks them deliberately or directly.⁶¹⁹

600. Cameroon's Disciplinary Regulations provides that the protection of medical units and establishments, as well as places where the wounded and sick, civilian or military, are collected, is contingent on their not being used for military purposes.⁶²⁰

⁶¹⁵ Argentina, *Law of War Manual* (1989), § 2.12.

⁶¹⁶ Australia, *Commanders' Guide* (1994), § 615.

⁶¹⁷ Australia, *Defence Force Manual* (1994), § 964, see also § 972.

⁶¹⁸ Belgium, *Teaching Manual for Soldiers* (undated), pp. 18–19.

⁶¹⁹ Bosnia and Herzegovina, *Military Instructions* (1992), Item 15, § 2.

⁶²⁰ Cameroon, *Disciplinary Regulations* (1975), Article 31.

601. Canada's LOAC Manual provides that:

90. The protection to which medical units are entitled shall not cease unless they are used to commit, outside their humanitarian function, acts harmful to the enemy. Protection may only cease, however, after a warning has been given and after such warning has remained unheeded.
91. The following are not considered "acts harmful to the enemy" and do not deprive medical units of protection:
 - a. that the personnel of the medical unit are armed for their own defence or that of the wounded and sick in their charge;
 - b. that the medical unit is protected by a picket, sentries or escort;
 - c. that small arms and ammunition taken from the wounded and sick, and not yet handed to the proper service, are found in the medical unit;
 - d. that personnel and material of the military veterinary service are found in the medical unit, without forming an integral part thereof; and
 - e. that the humanitarian activities of medical units or of their personnel extend to the care of both civilian and military wounded and sick.⁶²¹

The manual further provides that "use of a privileged building for improper purposes" constitutes a war crime.⁶²² With respect to non-international armed conflicts in particular, the manual states that the protection of medical units and transports "shall only cease if they commit hostile acts outside their humanitarian function. In such circumstances, a warning must be given, and protection only ceases if such warning remains unheeded."⁶²³

602. Canada's Code of Conduct provides that:

The protection provided to medical establishments and units shall only cease if they are used for purposes outside their humanitarian duties which are harmful to your forces. Even then, the protection shall cease only after due warning, and after a reasonable time period thereafter if the warning goes unheeded.⁶²⁴

603. Ecuador's Naval Manual states that "if medical facilities are used for military purposes inconsistent with their humanitarian mission, and if appropriate warnings that continuation of such use will result in loss of protected status are unheeded, the facilities become subject to attack".⁶²⁵

604. France's LOAC Summary Note states that "the immunity of specifically protected objects may only be lifted under certain conditions and under the personal responsibility of the commander. Military necessity justifies only those measures which are indispensable for the accomplishment of the mission."⁶²⁶

605. Germany's Military Manual provides that:

613. [Fixed medical establishments, vehicles and mobile medical units of the medical service] shall not be used to commit acts harmful to the enemy.

...

⁶²¹ Canada, *LOAC Manual* (1999), p. 4-9, §§ 90-91, see also p. 9-4, § 35.

⁶²² Canada, *LOAC Manual* (1999), p. 16-4, § 21(c).

⁶²³ Canada, *LOAC Manual* (1999), p. 17-4, § 34.

⁶²⁴ Canada, *Code of Conduct* (2001), Rule 10, § 4, see also § 6.

⁶²⁵ Ecuador, *Naval Manual* (1989), § 8.5.1.4.

⁶²⁶ France, *LOAC Summary Note* (1992), § 2.4.

618. Medical establishments which contrary to their intended purpose are used to carry out acts harmful to the enemy may lose their protection after prior warning has been given.

619. To this effect, the following acts shall not be considered as hostile acts:

- that medical personnel use arms for their own protection, and that of the wounded and sick;
- that medical personnel and medical establishments are protected by sentries or an escort;
- that medical personnel are employed as sentries for the protection of their own medical establishments; and
- that war material taken from the wounded and sick is retained.⁶²⁷

606. Germany's IHL Manual states that fixed medical establishments, vehicles and mobile medical units of the medical service "shall not be used to commit, outside their humanitarian function, acts harmful to the enemy".⁶²⁸

607. Kenya's LOAC Manual states that medical units and medical transports may not be attacked but specifies that "they must not take part in hostilities. If they do, their protection might be forfeited."⁶²⁹

608. The Military Manual of the Netherlands restates the rules on loss of protection of medical units found in Article 13 AP I.⁶³⁰ With respect to non-international armed conflicts in particular, the manual states that the protection of medical units and transports "ceases when they are used, outside their humanitarian function, to commit hostile acts. But even then a warning must be given."⁶³¹

609. The Military Handbook of the Netherlands provides that "medical units may not be used to commit acts, outside their humanitarian function, which can be detrimental for the enemy (for example housing healthy soldiers or regular units)".⁶³²

610. New Zealand's Military Manual provides that the immunity granted to medical units and transports "ceases once they are used for purposes hostile to the adverse Party and outside their humanitarian purpose".⁶³³ The manual further states that:

Civilian hospitals continue to enjoy protection so long as they are not made use of to commit acts harmful to the enemy. In the event of such misuse, however, the hospitals remain protected until due warning, with a reasonable time limit, has been given and remained unheeded.⁶³⁴

⁶²⁷ Germany, *Military Manual* (1992), §§ 613 and 618–619.

⁶²⁸ Germany, *IHL Manual* (1996), § 503.

⁶²⁹ Kenya, *LOAC Manual* (1997), Précis No. 3, p. 9.

⁶³⁰ Netherlands, *Military Manual* (1993), p. VI-5.

⁶³¹ Netherlands, *Military Manual* (1993), p. XI-6.

⁶³² Netherlands, *Military Handbook* (1995), p. 7-40.

⁶³³ New Zealand, *Military Manual* (1992), § 1007(1).

⁶³⁴ New Zealand, *Military Manual* (1992), § 1109(2).

The manual further states that “use of a privileged building for improper purposes” is a war crime recognised by the customary law of armed conflict.⁶³⁵ With respect to non-international armed conflict in particular, the manual states that the protection of medical units and transports “shall cease only if they commit hostile acts outside their humanitarian function. In such circumstances, a warning must be given with, whenever appropriate, a time limit, and protection only ceases if the time limit is unheeded.”⁶³⁶

611. Nigeria’s Manual on the Laws of War provides that:

Medical establishments are not entitled to protection when not used for humanitarian purposes; however, protection may be withdrawn only after the warning. Protection is not forfeited merely because medical personnel are armed for self-defence or when there are sentries who guard the medical establishments or when the activities of the unit include treatment of civilian wounded and sick.⁶³⁷

The manual qualifies “improper use of a privileged building for military purposes” as a war crime.⁶³⁸

612. South Africa’s LOAC Manual provides that:

55. The obligation to respect the means of medical transport does not cease unless they are used to commit acts injurious to the enemy (e.g. transporting able-bodied soldiers or weapons).

...

59. A medical unit must not be defended against the enemy in the event of penetration by the enemy into the territory where it is located. Such defence would constitute a hostile act, causing the unit to forfeit its right to protection. Weapons emplacements alongside or near medical units may also cause a loss of the right to protection. Other examples are locating an observation post in the unit and storing ammunition in the unit. Emphasis is placed on medical personnel being neutral. Medical personnel should ensure that nothing and no one within the unit may be considered as harmful to the enemy and thus endanger the protection of the unit.⁶³⁹

613. Spain’s LOAC Manual states that “the protection of medical units ceases only when they are used to commit acts hostile to the enemy and after a warning setting a reasonable time-limit to stop the hostile activity has remained unheeded”. It refers to the acts enumerated in Article 22 GC I as those not considered hostile to the enemy.⁶⁴⁰

614. Switzerland’s Basic Military Manual provides that:

The protection afforded to medical establishments, vehicles, aircraft and units may only be terminated if they are used to commit acts harmful to the enemy. The protection may only be terminated after a warning and a reasonable delay. Examples of

⁶³⁵ New Zealand, *Military Manual* (1992), 1704(5).

⁶³⁶ New Zealand, *Military Manual* (1992), § 1818(2).

⁶³⁷ Nigeria, *Manual on the Laws of War* (undated), § 36.

⁶³⁸ Nigeria, *Manual on the Laws of War* (undated), § 6.

⁶³⁹ South Africa, *LOAC Manual* (1996), §§ 55 and 59.

⁶⁴⁰ Spain, *LOAC Manual* (1996), Vol. I, § 9.2.b.(4).

violations: installation of an observation post on a hospital roof or a firing position in a medical post, collecting able-bodied troops in a field hospital, using an ambulance to transport munitions. Examples of acts which do not terminate protection: the presence of armed guards in front of a hospital, of weapons and munitions taken from the wounded inside an ambulance, the fact that the personnel of the unit or establishment are armed and that they use their arms for their own defence or the defence of the wounded and the sick, the presence of civilian wounded and sick.⁶⁴¹

615. The UK Military Manual restates the rules on loss of protection of medical units and civilian hospitals set out in Articles 21–22 GC I and Article 19 GC IV respectively.⁶⁴² The manual further states that “in addition to the ‘grave breaches’ of the 1949 [Geneva] Conventions . . . the following are examples of punishable violations of the laws of war, or war crimes: . . . (h) improper use of a privileged building for military purposes”.⁶⁴³

616. The UK LOAC Manual states that medical units and transports “must not take part in hostilities and if they do it may result in protection being forfeited”.⁶⁴⁴

617. The US Field Manual restates Articles 21–22 GC I and notes that:

The presence of such arms and ammunition in a medical unit or establishment is not of itself cause for denying the protection to be accorded to such organisations under [GC I]. However, such arms and ammunition should be turned in as soon as practicable and, in any event, are subject to confiscation.⁶⁴⁵

The manual further states that “in addition to the ‘grave breaches’ of the Geneva Conventions of 1949, the following acts are representative of violations of the law of war (“war crimes”): . . . h. Improper use of privileged buildings for military purposes.”⁶⁴⁶

618. The US Air Force Pamphlet provides that “in addition to grave breaches of the Geneva Conventions of 1949, the following acts are representative of situations involving individual criminal responsibility: . . . (7) wilful and improper use of privileged buildings or localities for military purposes”.⁶⁴⁷

619. The US Air Force Commander’s Handbook states:

Hospitals . . . lose their special status under the Geneva Conventions if they commit, or are used to commit, acts harmful to the enemy outside their humanitarian functions.

For example, using a hospital as an observation post, or to store nonmedical military supplies, or firing at the enemy from an ambulance, would deprive the hospital and the ambulance of protected status. . . . Both the Geneva Conventions and the rules of engagement may impose additional restrictions on actually attacking medical activities that are improperly used. Thus, hospitals and mobile medical units

⁶⁴¹ Switzerland, *Basic Military Manual* (1987), Article 83.

⁶⁴² UK, *Military Manual* (1958), §§ 31 and 352. ⁶⁴³ UK, *Military Manual* (1958), § 626(h).

⁶⁴⁴ UK, *LOAC Manual* (1981), Section 6, p. 23, § 8.

⁶⁴⁵ US, *Field Manual* (1956), §§ 222–223.

⁶⁴⁶ US, *Field Manual* (1956), § 504(h). ⁶⁴⁷ US, *Air Force Pamphlet* (1976), § 15-3(c)(7).

may not be attacked until after a warning has been given setting, in proper cases, a reasonable time limit to correct past abuses.⁶⁴⁸

620. The US Instructor's Guide states that "in addition to the grave breaches of the Geneva Conventions, the following acts are further examples of war crimes: . . . improperly using privileged buildings for military purposes".⁶⁴⁹

621. The US Rules of Engagement for Operation Desert Storm state "do not engage hospitals unless the enemy uses the hospital to commits acts harmful to US forces, and then only after giving a warning and allowing a reasonable time to expire before engaging, if the tactical situation permits".⁶⁵⁰

622. The US Naval Handbook states that "if medical facilities are used for military purposes inconsistent with their humanitarian mission, and if appropriate warnings that continuation of such use will result in loss of protected status are unheeded, the facilities become subject to attack".⁶⁵¹

623. The YPA Military Manual of the SFRY (FRY) restates Articles 21–22 GC I.⁶⁵²

National Legislation

624. Bangladesh's International Crimes (Tribunal) Act states that the "violation of any humanitarian rules applicable in armed conflicts laid down in the Geneva Conventions of 1949" is a crime.⁶⁵³

625. Ireland's Geneva Conventions Act as amended provides that any "minor breach" of the Geneva Conventions, including violations of Articles 21–22 GC I and 19 GC IV, and of AP I, including violations of Article 13 AP I, as well as any "contravention" of AP II, including violations of Article 11(2) AP II, are punishable offences.⁶⁵⁴

626. Italy's Law of War Decree as amended provides that the protection of military medical services is contingent on the condition that "under no circumstances they may be used for purposes other than those intended".⁶⁵⁵

627. Under Norway's Military Penal Code as amended, "anyone who contravenes or is accessory to the contravention of provisions relating to the protection of persons or property laid down in . . . the Geneva Conventions of 12 August 1949 . . . [and in] the two additional protocols to these Conventions . . . is liable to imprisonment".⁶⁵⁶

⁶⁴⁸ US, *Air Force Commander's Handbook* (1980), § 3-2(d).

⁶⁴⁹ US, *Instructor's Guide* (1985), p. 13.

⁶⁵⁰ US, *Rules of Engagement for Operation Desert Storm* (1991), § D.

⁶⁵¹ US, *Naval Handbook* (1995), § 8.5.1.4.

⁶⁵² SFRY (FRY), *YPA Military Manual* (1988), §§ 170–171.

⁶⁵³ Bangladesh, *International Crimes (Tribunal) Act* (1973), Section 3(2)(e).

⁶⁵⁴ Ireland, *Geneva Conventions Act as amended* (1962), Section 4(1) and (4).

⁶⁵⁵ Italy, *Law of war Decree as amended* (1938), Article 45.

⁶⁵⁶ Norway, *Military Penal Code as amended* (1902), § 108.

National Case-law

628. No practice was found.

Other National Practice

629. The Report on the Practice of the Republika Srpska notes that attacks on medical objects during the conflict in Bosnia and Herzegovina were often abusively justified on the grounds that these objects were allegedly used for military purposes.⁶⁵⁷

630. In 1987, in submitting AP II to the US Senate for advice and consent to ratification, the US President expressed the view that the obligations in AP II are “no more than a restatement of the rules of conduct with which US military forces would almost certainly comply as a matter of national policy, constitutional and legal protections, and common decency”.⁶⁵⁸

631. Order No. 579 issued in 1991 by the YPA Chief of Staff provides that:

Any attack on . . . protected objects (. . . medical facilities, etc.) is strictly prohibited, except when these objects are used to launch attacks on YPA units. In such cases, the commanding officer in charge shall, before opening fire, warn the opposing side in an appropriate manner to stop fire and vacate the objects in question.⁶⁵⁹

632. In the context of an internal armed conflict, the government considered that the use of a hospital as a cover for military operations allowed the armed forces to treat it as a military objective in accordance with Article 52(2) API. Apparently the same position was adopted by the armed opposition group after the hospital’s purpose was modified to suit military aims.⁶⁶⁰ In 1993, the governmental reacted to a note verbale from the ICRC regarding the shelling of a hospital by governmental forces by explaining that the hospital was used as a cover for military operations and that the army would cease “reprisals” when these activities were halted.⁶⁶¹

*III. Practice of International Organisations and Conferences**United Nations*

633. In 1994, in a report on the situation of human rights in the territory of the former Yugoslavia, the Special Rapporteur of the UN Commission on Human Rights reported the deliberate targeting of the Goražde hospital. He noted allegations that the hospital was in fact a “military command centre” and that there were machine-gun emplacements on the roof and mortar launching equipment on the ground. According to international observers, these allegations were

⁶⁵⁷ Report on the Practice of Republika Srpska, 1997, Chapter 2.7.

⁶⁵⁸ US, Message from the US President transmitting AP II to the US Senate for advice and consent to ratification, Treaty Doc. 100-2, 29 January 1987, Comment on Article 10.

⁶⁵⁹ SFRY (FRY), Chief of General Staff of the YPA, Political Department, Order No. 579, 14 October 1991, § 3.

⁶⁶⁰ ICRC archive documents. ⁶⁶¹ ICRC archive document.

entirely unfounded and the hospital served no military function during the offensive.⁶⁶²

634. In 1994, in a report on the situation of human rights in Rwanda, the Special Rapporteur of the UN Commission on Human Rights noted that a shell had hit an ICRC hospital. Commenting on the FPR's justification of its action on the grounds that members of the FAR were sheltering behind the hospital in order to attack, the Special Rapporteur said that such an attitude could not but demoralise the survivors.⁶⁶³

Other International Organisations

635. No practice was found.

International Conferences

636. No practice was found.

IV. Practice of International Judicial and Quasi-judicial Bodies

637. No practice was found.

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

638. In its Commentary on the First Geneva Convention, the ICRC prepared a more precise definition of "acts harmful to the enemy", they being "acts the purpose or effect of which is to harm the adverse Party, by facilitating or impeding military operations".⁶⁶⁴ The Commentary on Article 21 GC I gives as examples: "The use of a hospital as a shelter for able-bodied combatants or fugitives, as an arms or ammunition dump, or as a military observation post; another would be the deliberate siting of a medical unit in a position where it would impede an enemy attack."⁶⁶⁵

639. To fulfil its task of disseminating IHL, the ICRC has delegates around the world teaching armed and security forces that:

The protection to which specifically protected persons and objects are entitled shall not cease unless they are used to commit acts harmful to the enemy. Protection may cease only after due warning has been given, and after such warning has remained unheeded. A reasonable time-limit shall be set.⁶⁶⁶

⁶⁶² UN Commission on Human Rights, Special Rapporteur on the Situation of Human Rights in the Former Yugoslavia, Seventh periodic report, UN Doc. E/CN.4/1995/4, 10 June 1994, § 9.

⁶⁶³ UN Commission on Human Rights, Special Rapporteur on the Situation of Human Rights in Rwanda, Report, UN Doc. E/CN.4/1995/7, 24 June 1994, § 31.

⁶⁶⁴ Jean S. Pictet (ed.), *Commentary on the First Geneva Convention*, ICRC, Geneva, 1952, p. 200.

⁶⁶⁵ Jean S. Pictet (ed.), *Commentary on the First Geneva Convention*, ICRC, Geneva, 1952, pp. 200–201.

⁶⁶⁶ Frédéric de Mulinen, *Handbook on the Law of War for Armed Forces*, ICRC, Geneva, 1987, § 224.

640. Following incidents in a hospital compound in 1990, the ICRC delegation requested that an armed opposition group respect the security regulations that had been agreed upon, that is, that no armed persons be allowed into the hospital compound and no vehicles gain admittance, other than those of the hospital, the local Red Cross and the ICRC.⁶⁶⁷

641. In 1993, the ICRC asked an armed opposition group to remove bunkers placed in front of a hospital.⁶⁶⁸

642. In a communication to the press in 1994, the ICRC requested that the parties to the internal conflict in Mexico remove all military units from the vicinity of first-aid posts.⁶⁶⁹

643. In 1994, in a Memorandum on the Respect for International Humanitarian Law in Angola, the ICRC stated that “hospitals and medical units and means of transport shall not be the object of attack; they shall be used exclusively to give or to facilitate care and shall not be used to prepare or commit hostile acts”.⁶⁷⁰

644. In a press release issued in 1994 in the context of the conflict in Bosnia and Herzegovina, the ICRC stated that special protection should be given to the Bihac hospital, which meant, *inter alia*, that the buildings and compound “must serve exclusively to provide medical care and must not be used to prepare for or engage in military acts [and] no arms must be deployed either inside the hospital, the hospital compound or in the immediate surroundings”.⁶⁷¹

VI. Other Practice

645. In 1982, in a meeting with the ICRC, an armed opposition group stated that if a governmental base were attacked, it could not guarantee respect for the emblem, given past abuse. The transport in ambulances of political personalities accompanied by armed guards and of soldiers and munitions was cited. The armed opposition group also argued that in the case of attack, soldiers would seek refuge in Red Cross buildings and there was no means to prevent such abuse.⁶⁷² At a later date, the armed opposition group told ICRC representatives that it would be impossible to spare an ICRC building from attack if it were located in an opponent’s stronghold, since combatants would inevitably seek refuge there.⁶⁷³

646. In 1985, an armed opposition group ordered its troops not to park military vehicles near warehouses, hospitals and other locations bearing the red cross emblem.⁶⁷⁴

⁶⁶⁷ ICRC archive document. ⁶⁶⁸ ICRC archive document.

⁶⁶⁹ ICRC, Communication to the Press No. 94/5, Mexico: ICRC ready to restore medical services in conflictual areas of Chiapas state, 5 February 1994.

⁶⁷⁰ ICRC, Memorandum on Respect for International Humanitarian Law in Angola, 8 June 1994, § III, *IRRC*, No. 320, 1997, p. 504

⁶⁷¹ ICRC, Press Release No. 1792, Bihac: Urgent ICRC Appeal, 26 November 1994.

⁶⁷² ICRC archive document. ⁶⁷³ ICRC archive document. ⁶⁷⁴ ICRC archive document.

647. In a report on the FMLN offensive in El Salvador in November 1989, the Instituto de Derechos Humanos de la Universidad Centroamericana stated that:

Available reports, on the other hand, indicate that the FMLN is responsible for the partial destruction of the regional hospital of Zacatecoluca. According to reports from the FMLN, the army had put an observation post on the roof of the building, thus converting it into a military objective.⁶⁷⁵

648. Peacekeeping forces raised the matter of the shelling of a hospital with the authorities of a party involved in a non-international armed conflict in 1993. The latter consistently replied that the opposing forces fired mortars from the vicinity of the hospital. Upon conclusive proof that it was so, a military observer expressed the view that “the crime of using the hospital as a screen to fire weapons is as inhumane and disgusting as actually firing on the hospital”.⁶⁷⁶

649. In 1993, during the conflict in Somalia, MSF denounced an attack on its compound by UNOSOM II as a violation of the principle of immunity of medical installations and personnel. MSF stated that:

The armed forces were aware of the nature and identity of the building. According to the latest reports available to MSF, this attack was generated by the suspect presence of a microphone boom at the back of a vehicle parked in front of the building. This microphone boom was apparently mistaken for a weapon. The nature of the retaliation appears out of all proportion to the nature of the threat.⁶⁷⁷

E. Medical Transports

Respect for and protection of medical transports

I. Treaties and Other Instruments

Treaties

650. Article 35 GC I provides that:

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

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

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

⁶⁷⁵ Instituto de Derechos Humanos de la Universidad Centroamericana, “Los derechos humanos y la ofensiva del 11 de noviembre de 1989”, *Estudios Centroamericanos*, Universidad Centroamericana José Simeón Cañas, Vol. XLV, Nos. 495–496, January–February 1990, p. 65.

⁶⁷⁶ ICRC archive document.

⁶⁷⁷ MSF, Communication on the violations of humanitarian law in Somalia during UNOSOM operations, 21 July 1993, § 1(a).

651. Article 21 GC IV provides that:

Convoys of vehicles or hospital trains on land or specially provided vessels on sea, conveying wounded and sick civilians, the infirm and maternity cases, shall be respected and protected in the same manner as the hospitals provided for in Article 18, and shall be marked, with the consent of the State, by the display of the distinctive emblem provided for in Article 38 of the Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field of August 12, 1949.

652. Article 21 AP I provides that “medical vehicles shall be respected and protected in the same way as mobile medical units under the Conventions and this Protocol”. Article 21 AP I was adopted by consensus.⁶⁷⁸

653. Article 11(1) AP II provides that “medical . . . transports shall be respected and protected at all times and shall not be the object of attack”. Article 11 AP II was adopted by consensus.⁶⁷⁹

654. Upon signature of AP I and AP II, the US declared that “It is the understanding of the United States of America that the terms used in Part III of [AP II] which are the same as the terms defined in Article 8 [AP I] shall so far as relevant be construed in the same sense as those definitions”.⁶⁸⁰

Other Instruments

655. Based on several documents supplying evidence of outrages committed during the First World War, the 1919 Report of the Commission on Responsibility lists violations of the laws and customs of war which should be subject to criminal prosecution, including “attack on and destruction of hospital ships”.

656. Article 25 of the 1923 Hague Rules of Air Warfare provides that “in bombardment by aircraft, all necessary steps must be taken by the commander to spare as far as possible . . . hospital ships . . . provided [they] are not at the time used for military purposes”.

657. Paragraph 2.2 of the 1992 Agreement on the Application of IHL between the Parties to the Conflict in Bosnia and Herzegovina provides that “medical transportation may in no circumstances be attacked, they shall at all times be respected and protected. They may not be used to shield combatants, military objectives or operations from attack.”

658. Paragraph 47(a), (b) and (c)(ii) of the 1994 San Remo Manual includes hospital ships, small craft used for coastal rescue operations and other medical transports, as well as vessels engaged in humanitarian missions, among the classes of enemy vessels exempt from attack. Paragraph 48 of the manual lists the conditions of exemption as follows: such vessels must be “innocently employed in their normal role”; they must “submit to identification and inspection when

⁶⁷⁸ CDDH, *Official Records*, Vol. VI, CDDH/SR.38, 24 May 1977, p. 85.

⁶⁷⁹ CDDH, *Official Records*, Vol. VII, CDDH/SR.51, 3 June 1977, p. 113.

⁶⁸⁰ US, Declaration made upon signature of AP I and AP II, 12 December 1977, § B.

required"; and they must not "intentionally hamper the movement of combatants and obey orders to stop or move out of the way when required".

659. Section 9.5 of the 1999 UN Secretary-General's Bulletin provides that "the United Nations force shall respect and protect transports of wounded and sick or medical equipment in the same way as mobile medical units".

II. National Practice

Military Manuals

660. Argentina's Law of War Manual (1969) restates Articles 35 GC I and 21 GC IV.⁶⁸¹

661. Argentina's Law of War Manual (1989) states, with respect to non-international armed conflicts in particular, that "medical means of transportation shall be respected and protected and may not be made the object of attack, provided they are not being used to commit hostile acts."⁶⁸²

662. Australia's Commanders' Guide provides that "civilian medical . . . transports and supplies are not to be made the target of attack or unnecessarily destroyed. Military medical . . . facilities and equipment are also entitled to general protection under the Geneva Conventions."⁶⁸³

663. Australia's Defence Force Manual provides that "civilian medical . . . transports and supplies are not to be made the target of attack or unnecessarily destroyed. Military medical . . . facilities and equipment are also entitled to general protection."⁶⁸⁴ The manual defines medical transports as "any means of transportation, military or civilian, permanent or temporary, assigned exclusively to medical transportation and under control of a competent authority of a party to the conflict".⁶⁸⁵

664. Belgium's Law of War Manual states that "transport over land of the wounded and sick and medical material enjoys the same protection as medical units and material: it may not be made the object of attack".⁶⁸⁶

665. Belgium's Teaching Manual for Soldiers states that:

The protection accorded to the wounded would be illusory if the civilian and military medical services which are specifically set up to treat them could be attacked. Hence, medical services, identified by the Red Cross (or Red Crescent in certain countries), are not considered combatants or military objectives even if they wear the enemy uniform or bear its insignia. Enemy medical transports . . . may not be attacked.⁶⁸⁷

⁶⁸¹ Argentina, *Law of War Manual* (1969), §§ 3.016 and 4.006.

⁶⁸² Argentina, *Law of War Manual* (1989), § 7.07.

⁶⁸³ Australia, *Commanders' Guide* (1994), §§ 614–615.

⁶⁸⁴ Australia, *Defence Force Manual* (1994), § 963, see also § 902.

⁶⁸⁵ Australia, *Defence Force Manual* (1994), §§ 902 and 963.

⁶⁸⁶ Belgium, *Law of War Manual* (1983), p. 48.

⁶⁸⁷ Belgium, *Teaching Manual for Soldiers* (undated), p. 17, see also p. 8.

666. Benin's Military Manual lists the military and civilian medical service as specially protected objects.⁶⁸⁸ It states that "specially protected means of transport shall be authorised to carry out their mission as long as necessary. Their mission, content and actual use may be checked through an inspection."⁶⁸⁹

667. Burkina Faso's Disciplinary Regulations provides that, under the laws and customs of war, soldiers in combat must respect medical transports.⁶⁹⁰

668. Cameroon's Disciplinary Regulations provides that, under the laws and customs of war, each soldier must respect medical transports.⁶⁹¹

669. Cameroon's Instructors' Manual provides that medical transports exclusively used to transport wounded, sick and shipwrecked and medical material enjoy the protection granted thereto by the laws of war.⁶⁹²

670. Canada's LOAC Manual states that:

92. Medical transports of all types (land, sea, air) are protected and must not be attacked.

93. Medical transports should not be armed (i.e. crew-served weapons) because of the danger that they be mistaken as fighting vehicles. Medical personnel in the medical transports can, however, retain their personal weapons.⁶⁹³

The manual qualifies "attacking a properly marked hospital ship" as a war crime.⁶⁹⁴ With respect to non-international armed conflicts in particular, the manual states that "medical . . . transports are to be respected and protected at all times and not be made the object of attack".⁶⁹⁵

671. Canada's Code of Conduct states that:

Opposing forces transports for the wounded and sick, or of medical equipment, shall be respected as soon as they are identified as such and protected in the same manner as mobile medical units . . . As a general rule medical transports should not have any weapons "mounted" on them to avoid being mistaken for fighting vehicles.⁶⁹⁶

672. Colombia's Circular on Fundamental Rules of IHL states that the protection due to the wounded and sick "also covers, as such, . . . medical transports".⁶⁹⁷

673. Colombia's Basic Military Manual states that "attacks, misappropriation and destruction" of medical transports constitutes a "grave breach".⁶⁹⁸

674. Congo's Disciplinary Regulations provides that medical transports must be respected.⁶⁹⁹

⁶⁸⁸ Benin, *Military Manual* (1995), Fascicule I, p. 13.

⁶⁸⁹ Benin, *Military Manual* (1995), Fascicule II, p. 9.

⁶⁹⁰ Burkina Faso, *Disciplinary Regulations* (1994), Article 35.

⁶⁹¹ Cameroon, *Disciplinary Regulations* (1975), Article 31.

⁶⁹² Cameroon, *Instructors' Manual* (1992), p. 68, § 243.1.

⁶⁹³ Canada, *LOAC Manual* (1999), p. 4-9, §§ 92-93, see also p. 9-4, §§ 35-36.

⁶⁹⁴ Canada, *LOAC Manual* (1999), p. 16-4, § 21(e).

⁶⁹⁵ Canada, *LOAC Manual* (1999), p. 17-4, § 34.

⁶⁹⁶ Canada, *Code of Conduct* (2001), Rule 10, §§ 5-6.

⁶⁹⁷ Colombia, *Circular on Fundamental Rules of IHL* (1992), § 3.

⁶⁹⁸ Colombia, *Basic Military Manual* (1995), p. 26, § 4.

⁶⁹⁹ Congo, *Disciplinary Regulations* (1986), Article 32.

675. Croatia's Commanders' Manual provides that "medical transports may not be used to collect or transmit intelligence data".⁷⁰⁰
676. Croatia's Soldiers' Manual instructs soldiers to respect hospital ships displaying the distinctive emblem.⁷⁰¹
677. The Military Manual of the Dominican Republic instructs soldiers not to attack medical vehicles, whether on land or in the air.⁷⁰²
678. Ecuador's Naval Manual states that "medical vehicles . . . may not be deliberately bombarded. Belligerents are required to ensure that such medical facilities are, as far as possible, situated in such manner that attacks against military targets in the vicinity do not imperil their safety."⁷⁰³ The manual qualifies "deliberate attack upon hospitals ships . . . [and] medical vehicles" as a war crime.⁷⁰⁴
679. France's Disciplinary Regulations as amended provides that soldiers in combat must respect and protect medical transports.⁷⁰⁵
680. France's LOAC Summary Note states that "medical transports must not be used to collect military information".⁷⁰⁶
681. France's LOAC Manual, with reference to Article 12 API, includes medical means of transportation among objects which are specifically protected by the law of armed conflict.⁷⁰⁷
682. Germany's Military Manual states that "any transport of wounded, sick and medical equipment shall be respected and protected".⁷⁰⁸
683. Germany's IHL Manual provides that medical vehicles "shall under no circumstance be attacked. Their unhampered employment shall be ensured at all times."⁷⁰⁹
684. Hungary's Military Manual instructs soldiers to respect and protect medical transports, whether by land, sea or air.⁷¹⁰
685. Italy's LOAC Elementary Rules Manual provides that "medical transports may not be used to collect or transmit intelligence data".⁷¹¹
686. Kenya's LOAC Manual states that "protection from attack is given to . . . medical transports, e.g. ambulances".⁷¹²
687. Lebanon's Teaching Manual provides for respect for and protection of medical transports.⁷¹³
688. Mali's Army Regulations provides that, according to the laws and customs of war, soldiers in combat must respect medical transports.⁷¹⁴

⁷⁰⁰ Croatia, *Commanders' Manual* (1992), § 34.

⁷⁰¹ Croatia, *Soldiers' Manual* (1992), pp. 2 and 3.

⁷⁰² Dominican Republic, *Military Manual* (1980), p. 4.

⁷⁰³ Ecuador, *Naval Manual* (1989), § 8.5.1.4. ⁷⁰⁴ Ecuador, *Naval Manual* (1989), § 6.2.5.

⁷⁰⁵ France, *Disciplinary Regulations as amended* (1975), Article 9 bis (1).

⁷⁰⁶ France, *LOAC Summary Note* (1992), § 2.3. ⁷⁰⁷ France, *LOAC Manual* (2001), p. 30.

⁷⁰⁸ Germany, *Military Manual* (1992), § 617.

⁷⁰⁹ Germany, *IHL Manual* (1996), § 503. ⁷¹⁰ Hungary, *Military Manual* (1992), p. 19.

⁷¹¹ Italy, *LOAC Elementary Rules Manual* (1991), § 34.

⁷¹² Kenya, *LOAC Manual* (1997), Précis No. 3, p. 9.

⁷¹³ Lebanon, *Teaching Manual* (1997), p. 77.

⁷¹⁴ Mali, *Army Regulations* (1979), Article 36.

689. Morocco's Disciplinary Regulations provides that, according to the laws and customs of war, soldiers in combat must respect medical transports.⁷¹⁵

690. The Military Manual of the Netherlands states that "medical transport and medical means of transportation (vehicles, ships and aircraft) must be respected and protected".⁷¹⁶ The manual repeats this rule with respect to non-international armed conflicts.⁷¹⁷

691. The Military Handbook of the Netherlands provides that "medical transports may not be attacked . . . Medical transports, whether on water, on land or in the air, must also be respected. Such transport may not, however, be used as normal military transport."⁷¹⁸

692. New Zealand's Military Manual states that:

Hospital ships . . . must be respected and protected at all times and must not be attacked . . .

Medical transports are any means of transportation, military or civilian, permanent or temporary, assigned exclusively to medical transportation and under control of a competent authority of a party to the conflict.

...

Convoys of vehicles or hospital trains on land, and specially provided vessels at sea, conveying wounded and sick civilians, the infirm, and maternity cases must be protected and respected in the same way as civilian hospitals.⁷¹⁹

The manual further states that "attacking a properly marked hospital ship" constitutes a war crime recognised by the customary law of armed conflict.⁷²⁰

With respect to non-international armed conflicts in particular, it states that "medical . . . transports are to be respected at all times and not made the object of attack".⁷²¹

693. Nicaragua's Military Manual states, with respect to international armed conflicts, that assistance to the wounded, sick and shipwrecked includes a requirement of "respect for and protection of means of transportation for the wounded and sick or medical material" and "respect for and protection of transportation over land or sea of civilian wounded and sick".⁷²²

694. Nigeria's Manual on the Laws of War provides that "convoys of wounded or medical equipment must be respected and protected as mobile medical units".⁷²³

695. Nigeria's Military Manual provides that "specifically protected . . . transports recognised as such must be respected . . . Specifically protected

⁷¹⁵ Morocco, *Disciplinary Regulations* (1974), Article 25(1).

⁷¹⁶ Netherlands, *Military Manual* (1993), p. VI-6.

⁷¹⁷ Netherlands, *Military Manual* (1993), p. XI-6.

⁷¹⁸ Netherlands, *Military Handbook* (1995), pp. 7-40 and 7-41.

⁷¹⁹ New Zealand, *Military Manual* (1992), §§ 1007(1) and (2) and 1110(1).

⁷²⁰ New Zealand, *Military Manual* (1992), § 1704(5).

⁷²¹ New Zealand, *Military Manual* (1992), § 1818(2).

⁷²² Nicaragua, *Military Manual* (1996), Article 14(7) and (38).

⁷²³ Nigeria, *Manual on the Laws of War* (undated), § 36.

[transports] shall not be touched or entered, though they could be inspected to ascertain their contents and effective use".⁷²⁴

696. Romania's Soldiers' Manual requires respect for medical vehicles and transports.⁷²⁵

697. Russia's Military Manual states that "attack, bombardment or destruction of . . . medical transports" is a prohibited method of warfare.⁷²⁶

698. Senegal's Disciplinary Regulations provides that soldiers in combat must respect and protect medical transports.⁷²⁷

699. Senegal's IHL Manual states that "medical means of transport (ambulances) shall be authorised to perform their function as long as necessary. Their mission, content and actual use may be verified by inspection."⁷²⁸

700. South Africa's LOAC Manual provides that:

53. All means of medical transport, whether permanent or temporary, must be *assigned exclusively* to medical purposes in order to be entitled to protection. A convoy carrying both wounded and able-bodied soldiers or arms would lose the right to protection to the detriment of the wounded. (*Note:* the presence of light arms which have just been taken from the wounded and not yet turned over to the proper authority is permitted.)

54. The term "respect" for the means of medical transport indicates that they may not be attacked or damaged, nor may their passage be obstructed; put positively, they must be permitted to carry out their assigned tasks.⁷²⁹ [emphasis in original]

701. Spain's LOAC Manual defines medical transports in accordance with Article 8 AP I.⁷³⁰ With reference to Article 21 AP I, the manual states that medical transports over land "in general, enjoy the same protection and are subject to the same regulation as mobile medical units".⁷³¹

702. Sweden's IHL Manual considers that Article 21 AP I on the protection of medical vehicles has the status of customary law.⁷³²

703. Switzerland's Basic Military Manual provides that "transports of wounded and sick civilians, disabled, elderly, children and expectant mothers, by convoys and hospital trains, shall be respected and protected in the same way as hospitals".⁷³³ It further provides that medical vehicles "shall be respected and protected. They shall not be attacked, nor harmed in any way, nor their functioning be impeded, even if they do not momentarily hold any wounded or sick".⁷³⁴

⁷²⁴ Nigeria, *Military Manual* (1994), p. 45, § (f). ⁷²⁵ Romania, *Soldiers' Manual* (1991), p. 32.

⁷²⁶ Russia, *Military Manual* (1990), § 5(g).

⁷²⁷ Senegal, *Disciplinary Regulations* (1990), Article 34(1).

⁷²⁸ Senegal, *IHL Manual* (1999), p. 17. ⁷²⁹ South Africa, *LOAC Manual* (1996), §§ 53–54.

⁷³⁰ Spain, *LOAC Manual* (1996), Vol. I, § 9.2.c.(1), see also § 4.5.b.(2)(b).

⁷³¹ Spain, *LOAC Manual* (1996), Vol. I, § 9.2.c.(2), see also § 4.5.b.(2)(b).

⁷³² Sweden, *IHL Manual* (1991), Section 2.2.3, p. 18.

⁷³³ Switzerland, *Basic Military Manual* (1987), Article 37.

⁷³⁴ Switzerland, *Basic Military Manual* (1987), Article 82.

704. Togo's Military Manual lists the military and civilian medical service as specially protected objects.⁷³⁵ It states that "specially protected means of transport shall be authorised to carry out their mission as long as necessary. Their mission, content and actual use may be checked through an inspection."⁷³⁶

705. The UK Military Manual provides that "vehicles equipped for the transport of wounded and sick, as well as their medical equipment, must be respected and protected in the same way as mobile medical units".⁷³⁷ The manual further states that "convoys of vehicles or hospital trains on land, and specially provided vessels at sea, conveying wounded and sick civilians, the infirm, and maternity cases must be protected and respected in the same way as civilian hospitals".⁷³⁸

706. The UK LOAC Manual provides that "protection from attack is given . . . to medical transport, e.g. ambulances".⁷³⁹

707. The US Field Manual restates Article 35 GC I and Article 21 GC IV.⁷⁴⁰

708. The US Air Force Pamphlet states that "in addition to grave breaches of the Geneva Conventions of 1949, the following acts are representative of situations involving individual criminal responsibility: (1) deliberate attack on . . . hospital ships".⁷⁴¹

709. The US Air Force Commander's Handbook provides that ambulances and hospital ships "should not be deliberately attacked, fired upon, or unnecessarily prevented from performing their medical duties".⁷⁴² It further stresses that medical transports lose their special immunity if they are used to commit "acts harmful to the enemy outside their humanitarian functions". In this respect, the manual gives the example of "firing at the enemy from an ambulance".⁷⁴³

710. The US Naval Handbook states that "medical vehicles . . . may not be deliberately bombarded. Belligerents are required to ensure that such medical facilities are, as far as possible, situated in such manner that attacks against military targets in the vicinity do not imperil their safety."⁷⁴⁴ The manual qualifies "deliberate attack upon hospital ships . . . [and] medical vehicles" as a war crime.⁷⁴⁵

711. The YPA Military Manual of the SFRY (FRY) restates Article 19 GC I and extends the protection of military medical transports to civilian medical transports.⁷⁴⁶

⁷³⁵ Togo, *Military Manual* (1996), Fascicule I, p. 14.

⁷³⁶ Togo, *Military Manual* (1996), Fascicule II, p. 9.

⁷³⁷ UK, *Military Manual* (1958), § 356. ⁷³⁸ UK, *Military Manual* (1958), § 33.

⁷³⁹ UK, *LOAC Manual* (1981), Section 6, p. 23, § 8(a).

⁷⁴⁰ US, *Field Manual* (1956), §§ 236 and 260. ⁷⁴¹ US, *Air Force Pamphlet* (1976), § 15-3(c)(1).

⁷⁴² US, *Air Force Commander's Handbook* (1980), § 3-2.

⁷⁴³ US, *Air Force Commander's Handbook* (1980), § 3-2(d).

⁷⁴⁴ US, *Naval Handbook* (1995), § 8.5.1.4. ⁷⁴⁵ US, *Naval Handbook* (1995), § 6.2.5.

⁷⁴⁶ SFRY (FRY), *YPA Military Manual* (1988), §§ 184, 195 and 198, see also § 82 (conduct of hostilities).

National Legislation

712. Argentina's Draft Code of Military Justice punishes any soldier who "wilfully violates the protection due to . . . medical transports . . . which are properly marked".⁷⁴⁷

713. Bangladesh's International Crimes (Tribunal) Act states that the "violation of any humanitarian rules applicable in armed conflicts laid down in the Geneva Conventions of 1949" is a crime.⁷⁴⁸

714. Colombia's Emblem Decree provides that "all Colombian authorities and persons must protect . . . transports of medicine, food and humanitarian aid in situations of armed conflict or natural disaster".⁷⁴⁹

715. The Draft Amendments to the Penal Code of El Salvador punishes "anyone who, in the context of an international or non-international armed conflict, attacks or destroys ambulances and medical transports, without having taken adequate measures of protection and without imperative military necessity".⁷⁵⁰

716. Under Estonia's Penal Code, "an attack against . . . a hospital ship or aircraft, or any other means of transport used for transportation of non-combatants" is a war crime.⁷⁵¹

717. Georgia's Criminal Code provides for the punishment of "wilful breaches of norms of international humanitarian law committed in an international or internal armed conflict . . . against . . . medical transports".⁷⁵²

718. Germany's Law Introducing the International Crimes Code provides that:

Anyone who, in connection with an international or non-international armed conflict, . . . carries out an attack against . . . medical units and transport designated with the distinctive emblems of the Geneva Conventions . . . in conformity with international humanitarian law, shall be liable to imprisonment for not less than three years. In less serious cases, particularly where the attack is not carried out with military means, the period of imprisonment shall be for not less than one year.⁷⁵³

719. Ireland's Geneva Conventions Act as amended provides that any "minor breach" of the Geneva Conventions, including violations of Articles 35 GC I and 21 GC IV, and of AP I, including violations of Article 21 AP I, as well as any "contravention" of AP II, including violations of Article 11 AP II, are punishable offences.⁷⁵⁴

720. Italy's Law of War Decree as amended states that the means of transportation of the military medical service must be "respected and protected".⁷⁵⁵

⁷⁴⁷ Argentina, *Draft Code of Military Justice* (1998), Article 292, introducing a new Article 876(2) in the *Code of Military Justice as amended* (1951).

⁷⁴⁸ Bangladesh, *International Crimes (Tribunal) Act* (1973), Section 3(2)(e).

⁷⁴⁹ Colombia, *Emblem Decree* (1998), Article 10.

⁷⁵⁰ El Salvador, *Draft Amendments to the Penal Code* (1998), p. 19.

⁷⁵¹ Estonia, *Penal Code* (2001), § 106. ⁷⁵² Georgia, *Criminal Code* (1999), Article 411(2).

⁷⁵³ Germany, *Law Introducing the International Crimes Code* (2002), Article 1, § 11(1)(2).

⁷⁵⁴ Ireland, *Geneva Conventions Act as amended* (1962), Section 4(1) and (4).

⁷⁵⁵ Italy, *Law of War Decree as amended* (1938), Article 95.

721. Lithuania's Criminal Code as amended provides for the protection of medical transports.⁷⁵⁶

722. Nicaragua's Military Penal Code provides for the punishment of any soldier who "knowingly violates the protection due to...medical transports... which are recognizable by the established signs or the character of which can unequivocally be distinguished from a distance", provided that the protection due is not misused for hostile purposes.⁷⁵⁷

723. Nicaragua's Draft Penal Code punishes any person who, during an international or internal armed conflict, "without having previously taken appropriate measures of protection and without any justification based on imperative military necessity, attacks or destroys ambulances and medical transports... [and] medical convoys".⁷⁵⁸

724. Under Norway's Military Penal Code as amended, "anyone who contravenes or is accessory to the contravention of provisions relating to the protection of persons or property laid down in... the Geneva Conventions of 12 August 1949... [and in] the two additional protocols to these Conventions... is liable to imprisonment".⁷⁵⁹

725. Romania's Penal Code provides for the punishment of:

The total or partial destruction of objects marked with the regular distinctive emblem, such as:

- a) ... hospital ships,
- b) means of transport of any kind assigned to a medical service or the Red Cross or the organisations assimilated therewith which serve to transport the wounded, sick, or medical material [and/or] material of the Red Cross or of organisations assimilated therewith.⁷⁶⁰

726. Spain's Military Criminal Code provides for the punishment of any soldier who "knowingly violates the protection due to... medical transports... which are recognizable by the established signs or the character of which can unequivocally be distinguished from a distance", provided that the protection due is not misused for hostile purposes.⁷⁶¹

727. Under Spain's Penal Code, wilful violations of the protected status of medical transports are war crimes.⁷⁶²

728. Tajikistan's Criminal Code, in the section on "Serious violations of international humanitarian law", provides for the punishment of "wilful breaches of norms of international humanitarian law committed in an international or non-international armed conflict, against... medical transports".⁷⁶³

⁷⁵⁶ Lithuania, *Criminal Code as amended* (1961), Article 337.

⁷⁵⁷ Nicaragua, *Military Penal Code* (1996), Article 57(1).

⁷⁵⁸ Nicaragua, *Draft Penal Code* (1999), Article 468.

⁷⁵⁹ Norway, *Military Penal Code as amended* (1902), § 108.

⁷⁶⁰ Romania, *Penal Code* (1968), Article 359.

⁷⁶¹ Spain, *Military Criminal Code* (1985), Article 77(3).

⁷⁶² Spain, *Penal Code* (1995), Article 612. ⁷⁶³ Tajikistan, *Criminal Code* (1998), Article 403(2).

729. Venezuela's Code of Military Justice as amended provides for the punishment of "those who should . . . attack . . . convoys of sick and wounded".⁷⁶⁴

National Case-law

730. In the *Dover Castle case* in 1921, a German court acquitted the commander of a German submarine of sinking a hospital ship and killing six members of its crew in violation of the customs and laws of war. The Court found that the commander had sunk the ship in execution of orders and could not, therefore, be held responsible for the ensuing violations of the law.⁷⁶⁵

Other National Practice

731. In 1993, during a debate in the UN Security Council on the situation in the former Yugoslavia, Argentina stated that "the deliberate attacks on . . . ambulances" could not go on with impunity.⁷⁶⁶

732. In a note submitted to the ICRC in 1967, Egypt accused Israel of "bombardment of hospitals and ambulances in spite of the distinct markings of them" in violation of Article 19 GC I and Articles 18 and 21 GC IV and condemned it as a "flagrant violation of the elementary principle of humanity, and a serious breach of the laws of war and the Geneva Conventions of 1949".⁷⁶⁷

733. In its written comments submitted to the ICJ in the *Nuclear Weapons case* in 1995, Egypt stated that it was "prohibited to attack convoys of vehicles, hospital trains, hospital ships, aircraft exclusively employed for the removal of wounded and sick civilians, or the transport of medical personnel and equipment".⁷⁶⁸

734. Under the instructions given to the French armed forces for the conduct of Opération Mistral, simulating a military operation under the right of self-defence or a mandate of the UN Security Council, medical transports and material shall be protected.⁷⁶⁹

735. In 1944, the German hospital ship the *Tübingen* was bombed and sunk by the British air force. Following the sinking, the German government issued the following official protest:

On 18 November 1944 at 0745 hours near Pola the German hospital ship *Tübingen* was attacked by two double-engine British bombers with machine guns and bombs so that it sank, although the course of the hospital ship had been communicated to the British government well in advance of its voyage to Saloniki and back for the

⁷⁶⁴ Venezuela, *Code of Military Justice as amended* (1998), Article 474(1).

⁷⁶⁵ Germany, Reichsgericht, *Dover Castle case*, Judgement, 4 June 1921, p. 429.

⁷⁶⁶ Argentina, Statement before the UN Security Council, UN Doc. S/PV.3203, 20 April 1993, p. 57.

⁷⁶⁷ Egypt, Note to the International Committee of the Red Cross, 7 July 1967, annexed to Letter dated 17 July 1967 to the UN Secretary-General, UN Doc. S/8064, 17 July 1967, § 2(a).

⁷⁶⁸ Egypt, Written comments on other written statements before the ICJ, *Nuclear Weapons case*, September 1995, p. 21, § 50.

⁷⁶⁹ France, État-major de la Force d'Action Rapide, Ordres pour l'Opération Mistral, 1995, Section 6, § 62.

purpose of transporting wounded German soldiers. Numerous members of the crew were thereby killed and wounded. The German government emphatically protests the serious violations of international law committed by the sinking of the hospital ship *Tübingen*.⁷⁷⁰

736. In 1992, during a debate in the UN Security Council on the situation in the former Yugoslavia, Hungary stated that “it goes without saying that the international community cannot disregard the responsibility of those who violate international humanitarian law, who order attacks on . . . ambulances . . . to mention only a few examples of criminal atrocities”.⁷⁷¹

737. According to the Report on the Practice of the Iran, Iran accused Iraq on several occasions of attacking Iranian Red Crescent vehicles during the Iran–Iraq war. Iran claimed that Iraq had violated IHL by committing these acts.⁷⁷²

738. In 1972, during a debate in the UN Security Council on the situation in the Middle East, the representative of Lebanon stated that the Lebanese Red Cross had reported that its ambulances, cars and volunteers had been attacked by Israeli forces.⁷⁷³ In a subsequent debate in 1984, Lebanon complained that an ambulance attendant of the Lebanese Red Cross had been detained while he and a colleague were transporting a wounded man to the hospital in a car belonging to the Red Cross.⁷⁷⁴

739. The UK reacted to the sinking of the *Tübingen* during the Second World War by ordering an inquiry, in the course of which it was determined that, through a chain of errors on the part of the UK pilots and a misunderstanding in the wireless transmission, the order was actually given to attack the hospital ship. The UK government expressed its regret at the sinking of the ship, stating that:

In the circumstances described, they cannot refrain from remarking that had the *Tübingen* been properly illuminated at the time of sighting in accordance with international practice, the leader of the section would have had no difficulty in identifying her as a hospital ship and the incident would thus have been avoided.⁷⁷⁵

740. At the CDDH, the UK welcomed “the humanitarian advances made in such fields as medical aircraft, the extension of protection to a wider group of medical units and transports and the improved provisions on relief”.⁷⁷⁶

⁷⁷⁰ Alfred M. de Zayas, *The Wehrmacht War Crimes Bureau, 1939–1945*, University of Nebraska Press, Lincoln, 1989, pp. 261–266.

⁷⁷¹ Hungary, Statement before the UN Security Council, UN Doc. S/PV.3106, 13 August 1992, p. 32.

⁷⁷² Report on the Practice of Iran, 1997, Chapter 2.7.

⁷⁷³ Lebanon, Statement before the UN Security Council, UN Doc. S/PV.2376, 8 June 1982, p. 2.

⁷⁷⁴ Lebanon, Statement before the UN Security Council, UN Doc. S/PV.2552, 29 August 1984, § 26.

⁷⁷⁵ Alfred M. de Zayas, *The Wehrmacht War Crimes Bureau, 1939–1945*, University of Nebraska Press, Lincoln, 1989, pp. 261–266.

⁷⁷⁶ UK, Statement at the CDDH, *Official Records*, Vol. VII, CDDH/SR. 58, 9 June 1977, p. 302, § 114.

741. In 1987, in submitting AP II to the US Senate for advice and consent to ratification, the US President expressed the view that the obligations in AP II were “no more than a restatement of the rules of conduct with which US military forces would almost certainly comply as a matter of national policy, constitutional and legal protections, and common decency”.⁷⁷⁷

742. In 1991, in a document entitled “Examples of violations of the rules of international law committed by the so-called armed forces of Slovenia”, the Ministry of Defence of the SFRY (FRY) included the following example: “Fire has been opened on medical vehicles in spite of their Red Cross signs.”⁷⁷⁸

III. Practice of International Organisations and Conferences

United Nations

743. In a resolution adopted in 1992, the UN Security Council expressed “grave alarm at continuing reports of widespread violations of international humanitarian law occurring within the territory of the former Yugoslavia and especially in Bosnia and Herzegovina including . . . deliberate attacks on . . . ambulances”. The Council strongly condemned such violations and demanded that “all parties and others concerned in the former Yugoslavia, and all military forces in Bosnia and Herzegovina, immediately cease and desist from all breaches of international humanitarian law”.⁷⁷⁹

744. In a resolution adopted in 1992, the UN Commission on Human Rights stated that it was “appalled at the continuing reports of widespread, massive and grave violations of human rights within the territory of the former Yugoslavia and especially in Bosnia and Herzegovina”, including reports of deliberate attacks on ambulances.⁷⁸⁰

745. In 1993, in a report on the situation of human rights in the territory of the former Yugoslavia, the Special Rapporteur of the UN Commission on Human Rights reported that, in March 1993, a group of UN relief workers escorted by two armoured personnel carriers from the UK Battalion of UNPROFOR were allowed to enter Konjevic Polje. The aim was to evacuate wounded persons who urgently required treatment and who had been identified on an earlier visit. However, Serb forces refused to allow UNHCR to bring in ambulances or trucks. A crowd of at least 2,000 civilians gathered around the two UNPROFOR vehicles. Both the crowd and the vehicles were deliberately shelled by the Serb forces. One of the carriers was destroyed by an almost direct hit just moments

⁷⁷⁷ US, Message from the US President transmitting AP II to the US Senate for advice and consent to ratification, Treaty Doc. 100-2, 29 January 1987, Comment on Article 10.

⁷⁷⁸ SFRY (FRY), Minister of Defence, Examples of violations of the rules of international law committed by the so-called Armed Forces of Slovenia, July 1991, § 1(iii).

⁷⁷⁹ UN Security Council, Res. 771, 13 August 1992, preamble and §§ 2 and 3.

⁷⁸⁰ UN Commission on Human Rights, Res. 1992/S-1/1, 14 August 1992, preamble.

after its occupants had moved to the other carrier.⁷⁸¹ In a later report, the Special Rapporteur noted, in a section entitled "Human rights violations", direct attacks on a UNHCR driver in a clearly marked armoured vehicle.⁷⁸²

746. In 1995, in the context of the conflict in Guatemala, MINUGUA examined the case of an attack on a duly identified ambulance of the volunteer fire brigade that was evacuating a wounded soldier. The URNG command denied responsibility. MINUGUA acknowledged that the proximity of fighting made it difficult to judge whether the shot was intentional. The Director of MINUGUA recommended to the URNG that it "should issue precise instructions to its combatants to refrain from...endangering ambulances and duly identified health workers who assist such wounded persons".⁷⁸³

747. In 1996, in report on the situation of human rights in the Sudan under the title "Human rights violations – Abuses by parties to the conflict other than the Government of Sudan", the Special Rapporteur of the UN Commission on Human Rights noted that OLS had reported that, despite security assurances from local authorities, a UNICEF ambulance had been ambushed and one of the wounded persons it was transporting had been killed.⁷⁸⁴

Other International Organisations

748. No practice was found.

International Conferences

749. The Final Declaration adopted by the International Conference for the Protection of War Victims in 1993 urged all States to "make every effort" to protect medical means of transport.⁷⁸⁵

IV. Practice of International Judicial and Quasi-judicial Bodies

750. No practice was found.

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

751. To fulfil its task of disseminating IHL, the ICRC has delegates around the world teaching armed and security forces that:

⁷⁸¹ UN Commission on Human Rights, Special Rapporteur on the Situation of Human Rights in the Former Yugoslavia, Periodic report, UN Doc. E/CN.4/1994/3, 5 May 1993, §§ 21–22.

⁷⁸² UN Commission on Human Rights, Special Rapporteur on the Situation of Human Rights in the Former Yugoslavia, Fifth periodic report, UN Doc. E/CN.4/1994/47, 17 November 1993, §§ 67 and 96.

⁷⁸³ MINUGUA, Director, First report, UN Doc. A/49/856, 1 March 1995, Annex, §§ 130 and 194.

⁷⁸⁴ UN Commission on Human Rights, Special Rapporteur on the Situation of Human Rights in the Sudan, Report, UN Doc. E/CN.4/1996/62, 20 February 1996, § 78.

⁷⁸⁵ International Conference for the Protection of War Victims, Geneva, 30 August–1 September 1993, Final Declaration, § II (9), *ILM*, Vol. 33, 1994, p. 301.

67. "Medical transport" means any means of transportation assigned exclusively to conveyance by land, water or air of the wounded, sick, shipwrecked, of medical and religious personnel, or of medical material.

...

68. The law of war grants the same status to civilian and military medical services... The provisions governing military medical... transports apply equally to the corresponding categories of the civilian medical service.⁷⁸⁶

Delegates also teach that "specifically protected... transports recognized as such must be respected".⁷⁸⁷

752. In 1978, in a letter to a National Society, the ICRC stated that civilian and military means of transportation, including ambulances, medical convoys and trains, hospital ships and other medical craft, lifeboats and other rescue craft "must be respected and protected in all circumstances".⁷⁸⁸

753. In 1990, following an attack on its vehicles in the context of an internal conflict, the ICRC reiterated to governmental authorities that persons and objects displaying the distinctive emblem should be respected. It requested an investigation into the incident and demanded that the government issue clear instructions regarding the obligation to respect "with the utmost rigour" the red cross and red crescent emblems.⁷⁸⁹

754. In 1991, in the context of an armed conflict, the ICRC reported attacks on medical objects marked by the red cross.⁷⁹⁰ In particular, following an attack on its medical ship by two patrolling ships of a party to the conflict, the ICRC sent a letter to the Permanent Mission of the State, in which it recalled the obligation not to attack medical transports.⁷⁹¹

755. In a press release in 1992, the ICRC enjoined the parties to the conflict in Chechnya "to ensure that medical... vehicles are respected and protected".⁷⁹²

756. In a declaration issued in 1994 in the context of the conflict between the Mexican government and the EZLN, the Mexican Red Cross stated that "protection must be extended to health personnel in general and, in particular, to Mexican Red Cross personnel as well as their... transport facilities".⁷⁹³

757. In 1994, in a Memorandum on Respect for International Humanitarian Law in Angola, the ICRC stated that "ambulances and other medical units and

⁷⁸⁶ Frédéric de Mulinen, *Handbook on the Law of War for Armed Forces*, ICRC, Geneva, 1987, §§ 67 and 78.

⁷⁸⁷ Frédéric de Mulinen, *Handbook on the Law of War for Armed Forces*, ICRC, Geneva, 1987, § 474.

⁷⁸⁸ ICRC archive document. ⁷⁸⁹ ICRC archive document.

⁷⁹⁰ ICRC archive documents. ⁷⁹¹ ICRC archive document.

⁷⁹² ICRC, Press Release No. 1793, Chechnya: ICRC urges respect for humanitarian rules, 28 November 1994; see also Communication to the Press No. 96/10, Chechen conflict: ICRC appeal, 8 March 1996 and Communication to the Press No. 96/27, Russian Federation/Chechnya: ICRC calls on Federal Authorities to extend ultimatum, 21 August 1996.

⁷⁹³ Mexican Red Cross, Declaración de la Cruz Roja Mexicana en torno a los acontecimientos que se han presentado en el estado de Chiapas a partir del 1° enero de 1994, 3 January 1994, § 2(C).

means of transport shall be protected and respected . . . Medical units and means of transport shall not be the object of attack."⁷⁹⁴

758. In a press release issued in 2000 following allegations that the Palestine Red Crescent Society had been targeted in shooting incidents, the ICRC stated that "any attacks . . . on ambulances . . . indeed constitute a grave violation of IHL".⁷⁹⁵

759. In a communication to the press issued in 2000 in connection with the hostilities in the Near East, the ICRC stated that:

Ambulances . . . of the medical services must be respected and protected. They must be allowed to circulate unharmed so that they can discharge their humanitarian duties. All those who take part in the confrontations must respect the medical services, whether deployed by the armed forces, civilian facilities, the Palestine Red Crescent Society or the Magen David Adom in Israel. To date, dozens of Palestine Red Crescent ambulances and many of its staff have come under fire while conducting their medical activities in the occupied territories. Ambulances belonging to the Magen David Adom have also been attacked. The ICRC once again calls on all those involved in the violence to respect . . . ambulances [and] other medical transports.⁷⁹⁶

VI. Other Practice

760. In 1985, in a report on violations of the laws of war in Nicaragua, Americas Watch, noted, with respect to attacks against vehicles of the Ministry of Health, that the vehicles were escorted by military vehicles. It stated that "although in such circumstances, the relevant law gives any clearly marked medical vehicle immunity from attack, that immunity is set alongside the risk that it may become a collateral casualty during a legitimate attack on the military vehicles with it".⁷⁹⁷

761. In a report on the FMLN offensive in El Salvador in November 1989, the Instituto de Derechos Humanos de la Universidad Centroamericano stated that "three ambulances of the Salvadoran Red Cross in San Salvador and three others inside the country were machine-gunned".⁷⁹⁸

762. Rule A5 of the Rules of International Humanitarian Law Governing the Conduct of Hostilities in Non-international Armed Conflicts, adopted in

⁷⁹⁴ ICRC, Memorandum on Respect for International Humanitarian Law in Angola, 8 June 1994, § III, *IRRC*, No. 320, 1997, p. 504.

⁷⁹⁵ ICRC, Press Release, Israel and Occupied Territories: Respect for medical personnel, ICRC Tel Aviv, 1 November 2000.

⁷⁹⁶ ICRC, Communication to the Press No. 00/42, ICRC appeal to all involved in violence in the Near East, 21 November 2000.

⁷⁹⁷ Americas Watch, *Violations of the Laws of War by Both Sides in Nicaragua: 1981–1985*, New York, March 1985, pp. 82–83.

⁷⁹⁸ Instituto de Derechos Humanos de la Universidad Centroamericana (UCA), "Los derechos humanos y la ofensiva del 11 de noviembre de 1989", *Estudios Centroamericanos*, Universidad Centroamericana José Simeón Cañas, Vol. XLV, Nos. 495–496, January–February 1990, p. 64.

1990 by the Council of the IIHL, provides that “the obligation to respect and protect . . . medical . . . transports in the conduct of military operations is a general rule applicable in non-international armed conflicts”.⁷⁹⁹

763. In 1993, in the context of the conflict in Rwanda, the MRND vigorously condemned an attack on a Red Cross ambulance. It appealed to all political forces in Rwanda to condemn such acts.⁸⁰⁰

764. In 1994, an armed opposition group assured the ICRC that anti-tank mines would be deactivated for ICRC convoys. It later undertook to inform the ICRC systematically of mined locations.⁸⁰¹

765. In 1995, a representative of an armed opposition group told an ICRC delegate that medical vehicles would not be respected if they transported soldiers. He added that wounded soldiers would be respected only when dispossessed of all military attributes, including uniform. Reference was made to an earlier incident, but it is not clear from the document if the transported soldiers were wounded at the time or not.⁸⁰²

766. In 1995, a representative of an armed opposition group told an ICRC delegate that governmental forces sometimes used vehicles of foreign NGOs to transport troops. These vehicles were then considered to be potential targets. He added that if Red Cross vehicles were used in the same way, it was clear that they would also be targeted.⁸⁰³

Loss of protection of medical transports from attack

767. Specific practice concerning loss of protection from attack of medical transports has been included in the subsection on respect for and protection of medical transports. In addition, general practice concerning loss of protection from attack of medical units and medical transports is contained in the subsection on loss of protection of medical units and is not repeated here.

Respect for and protection of medical aircraft

I. Treaties and Other Instruments

Treaties

768. Article 36 GC I provides that:

Medical aircraft, that is to say, aircraft exclusively employed for the removal of wounded and sick and for the transport of medical personnel and equipment, shall not be attacked, but shall be respected by the belligerents, while flying at

⁷⁹⁹ IIHL, Rules of International Humanitarian Law Governing the Conduct of Hostilities in Non-international Armed Conflicts, Rule A5, *IRRC*, No. 278, 1990, p. 391.

⁸⁰⁰ MRND, Official Declaration, 7 July 1993. ⁸⁰¹ ICRC archive documents.

⁸⁰² ICRC archive document. ⁸⁰³ ICRC archive document.

heights, times and on routes specifically agreed upon between the belligerents concerned.

...

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

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

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

769. Article 22 GC IV provides that:

Aircraft exclusively employed for the removal of wounded and sick civilians, the infirm and maternity cases or for the transport of medical personnel and equipment, shall not be attacked, but shall be respected while flying at heights, times and on routes specifically agreed upon between all the Parties to the conflict concerned. . . . Unless agreed otherwise, flights over enemy or enemy occupied territory are prohibited. Such aircraft shall obey every summons to land. In the event of a landing thus imposed, the aircraft with its occupants may continue its flight after examination, if any.

770. Article 25 AP I provides that:

In and over land areas physically controlled by friendly forces, or in and over sea areas not physically controlled by an adverse Party, the respect and protection of medical aircraft of a Party to the conflict is not dependent on any agreement with an adverse Party. For greater safety, however, a Party to the conflict operating its medical aircraft in these areas may notify the adverse Party, as provided in Article 29, in particular when such aircraft are making flights bringing them within range of surface-to-air weapons systems of the adverse Party.

Article 25 AP I was adopted by consensus.⁸⁰⁴

771. Article 26 AP I provides that:

1. In and over those parts of the contact zone which are physically controlled by friendly forces and in and over those areas the physical control of which is not clearly established, protection for medical aircraft can be fully effective only by prior agreement between the competent military authorities of the Parties to the conflict, as provided for in Article 29. Although, in the absence of such an agreement, medical aircraft operate at their own risk, they shall nevertheless be respected after they have been recognized as such.
2. "Contact zone" means any area on land where the forward elements of opposing forces are in contact with each other, especially where they are exposed to direct fire from the ground.

Articles 26 AP I was adopted by consensus.⁸⁰⁵

⁸⁰⁴ CDDH, *Official Records*, Vol. VI, CDDH/SR.38, 24 May 1977, p. 89.

⁸⁰⁵ CDDH, *Official Records*, Vol. VI, CDDH/SR.39, 25 May 1977, p. 94.

772. Article 27 AP I provides that:

1. The medical aircraft of a Party to the conflict shall continue to be protected while flying over land or sea areas physically controlled by an adverse Party, provided that prior agreement to such flights has been obtained from the competent authority of that adverse Party.
2. A medical aircraft which flies over an area physically controlled by an adverse Party without, or in deviation from the terms of, an agreement provided for in paragraph 1, either through navigational error or because of an emergency affecting the safety of the flight, shall make every effort to identify itself and to inform the adverse Party of the circumstances. As soon as such medical aircraft has been recognized by the adverse Party, that Party shall make all reasonable efforts to give the order to land or to alight on water, referred to in Article 30, paragraph 1, or to take other measures to safeguard its own interests, and, in either case, to allow the aircraft time for compliance, before resorting to an attack against the aircraft.

Article 27 AP I was adopted by consensus.⁸⁰⁶

773. Article 28 AP I provides that:

1. The Parties to the conflict are prohibited from using their medical aircraft to attempt to acquire any military advantage over an adverse Party. The presence of medical aircraft shall not be used in an attempt to render military objectives immune from attack.
2. Medical aircraft shall not be used to collect or transmit intelligence data and shall not carry any equipment intended for such purposes. They are prohibited from carrying any persons or cargo not included within the definition in Article 8, sub-paragraph f). The carrying on board of the personal effects of the occupants or of equipment intended solely to facilitate navigation, communication or identification shall not be considered as prohibited.
3. Medical aircraft shall not carry any armament except small arms and ammunition taken from the wounded, sick and shipwrecked on board and not yet handed to the proper service, and such light individual weapons as may be necessary to enable the medical personnel on board to defend themselves and the wounded, sick and shipwrecked in their charge.

Article 28 AP I was adopted by consensus.⁸⁰⁷

774. Upon ratification of AP I, France stated that:

Given the practical need to use non-dedicated aircraft for medical evacuation missions, the Government of the Republic of France does not interpret paragraph 2 of Article 28 as precluding the presence on board of communication equipment and encryption material or the use thereof solely to facilitate navigation, identification or communication in support of a medical transportation mission as defined in Article 8.⁸⁰⁸

⁸⁰⁶ CDDH, *Official Records*, Vol. VI, CDDH/SR.39, 25 May 1977, p. 95.

⁸⁰⁷ CDDH, *Official Records*, Vol. VI, CDDH/SR.39, 25 May 1977, p. 97.

⁸⁰⁸ France, Reservations and declarations made upon ratification of AP I, 11 April 2001, § 5.

775. Upon ratification of AP I, the UK declared with respect to Article 28(2) that:

Given the practical need to make use of non-dedicated aircraft for medical evacuation purposes, the United Kingdom does not interpret this paragraph as precluding the presence on board of communication equipment and encryption materials or the use thereof solely to facilitate navigation, identification or communication in support of medical transportation as defined in Article 8 (f).⁸⁰⁹

Other Instruments

776. Paragraph 53(a) of the 1994 San Remo Manual provides that medical aircraft are exempt from attack. Paragraph 54 lists the following conditions of exemption:

Medical aircraft are exempt from attack only if they:

- (a) have been recognised as such;
- (b) are acting in compliance with an agreement . . .
- (c) fly in areas under the control of own or friendly forces; or
- (d) fly outside the area of armed conflict.

In other instances, medical aircraft operate at their own risk.

777. Paragraph 178 of the 1994 San Remo Manual states that:

Medical aircraft shall not be used to commit acts harmful to the enemy. They shall not carry any equipment intended for the collection or transmission of intelligence data. They shall not be armed, except for small arms for self-defence, and shall only carry medical personnel and equipment.

II. National Practice

Military Manuals

778. Argentina's Law of War Manual restates Articles 36 GC I and 22 GC IV.⁸¹⁰

779. Australia's Defence Force Manual states that:

972. . . . Medical aircraft must be respect and protected at all times and must not be attacked. Their immunity ceases once they are used for purposes hostile to the adverse party and outside their humanitarian purpose.

...

977. Medical aircraft may fly over land physically controlled by their own or friendly forces, and over sea areas not under enemy control. However, it is advisable that the enemy be informed if such flights are likely to bring the aircraft within range of enemy surface-to-air weapon systems.

978. In accordance with LOAC, flight of such aircraft over enemy or enemy-occupied territory is forbidden without prior agreement. In the absence of such agreement, medical aircraft operating in parts of the zone controlled by friendly forces, and over areas the control of which is doubtful, do so at their own risk, but once they are recognised as medical aircraft they must be respected.

⁸⁰⁹ UK, Reservations and declarations made upon ratification of AP I, 28 January 1998, § (e).

⁸¹⁰ Argentina, *Law of War Manual* (1969), §§ 3.017 and 4.006.

979. Provided prior agreement has been obtained from the enemy, medical aircraft belonging to a combatant remain protected while flying over land or sea areas under the physical control of the enemy. If it deviates for any reason from the terms of such an agreement, the aircraft shall take immediate steps to identify itself. Upon being recognised as a medical aircraft, the adverse party may order it to land, or take such other steps to safeguard its own interests, and must allow time for compliance before attacking the aircraft.

980. Known medical aircraft are entitled to protection while performing medical functions... Medical aircraft must not be used in order to gain any military advantage and while carrying out flights in accordance with the two preceding paragraphs, shall not, without prior agreement, be used to search for the wounded, sick and shipwrecked.⁸¹¹

780. Belgium's Law of War Manual states that:

Medical aircraft are immune from attack during the flights agreed upon beforehand between belligerents. They may not fly over enemy controlled or occupied territory without authorisation. They must obey each order to land... No authorisation is necessary to fly over territory controlled by one's own forces. Medical aircraft are still protected above contact zones, but the risk of sustaining damage are bigger in the absence of an agreement.⁸¹²

781. Canada's LOAC Manual states that "medical aircraft, correctly identified and exclusively used as such, are immune from attack".⁸¹³ The manual further states that:

41. Medical aircraft are free to fly over land physically controlled by their own or friendly forces, and over sea areas not under enemy control. It is advisable, however, that the adverse party be informed if such flights are likely to bring the aircraft within range of surface-to-air weapon systems of the adverse party.
42. Flight of medical aircraft over enemy or enemy-occupied territory is forbidden without prior agreement. In the absence of such agreement, medical aircraft operating in parts of the contact zone controlled by friendly forces, and over areas the control of which is doubtful, do so at their own risk. "Contact zone" means any area on land where the forward elements of opposing forces are in contact with each other, especially where they are exposed to direct fire from the ground.
43. Provided prior agreement has been obtained from the adverse party, medical aircraft belonging to a combatant remain protected while flying over land or sea areas under the physical control of the adverse party. If the aircraft lags or deviates for any reason from the terms of the agreement, the aircraft shall take immediate steps to identify itself. Upon being recognized as a medical aircraft, the adverse party may order it to land, or take such other steps to safeguard its own interests, but must allow time for compliance before attacking the aircraft.

⁸¹¹ Australia, *Defence Force Manual* (1994), §§ 972 and 977-980.

⁸¹² Belgium, *Law of War Manual* (1983), p. 49.

⁸¹³ Canada, *LOAC Manual* (1999), p. 7-5, § 43.

44. Medical aircraft must not be used in order to gain any military advantage. While carrying out flights, medical aircraft shall not, without prior agreement, be used to search for the wounded, sick and shipwrecked.⁸¹⁴

The manual qualifies “attacking a properly marked . . . medical aircraft” as a war crime.⁸¹⁵

782. Croatia’s Commanders’ Manual provides that “medical transports may not be used to collect or transmit intelligence data”.⁸¹⁶

783. Croatia’s Soldiers’ Manual instructs soldiers to respect medical aircraft displaying the distinctive emblem.⁸¹⁷

784. The Military Manual of the Dominican Republic directs soldiers not to attack medical aircraft.⁸¹⁸

785. Ecuador’s Naval Manual qualifies “deliberate attack upon . . . medical aircraft” as a war crime.⁸¹⁹

786. France’s LOAC Summary Note states that “medical transports must not be used to collect military information”.⁸²⁰

787. Germany’s Military Manual states that “the parties to the conflict are prohibited from using their medical aircraft to attempt to acquire any military advantage over an adverse party. The presence of medical aircraft shall not be used in an attempt to render military objectives immune from attack.”⁸²¹

788. Hungary’s Military Manual states that “medical aircraft flying over the high seas, on specified routes, according to an agreement or identified as such” must be protected.⁸²²

789. Indonesia’s Air Force Manual states that medical aircraft must not be attacked, provided they fly on routes, heights and at times agreed between belligerents. The manual further states that medical aircraft lose their immunity if they are used for purposes other than the transportation of the wounded, medical personnel or medical equipment.⁸²³ The manual also states that no immunity is provided to medical aircraft which enter a war zone or enemy controlled territory without prior authorisation or without agreement between the parties to the conflict or when they ignore instructions given by the parties to the conflict.⁸²⁴

790. Italy’s LOAC Elementary Rules Manual provides that “medical transports may not be used to collect or transmit intelligence data”.⁸²⁵

791. Italy’s IHL Manual provides that “medical aircraft attached to the military [medical] service must be respected and protected”.⁸²⁶

⁸¹⁴ Canada, *LOAC Manual* (1999), p. 9-4, §§ 41-47 and p. 11-3, § 22.

⁸¹⁵ Canada, *LOAC Manual* (1999), p. 16-4, § 21(e).

⁸¹⁶ Croatia, *Commanders’ Manual* (1992), § 34.

⁸¹⁷ Croatia, *Soldiers’ Manual* (1992), pp. 2 and 3.

⁸¹⁸ Dominican Republic, *Military Manual* (1980), p. 4.

⁸¹⁹ Ecuador, *Naval Manual* (1989), § 6.2.5.

⁸²⁰ France, *LOAC Summary Note* (1992), § 2.3.

⁸²¹ Germany, *Military Manual* (1992), § 620.

⁸²² Hungary, *Military Manual* (1992), p. 71.

⁸²³ Indonesia, *Air Force Manual* (1990), § 36.

⁸²⁴ Indonesia, *Air Force Manual* (1990), § 46.

⁸²⁵ Italy, *LOAC Elementary Rules Manual* (1991), § 34.

⁸²⁶ Italy, *IHL Manual* (1991), Vol. I, § 14.

792. Lebanon's Teaching Manual provides for respect for aircraft displaying the distinctive emblem.⁸²⁷

793. The Military Manual of the Netherlands restates the rules governing medical aircraft found in Article 25–28 AP I.⁸²⁸

794. New Zealand's Military Manual states that "medical aircraft, correctly identified and exclusively used as such, are for the main part immune from attack".⁸²⁹ It further states that "medical aircraft must be respected and protected at all times and must not be attacked. Their immunity ceases once they are used for purposes hostile to the adverse Party and outside their humanitarian purposes."⁸³⁰ The manual restates the rules governing medical aircraft found in Articles 25–28 AP I.⁸³¹ In addition, the manual specifies that:

Aircraft used exclusively for the removal of wounded and sick civilians, the infirm and maternity cases, or for the transport of medical personnel and equipment must not be attacked when flying at heights, times and on routes specifically agreed upon between all the belligerents concerned . . . In the absence of agreement to the contrary, flights over enemy or enemy-occupied territory are prohibited. Such aircraft must obey every order to land, but, after landing and examination, may continue their flight.⁸³²

According to the manual, "attacking a properly marked . . . medical aircraft" constitutes a war crime recognised by the customary law of armed conflict.⁸³³

795. Nicaragua's Military Manual states, with respect to international armed conflicts, that assistance to the wounded, sick and shipwrecked includes a requirement of "respect for medical aircraft assigned to the evacuation of the wounded and the sick and the transportation of medical personnel and equipment" and "respect for aircraft used to transfer civilian wounded and sick, disabled and elderly or to transport medical personnel or material".⁸³⁴

796. Russia's Military Manual states that "attack, bombardment or destruction of . . . medical aircraft displaying the distinctive emblems" is a prohibited method of warfare.⁸³⁵

797. South Africa's LOAC Manual provides that "medical transport by air must also be respected, even in the absence of any overflying rights, after they have been recognised as medical aircraft".⁸³⁶

798. Spain's LOAC Manual restates the rules governing medical aircraft found in Articles 25–27 AP I.⁸³⁷

⁸²⁷ Lebanon, *Teaching Manual* (1997), p. 77.

⁸²⁸ Netherlands, *Military Manual* (1993), pp. VI-6 and VI-7.

⁸²⁹ New Zealand, *Military Manual* (1992), § 629.1.

⁸³⁰ New Zealand, *Military Manual* (1992), § 1007(1).

⁸³¹ New Zealand, *Military Manual* (1992), § 1009(1)–(5).

⁸³² New Zealand, *Military Manual* (1992), § 1110(2).

⁸³³ New Zealand, *Military Manual* (1992), § 1704(5).

⁸³⁴ Nicaragua, *Military Manual* (1996), Article 14(8) and (39).

⁸³⁵ Russia, *Military Manual* (1990), § 5(g). ⁸³⁶ South Africa, *LOAC Manual* (1996), § 54.

⁸³⁷ Spain, *LOAC Manual* (1996), Vol. I, § 9.2.c.(3).

799. Sweden's IHL Manual states that Articles 25–27 AP I on the protection of medical aircraft have the status of customary law.⁸³⁸

800. Switzerland's Basic Military Manual provides that:

Art. 91. Medical aircraft (airplanes, helicopters, etc.) exclusively used for the transport of the wounded and sick shall be respected and protected . . . The time, height and route of the flight, as well as the means of identification, must be agreed upon beforehand between the belligerents.

Art. 92. Unless there is an agreement to the contrary, flights over enemy territory are prohibited. Medical aircraft must obey each order to land. After inspection, they may continue their flight with their passengers.⁸³⁹

801. The UK Military Manual restates the rules on medical aircraft found in Articles 36 GC I and 22 GC IV.⁸⁴⁰

802. The UK LOAC Manual provides that:

Helicopters are increasingly used for the evacuation of the wounded. Medical aircraft are protected in the same way as other medical transports, but, having regard to the range of anti-aircraft missiles, the problems of identification are greater. Overflight of enemy-held territory without prior agreement will mean loss of protection. Medical aircraft must obey summonses for inspection. Protocol I contains detailed new rules on medical aircraft and provides for light and radio recognition signals.⁸⁴¹

803. The US Field Manual restates Article 36 GC I and states that:

It is not necessary that the aircraft should have been specially built and equipped for medical purposes. There is no objection to converting ordinary aircraft into medical aircraft or to using former medical aircraft for other purposes, provided the distinctive markings are removed.⁸⁴²

804. The US Air Force Pamphlet states that:

Generally, a medical aircraft, (identified as such) should not be attacked unless under the circumstances at the time it represents an immediate military threat and other methods of control are not available. For example, this might occur when it approaches enemy territory or a combat zone without permission and disregards instructions, or initiates an attack. Attacks might also occur when the aircraft is not identified as a medical aircraft because of lack of agreement as to the height, time and route.⁸⁴³

It further provides that "in addition to grave breaches of the Geneva Conventions of 1949, the following acts are representative of situations involving

⁸³⁸ Sweden, *IHL Manual* (1991), Section 2.2.3, p. 18.

⁸³⁹ Switzerland, *Basic Military Manual* (1987), Articles 91–92.

⁸⁴⁰ UK, *Military Manual* (1958), §§ 34 and 358–359.

⁸⁴¹ UK, *LOAC Manual* (1981), Section 6, p. 24, § 12.

⁸⁴² US, *Field Manual* (1956), § 237. ⁸⁴³ US, *Air Force Pamphlet* (1976), § 4-2(f).

individual criminal responsibility: (1) deliberate attack on protected medical aircraft".⁸⁴⁴

805. The US Air Force Commander's Handbook provides that:

Medical aircraft, recognized as such, should not be deliberately attacked or fired on. Medical aircraft are not permitted to fly over territory controlled by the enemy, without the enemy's prior agreement. Medical aircraft must comply with requests to land for inspection. Medical aircraft complying with such a request must be allowed to continue their flight, with all personnel on board, if inspection does not reveal that the aircraft has engaged in acts harmful to the enemy or otherwise violated the Geneva Conventions of 1949.⁸⁴⁵

806. The US Naval Handbook qualifies "deliberate attack upon . . . medical aircraft" as a war crime.⁸⁴⁶

807. The YPA Military Manual of the SFRY (FRY) restates the rules on medical aircraft set out in Articles 25–28 AP I.⁸⁴⁷

National Legislation

808. Bangladesh's International Crimes (Tribunal) Act states that the "violation of any humanitarian rules applicable in armed conflicts laid down in the Geneva Conventions of 1949" is a crime.⁸⁴⁸

809. Under Estonia's Penal Code, "an attack against . . . a medical aircraft" is a war crime.⁸⁴⁹

810. Greece's Military Penal Code provides for the protection of medical aircraft.⁸⁵⁰

811. Ireland's Geneva Conventions Act as amended provides that any "minor breach" of the Geneva Conventions, including violations of Article 36 GCI, and of AP I, including violations of Articles 25–27 AP I, is a punishable offence.⁸⁵¹

812. Under Norway's Military Penal Code as amended, "anyone who contravenes or is accessory to the contravention of provisions relating to the protection of persons or property laid down in . . . the Geneva Conventions of 12 August 1949 . . . [and in] the two additional protocols to these Conventions . . . is liable to imprisonment".⁸⁵²

National Case-law

813. No practice was found.

⁸⁴⁴ US, *Air Force Pamphlet* (1976), § 15-3(c)(1).

⁸⁴⁵ US, *Air Force Commander's Handbook* (1980), § 3-2(c).

⁸⁴⁶ US, *Naval Handbook* (1995), § 6.2.5.

⁸⁴⁷ SFRY (FRY), *YPA Military Manual* (1988), §§ 317–321.

⁸⁴⁸ Bangladesh, *International Crimes (Tribunal) Act* (1973), Section 3(2)(e).

⁸⁴⁹ Estonia, *Penal Code* (2001), § 106. ⁸⁵⁰ Greece, *Military Penal Code* (1995), Article 156.

⁸⁵¹ Ireland, *Geneva Conventions Act as amended* (1962), Section 4(1) and (4).

⁸⁵² Norway, *Military Penal Code as amended* (1902), § 108.

Other National Practice

814. At the CDDH, during a debate in Committee II on Article 32 of draft AP I ("Neutral or other States not parties to the conflict"), Egypt stated that "to attack a medical aircraft is a serious matter and it would be better to take all other possible action first".⁸⁵³

815. At the CDDH, commenting on Article 27 of draft AP I, Egypt stated that "for the protection of medical aircraft, prior agreement is absolutely necessary for aircraft to fly over contact or similar zones".⁸⁵⁴

816. The instructions given to the French armed forces for the conduct of Opération Mistral, simulating a military operation under the right of self-defence or a mandate of the UN Security Council, refer to Articles 25 and 27 AP I.⁸⁵⁵

817. At the CDDH, Japan stated that "flying over enemy occupied areas was still prohibited . . . if [it] occurred by force of urgent necessity, in the absence of an agreement, that constituted a violation of the Protocol".⁸⁵⁶

818. It is reported that in the Vietnam War, US army medical evacuation helicopters marked with the red cross emblem suffered a high loss rate from enemy fire, with the result that some medical evacuation units armed their helicopters with machine guns.⁸⁵⁷

819. In 1987, the Deputy Legal Adviser of the US Department of State affirmed that "we support the principle that known medical aircraft be respected and protected when performing their humanitarian functions". He added: "that is a rather general statement of what is reflected in many, but not all, aspects of the detailed rules in Articles 24 through 31, which include some of the more useful innovations in the Protocol".⁸⁵⁸

820. The Report on US Practice notes that US practice suggests that if enemy forces do not respect the protected status of medical units, the right of self-defence may justify the use of force.⁸⁵⁹

821. In 1991, in a document entitled "Examples of violations of the rules of international law committed by the so-called armed forces of Slovenia", the Ministry of Defence of the SFRY (FRY) included the following example: "Fire

⁸⁵³ Egypt, Statement at the CDDH, *Official Records*, Vol. XII, CDDH/II/SR. 58, 27 April 1976, p. 34, § 30.

⁸⁵⁴ Egypt, Statement at the CDDH, *Official Records*, Vol. VI, CDDH/SR.39, 25 May 1977, p. 114.

⁸⁵⁵ France, Etat-major de la Force d'Action Rapide, *Ordres pour l'Opération Mistral*, 1995, Section 6, § 62.

⁸⁵⁶ Japan, Statement at the CDDH, *Official Records*, Vol. XI, CDDH/II/SR.47, 5 April 1975, pp. 528–529, § 22.

⁸⁵⁷ Peter Dorland and James Nanney, *Dust Off: Army Aeromedical Evacuation in Vietnam*, Center of Military History, United States Army, Washington D.C., 1982, p. 85.

⁸⁵⁸ US, Remarks of Michael J. Matheson, Deputy Legal Adviser, US Department of State, The Sixth Annual American Red Cross-Washington College of Law Conference on International Humanitarian Law: A Workshop on Customary International Law and the 1977 Protocols Additional to the 1949 Geneva Conventions, *American University Journal of International Law and Policy*, Vol. 2, 1987, p. 423–424.

⁸⁵⁹ Report on US Practice, 1997, Chapter 2.7.

has been opened on medical and helicopters and planes in spite of their Red Cross signs.”⁸⁶⁰

III. Practice of International Organisations and Conferences

United Nations

822. In 1996, in a report on the situation of human rights in the Sudan, in a section entitled “Human rights violations – Abuses by parties to the conflict other than the Government of Sudan”, the Special Rapporteur of the UN Commission on Human Rights reported that an ICRC plane was shot at and hit when preparing for landing. Following the incident, the ICRC delegation was advised by its headquarters not to fly to certain areas.⁸⁶¹

Other International Organisations

823. No practice was found.

International Conferences

824. No practice was found.

IV. Practice of International Judicial and Quasi-judicial Bodies

825. No practice was found.

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

826. To fulfil its task of disseminating IHL, the ICRC has delegates around the world teaching armed and security forces the rules set out in Articles 25–28 AP I.⁸⁶²

827. In 1978, in a letter to a National Society, the ICRC indicated that medical aircraft are among those objects which “must be respected and protected in all circumstances”.⁸⁶³

828. In 1990, the ICRC protested to a government official responsible for humanitarian aid about the bombardment of one of its planes. It considered that the attack was a grave violation of the duty to respect the red cross emblem and of the security agreement concluded with the government concerned.⁸⁶⁴

829. In a press release issued in 1993 in the context of the conflict in Angola, the ICRC denounced the destruction of one of its planes at Uige airport while

⁸⁶⁰ SFRY (FRY), Minister of Defence, Examples of violations of the rules of international law committed by the so-called Armed Forces of Slovenia, July 1991, § 1(iii).

⁸⁶¹ UN Commission on Human Rights, Special Rapporteur on the Situation of Human Rights in the Sudan, Report, UN Doc. E/CN.4/1996/62, 20 February 1996, § 78.

⁸⁶² Frédéric de Mulinen, *Handbook on the Law of War for Armed Forces*, ICRC, Geneva, 1987, §§ 628–632.

⁸⁶³ ICRC archive document. ⁸⁶⁴ ICRC archive document.

waiting to evacuate 21 foreigners held by UNITA. It called on the parties to comply with IHL and regarded the attack as a serious breach of the principles of IHL concerning respect for the red cross emblem.⁸⁶⁵

VI. Other Practice

830. In 1983, in a letter to the ICRC, the Secretary-General of an armed opposition group justified an attack on an ICRC aircraft on the grounds that his soldiers were “nervous and suspicious of the presence of any aircraft in the region”. In a later letter in 1985, he stated that the armed opposition group would respect the ICRC but did not regard it as “neutral” and considered the protection through the emblem alone as insufficient.⁸⁶⁶

Loss of protection of medical aircraft from attack

831. Specific practice concerning loss of protection of medical aircraft from attack has been included in the subsection on respect for and protection of medical aircraft. In addition, general practice concerning loss of protection of medical units and medical transports from attack is contained in the subsection on loss of protection of medical units and is not repeated here.

F. Persons and Objects Displaying the Distinctive Emblem

I. Treaties and Other Instruments

Treaties

832. Pursuant to Article 8(2)(b)(xxiv) and (e)(ii) of the 1998 ICC Statute, “intentionally directing attacks against buildings, material, medical units and transport, and personnel using the distinctive emblems of the Geneva Conventions in conformity with international law” constitutes a war crime in both international and non-international armed conflicts.

Other Instruments

833. Based on several documents supplying evidence of outrages committed during the First World War, the 1919 Report of the Commission on Responsibility lists violations of the laws and customs of war which should be subject to criminal prosecution, including the “breach of . . . rules relating to the Red Cross”.

834. In the 1991 Hague Statement on Respect for Humanitarian Principles, the Presidents of the six republics of the former Yugoslavia stated that “the Red Cross emblem must be respected”.

⁸⁶⁵ ICRC, Press Release No. 1737, Angola: Solemn ICRC Appeal, 10 February 1993.

⁸⁶⁶ ICRC archive documents.

835. Paragraph 10 of the 1991 Memorandum of Understanding on the Application of IHL between Croatia and the SFRY provides that “the parties shall repress . . . any attack on persons or property under [the] protection [of the red cross emblem]”.

836. Paragraph 3 of the 1992 Agreement on the Application of IHL between the Parties to the Conflict in Bosnia and Herzegovina provides that “the Red Cross emblem shall be respected”.

837. In paragraph II (7) of the 1992 Agreement No. 3 on the ICRC Plan of Action between the Parties to the Conflict in Bosnia and Herzegovina the ICRC requested the parties to “enforce respect for the red cross emblem”.

838. Section 9.7 of the 1999 UN Secretary-General’s Bulletin provides that “the United Nations force shall in all circumstances respect the Red Cross and Red Crescent emblems”.

839. The 2000 UNTAET Regulation No. 2000/15 establishes panels with exclusive jurisdiction over serious criminal offences, including war crimes. According to Section 6(1)(b)(xxiv) and (e)(ii), “intentionally directing attacks against buildings, material, medical units and transport, and personnel using the distinctive emblems of the Geneva Conventions in conformity with international law” constitutes a war crime in both international and non-international armed conflicts.

II. National Practice

Military Manuals

840. Australia’s Defence Force Manual provides that “firing upon . . . the Red Cross symbol” constitutes a grave breach or a serious war crime likely to warrant institution of criminal proceedings.⁸⁶⁷

841. Benin’s Military Manual instructs soldiers to “respect and protect persons and objects displaying the red cross [or] red crescent emblem”.⁸⁶⁸

842. Cameroon’s Disciplinary Regulations provides that, under the laws and customs of war, each soldier must respect “the emblems of the Red Cross and of national Red Cross societies which are protective signs as such”.⁸⁶⁹

843. Canada’s LOAC Manual states, with respect to non-international armed conflicts in particular, that “medical and religious personnel, together with medical units and transports shall, under the direction of the competent authority concerned, display the distinctive emblem of the Red Cross or Red Crescent which emblem is to be respected at all times”.⁸⁷⁰

⁸⁶⁷ Australia, *Defence Force Manual* (1994), § 1315(q); see also *Commanders’ Guide* (1994), § 1305(q).

⁸⁶⁸ Benin, *Military Manual* (1995), Fascicule II, pp. 18–19.

⁸⁶⁹ Cameroon, *Disciplinary Regulations* (1975), Article 31.

⁸⁷⁰ Canada, *LOAC Manual* (1999), p. 17-4, § 33.

844. Canada's Code of Conduct states that "international law provides special protection to personnel and facilities displaying the Red Cross or Red Crescent . . . Medical personnel and their medical facilities/buildings and transport displaying the distinctive emblem must not be attacked."⁸⁷¹

845. Colombia's Circular on Fundamental Rules of IHL provides that "the emblem of the red cross (red crescent, red lion and sun) is the sign of that protection [of medical personnel, units and transports] and must be respected".⁸⁷²

846. France's LOAC Summary Note states that "the specific immunity granted to certain persons and objects by the law of war must be strictly observed. Specifically protected persons and objects can be identified by the display of the emblem of the red cross, red crescent or red lion and sun."⁸⁷³ The manual qualifies "attacks against marked property" as a war crime.⁸⁷⁴

847. France's LOAC Manual provides that the red cross and red crescent emblems "indicate that the persons, material and installations which display them have a special protected status and may not be made the object of attack or violence".⁸⁷⁵

848. Germany's Military Manual provides that:

The distinctive emblem of medical and religious personnel as well as that of medical establishments (including hospital ships), medical transports, medical material and hospital zones is the red cross on a white ground. Countries which wish to use the red crescent in place of the red cross shall be free to do so. The two distinctive emblems have no religious significance; they must be equally respected in all places, and at all times.⁸⁷⁶

849. Hungary's Military Manual includes persons and objects displaying the red cross or red crescent emblem among specifically protected persons objects.⁸⁷⁷

850. Indonesia's Air Force Manual requires respect for persons and objects displaying the distinctive emblem.⁸⁷⁸

851. Italy's LOAC Elementary Rules Manual provides that, during military operations, persons and objects displaying the distinctive emblems must be respected.⁸⁷⁹

852. Kenya's LOAC Manual instructs soldiers to "respect all persons and objects bearing the emblem of the Red Cross [or] Red Crescent".⁸⁸⁰

853. Lebanon's Teaching Manual provides for respect for hospitals, ships and medical aircraft displaying the red cross or red crescent emblem.⁸⁸¹

⁸⁷¹ Canada, *Code of Conduct* (2001), Rule 10, § 1.

⁸⁷² Colombia, *Circular on Fundamental Rules of IHL* (1992), § 3.

⁸⁷³ France, *LOAC Summary Note* (1992), § 2.2.

⁸⁷⁴ France, *LOAC Summary Note* (1992), § 3.4. ⁸⁷⁵ France, *LOAC Manual* (2001), p. 61.

⁸⁷⁶ Germany, *Military Manual* (1992), § 637. ⁸⁷⁷ Hungary, *Military Manual* (1992), p. 44.

⁸⁷⁸ Indonesia, *Air Force Manual* (1990), § 54.

⁸⁷⁹ Italy, *LOAC Elementary Rules Manual* (1991), p. 30.

⁸⁸⁰ Kenya, *LOAC Manual* (1997), Précis No. 3, p. 14.

⁸⁸¹ Lebanon, *Teaching Manual* (1997), p. 77.

854. Madagascar's Military Manual instructs soldiers to "respect persons and objects displaying the distinctive emblem" of the medical service and religious personnel, whether military or civilian.⁸⁸²

855. Nigeria's Soldiers' Code of Conduct states that "signs which protect the wounded, sick, medical, Red Cross/Crescent personnel, ambulances and Red Cross/Crescent relief transports, hospitals, first aid posts, etc. must be identified and respected".⁸⁸³

856. The Philippines' Rules for Combatants provides that "it is forbidden to attack the persons, vehicles and installations which are protected by the Red Cross sign".⁸⁸⁴

857. The Soldier's Rules of the Philippines instructs soldiers to "respect all persons and objects bearing the emblem of the Red Cross, Red Crescent [or] Red Lion and Sun".⁸⁸⁵

858. Romania's Soldiers' Manual prohibits attacks against buildings displaying the emblem.⁸⁸⁶

859. Senegal's IHL Manual states that "the emblem of the red cross and red crescent ensures the protection of medical personnel, units and transports".⁸⁸⁷

860. Switzerland's Basic Military Manual provides that:

The distinctive emblem (red cross, red crescent) serves to indicate, under control of the military authority, the establishments, units, personnel, vehicles and material. It must not be used for other purposes. The emblem indicates that those who wear it must be respected and protected.⁸⁸⁸

The manual further refers to Article 111 of the Military Criminal Code (see *infra*) which qualifies "acts of hostility against persons protected by the red cross" and "destruction of objects protected by the red cross" as war crimes.⁸⁸⁹

861. Togo's Military Manual instructs soldiers to "respect and protect persons and objects displaying the red cross [or] red crescent emblem".⁸⁹⁰

862. The UK LOAC Manual provides that "persons, units or establishments displaying either sign [red cross or red crescent] are protected from attack".⁸⁹¹

863. The US Soldier's Manual instructs members of armed forces not to fire on persons and objects displaying the red cross or red crescent emblem.⁸⁹²

National Legislation

864. Australia's ICC (Consequential Amendments) Act incorporates in the Criminal Code the war crimes defined in the 1998 ICC Statute, including

⁸⁸² Madagascar, *Military Manual* (1994), Fiche No. 4-T, § 24.

⁸⁸³ Nigeria, *Soldiers' Code of Conduct* (undated), § 5.

⁸⁸⁴ Philippines, *Rules of Combatants* (1989), § 2. ⁸⁸⁵ Philippines, *Soldier's Rules* (1989), § 10.

⁸⁸⁶ Romania, *Soldiers' Manual* (1991), p. 19. ⁸⁸⁷ Senegal, *IHL Manual* (1999), p. 16.

⁸⁸⁸ Switzerland, *Basic Military Manual* (1987), Article 94.

⁸⁸⁹ Switzerland, *Basic Military Manual* (1987), Article 200(c) and (d).

⁸⁹⁰ Togo, *Military Manual* (1996), Fascicule II, p. 19.

⁸⁹¹ UK, *LOAC Manual* (1981), Section 4, p. 16, § 9. ⁸⁹² US, *Soldier's Manual* (1984), p. 7.

“attacking persons or objects using the distinctive emblems of the Geneva Conventions” in both international and non-international armed conflicts.⁸⁹³

865. Azerbaijan’s Criminal Code provides that “directing attacks... against personnel, buildings, installations and transports, using the distinctive emblems of the red cross and red crescent” constitutes a war crime in international and non-international armed conflicts.⁸⁹⁴

866. The Criminal Code of Belarus provides that it is a war crime to “attack personnel, buildings, objects, units and means of transport displaying the protective emblem of the Red Cross or Red Crescent”.⁸⁹⁵

867. Under Burundi’s Draft Law on Genocide, Crimes against Humanity and War Crimes, “intentionally directing attacks against buildings, material, medical units and transport, and personnel using the distinctive emblems of the Geneva Conventions in conformity with international law” is a war crime in both international and non-international armed conflicts.⁸⁹⁶

868. Canada’s Crimes against Humanity and War Crimes Act provides that the war crimes defined in Article 8(2) of the 1998 ICC Statute are “crimes according to customary international law” and, as such, indictable offences under the Act.⁸⁹⁷

869. Under Colombia’s Penal Code, it is a punishable act to attack or destroy, without imperative military necessity:

ambulances or means of medical transport, field hospitals or fixed hospitals, depots of aid material, medical convoys, goods destined for relief and aid of protected persons, . . . medical goods and installations properly marked with the distinctive emblems of the Red Cross or Red Crescent.⁸⁹⁸

870. Congo’s Genocide, War Crimes and Crimes against Humanity Act defines war crimes with reference to the categories of crimes set out in Article 8 of the 1998 ICC Statute.⁸⁹⁹

871. Under Denmark’s Military Criminal Code as amended, failure to respect the distinctive signs reserved for people and materials bringing assistance to the sick and wounded is an offence.⁹⁰⁰

872. The Draft Amendments to the Penal Code of El Salvador punishes anyone who, in the context of an international or non-international armed conflict, “attacks or destroys . . . medical objects and installations properly marked with the emblem of the Red Cross or Red Crescent, without having taken adequate measures of protection and without imperative military necessity”.⁹⁰¹

⁸⁹³ Australia, *ICC (Consequential Amendments) Act* (2002), Schedule 1, §§ 268.66 and 268.78.

⁸⁹⁴ Azerbaijan, *Criminal Code* (1999), Article 116(3).

⁸⁹⁵ Belarus, *Criminal Code* (1999), Article 136.

⁸⁹⁶ Burundi, *Draft Law on Genocide, Crimes against Humanity and War Crimes* (2001), Article 4(B)(w) and (D)(b).

⁸⁹⁷ Canada, *Crimes against Humanity and War Crimes Act* (2000), Section 4(1) and (4).

⁸⁹⁸ Colombia, *Penal Code* (2000), Article 155.

⁸⁹⁹ Congo, *Genocide, War Crimes and Crimes against Humanity Act* (1998), Article 4.

⁹⁰⁰ Denmark, *Military Criminal Code as amended* (1978), Article 25.

⁹⁰¹ El Salvador, *Draft Amendments to the Penal Code* (1998), Article entitled “Destrucción de bienes e instalaciones de carácter sanitario”.

873. Under Estonia's Penal Code, "a person who kills, tortures, causes health damage to or takes hostage a member of a medical unit properly identified, or any other person attending to the sick or wounded persons . . . [as well as] a representative of a humanitarian organisation performing his/her duties in a war zone" commits a war crime.⁹⁰²

874. Germany's Law Introducing the International Crimes Code provides that:

Anyone who, in connection with an international or non-international armed conflict, . . . carries out an attack against personnel, buildings, material or medical units and transport designated with the distinctive emblems of the Geneva Conventions . . . in conformity with international humanitarian law, shall be liable to imprisonment for not less than three years. In less serious cases, particularly where the attack is not carried out with military means, the period of imprisonment shall be for not less than one year.⁹⁰³

875. Under the International Crimes Act of the Netherlands, "intentionally directing attacks against buildings, material, medical units and transports, and personnel using the distinctive emblems of the Geneva Conventions in conformity with international law" is a crime, whether committed in an international or a non-international armed conflict.⁹⁰⁴

876. Under New Zealand's International Crimes and ICC Act, war crimes include the crimes defined in Article 8(2)(b)(xxiv) and (e)(ii) of the 1998 ICC Statute.⁹⁰⁵

877. Under Nicaragua's Military Penal Code, failure to respect the red cross emblem is considered an offence against the laws and customs of war.⁹⁰⁶

878. Nicaragua's Draft Penal Code punishes anyone who, during an international or internal armed conflict, "without having previously taken appropriate measures of protection and without any justification based on imperative military necessity, attacks or destroys . . . objects or installations of medical character properly marked with the conventional signs of the red cross or red crescent".⁹⁰⁷

879. Under Peru's Code of Military Justice, it is an offence to knowingly open fire upon personnel of the Red Cross displaying the distinctive emblem in a situation of combat, on the battlefield or during military operations.⁹⁰⁸

880. Romania's Penal Code provides for the punishment of anyone who "subjects to inhuman treatment . . . members of . . . the Red Cross or any other organisation assimilated with it . . . or subjects such persons to medical or scientific experiments".⁹⁰⁹ It further provides for the punishment of:

⁹⁰² Estonia, *Penal Code* (2001), § 102.

⁹⁰³ Germany, *Law Introducing the International Crimes Code* (2002), Article 1, § 11(1)(2).

⁹⁰⁴ Netherlands, *International Crimes Act* (2003), Articles 5(5)(n) and 6(3)(b).

⁹⁰⁵ New Zealand, *International Crimes and ICC Act* (2000), Section 11(2).

⁹⁰⁶ Nicaragua, *Military Penal Code* (1996), Articles 48–49.

⁹⁰⁷ Nicaragua, *Draft Penal Code* (1999), Article 468.

⁹⁰⁸ Peru, *Code of Military Justice* (1980), Article 96.

⁹⁰⁹ Romania, *Penal Code* (1968), Article 358.

The total or partial destruction of objects marked with the regular distinctive emblem, such as:

- a) buildings . . .
- b) means of transport of any kind assigned to . . . the Red Cross or the organisations assimilated therewith which serve to transport . . . material of the Red Cross or of organisations assimilated therewith.⁹¹⁰

881. Spain's Penal Code provides for the punishment of "anyone who, in the event of armed conflict, should . . . knowingly violate the protection due to medical units and medical transports . . . which are duly identified with signs or the appropriate distinctive signals".⁹¹¹

882. Sweden's Penal Code as amended provides that:

A person guilty of a serious violation of a treaty or agreement with a foreign power or an infraction of a generally recognised principle or tenet relating to international humanitarian law concerning armed conflicts shall be sentenced for crime against international law to imprisonment for at most four years. Serious violations shall be understood to include:

- ...
 - (5) initiating an attack against establishments or installations which enjoy special protection under international law.⁹¹²

883. Under Switzerland's Military Criminal Code as amended, the commission of hostile acts against persons or objects placed under the protection of the distinctive emblems, or impeding the carrying out of their functions is punishable by imprisonment.⁹¹³

884. Under Trinidad and Tobago's Draft ICC Act, it is a punishable offence to commit a war crime as defined in Article 8(2)(b)(xxiv) and (e)(ii) of the 1998 ICC Statute.⁹¹⁴

885. Under the UK ICC Act, it is a punishable offence to commit a war crime as defined in Article 8(2)(b)(xxiv) and (e)(ii) of the 1998 ICC Statute.⁹¹⁵

886. Venezuela's Code of Military Justice as amended provides for the punishment of "those who carry out serious attacks against members of the Red Cross".⁹¹⁶

National Case-law

887. No practice was found.

⁹¹⁰ Romania, *Penal Code* (1968), Article 359. ⁹¹¹ Spain, *Penal Code* (1995), Article 612(1).

⁹¹² Sweden, *Penal Code as amended* (1962), Chapter 22, § 6.

⁹¹³ Switzerland, *Military Criminal Code as amended* (1927), Article 111.

⁹¹⁴ Trinidad and Tobago, *Draft ICC Act* (1999), Section 5(1)(a).

⁹¹⁵ UK, *ICC Act* (2001), Sections 50(1) and 51(1) (England and Wales) and Section 58(1) (Northern Ireland).

⁹¹⁶ Venezuela, *Code of Military Justice as amended* (1998), Article 474(3).

Other National Practice

888. In 1992, in the context of the conflict in Bosnia and Herzegovina, the Presidency of the Republika Srpska issued a statement calling on “local authorities and the most influential of Serbian people” to respect the red cross emblem “which ought to be used by medical personnel, hospitals and medical transports only”.⁹¹⁷ On another occasion, the Presidency ordered all combatants to “take all measures to respect the Red Cross emblem”.⁹¹⁸

889. Under the instructions given to the French armed forces for the conduct of Opération Mistral, simulating a military operation under the right of self-defence or a mandate of the UN Security Council, the red cross emblem must be respected in all circumstances.⁹¹⁹

890. A note issued by the Kuwaiti Ministry of Defence in 1994 recognised the principle whereby persons and objects displaying the distinctive emblem must be respected.⁹²⁰

891. In 1991, in a document entitled “Examples of violations of the rules of international law committed by the so-called armed forces of Slovenia”, the Ministry of Defence of the SFRY (FRY) included the following example: “Fire has been opened on medical vehicles and helicopters and planes, in spite of their Red Cross signs, medical teams were arrested.”⁹²¹

892. In an order to Yugoslav army units in 1991, the Federal Executive Council of the SFRY requested that “all the participants in the armed conflicts in the territory of Yugoslavia . . . respect and protect the Red Cross sign so as to ensure the safety of all those performing their humanitarian duties under this sign”.⁹²²

893. In 1993 and 1994, in meetings with the ICRC, the Minister of Defence of a State guaranteed that the armed forces would respect any installation displaying the distinctive emblem. It insisted that incidents in which ICRC personnel and objects had been targeted were the work of uncontrolled elements and that strict orders had been issued.⁹²³

894. In 1996, an ICRC document noted several incidents in which ICRC buildings and vehicles displaying the distinctive emblem had been attacked by government forces.⁹²⁴

⁹¹⁷ Bosnia and Herzegovina, Republika Srpska, Appeal by the Presidency, 15 June 1992.

⁹¹⁸ Bosnia and Herzegovina, Republika Srpska, Order issued by the Presidency, 22 August 1992.

⁹¹⁹ France, Etat-major de la Force d’Action Rapide, Ordres pour l’Opération Mistral, 1995, Section 6, § 62.

⁹²⁰ Report on the Practice of Kuwait, 1997, Chapter 2.5, referring to Note by the Ministry of Defence concerning the emblems, 15 October 1994.

⁹²¹ SFRY (FRY), Minister of Defence, Examples of violations of the rules of IHL committed by the so-called Armed Forces of Slovenia, 10 July 1991, § 2(iii).

⁹²² SFRY (FRY), Federal Executive Council, Secretariat for Information, Statement regarding the need for respect of the norms of international humanitarian law in the armed conflicts in Yugoslavia, Belgrade, 31 October 1991.

⁹²³ ICRC archive documents. ⁹²⁴ ICRC archive document.

III. Practice of International Organisations and Conferences

United Nations

895. No practice was found.

Other International Organisations

896. In 1981, in a report on refugees from El Salvador, the Rapporteur of the Parliamentary Assembly of the Council of Europe noted that it had become necessary to launch a large-scale information campaign about the tasks of the Red Cross, because the red cross emblem was frequently being ignored and Red Cross convoys were being fired upon. She proposed that a special appeal should be made to the government of El Salvador and to right- and left-wing extremist groups to, *inter alia*, respect the red cross emblem.⁹²⁵

897. In a resolution adopted in 1994 on respect for international humanitarian law and support for humanitarian action in armed conflicts, the Council of Ministers of the OAU urged all member States and warring parties “to respect the Red Cross, Red Crescent and other humanitarian organization emblems”.⁹²⁶

898. In a resolution adopted in 1994 on respect for international humanitarian law, the OAS urged all member States “to do their utmost to guarantee the security of personnel engaged in humanitarian activities, . . . in particular by respecting the Red Cross emblem”.⁹²⁷

899. In 1994, respect for the red cross and red crescent emblems was included as part of confidence-building measures proposed by the OSCE in the conflict in Nagorno-Karabakh.⁹²⁸

International Conferences

900. At the 1992 Helsinki Summit of Heads of State or Government, CSCE participating States reaffirmed their commitment to respect the protective emblems of the red cross and red crescent.⁹²⁹

901. The Final Declaration adopted by the International Conference for the Protection of War Victims in 1993 urged all States to “make every effort to . . . increase respect for the emblems of the red cross and red crescent”.⁹³⁰

902. In a resolution adopted in 1993, the 90th Inter-Parliamentary Conference called on “all States to make every effort to protect agents from belligerents as

⁹²⁵ Council of Europe, Parliamentary Assembly, Rapporteur on Refugees from El Salvador, Report, Doc. 4698, Report on refugees from El Salvador, 30 January 1981, pp. 9 and 12; *Official Report of Debates*, 33rd Session, Vol. 1, 1–7 sittings, 11–15 May 1991, p. 203.

⁹²⁶ OAU, Council of Ministers, Res. 1526 (LX), 11 June 1994, § 4.

⁹²⁷ OAS, General Assembly, Res. 1270 (XXIV-O/94), 10 June 1994, § 3.

⁹²⁸ OSCE, Confidence-building measures for possible application in the conflict in and around Nagorno-Karabakh (revised), annexed to Letter dated 9 June 1994 from Sweden to the President of the UN Security Council, UN Doc. S/1994/687, 9 June 1994, § 2.

⁹²⁹ CSCE, Helsinki Summit of Heads of State or Government, 9–10 July 1992, Helsinki Document 1992: The Challenges of Change, Decisions, Chapter VI: The Human Dimension, § 51.

⁹³⁰ International Conference for the Protection of War Victims, Geneva, 30 August–1 September 1993, Final Declaration, § II (9), *ILM*, Vol. 33, 1994, p. 301.

well as common criminals and ensure the immunity which should be guaranteed by the emblems of the Red Cross and Red Crescent".⁹³¹

903. In a resolution on health and war adopted in 1995, the Conference of African Ministers of Health invited the OAU member States "to guarantee the immunity of the emblems of the Red Cross and Red Crescent".⁹³²

IV. Practice of International Judicial and Quasi-judicial Bodies

904. No practice was found.

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

905. In a press release issued in 1978 concerning fighting in East Beirut, the ICRC expressed its indignation "at the non-respect of the Red Cross emblem which should be observed for the protection of the medical personnel, units and vehicles which, from the outset, have been repeatedly under attack".⁹³³

906. In 1979, the ICRC appealed to all parties to the conflict in Rhodesia/Zimbabwe to "respect the protective emblem of the Red Cross and thus allow those carry it in the accomplishment of their humanitarian task to work in safety".⁹³⁴

907. In 1980, a National Red Cross Society sent a letter of protest to the army Chief of Staff of a State following an incident in which one of its trucks displaying the distinctive emblem was requisitioned by governmental soldiers and used to transport goods looted in nearby villages, while the driver and other Red Cross employees were detained and forced to accompany the soldiers in their looting.⁹³⁵ Two years later similar violations occurred, when searches conducted by governmental army soldiers in the local Red Cross premises were reported. The head of the delegation of the Federation of Red Cross and Red Crescent Societies asked them to leave, the place being under the protection of the red cross emblem, but later a grenade was thrown into the compound. The head of the Federation delegation made a verbal protest to the Defence Secretary of State. The ICRC delegation proposed making a formal protest to the Ministries of Health and Defence regarding the violation of a place protected by the red cross emblem.⁹³⁶

908. In a press release issued in 1987 after two ambulances clearly marked with the red cross and red crescent emblems suffered direct hits from helicopter gun

⁹³¹ 90th Inter-Parliamentary Conference, Canberra, 13–18 September 1993, Resolution on respect for international humanitarian law and support for humanitarian action in armed conflicts, § 2(h).

⁹³² Conference of African Ministers of Health, Cairo, 26–28 April 1995, Res. 14 (V), § 5(c).

⁹³³ ICRC, Press Release No. 1333b, Fighting in East Beirut – ICRC Appeal, 7 July 1978.

⁹³⁴ ICRC, Conflict in Southern Africa: ICRC appeal, 19 March 1979, § 5, *IRRC*, No. 209, 1979, p. 88.

⁹³⁵ ICRC archive document. ⁹³⁶ ICRC archive document.

fire in southern Lebanon, the ICRC appealed to the parties concerned to respect everywhere and at all times the emblems of the red cross and red crescent "which protect those who provide assistance to all victims of the Lebanese conflict".⁹³⁷

909. In a Memorandum on the Applicability of International Humanitarian Law sent in 1990 to all States party to the Geneva Conventions in the context of the Gulf War, the ICRC stated that "the Red Cross and Red Crescent emblems must be respected in all circumstances. Medical and religious personnel, ambulances, hospitals and other medical units and means of transport and respected accordingly."⁹³⁸

910. In 1991, the ICRC appealed to the parties to the conflict in the former Yugoslavia "to respect and ensure respect for the Red Cross emblem so as to guarantee the safety of those engaged in humanitarian activities under its protection".⁹³⁹

911. In a joint statement adopted in 1991, the Yugoslav Red Cross and the Hungarian Red Cross expressed their deep concern about "the protracting internal conflict in Yugoslavia" and urged the parties to the conflict "to do their utmost to ensure respect for the Red Cross sign".⁹⁴⁰

912. In a press release in 1992, the ICRC enjoined the parties to the conflict in Bosnia and Herzegovina "to respect and ensure respect for the Red Cross emblem so as to guarantee the safety of medical personnel and Red Cross workers carrying out their humanitarian mandate".⁹⁴¹

913. In a press release in 1992, the ICRC enjoined the parties to the conflict in Afghanistan "to respect and ensure respect for the Red Cross or Red Crescent emblem so as to guarantee the safety of all those engaged in humanitarian activities under its protection".⁹⁴²

914. In 1992, the ICRC appealed to all parties to the conflict in Bosnia and Herzegovina to "instruct all combatants in the field to respect . . . the Red Cross emblem".⁹⁴³

915. In a press release in 1992, the ICRC urged the parties to the conflict in Tajikistan "to respect and ensure respect for the Red Cross or Red Crescent

⁹³⁷ ICRC, Press Release, ICRC Beirut, 23 December 1987.

⁹³⁸ ICRC, Memorandum on the Applicability of International Humanitarian Law, 14 December 1990, § III, *IRRC*, No. 280, 1991, p. 25.

⁹³⁹ ICRC, Appeal in behalf of civilians in Yugoslavia, Geneva, 4 October 1991.

⁹⁴⁰ Yugoslav Red Cross and Hungarian Red Cross, Joint Statement, Subotica, 25 October 1991.

⁹⁴¹ ICRC, Press Release No. 1705, Bosnia-Herzegovina: ICRC calls for protection of civilians, 10 April 1992.

⁹⁴² ICRC, Press Release No. 1712, Afghanistan: ICRC appeals for compliance with humanitarian rules, 5 May 1992; see also Press Release No. 1726, Afghanistan: New ICRC appeal for compliance with humanitarian rules, 14 August 1992.

⁹⁴³ ICRC, Bosnia-Herzegovina: Solemn appeal to all parties to the conflict, *IRRC*, No. 290, 1992, p. 493.

emblem, so as to guarantee the safety of medical staff and workers carrying out their humanitarian tasks under its protection".⁹⁴⁴

916. In a press release in 1992, the ICRC enjoined the parties to the conflict in Chechnya "to respect both the Red Cross and the Red Crescent emblems, so as to guarantee the safety of medical personnel and relief workers carrying out humanitarian tasks under their protection".⁹⁴⁵

917. In a communication to the press issued in 1993 following the destruction of its delegation in Huambo (Angola), the ICRC appealed to the parties to comply with the rules of IHL concerning the red cross emblem.⁹⁴⁶

918. In 1993, the Brazilian Red Cross condemned the destruction of the ICRC delegation in Huambo (Angola).⁹⁴⁷

919. In a communication to the press in 1993, the ICRC enjoined the parties to the conflict in Somalia "to respect the Red Cross or Red Crescent emblem and not to abuse it, so as to guarantee the safety of the victims it is meant to protect and of all those engaged in humanitarian activities under this emblem".⁹⁴⁸

920. In a declaration issued in 1994 in the context of the conflict between the Mexican government and the EZLN, the Mexican Red Cross stated that "protection must be extended to health personnel in general and, in particular, to Mexican Red Cross personnel as well as their equipment, installations and transport facilities which are duly identified with the red cross on a white background".⁹⁴⁹

921. In 1994, in a Memorandum on Respect for International Humanitarian Law in Angola, the ICRC stated that "medical and religious personnel, hospitals, ambulances and other medical units and means of transport shall be protected and respected; the red cross emblem, which is the symbol of that protection, must be respected in all circumstances".⁹⁵⁰

922. In 1994, in a Memorandum on Compliance with International Humanitarian Law by the Forces Participating in Opération Turquoise in the Great Lakes region, the ICRC stated that "medical and religious personnel, ambulances, hospitals and other medical units and means of transport shall be protected

⁹⁴⁴ ICRC, Press Release, Tajikistan: ICRC urges respect for humanitarian rules, ICRC Dushanbe, 23 November 1992.

⁹⁴⁵ ICRC, Press Release No. 1793, Chechnya: ICRC urges respect for humanitarian rules, 28 November 1994.

⁹⁴⁶ ICRC, Communication to the Press No. 93/24, Conflict in Angola: ICRC Appeals for respect for civilians – Its Huambo delegation destroyed, 4 August 1993.

⁹⁴⁷ Brazilian Red Cross, Communication to the Press, 17 August 1993.

⁹⁴⁸ ICRC, Communication to the Press No. 93/17, Somalia: ICRC appeals for compliance with international humanitarian law, 17 June 1993.

⁹⁴⁹ Mexican Red Cross, *Declaración de Cruz Roja Mexicana en torno a los acontecimientos que se han presentado en el Chiapas a partir del 1o. de enero de 1994*, 3 January 1994, § 2(C).

⁹⁵⁰ ICRC, Memorandum on Respect for International Humanitarian Law in Angola, 8 June 1994, § III, *IRRC*, No. 320, 1997, p. 504.

and respected, the emblem of the Red Cross, which is the symbol of that protection must be respected in all circumstances".⁹⁵¹

923. In a press release in 1995, the ICRC appealed to all the parties involved in Turkey's military operations in northern Iraq "to respect the Red Cross and Red Crescent emblems".⁹⁵²

924. In a working paper on war crimes submitted in 1997 to the Preparatory Committee for the Establishment of an International Criminal Court, the ICRC listed attacks against buildings, material, medical units and transports, and personnel entitled to use, in conformity with international law, the distinctive emblems of the red cross and red crescent, as serious violations of IHL applicable in international and non-international armed conflicts to be subject to the jurisdiction of the ICC.⁹⁵³

925. In a communication to the press issued in 2000 following two separate incidents in Colombia in which wounded combatants being evacuated by the ICRC were seized and summarily executed by men belonging to opposition forces, the ICRC stated that these acts constituted serious violations of IHL and called on all the warring parties to respect the red cross emblem.⁹⁵⁴

926. In a communication to the press issued in 2001 following the killing of six ICRC staff members by unidentified assailants in the DRC, the ICRC condemned "in the strongest terms this attack and the flouting of the red cross emblem".⁹⁵⁵

927. In 2001, following the bombing of an ICRC compound by US aircraft in Kabul, the ICRC recalled that "international humanitarian law obliges the parties to conflict to respect the red cross and red crescent emblems".⁹⁵⁶

928. In a communication to the press issued in 2001 in the context of the conflict in Afghanistan, the ICRC reminded all the parties involved – the Taliban, the Northern Alliance, and the US-led coalition – of their obligation to respect the red cross and red crescent emblems.⁹⁵⁷

⁹⁵¹ ICRC, Memorandum on Compliance with International Humanitarian Law by the Forces Participating in Opération Turquoise, 23 June 1994, § I, reprinted in Marco Sassòli and Antoine A. Bouvier, *How Does Law Protect in War?*, ICRC, Geneva, 1999, p. 1309.

⁹⁵² ICRC, Press Release No. 1797, ICRC calls for compliance with international humanitarian law in Turkey and Northern Iraq, 22 March 1995.

⁹⁵³ ICRC, Working paper on war crimes submitted to the Preparatory Committee for the Establishment of an International Criminal Court, 14 February 1997, § 2(I).

⁹⁵⁴ ICRC, Communication to the Press No. 00/36, Colombia: ICRC condemns grave breaches of international humanitarian law, suspends medical evacuations of wounded combatants, 3 October 2000.

⁹⁵⁵ ICRC, Communication to the Press No. 01/14, Six ICRC staff killed in Democratic Republic of the Congo, 27 April 2001.

⁹⁵⁶ ICRC, Communication to the Press No. 01/43, ICRC warehouses bombed in Kabul, 16 October 2001.

⁹⁵⁷ ICRC Communication to the Press No. 01/47, Afghanistan: ICRC calls on all parties to conflict to respect international humanitarian law, 24 October 2001.

VI. Other Practice

929. In 1980, an armed opposition group agreed to be bound by the obligation to protect medical personnel and objects displaying the red cross emblem.⁹⁵⁸

930. In 1983, a representative of an armed opposition group assured ICRC representatives that it would fully respect persons and vehicles displaying the emblem.⁹⁵⁹

931. In 1985, in a meeting with the ICRC, a representative of an armed opposition group stated that the group respected the emblem and that instructions had been given to the troops to that effect. However, he considered that the National Red Cross Society was only a governmental organisation and was not neutral.⁹⁶⁰ In a subsequent meeting, another representative stated that the display of the emblem was not sufficient to ensure the protection of Red Cross vehicles.⁹⁶¹

932. According to eye-witness statements collected by the ICRC in 1992, a camp for displaced persons protected by the red cross emblem was attacked by an armed opposition group. The ICRC delegates noted that there were no military installations nearby and that the camp was clearly indicated and well known in the region.⁹⁶²

933. In 1992, in a meeting with the ICRC, an armed opposition group agreed to respect the emblem.⁹⁶³

934. In 1995, a representative of an armed opposition group assured the ICRC that the red cross emblem was well known and respected by all, as long as Red Cross vehicles were not used to transport troops.⁹⁶⁴

⁹⁵⁸ ICRC archive document.

⁹⁶¹ ICRC archive document.

⁹⁶⁴ ICRC archive document.

⁹⁵⁹ ICRC archive document.

⁹⁶² ICRC archive document.

⁹⁶⁰ ICRC archive document.

⁹⁶³ ICRC archive document.

**HUMANITARIAN RELIEF PERSONNEL
AND OBJECTS**

A. Safety of Humanitarian Relief Personnel (practice relating to Rule 31)	§§ 1–281
General	§§ 1–138
Attacks on the safety of humanitarian relief personnel	§§ 139–281
B. Safety of Humanitarian Relief Objects (practice relating to Rule 32)	§§ 282–370

A. Safety of Humanitarian Relief Personnel

General

I. Treaties and Other Instruments

Treaties

1. Article III(57)(c) of the 1953 Panmunjon Armistice Agreement provides that “the Commander of each side shall cooperate fully with the joint Red Cross teams in the performance of their functions, and undertakes to insure the security of the personnel of the joint Red Cross teams in the area under his military control”.

2. Article 17(2) AP I allows the parties to a conflict to appeal to aid societies such as National Red Cross and Red Crescent Societies “to collect and care for the wounded, sick and shipwrecked, and to search for the dead and report their location”. It adds that the parties “shall grant both protection and the necessary facilities to those who respond to this appeal”. Article 17 AP I was adopted by consensus.¹

3. Article 71 AP I provides that:

1. Where necessary, relief personnel may form part of the assistance provided in any relief action, in particular for the transportation and distribution of relief consignments; the participation of such personnel shall be subject to the approval of the Party in whose territory they will carry out their duties.
2. Such personnel shall be respected and protected.

Article 71 AP I was adopted by consensus.²

¹ CDDH, *Official Records*, Vol. VI, CDDH/SR.37, 24 May 1977, p. 70.

² CDDH, *Official Records*, Vol. VI, CDDH/SR.43, 27 May 1977, p. 245.

4. Article 7(2) of the 1994 Convention on the Safety of UN Personnel provides that “States Parties shall take all appropriate measures to ensure the safety and security of United Nations and associated personnel”.

Other Instruments

5. Paragraph 2(d) of the 1992 Agreement No. 2 on the Implementation of the Agreement of 22 May 1992 between the Parties to the Conflict in Bosnia and Herzegovina states that “each party undertakes to provide security guarantees to the ICRC in the accomplishment of its humanitarian activities”.

6. In paragraph II(9) of the 1992 Agreement No. 3 on the ICRC Plan of Action between the Parties to the Conflict in Bosnia and Herzegovina, the ICRC requested the parties to “ensure respect for ICRC personnel, local ICRC staff and the personnel of other humanitarian organizations involved in the implementation of this plan”.

7. In paragraph 2 of the 1992 Bahir Dar Agreement, the various Somali organisations attending the meeting on humanitarian issues convened by the Standing Committee on Somalia pledged to guarantee the security of relief personnel.

8. In the 1995 Agreement on Ground Rules for Operation Lifeline Sudan, intended to “improve the delivery of humanitarian assistance to and protection of civilians in need”, the SPLM/A expressed its support for “the following humanitarian conventions and their principles, namely . . . the Geneva Conventions of 1949 and the Protocols Additional to the Geneva Conventions”.

9. Section 9.9 of the 1999 UN Secretary-General’s Bulletin provides that “the United Nations force shall facilitate the work of relief operations which are humanitarian and impartial in character and conducted without any adverse distinction, and shall respect personnel . . . involved in such operations”.

10. In paragraph 1 of the 1999 Agreement on the Protection and Provision of Humanitarian Assistance in the Sudan, the parties agreed to inform the UN of any possible security risks to humanitarian personnel, while recognising the right of the organisation to decide on all security issues relating to its personnel as well as to the personnel of NGOs for whom it provided security coverage.

11. In paragraph 67 of the 2000 Cairo Declaration, participating States committed themselves to ensuring the security of relief workers.

II. National Practice

Military Manuals

12. Argentina’s Law of War Manual provides that personnel involved in relief actions shall be respected and protected.³

13. Australia’s Defence Force Manual states that:

³ Argentina, *Law of War Manual* (1989), § 4.11.

In addition to the special immunity granted to civilian and military medical services there is a number of civilian bodies which are given special protection. These include the International Committee of the Red Cross (ICRC), the Red Cross and Red Crescent Societies . . . [and] personnel involved in relief operations.⁴

14. Canada's Code of Conduct provides that "members of the ICRC wearing the distinctive emblem must be protected at all times".⁵ It further states that:

NGOs such as CARE and *Médecins Sans Frontières* might wear other recognizable symbols. The symbols used by CARE, MSF and other NGOs do not benefit from international legal protection, although their work in favour of the victims of armed conflict must be respected. Upon recognition that they are providing care to the sick and wounded, NGOs are also to be respected.⁶

15. France's LOAC Manual states that "the law of armed conflict provides special protection for . . . relief personnel".⁷

16. The Military Manual of the Netherlands states that "personnel engaged in relief activities must be respected and protected. Only in case of imperative military necessity may their activities be limited."⁸

17. Sweden's IHL Manual states that the rules on the recognition of the role of aid organisations under Article 17 AP I and on the protection of personnel in relief actions under Article 71(2) AP I have the status of customary international law.⁹

18. The YPA Military Manual of the SFRY (FRY) provides that relief personnel are entitled to protection in the performance of their task of "civil protection" and shall not be made the object of attack.¹⁰ The Report on the Practice of the SFRY (FRY) states that the wording "civil protection" also covers humanitarian assistance.¹¹

National Legislation

19. Under Ireland's Geneva Conventions Act as amended, any "minor breach" of AP I, including violations of Articles 17(2) and 71 AP I, is a punishable offence.¹²

20. Under Norway's Military Penal Code as amended, "anyone who contravenes or is accessory to the contravention of provisions relating to the protection of persons or property laid down in . . . the two additional protocols to [the Geneva] Conventions . . . is liable to imprisonment".¹³

⁴ Australia, *Defence Force Manual* (1994), § 925.

⁵ Canada, *Code of Conduct* (2001), Rule 10, § 7.

⁶ Canada, *Code of Conduct* (2001), Rule 10, § 9.

⁷ France, *LOAC Manual* (2001), p. 95. ⁸ Netherlands, *Military Manual* (1993), p. VIII-4, § 3.

⁹ Sweden, *IHL Manual* (1991), Section 2.2.3, pp. 18–19.

¹⁰ SFRY (FRY), *YPA Military Manual* (1988), §§ 277–278.

¹¹ Report on the Practice of SFRY (FRY), 1997, Chapter 4.2.

¹² Ireland, *Geneva Conventions Act as amended* (1962), Section 4(1) and (4).

¹³ Norway, *Military Penal Code as amended* (1902), § 108(b).

21. The Act on Child Protection of the Philippines contains an article on “children in situations of armed conflicts” which states that “the safety and protection of those who provide [emergency relief] services . . . shall be ensured”.¹⁴

National Case-law

22. No practice was found.

Other National Practice

23. In 2000, during a debate in the UN Security Council on the protection of UN and associated personnel and humanitarian personnel in conflict zones, Australia recalled the duty of States to provide physical protection and assistance to UN and humanitarian personnel.¹⁵

24. According to the Report on the Practice of Egypt, “because of the importance of relief personnel and objects for the survival of the civilian population, Egypt believes that their protection is a *sine qua non conditio*”.¹⁶

25. In 1997, during a debate in the UN General Assembly, Germany called upon all parties to the conflict in Afghanistan to ensure the safety of UN and other international humanitarian personnel.¹⁷

26. In 1998, during a debate in the UN General Assembly, Germany deeply deplored “the hostility, particularly among the Taliban, towards the community of international aid workers in Afghanistan” and emphasised that “safety and security [of humanitarian relief personnel] is a non-negotiable issue and a prerequisite for the delivery of humanitarian assistance”.¹⁸

27. According to the Report on the Practice of India, relief personnel enjoy the same protection as medical and religious personnel.¹⁹

28. At the First Periodical Meeting on International Humanitarian Law in 1998, the Iraqi representative requested that “urgent measures be taken to protect relief personnel”.²⁰

29. On the basis of the reply by Iraq’s Ministry of Defence to a questionnaire, the Report on the Practice of Iraq states that:

Protection of relief personnel is an absolute principle, without any restriction, for they must be allowed to perform their activities without impediment, even if the matter necessitates the request for holding a temporary armistice to make room

¹⁴ Philippines, *Act on Child Protection* (1992), Article X, Section 22(d).

¹⁵ Australia, Statement before the UN Security Council, UN Doc. S/PV.4100 (Resumption 1), 9 February 2000, p. 6.

¹⁶ Report on the Practice of Egypt, 1997, Chapter 4.2.

¹⁷ Germany, Statement before the UN General Assembly, UN Doc. A/52/PV.74, 16 December 1997, p. 2.

¹⁸ Germany, Statement before the UN General Assembly, UN Doc. A/53/PV.84, 9 December 1998, p. 3.

¹⁹ Report on the Practice of India, 1997, Chapter 4.2.

²⁰ Iraq, Statement at the First Periodical Meeting on International Humanitarian Law, Geneva, 19–23 January 1998.

for them to carry out their humanitarian roles. The personnel include staff of the International and National Red Cross and Red Crescent.²¹

30. According to the Report on the Practice of Jordan, Jordan has “always assumed the safety of those who are engaged in humanitarian action”.²²

31. According to the Report on the Practice of Kuwait, it is the *opinio juris* of Kuwait that humanitarian relief personnel must be protected from the effects of military operations.²³

32. On the basis of an interview with a legal advisor of the Ministry of Defence, the Report on the Practice of the Netherlands notes that during the negotiations on the 1980 Protocol II to the CCW, one of the more important issues for the Netherlands was “the protection of humanitarian personnel, ICRC delegates in particular, and military personnel assisting in humanitarian relief operations”. It adds that “the Netherlands would have preferred more protective provisions than are now included in the text”.²⁴

33. According to the Report on the Practice of Nigeria, it is the *opinio juris* of Nigeria that the protection of relief personnel is part of customary international law.²⁵

34. On the basis of replies by army officers to a questionnaire, the Report on the Practice of Rwanda states that humanitarian personnel are protected in Rwanda; if necessary, they receive special protection from the Rwandan armed forces. The report notes that there is no practice in Rwanda which could be considered contrary to the principle of the protection of humanitarian personnel. According to the report, it is the *opinio juris* of Rwanda that the principle of the protection of humanitarian personnel is an obligation binding upon all States under customary international law.²⁶

35. In 2000, during a debate in the UN Security Council on the protection of UN and associated personnel and humanitarian personnel in conflict zones, Slovenia referred to States’ primary responsibility to ensure the safety and security of such personnel.²⁷

36. In 2000, during a debate in the UN Security Council on the protection of UN and associated personnel and humanitarian personnel in conflict zones, South Africa stated that “the primary responsibility for the protection of United Nations and humanitarian personnel lies with the host Government”. However,

²¹ Report on the Practice of Iraq, 1998, Reply by the Iraqi Ministry of Defence to a questionnaire, July 1997, Chapter 4.2.

²² Report on the Practice of Jordan, 1997, Chapter 4.2.

²³ Report on the Practice of Kuwait, 1997, Chapter 4.2.

²⁴ Report on the Practice of Netherlands, 1997, Interview with a legal advisor of the Ministry of Defence, 28 July 1997, Chapter 4.2.

²⁵ Report on the Practice of Nigeria, 1997, Chapter 4.2.

²⁶ Report on the Practice of Rwanda, 1997, Replies by Rwandan army officers to a questionnaire, Chapter 4.2.

²⁷ Slovenia, Statement before the UN Security Council, UN Doc. S/PV.4100 (Resumption 1), 9 February 2000, p. 8.

he added that “non-state parties should similarly protect such personnel, in line with the provisions of international humanitarian law”.²⁸

37. At the First Periodical Meeting on International Humanitarian Law in 1998, Switzerland presented a working paper on the topic of respect for and security of the personnel of humanitarian organisations in which it recommended that “States intensify their efforts in the dissemination of international humanitarian law, especially within their armed and security forces... by emphasising respect for and the protection of humanitarian action and personnel”.²⁹

38. The Report on UK Practice states that “as regards protection of relief personnel and objects, the UK has, both in words and in action, demonstrated support for this principle, as in Iraq, and in the former Yugoslavia”.³⁰

39. According to the Report on the Practice of Zimbabwe, “Zimbabwe regards the relevant provisions of the Geneva Conventions guaranteeing the activities of relief personnel as part of international customary law”.³¹

40. In 1996, a State made assurances that it guaranteed the security of ICRC personnel, but insisted it could not do so in the area controlled by the opposition.³²

III. Practice of International Organisations and Conferences

United Nations

41. In a resolution adopted in 1992, the UN Security Council urged all parties to the conflict in Somalia “to take all the necessary measures to ensure the safety of personnel sent to provide humanitarian assistance, to assist them in their tasks and to ensure full respect for the rules and principles of international law regarding the protection of civilian populations”.³³ This demand was reiterated in 1993.³⁴

42. In a resolution adopted in 1992, in the context of the conflict in Somalia, the UN Security Council called upon “all parties, movements and factions, in Mogadishu in particular, and in Somalia in general, to respect fully the security and safety of humanitarian organizations”.³⁵ This call was reiterated in a subsequent resolution in the same year.³⁶

²⁸ South Africa, Statement before the UN Security Council, UN Doc. S/PV.4100 (Resumption 1), 9 February 2000, p. 4.

²⁹ Switzerland, Working Paper on Respect for and Security of the Personnel of Humanitarian Organisations, First Periodical Meeting on International Humanitarian Law, Doc. RPDH1/RP, Geneva, 19–23 January 1998, p. 1, § 3.

³⁰ Report on UK Practice, 1997, Chapter 4.2.

³¹ Report on the Practice of Zimbabwe, 1998, Chapter 4.2. ³² ICRC archive document.

³³ UN Security Council, Res. 733, 23 January 1992, § 8.

³⁴ UN Security Council, Res. 814, 26 March 1993, § 9.

³⁵ UN Security Council, Res. 746, 17 March 1992, § 8.

³⁶ UN Security Council, Res. 751, 24 April 1992, § 14.

43. In a resolution adopted in 1992, the UN Security Council demanded that all parties to the conflict in Bosnia and Herzegovina cooperate fully with international humanitarian agencies and take all necessary steps to ensure the safety of their personnel.³⁷ This demand was reiterated the same year.³⁸

44. In a resolution adopted in 1993, the UN Security Council demanded that "all parties guarantee the safety... of all other United Nations personnel as well as members of humanitarian organizations".³⁹ The same year, the Council declared that "full respect for the safety of the personnel engaged in these [humanitarian] operations" in Bosnia and Herzegovina should be observed.⁴⁰

45. In a resolution adopted in 1993 concerning the conflict in Angola, the UN Security Council reiterated "its appeal to both parties to take all necessary measures to ensure the security of UNAVEM II personnel as well as of the personnel involved in humanitarian relief operations".⁴¹

46. In a resolution adopted in 1993 on security and safety of UN forces and personnel, the UN Security Council urged States and parties to a conflict "to cooperate closely with the United Nations to ensure the security and safety of United Nations forces and personnel".⁴²

47. In a resolution adopted in 1994 in the context of the conflict in Somalia, the UN Security Council emphasised the importance it attached to "the safety and security of United Nations and other personnel engaged in humanitarian relief... throughout Somalia".⁴³ This statement was repeated in subsequent resolutions later that year.⁴⁴

48. In a resolution adopted in 1994, the UN Security Council demanded that "all parties in Rwanda strictly respect the persons and premises of the United Nations and other organizations serving in Rwanda".⁴⁵ This demand was reiterated in a subsequent resolution a few weeks later.⁴⁶

49. In a resolution on Somalia adopted in 1994, the UN Security Council underlined "the responsibility of the Somali parties for the security and safety of [international] personnel".⁴⁷

50. In a resolution adopted in 1994 in the context of the conflict in Angola, the UN Security Council demanded that "both parties grant security clearances and guarantees for relief deliveries to all locations and refrain from any action which could jeopardize the safety of relief personnel".⁴⁸

³⁷ UN Security Council, Res. 758, 8 June 1992, § 7.

³⁸ UN Security Council, Res. 770, 13 August 1992, § 6; Res. 787, 16 November 1992, § 18.

³⁹ UN Security Council, Res. 819, 16 April 1993, preamble and § 10.

⁴⁰ UN Security Council, Res. 824, 6 May 1993, § 4 (b).

⁴¹ UN Security Council, Res. 851, 15 July 1993, § 20.

⁴² UN Security Council, Res. 868, 29 September 1993, § 3, see also §§ 4–6.

⁴³ UN Security Council, Res. 897, 4 February 1994, preamble.

⁴⁴ UN Security Council, Res. 923, 31 May 1994, preamble; Res. 954, 4 November 1994, preamble.

⁴⁵ UN Security Council, Res. 918, 17 May 1994, § 11.

⁴⁶ UN Security Council, Res. 925, 8 June 1994, § 11.

⁴⁷ UN Security Council, Res. 946, 30 September 1994, preamble.

⁴⁸ UN Security Council, Res. 952, 27 October 1994, § 7.

51. In a resolution adopted in 1994 on the situation in Somalia, the UN Security Council emphasised “the responsibility of the Somali parties for the security and safety of . . . personnel engaged in humanitarian activities”.⁴⁹

52. In a resolution adopted in 1995 on the situation in Liberia, the UN Security Council demanded that “all factions in Liberia strictly respect the status of personnel of the ECOWAS Monitoring Group and UNOMIL and those of organizations and personnel delivering humanitarian assistance throughout Liberia”.⁵⁰ This demand was reiterated in two further resolutions adopted the same year.⁵¹

53. In a resolution adopted in 1995 in the context of the conflict in Bosnia and Herzegovina, the UN Security Council demanded that all parties fully respect the safety of UNPROFOR personnel and others engaged in the delivery of humanitarian assistance.⁵²

54. In a resolution adopted in 1996, the UN Security Council underlined “the responsibility of the authorities in Burundi for the security of international personnel”.⁵³

55. In a resolution adopted in 1996, the UN Security Council demanded that “all factions in Liberia strictly respect the status of ECOMOG and UNOMIL personnel, as well as organizations and agencies delivering humanitarian assistance throughout Liberia”.⁵⁴ This demand was reiterated in two further resolutions adopted the same year.⁵⁵

56. In a resolution adopted in 1996, the UN Security Council demanded that “all parties to the conflict and others concerned in Angola take all necessary measures to ensure the safety of United Nations and other international personnel and premises and to guarantee the safety . . . of humanitarian supplies throughout the country”.⁵⁶ This demand was reiterated in a subsequent resolution later the same year.⁵⁷

57. In a resolution adopted in 1996, the UN Security Council demanded that the parties to the conflict in Bosnia and Herzegovina respect the security and freedom of movement of SFOR and other international personnel.⁵⁸

58. In a resolution adopted in 1997 on the implementation of the Lusaka Peace Accords in Angola, the UN Security Council demanded that the government of Angola “ensure the safety of MONUA and other international personnel”.⁵⁹

⁴⁹ UN Security Council, Res. 954, 4 November 1994, § 7.

⁵⁰ UN Security Council, Res. 985, 13 April 1995, § 6.

⁵¹ UN Security Council, Res. 1001, 30 June 1995, § 13; Res. 1014, 15 September 1995, § 13.

⁵² UN Security Council, Res. 998, 16 June 1995, § 1.

⁵³ UN Security Council, Res. 1040, 29 January 1996, preamble.

⁵⁴ UN Security Council, Res. 1041, 29 January 1996, § 6.

⁵⁵ UN Security Council, Res. 1059, 31 May 1996, § 7; Res. 1071, 30 August 1996, § 10.

⁵⁶ UN Security Council, Res. 1075, 11 October 1996, § 18.

⁵⁷ UN Security Council, Res. 1087, 11 December 1996, § 16.

⁵⁸ UN Security Council, Res. 1088, 12 December 1996, § 23.

⁵⁹ UN Security Council, Res. 1127, 28 August 1997, § 14.

59. In a resolution adopted in 1998, the UN Security Council called upon the Angolan government and UNITA “to guarantee unconditionally the safety [and] security . . . of all United Nations personnel and international personnel”.⁶⁰

60. In a resolution adopted in 1998, the UN Security Council demanded that “all Afghan factions and, in particular the Taliban, do everything possible to assure the safety . . . of the United Nations and other international and humanitarian personnel”.⁶¹

61. In a resolution adopted in 1998, the UN Security Council demanded that:

the Government of Angola and in particular UNITA guarantee unconditionally the safety and freedom of movement of the Special Representative of the UN Secretary-General and all United Nations and international humanitarian personnel, including those providing humanitarian assistance.⁶²

62. In a resolution adopted in 1998 on the situation in Kosovo, the UN Security Council reminded the FRY that “it has the primary responsibility for . . . the safety and security of all international and non-governmental humanitarian personnel in the Federal Republic of Yugoslavia”.⁶³ This reminder was repeated in a subsequent resolution in 1999.⁶⁴

63. In a resolution adopted in 1999, the UN Security Council underscored the importance of “the safety [and] security . . . of United Nations and associated personnel to the alleviation of the impact of armed conflict on children”.⁶⁵

64. In a resolution adopted in 1999, the UN Security Council emphasised “the need for combatants to ensure the safety [and] security . . . of United Nations and associated personnel, as well as personnel of international humanitarian organizations”.⁶⁶

65. In a resolution adopted in 2000, the UN Security Council, without reference to any particular conflict, called upon all parties concerned, including non-State parties, “to ensure the safety, security and freedom of movement of United Nations and associated personnel, as well as personnel of humanitarian organizations”.⁶⁷

66. In 1993, in a statement by its President, the UN Security Council reiterated its demand that “States and other parties to various conflicts take all possible steps to ensure the safety and security of United Nations . . . personnel”.⁶⁸

67. In 1993, in a statement by its President following accounts of “an attack to which an humanitarian convoy under the protection of UNPROFOR was subjected on 25 October 1993 in central Bosnia”, the UN Security Council called

⁶⁰ UN Security Council, Res. 1173, 12 June 1998, § 9.

⁶¹ UN Security Council, Res. 1193, 28 August 1998, § 7.

⁶² UN Security Council, Res. 1195, 15 September 1998, § 9.

⁶³ UN Security Council, Res. 1199, 23 September 1998, § 10.

⁶⁴ UN Security Council, Res. 1203, 4 October 1998, § 8.

⁶⁵ UN Security Council, Res. 1261, 25 August 1999, § 12.

⁶⁶ UN Security Council, Res. 1265, 17 September 1999, § 8.

⁶⁷ UN Security Council, Res. 1296, 19 April 2000, § 12.

⁶⁸ UN Security Council, Statement by the President, UN Doc. S/25493, 31 March 1993, p. 2.

upon all parties to the conflict in the former Yugoslavia “to guarantee . . . the security of the personnel responsible” for humanitarian assistance.⁶⁹

68. In 1994, in a statement by its President concerning the conflict in Bosnia and Herzegovina, the UN Security Council demanded that “all parties ensure the safety and security of . . . United Nations personnel and those of non-governmental organizations”.⁷⁰

69. In 1994, in a statement by its President concerning the situation in Rwanda, the UN Security Council urged all parties and factions to respect the “safety and security of . . . United Nations personnel”.⁷¹

70. In 1994, in a statement by its President, the UN Security Council underlined “the responsibility of the Somali parties for the security and safety” of international personnel, including the staff of non-governmental organisations.⁷²

71. In 1995, in a statement by its President concerning the situation in Croatia, the UN Security Council reminded the parties, and in particular the Croatian government, “that they have an obligation to respect United Nations personnel [and] to ensure their safety . . . at all times”.⁷³

72. In 1996, in two statements by its President, the UN Security Council underlined “the responsibility of all parties in Somalia for ensuring the safety and security of humanitarian and other international personnel”.⁷⁴

73. In 1996, in a statement by its President, the UN Security Council stressed that “the authorities in Burundi are responsible for the security of personnel of international humanitarian organizations” and called upon the government of Burundi “to provide adequate security to food convoys and humanitarian personnel”.⁷⁵

74. In 1996, in a statement by its President, the UN Security Council called upon the parties to the conflict in Tajikistan “to ensure the safety . . . of the personnel of the United Nations and other international organizations”.⁷⁶ The Security Council reiterated its call in another statement by its President two months later.⁷⁷

⁶⁹ UN Security Council, Statement by the President, UN Doc. S/26661, 28 October 1993, p. 1.

⁷⁰ UN Security Council, Statement by the President, UN Doc. S/PRST/1994/11, 14 March 1994, p. 1.

⁷¹ UN Security Council, Statement by the President, UN Doc. S/PRST/1994/16, 7 April 1994, p. 1.

⁷² UN Security Council, Statement by the President, UN Doc. S/PRST/1994/46, 25 August 1994, p. 2.

⁷³ UN Security Council, Statement by the President, UN Doc. S/PRST/1995/38, 4 August 1995, p. 1.

⁷⁴ UN Security Council, Statement by the President, UN Doc. S/PRST/1996/4, 24 January 1996; Statement by the President, UN Doc. S/PRST/1996/47, 20 December 1996.

⁷⁵ UN Security Council, Statement by the President, UN Doc. S/PRST/1996/1, 5 January 1996, pp. 1–2.

⁷⁶ UN Security Council, Statement by the President, UN Doc. S/PRST/1996/14, 29 March 1996, p. 2.

⁷⁷ UN Security Council, Statement by the President, UN Doc. S/PRST/1996/25, 21 May 1996, p. 2.

75. In 1996, in a statement by its President, the UN Security Council reminded all parties to the conflict in Liberia of their responsibility "to ensure the safety of United Nations and other international personnel".⁷⁸

76. In 1996, in a statement by its President concerning, the UN Security Council demanded that all parties to the conflict in Afghanistan "fulfil their obligations and commitments regarding the safety of the United Nations personnel and other international personnel in Afghanistan".⁷⁹

77. In 1996, in a statement by its President, the UN Security Council stressed that the international community's ability to assist in the conflict in Georgia depended on "the full cooperation of the parties, especially the fulfilment of their obligations regarding the safety . . . of international personnel".⁸⁰

78. In 1996, in a statement by its President, the UN Security Council called on all parties in the Great Lakes region "to ensure the security . . . of all international humanitarian personnel".⁸¹

79. In 1997, in a statement by its President with respect to the situation in the Great Lakes region, the UN Security Council demanded that the parties ensure "the security . . . of all United Nations and humanitarian personnel".⁸²

80. In 1997, in a statement by its President, the UN Security Council called upon the parties "to ensure the safety . . . of the personnel of the United Nations . . . and other international personnel in Tajikistan".⁸³

81. In 1997, in a statement by its President, the UN Security Council called upon the Somali factions "to ensure the safety . . . of all humanitarian personnel".⁸⁴

82. In 1997, in a statement by its President, the UN Security Council emphasised "the unacceptability of any acts endangering the safety and security of United Nations and associated personnel, as well as personnel of international humanitarian organizations".⁸⁵

83. In 1997, in a statement by its President concerning the situation in the Great Lakes region, the UN Security Council called upon the ADFL in the strongest terms "to guarantee the safety of humanitarian relief workers . . . in the areas which the ADFL control".⁸⁶

⁷⁸ UN Security Council, Statement by the President, UN Doc. S/PRST/1996/16, 9 April 1996, p. 1.

⁷⁹ UN Security Council, Statement by the President, UN Doc. S/PRST/1996/40, 28 September 1996, p. 1.

⁸⁰ UN Security Council, Statement by the President, UN Doc. S/PRST/1996/43, 22 October 1996, p. 2.

⁸¹ UN Security Council, Statement by the President, UN Doc. S/PRST/1996/44, 1 November 1996, p. 1.

⁸² UN Security Council, Statement by the President, UN Doc. S/PRST/1997/5, 7 February 1997, p. 1.

⁸³ UN Security Council, Statement by the President, UN Doc. S/PRST/1997/6, 7 February 1997, p. 2.

⁸⁴ UN Security Council, Statement by the President, UN Doc. S/PRST/1997/8, 27 February 1997.

⁸⁵ UN Security Council, Statement by the President, UN Doc. S/PRST/1997/13, 12 March 1997, p. 1.

⁸⁶ UN Security Council, Statement by the President, UN Doc. S/PRST/1997/22, 24 April 1997, p. 1.

84. In 1997, in a statement by its President following the military coup d'état in Sierra Leone, the UN Security Council recalled the obligations of all concerned "to ensure the protection of United Nations and other international personnel in the country".⁸⁷

85. In 1997, in a statement by its President in the context of the conflict in the DRC, the UN Security Council called for "safety for humanitarian relief workers".⁸⁸

86. In 1997, in a statement by its President following a debate on the protection of humanitarian assistance to refugees and others in conflict situations, the UN Security Council called upon all parties concerned "to ensure the safety and security of [UN and associated] personnel as well as personnel of humanitarian organizations" and encouraged all States "to consider ways and means to strengthen the protection of such personnel".⁸⁹

87. In 1997, in a statement by its President concerning the conflict in Angola, the UN Security Council called upon UNITA in particular "to ensure... of the safety... of international humanitarian organizations".⁹⁰

88. In 1998, in a statement by its President concerning the conflict in Afghanistan, the UN Security Council expressed its deep concern about "the deteriorating security conditions for United Nations and humanitarian personnel" and called upon all Afghan factions, in particular the Taliban, "to take necessary steps to assure their safety".⁹¹

89. In 1998, in a statement by its President, the UN Security Council expressed concern "for the safety of all humanitarian personnel working in Sierra Leone" and called on all parties concerned "to facilitate the work of humanitarian agencies".⁹²

90. In 1998, in a statement by its President, the UN Security Council demanded that the Angolan government and in particular UNITA "guarantee unconditionally the safety... of all United Nations and other international personnel".⁹³

91. In 1998, in a statement by its President, the UN Security Council urged all Afghan factions "to cooperate fully with the United Nations Special Mission to Afghanistan and international humanitarian organizations" and called upon them, in particular the Taliban, "to take all necessary steps to ensure the safety... of such personnel".⁹⁴ This demand was reiterated later in the year.⁹⁵

⁸⁷ UN Security Council, Statement by the President, UN Doc. S/PRST/1997/29, 27 May 1997.

⁸⁸ UN Security Council, Statement by the President, UN Doc. S/PRST/1997/31, 29 May 1997, p. 2.

⁸⁹ UN Security Council, Statement by the President, UN Doc. S/PRST/1997/34, 19 June 1997, p. 2.

⁹⁰ UN Security Council, Statement by the President, UN Doc. S/PRST/1997/39, 23 July 1997, p. 1.

⁹¹ UN Security Council, Statement by the President, UN Doc. S/PRST/1998/9, 6 April 1998, p. 2.

⁹² UN Security Council, Statement by the President, UN Doc. S/PRST/1998/13, 20 May 1998, p. 2.

⁹³ UN Security Council, Statement by the President, UN Doc. S/PRST/1998/14, 22 May 1998, p. 1.

⁹⁴ UN Security Council, Statement by the President, UN Doc. S/PRST/1998/22, 14 July 1998, p. 2.

⁹⁵ UN Security Council, Statement by the President, UN Doc. S/PRST/1998/24, 6 August 1998, p. 2.

92. In 1998, in a statement by its President, the UN Security Council urged all parties to the conflict in the DRC “to guarantee the safety and security of United Nations and humanitarian personnel”.⁹⁶

93. In 1998, in a statement by its President, the UN Security Council recalled its “condemnation of the murders of members of the United Nations Special Mission to Afghanistan and the personnel of humanitarian agencies in areas controlled by the Taliban” and demanded that the Taliban “ensure the safety and security of all international personnel”.⁹⁷

94. In a resolution adopted in 1992 on the conflict in the former Yugoslavia, the UN General Assembly demanded that “all parties to the conflict ensure complete safety and freedom of movement for the International Committee of the Red Cross and otherwise facilitate such access”.⁹⁸

95. In a resolution adopted in 1994, the UN General Assembly emphasised that it was “the duty of all parties to the conflict in Sudan to protect relief workers”.⁹⁹

96. In a resolution adopted in 1995, the UN General Assembly strongly urged all parties to the conflict in Afghanistan “to take all necessary measures to ensure the safety of all personnel of humanitarian organizations”.¹⁰⁰

97. In a resolution adopted in 1995 on the situation in Rwanda, the UN General Assembly acknowledged “the responsibility of the Government of Rwanda for the safety and security of all personnel attached to the United Nations Mission for Rwanda . . . and humanitarian organizations” and called upon the government of Rwanda “to take all necessary measures to ensure the safety and security of all personnel attached to the United Nations Assistance Mission for Rwanda . . . and humanitarian organizations”.¹⁰¹

98. In a resolution adopted in 1996, the UN General Assembly called upon “all parties, movements and factions in Somalia to respect fully the safety and security of personnel of the United Nations and its specialized agencies and of non-governmental organizations”.¹⁰²

99. In a resolution adopted in 1996 on the situation of human rights in Afghanistan, the UN General Assembly strongly urged “all parties to the conflict to take all necessary measures to ensure the safety of all personnel of humanitarian organizations . . . in Afghanistan”.¹⁰³

100. In a resolution adopted in 1996 on the 1994 Convention on the Safety of UN Personnel, the UN General Assembly expressed the need “to promote and

⁹⁶ UN Security Council, Statement by the President, UN Doc. S/PRST/1998/26, 31 August 1998, p. 2.

⁹⁷ UN Security Council, Statement by the President, UN Doc. S/PRST/1998/27, 15 September 1998, p. 1.

⁹⁸ UN General Assembly, Res. 46/242, 25 August 1992, § 9.

⁹⁹ UN General Assembly, Res. 49/198, 23 December 1994, preamble.

¹⁰⁰ UN General Assembly, Res. 50/189, 22 December 1995, § 9.

¹⁰¹ UN General Assembly, Res. 50/200, 22 December 1995, preamble and § 5.

¹⁰² UN General Assembly, Res. 51/30 G, 13 December 1996, § 8.

¹⁰³ UN General Assembly, Res. 51/108, 12 December 1996, § 9.

protect the safety and security of the personnel who act on behalf of the United Nations".¹⁰⁴

101. In a resolution adopted in 1997 on the situation of human rights in Afghanistan, the UN General Assembly demanded that "all Afghan parties fulfil their obligations and commitments regarding the safety of all personnel of . . . the United Nations and other international organizations".¹⁰⁵

102. In a resolution adopted in 1997 on the safety and security of humanitarian personnel, the UN General Assembly called upon "all Governments and parties in countries where humanitarian personnel are operating to take all possible measures to ensure that the lives and well-being of humanitarian personnel are respected and protected".¹⁰⁶

103. In a resolution adopted in 1998, the UN General Assembly, referring to the situation in Kosovo, called upon the government of the FRY (Serbia and Montenegro) and all others concerned to ensure the safety and security of humanitarian personnel.¹⁰⁷

104. In a resolution adopted in 1999 on the safety and security of humanitarian personnel and protection of UN personnel, the UN General Assembly recalled that:

Primary responsibility under international law for the security and protection of humanitarian personnel and United Nations and its associated personnel lies with the Government hosting a United Nations operation conducted under the Charter of the United Nations or its agreements with relevant organizations.

It urged all other parties involved in armed conflicts "to ensure the security and protection of all humanitarian personnel and United Nations and its associated personnel".¹⁰⁸ The General Assembly further urged all States "to take the necessary measures to ensure the full and effective implementation of the relevant principles and rules of international humanitarian law, as well as relevant provisions of human rights law related to the safety and security of humanitarian personnel and United Nations personnel" and "to take the necessary measures to ensure the safety and security of humanitarian personnel and United Nations and its associated personnel".¹⁰⁹

105. In a resolution adopted in 2000 on the situation of human rights in the Sudan, the UN General Assembly expressed its deep concern at continuing serious violations of IHL by all parties, in particular "the conditions imposed by SPLA/M on humanitarian organizations working in the southern Sudan, which have seriously affected their safety and led to the withdrawal of many of them".¹¹⁰

¹⁰⁴ UN General Assembly, Res. 51/137, 13 December 1996, § 3.

¹⁰⁵ UN General Assembly, Res. 52/145, 12 December 1997, § 9.

¹⁰⁶ UN General Assembly, Res. 52/167, 16 December 1997, § 4.

¹⁰⁷ UN General Assembly, Res. 53/164, 9 December 1998, § 24.

¹⁰⁸ UN General Assembly, Res. 54/192, 17 December 1999, preamble.

¹⁰⁹ UN General Assembly, Res. 54/192, 17 December 1999, §§ 1 and 2.

¹¹⁰ UN General Assembly, Res. 55/116, 4 December 2000, § 2(a)(vi).

106. In a resolution adopted in 2001 on the situation of human rights in the Sudan, the UN Commission on Human Rights expressed its deep concern at continuing serious violations of IHL by all parties to the conflict, in particular “the conditions, in contravention of humanitarian principles, imposed by the Sudanese People’s Liberation Army on humanitarian organizations working in southern Sudan, which have seriously affected their safety”.¹¹¹

107. In a resolution adopted in 1996, the UN Sub-Commission on Human Rights called upon the Burundian authorities “to ensure the security... of foreigners present in Burundian territory, including those who are providing humanitarian or other assistance to Burundi”.¹¹²

Other International Organisations

108. In a resolution adopted in 1989, the Parliamentary Assembly of the Council of Europe stated that it was “preoccupied by the increase in breaches in the security of delegates of the ICRC”.¹¹³

109. In a declaration by the Presidency in 1998 with respect to the situation in Sierra Leone, the EU urged ECOMOG “to ensure that international humanitarian law is upheld and to ensure the security of those engaged in providing such relief”.¹¹⁴

110. In a declaration by the Presidency in 1998, the EU called upon all parties to the conflict in Sudan “to respect and guarantee the security of all personnel of aid organizations and relief flights and their crews”.¹¹⁵

111. In a statement by the Presidency in 1999 on the occasion of the 50th anniversary of the Geneva Conventions, the EU stated that during armed conflicts, the security of humanitarian personnel was frequently not respected.¹¹⁶

112. In 1994, the North Atlantic Council demanded “strict respect for the safety of UNPROFOR and other UN relief agency personnel throughout Bosnia-Herzegovina”.¹¹⁷

113. In a resolution adopted in 1994, the OAU Council of Ministers urged member States and warring parties to ensure the safety of relief personnel.¹¹⁸

114. In a resolution adopted in 1996, the OAU Council of Ministers urged member States “to take all necessary steps to ensure that the personnel of humanitarian organizations are protected and respected by all, in conformity with international law especially international humanitarian law”.¹¹⁹

¹¹¹ UN Commission on Human Rights, Res. 2001/18, 20 April 2001, § 2(a)(vii).

¹¹² UN Sub-Commission on Human Rights, Res. 1996/41, 19 August 1996, § 6.

¹¹³ Council of Europe, Parliamentary Assembly, Res. 921, 6 July 1989, § 8.

¹¹⁴ EU, Declaration on the situation in Sierra Leone by the Presidency on behalf of the EU, 20 February 1998, § 2.

¹¹⁵ EU, Declaration on Sudan by the Presidency on behalf of the EU, 14 August 1998, § 11.

¹¹⁶ EU, Statement by the Presidency on behalf of the EU at the 50th anniversary of the Four Geneva Conventions, 12 August 1999, § 5.

¹¹⁷ North Atlantic Council, Decision taken at the meeting of 9 February 1994, annexed to Council of Europe, Report to the Parliamentary Assembly on the situation in Bosnia-Herzegovina, Doc. No. 7065, 12 April 1994, Appendix I, § 12.

¹¹⁸ OAU, Council of Ministers, Res. 1526 (LX), 6–11 June 1994, § 5.

¹¹⁹ OAU, Council of Ministers, Res. 1662 (LXIV), 1–5 July 1996, § 10.

115. In a resolution adopted in 1996, the OAU Council of Ministers called upon the authorities of Burundi “to take necessary measures to ensure the safety of . . . the personnel of international organizations, IGOs, NGOs, who currently risk their lives to render humanitarian assistance”.¹²⁰

116. In a decision adopted in 1997, the OAU Council of Ministers called upon “the Member States concerned to create conditions of peace and security in order to ensure . . . the safety of relief workers”.¹²¹

117. In a resolution adopted in 1994, the OAS General Assembly urged all member States “to do their utmost to guarantee the security of personnel engaged in humanitarian activities, so as to ensure protection and assistance for all victims”.¹²²

International Conferences

118. In a public statement issued on 31 October 1992, the International Conference on the Former Yugoslavia asked all parties to the conflict to avoid harming UNHCR and other international humanitarian workers in Travnik and called upon all political and military leaders to issue instructions to prevent the further endangerment of these relief workers.¹²³

119. The Final Declaration adopted by the International Conference for the Protection of War Victims in 1993 demanded that “measures be taken at the national, regional and international levels to allow assistance and relief personnel to carry out in all safety their mandate in favour of the victims of an armed conflict”. It further urged “all States to make every effort to . . . take the appropriate measures to enhance respect for [the] safety, security and integrity [of humanitarian organisations], in conformity with applicable rules of international humanitarian law”.¹²⁴

120. In the Vienna Declaration and Programme of Action, the World Conference on Human Rights in 1993 called for “safe and timely access for [humanitarian] assistance”.¹²⁵

121. The 26th International Conference of the Red Cross and Red Crescent in 1995 adopted a resolution on principles and action in international humanitarian assistance and protection calling on States “to fully respect humanitarian operations and the personnel engaged therein in all circumstances”.¹²⁶

122. In 1999, the 102nd Inter-Parliamentary Conference in Berlin adopted a resolution on the occasion of the 50th anniversary of the Geneva Conventions

¹²⁰ OAU, Council of Ministers, Res. 1649 (LXIV), 1–5 July 1996, § 4.

¹²¹ OAU, Council of Ministers, Dec. 362 (LXVI) Rev.1, 28–31 May 1997, § d.

¹²² OAS, General Assembly, Res. 1270 (XXIV-O/94), 10 June 1994, § 3.

¹²³ International Conference on the Former Yugoslavia, Statement, 31 October 1992, reprinted in Report of the UN Secretary-General on the International Conference on the Former Yugoslavia, UN Doc. S/24795, 11 November 1992, § 11.

¹²⁴ International Conference for the Protection of War Victims, Geneva, 30 August–1 September 1993, Final Declaration, §§ I (7) and II (8), *ILM*, Vol. 33, 1994, pp. 299 and 301.

¹²⁵ World Conference on Human Rights, Vienna, 14–25 June 1993, Vienna Declaration and Programme of Action, UN Doc. A/CONF.157/24, 12 July 1993, § I(29).

¹²⁶ 26th International Conference of the Red Cross and Red Crescent, Geneva, 3–7 December 1995, Res. IV, § 2(d).

concerning the contribution of parliaments to ensuring respect for and promoting IHL. The resolution called upon States "to strengthen safety and security requirements for humanitarian personnel, including locally recruited staff".¹²⁷ **123.** The Plan of Action for the years 2000–2003 adopted by the 27th International Conference of the Red Cross and Red Crescent in 1999 states that "humanitarian personnel will be respected and protected at all times".¹²⁸

IV. Practice of International Judicial and Quasi-judicial Bodies

124. No practice was found.

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

125. In 1992, the ICRC appealed to all parties to the conflict in Bosnia and Herzegovina to "take the action necessary to ensure that ICRC delegates can work effectively and rapidly in adequate conditions of security".¹²⁹

126. In a communication to the press in 1993, the ICRC enjoined the parties to the conflict in Somalia "to facilitate relief operations . . . and to respect the personnel, vehicles and premises involved".¹³⁰

127. In 1994, in a Memorandum on Respect for International Humanitarian Law in Angola, the ICRC stated that "the personnel, vehicles and premises of relief agencies shall be protected".¹³¹

128. In 1994, in a Memorandum on Compliance with International Humanitarian Law by the Forces Participating in Opération Turquoise in the Great Lakes region, the ICRC stated that "relief operations aimed at the civilian population which are exclusively humanitarian, impartial and non-discriminatory shall be facilitated and respected. The personnel, vehicles and premises of relief agencies shall be protected."¹³²

129. At its Seville Session in 1997, the Council of Delegates adopted a resolution on peace, international humanitarian law and human rights in which it reaffirmed that "humanitarian law also extends protection to the relief work

¹²⁷ 102nd Inter-Parliamentary Conference, Berlin, 10–15 October 1999, Resolution on contribution of parliaments to ensuring respect for and promoting international humanitarian law on the occasion of the fiftieth anniversary of the Geneva Conventions, § 3.

¹²⁸ 27th International Conference of the Red Cross and Red Crescent, Geneva, 31 October–6 November 1999, Res. I, Annex 2, Plan of Action for the years 2000–2003, Actions proposed for final goal 2.4, § 12.

¹²⁹ ICRC, Bosnia-Herzegovina: Solemn appeal to all parties to the conflict, *IRRC*, No. 290, 1992, p. 493.

¹³⁰ ICRC, Communication to the Press No. 93/17, Somalia: ICRC appeals for compliance with international humanitarian law, 17 June 1993.

¹³¹ ICRC, Memorandum on Respect for International Humanitarian Law in Angola, 8 June 1994, § IV, *IRRC*, No. 320, 1997, p. 505.

¹³² ICRC, Memorandum on Compliance with International Humanitarian Law by the Forces Participating in Opération Turquoise, 23 June 1994, § IV, reprinted in Marco Sassoli and Antoine A. Bouvier, *How Does Law Protect in War?*, ICRC, Geneva, 1999, p. 1309.

of impartial and humanitarian organizations" and further reaffirmed "the obligation, under international humanitarian law, of parties to armed conflicts to respect and protect relief work and in particular personnel engaged in relief operations".¹³³

130. In a preparatory document for the First Periodical Meeting on International Humanitarian Law in 1998, the ICRC emphasised that "generally speaking, the relief operations provided for under international humanitarian law cannot be carried out unless the security of the humanitarian personnel involved is guaranteed. Their safety is therefore directly linked to respect for the law."¹³⁴

131. In a communication to the press issued in 2000 following two separate incidents in Colombia in which wounded combatants being evacuated by the ICRC were seized and summarily executed by men belonging to opposition forces, the ICRC called on all the warring parties to respect individuals engaged in humanitarian work for the victims of the conflict.¹³⁵

132. In a communication to the press issued in 2001 in the context of the conflict in Afghanistan, the ICRC reminded all the parties involved – the Taliban, the Northern Alliance and the US-led coalition – of their obligation to "ensure the safety of medical and humanitarian personnel".¹³⁶

VI. Other Practice

133. In 1982, in a meeting with the ICRC, an armed opposition group declared that it would respect ICRC operations and the lives of ICRC delegates.¹³⁷

134. In a resolution adopted in 1991, the Politico-Military High Command of the SPLM/A stated that "all international and local relief, rehabilitation and development assistance and efforts shall be organized and processed through the Sudan Relief and Rehabilitation Association (SRRA) which shall remain an autonomous humanitarian organization".¹³⁸

135. The SRRA Model Agreement, concluded by the SPLM/A with various international NGOs and agencies in the context of the conflict in southern

¹³³ International Red Cross and Red Crescent Movement, Council of Delegates, Seville Session, 25–27 November 1997, Res. 8, Part 5, preamble and § 3.

¹³⁴ ICRC, Respect for and protection of the personnel of humanitarian organizations, Preparatory document for the First Periodical Meeting on International Humanitarian Law, Geneva, 19–23 January 1998, p. 19.

¹³⁵ ICRC, Communication to the Press No. 00/36, Colombia: ICRC condemns grave breaches of international humanitarian law, suspends medical evacuations of wounded combatants, 3 October 2000.

¹³⁶ ICRC, Communication to the Press No. 01/47, Afghanistan: ICRC calls on all parties to conflict to respect international humanitarian law, 24 October 2001.

¹³⁷ ICRC archive document.

¹³⁸ SPLM/A, PMHC Resolution No. 10: Relief assistance, 9 September 1991, § 3, Report on SPLM/A Practice, 1998, Chapter 4.1

Sudan, is aimed at protecting relief personnel and facilitating the delivery of humanitarian relief.¹³⁹

136. In 1994, the SPLM/A concluded an agreement with Operation Lifeline Sudan (OLS), which sought to determine possible corridors for the delivery of relief supplies and humanitarian assistance to war-affected areas. The agreement recognised that “the delivery of humanitarian assistance should be as far as possible practical, safe and cost effective”.¹⁴⁰

137. In 1994, an armed opposition group committed itself to ensuring that the security of ICRC installations, personnel, equipment and activities within its territory were guaranteed in accordance with the provisions of the Geneva Conventions.¹⁴¹

138. At the International Symposium on Water in Armed Conflicts held in Montreux (Switzerland) in 1994, the group of international experts present agreed to “aim for absolute protection of water supplies and systems, and to extend legal protection to include engineers attempting to restore water supplies in times of armed conflict”.¹⁴²

Attacks on the safety of humanitarian relief personnel

I. Treaties and Other Instruments

Treaties

139. Article 7 of the 1994 Convention on the Safety of UN Personnel provides that:

1. United Nations and associated personnel . . . shall not be made the object of attack or of any action that prevents them from discharging their mandate.
2. States Parties shall take all appropriate measures to ensure the safety and security of United Nations and associated personnel. In particular, States Parties shall take all appropriate steps to protect United Nations and associated personnel who are deployed in their territory from the crimes set out in article 9.

140. Article 8 of the 1994 Convention on the Safety of UN Personnel provides that:

Except as otherwise provided in an applicable status-of-forces agreement, if United Nations or associated personnel are captured or detained in the course of the performance of their duties and their identification has been established, they shall not be subjected to interrogation and they shall be promptly released and returned to United Nations or other appropriate authorities. Pending their release such

¹³⁹ Report on SPLM/A Practice, 1998, Chapter 4.1, referring to SRRA Model Agreement, § 5.

¹⁴⁰ Agreement on Operation Lifeline Sudan (OLS) corridors for relief supplies and humanitarian assistance to war-affected areas, 23 March 1994.

¹⁴¹ ICRC archive documents.

¹⁴² International Symposium on Water in Armed Conflicts, Montreux, November 1994, *ICRC News*, 24 November 1994, quoted in Marco Sassòli and Antoine A. Bouvier, *How Does Law Protect in War?*, ICRC, Geneva, 1999, pp. 458–459.

personnel shall be treated in accordance with universally recognized standards of human rights and the principles and spirit of the Geneva Conventions of 1949.

141. Article 9(1)(a) of the 1994 Convention on the Safety of UN Personnel provides that the intentional commission of “murder, kidnapping or other attack upon the person or liberty of any United Nations or associated personnel” shall be made by each State party a crime under its national law.

142. Pursuant to Article 8(2)(b)(iii) and (e)(iii) of the 1998 ICC Statute, “intentionally directing attacks against personnel . . . involved in a humanitarian assistance . . . mission . . . as long as they are entitled to the protection given to civilians . . . under the international law of armed conflict” constitutes a war crime in both international and non-international armed conflicts.

143. Article 4(b) of the 2002 Statute of the Special Court for Sierra Leone provides that:

The Special Court shall have the power to prosecute persons who committed the following serious violations of international humanitarian law:

...

(b) Intentionally directing attacks against personnel . . . involved in a humanitarian assistance . . . mission . . . as long as they are entitled to the protection given to civilians or civilian objects under the international law of armed conflict.

Other Instruments

144. Article 19(a) of the 1996 ILC Draft Code of Crimes against the Peace and Security of Mankind provides that “murder, kidnapping or other attack upon the person or liberty” of UN and associated personnel involved in a UN operation constitutes a crime against the peace and security of mankind when committed intentionally and in a systematic manner or on a large scale with a view to preventing or impeding that operation from fulfilling its mandate. The commentary on the Article emphasises that:

Attacks against United Nations and associated personnel constitute violent crimes of exceptionally serious gravity which have serious consequences not only for the victims, but also for the international community . . . Attacks against such personnel are in effect directed against the international community and strike at the very heart of the international legal system established for the purpose of maintaining international peace and security . . . The international community has a special responsibility to ensure the effective prosecution and punishment of the individuals who are responsible for criminal attacks against United Nations and associated personnel.

145. The 2000 UNTAET Regulation No. 2000/15 establishes panels with exclusive jurisdiction over serious criminal offences, including war crimes. According to Section 6(1)(b)(iii) and (e)(iii), “intentionally directing attacks against personnel . . . involved in a humanitarian assistance . . . mission . . . as long as they are entitled to the protection given to civilians . . . under the international law of armed conflict” constitutes a war crime in both international and non-international armed conflicts.

II. National Practice

Military Manuals

146. Canada's LOAC Manual provides that:

Humanitarian aid societies, such as the Red Cross or Red Crescent Societies, who on their own initiative, collect and care for the wounded, sick and shipwrecked, even in invaded or occupied areas, shall not be made the object of attack. Personnel participating in relief actions shall not be made the object of attack.¹⁴³

National Legislation

147. Australia's ICC (Consequential Amendments) Act incorporates in the Criminal Code the war crimes defined in the 1998 ICC Statute, including "attacking personnel . . . involved in a humanitarian assistance . . . mission" in international and non-international armed conflicts.¹⁴⁴

148. Azerbaijan's Criminal Code provides that "directing attacks against personnel recruited . . . to provide humanitarian assistance" constitutes a war crime in international and non-international armed conflicts.¹⁴⁵

149. Under Burundi's Draft Law on Genocide, Crimes against Humanity and War Crimes, "intentionally directing attacks against personnel . . . involved in a humanitarian assistance mission . . . as long as they are entitled to the protection given to civilians . . . under the international law of armed conflict" constitutes a war crime in both international and non-international armed conflicts.¹⁴⁶

150. Canada's Crimes against Humanity and War Crimes Act provides that the war crimes defined in Article 8(2) of the 1998 ICC Statute are "crimes according to customary international law" and, as such, indictable offences under the Act.¹⁴⁷

151. Congo's Genocide, War Crimes and Crimes against Humanity Act defines war crimes with reference to the categories of crimes set out in Article 8 of the 1998 ICC Statute.¹⁴⁸

152. Under Estonia's Penal Code, "a person who kills, tortures, causes health damage . . . to a representative of a humanitarian organisation performing his/her duties in a war zone" commits a war crime.¹⁴⁹

153. Under Ethiopia's Penal Code, anyone who "indulges in hostile acts against or threats or insults to persons belonging to the International Red Cross or to corresponding humanitarian relief organizations (the Red Crescent, the Red Lion and Sun) or to the representatives of those organizations" commits a punishable offence.¹⁵⁰

¹⁴³ Canada, *LOAC Manual* (1999), §§ 53 and 54.

¹⁴⁴ Australia, *ICC (Consequential Amendments) Act* (2002), Schedule 1, §§ 268.37 and 268.79.

¹⁴⁵ Azerbaijan, *Criminal Code* (1999), Article 116(3).

¹⁴⁶ Burundi, *Draft Law on Genocide, Crimes against Humanity and War Crimes* (2001), Article 4(B)(c) and (D)(c).

¹⁴⁷ Canada, *Crimes against Humanity and War Crimes Act* (2000), Section 4(1) and (4).

¹⁴⁸ Congo, *Genocide, War Crimes and Crimes against Humanity Act* (1998), Article 4.

¹⁴⁹ Estonia, *Penal Code* (2001), § 102 ¹⁵⁰ Ethiopia, *Penal Code* (1957), Article 293(a).

154. Germany's Law Introducing the International Crimes Code provides that:

Anyone who, in connection with an international or non-international armed conflict, carries out an attack against personnel . . . involved in a humanitarian assistance . . . mission . . . as long as they are entitled to the protection given to civilians or civilian objects under international humanitarian law, shall be liable to imprisonment for not less than three years. In less serious cases, particularly where the attack is not carried out with military means, the period of imprisonment shall be for not less than one year.¹⁵¹

155. Under the International Crimes Act of the Netherlands, "intentionally directing attacks against personnel . . . involved in humanitarian assistance . . . , as long as they are entitled to the protection given to civilians . . . under the international law of armed conflict" is a crime, whether committed in an international or a non-international armed conflict.¹⁵²

156. New Zealand's Crimes (Internationally Protected Persons and Hostages) Amendment Act gives New Zealand's courts extraterritorial jurisdiction over attacks against UN and associated personnel, their property and vehicles, which are criminalised by the Act.¹⁵³

157. Under New Zealand's International Crimes and ICC Act, war crimes include the crimes defined in Article 8(2)(b)(iii) and (e)(iii) of the 1998 ICC Statute.¹⁵⁴

158. The Act on Child Protection of the Philippines contains an article on "children in situations of armed conflicts" which provides that those who provide emergency relief services "shall not be subjected to undue harassment in the performance of their work".¹⁵⁵

159. Under Portugal's Penal Code, killing, torturing, treating inhumanely or causing serious injury to the body or health of members of humanitarian organisations in time of war, armed conflict or occupation is a war crime.¹⁵⁶

160. Under Trinidad and Tobago's Draft ICC Act, it is a punishable offence to commit a war crime as defined in Article 8(2)(b)(iii) and (e)(iii) of the 1998 ICC Statute.¹⁵⁷

161. The UK UN Personnel Act, which gives effect to certain provisions of the 1994 Convention on the Safety of UN Personnel, provides that:

If a person does outside the United Kingdom any act to or in relation to a UN worker which, if he had done it in any part of the United Kingdom, would have made him guilty of any of the offences mentioned in subsection (2) [*inter alia* murder, manslaughter, culpable homicide, rape, assault causing injury, kidnapping,

¹⁵¹ Germany, *Law Introducing the International Crimes Code* (2002), § 11.1(1).

¹⁵² Netherlands, *International Crimes Act* (2003), Articles 5(5)(o) and 6(3)(c).

¹⁵³ New Zealand, *Crimes (Internationally Protected Persons and Hostages) Amendment Act* (1998).

¹⁵⁴ New Zealand, *International Crimes and ICC Act* (2000), Section 11(2).

¹⁵⁵ Philippines, *Act on Child Protection* (1992), Article X, Section 22(d).

¹⁵⁶ Portugal, *Penal Code* (1996), Article 241.

¹⁵⁷ Trinidad and Tobago, *Draft ICC Act* (1999), Section 5(1)(a).

abduction and false imprisonment], he shall in that part of the United Kingdom be guilty of that offence.¹⁵⁸

162. Under the UK ICC Act, it is a punishable offence to commit a war crime as defined in Article 8(2)(b)(iii) and (e)(iii) of the 1998 ICC Statute.¹⁵⁹

National Case-law

163. No practice was found.

Other National Practice

164. In a debate in the Senate in 1995, the Australian government stated that attacks on UN and associated personnel would not be tolerated.¹⁶⁰

165. In an appeal issued in 1992, the Presidency of the Republika Srpska of Bosnia and Herzegovina stated "we shall make efforts to provide, as soon as possible, conditions for operations of the Red Cross and other humanitarian organizations and, in particular, to ensure respect for their representatives, vehicles and supplies and their safe work".¹⁶¹

166. In 1996, in response to a letter written jointly by the Special Rapporteurs of the UN Commission on Human Rights on Extrajudicial, Summary or Arbitrary Executions and for Burundi following a deliberate attack on a vehicle carrying ICRC delegates, the President and the Prime Minister of Burundi wrote that they deplored the incident and indicated that they had requested an independent inquiry to identify the perpetrators.¹⁶²

167. According to the Report on the Practice of Ethiopia, NGOs operating in Ethiopia have reported being harassed.¹⁶³ In addition, it has been reported that "the Ethiopian air force had bombed relief convoys" and that "the EPLF, too, attacked food convoys, claiming that the regime was using them to ship weapons to its troops".¹⁶⁴

168. At the First Periodical Meeting on International Humanitarian Law in 1998, the representative of Ethiopia "deplored and condemned" attacks against relief workers.¹⁶⁵

¹⁵⁸ UK, *UN Personnel Act* (1997), Section 1(1).

¹⁵⁹ UK, *ICC Act* (2001), Sections 50(1) and 51(1) (England and Wales) and Section 58(1) (Northern Ireland).

¹⁶⁰ Australia, Government statement, 13 November 1995, *Senate Debates*, Vol. 176, p. 2760, Recommendation 7.

¹⁶¹ Bosnia and Herzegovina, Republika Srpska, Appeal of the Presidency concerning the International Committee of the Red Cross Operations, Pale, 7 June 1992.

¹⁶² UN Commission on Human Rights, Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions, Report, UN Doc. E/CN.4/1997/60/Add.1, 23 December 1996, § 87.

¹⁶³ Report on the Practice of Ethiopia, 1998, Chapter 4.1.

¹⁶⁴ Thomas P. Ofcansky and LaVerle Berry (eds.), *Ethiopia: A Country Study*, Government Printing Office, Washington D.C., Fourth edition, 1993, p. 328.

¹⁶⁵ Ethiopia, Statement at the First Periodical Meeting on International Humanitarian Law, Geneva, 19–23 January 1998.

169. In 1991, during a debate in the German parliament, a member of parliament strongly protested about threats to relief personnel in southern Sudan. His protest was shared by all parties in the parliament.¹⁶⁶

170. At the First Periodical Meeting on International Humanitarian Law in 1998, the representative of India insisted on the punishment of those who attacked humanitarian personnel. He considered this issue to be of “high priority” for his delegation.¹⁶⁷

171. According to the Report on the Practice of Iran, it is the *opinio juris* of Iran that relief personnel are “immune from attack”.¹⁶⁸

172. The Report on the Practice of Israel states that:

It is the IDF's policy to cooperate with international humanitarian agencies and organizations, both in time of peace and in time of war. In times of hostilities, members of such agencies and organizations would naturally not be the subject of any attack or capture, and would be allowed to continue to execute their mandate, inasmuch as their activities do not directly conflict with military operations.¹⁶⁹

173. In a memorandum submitted to the International Conference for the Protection of War Victims in 1993, Kuwait stated that it considered attacks against humanitarian personnel to be a war crime.¹⁷⁰

174. According to the Report on the Practice of Malaysia, in 1983, the Malaysian government condemned an attack by Vietnamese troops on an international relief encampment in Nong-Chan near the Thai-Kampuchean border.¹⁷¹

175. In 1996, following the killing of six ICRC medical aid workers in Chechnya, the Russian government condemned the murders and ordered the police to investigate the crime. The Chechen Prime Minister stated that his government “would do everything possible to see that the murderers are severely punished as soon as possible”.¹⁷²

176. At the First Periodical Meeting on International Humanitarian Law in 1998, Switzerland presented a working paper on the topic of respect for and security of the personnel of humanitarian organisations, in which it recommended that:

¹⁶⁶ Germany, Lower House of Parliament, Statement by Dr. Werner Schuster, Member of Parliament, 21 June 1991, *Plenarprotokoll* 12/35, p. 2966.

¹⁶⁷ India, Statement at the First Periodical Meeting on International Humanitarian Law, Geneva, 19–23 January 1998.

¹⁶⁸ Report on the Practice of Iran, 1997, Chapter 4.2.

¹⁶⁹ Report on the Practice of Israel, 1997, Chapter 4.2.

¹⁷⁰ Kuwait, Remarks and proposals of the Kuwaiti Ministry of Justice concerning the Draft Declaration, International Conference for the Protection of War Victims, Geneva, 30 August–1 September 1993.

¹⁷¹ Report on the Practice of Malaysia, 1997, Chapter 4.2.

¹⁷² Brian Humphreys, “Chechen Peace Hit by Provocations”, *Christian Science Monitor*, 20 December 1996.

States intensify their efforts in the dissemination of international humanitarian law, especially within their armed and security forces . . . by emphasising respect for and the protection of humanitarian action and personnel . . . The proposed dissemination recalls the rule according to which it is forbidden to attack humanitarian organisations.¹⁷³

The paper also proposed that “national legislation give effect, as widely as possible, to the rules according to which an order to attack a humanitarian organisation does not exonerate anyone from responsibility” and recommended that:

States adopt necessary provisions, especially on the criminal and administrative levels, with a view to pronouncing appropriate sanctions against all those who will have participated, directly or indirectly, in an attack against a humanitarian organisation . . . States on whose territory attacks have taken place initiate without any delay impartial and efficient enquiry procedures . . . States take necessary measures against those who have prepared, participated in or in any other way facilitated an attack against a humanitarian organisation.¹⁷⁴

177. At the First Periodical Meeting on International Humanitarian Law in 1998, the representative of Turkey referred to attacks against humanitarian organisations as “terrorism of modern times”.¹⁷⁵

178. In 1992, during a debate in the UN Security Council on the situation in Bosnia and Herzegovina, the UK stated that attacks on ICRC personnel were contrary to all the provisions of IHL.¹⁷⁶

179. In 1992, in a report submitted pursuant to paragraph 5 of UN Security Council Resolution 771 (1992) on grave breaches of GC IV committed in the former Yugoslavia, the US included among “deliberate attacks on non-combatants” a report that “snipers fired all day at United Nations personnel as they distributed food to people in Sarajevo”.¹⁷⁷

180. During a press briefing on 17 December 1996, an official spokesperson for the US Department of State characterised the killing of six ICRC medical aid workers in Chechnya as “a barbarous act” and condemned it in the strongest possible terms.¹⁷⁸

¹⁷³ Switzerland, Working Paper on Respect for and Security of the Personnel of Humanitarian Organisations, First Periodical Meeting on International Humanitarian Law, Doc. RPDIH1/RP, Geneva, 19–23 January 1998, p. 1, § 3.

¹⁷⁴ Switzerland, Working Paper on Respect for and Security of the Personnel of Humanitarian Organisations, First Periodical Meeting on International Humanitarian Law, Doc. RPDIH1/RP, Geneva, 19–23 January 1998, p. 1, §§ I-2 and I-5.

¹⁷⁵ Turkey, Statement at the First Periodical Meeting on International Humanitarian Law, Geneva, 19–23 January 1998.

¹⁷⁶ UK, Statement before the UN Security Council, UN Doc. S/PV.3106, 13 August 1992, p. 36.

¹⁷⁷ US, Former Yugoslavia: Grave Breaches of the Fourth Geneva Convention, annexed to Letter dated 22 September 1992 to the UN Secretary-General, UN Doc. S/24583, 23 September 1992, p. 8.

¹⁷⁸ US, Department of State Daily Press Briefing, 17 December 1996.

181. According to the Report on US Practice, it is the *opinio juris* of the US that “unjustified attacks on international relief workers are also violations of international humanitarian law”.¹⁷⁹

182. At the First Periodical Meeting on International Humanitarian Law in 1998, the representative of Venezuela requested that those who “commit crimes” by attacking relief workers be punished.¹⁸⁰

183. In 1993, in a meeting with the ICRC, a governmental official insisted that incidents in which ICRC personnel and objects were targeted were the work of “uncontrolled elements” and that “strict orders had been issued to respect the ICRC”.¹⁸¹

184. In 1994, a State considered itself responsible for any wrongful act committed by its forces towards ICRC personnel and objects. It undertook to open an inquiry into any problems or security incidents that occurred.¹⁸²

III. Practice of International Organisations and Conferences

United Nations

185. In a resolution adopted in 1992, the UN Security Council deplored “the incident of 18 May 1992 which caused the death of a member of the ICRC team in Bosnia and Herzegovina”.¹⁸³

186. In a resolution adopted in 1993, the UN Security Council condemned repeated attacks carried out by UNITA against UN personnel providing humanitarian assistance and reaffirmed that “such attacks are clear violations of international humanitarian law”.¹⁸⁴

187. In a resolution adopted in 1994 with respect to the conflict in Somalia, the UN Security Council condemned “violence and armed attacks against persons engaged in humanitarian . . . efforts” and demanded that “all Somali parties refrain from any acts of intimidation or violence against personnel engaged in humanitarian . . . work in Somalia”.¹⁸⁵ These statements were reiterated in a subsequent resolution later that year.¹⁸⁶

188. In a resolution adopted in 1994 in the context of the conflict in the former Yugoslavia, the UN Security Council condemned all attacks against humanitarian relief workers in Gorade.¹⁸⁷

189. In a resolution adopted in 1994, the UN Security Council demanded that “all parties in Rwanda strictly respect the persons and premises of the

¹⁷⁹ Report on US Practice, 1997, Chapter 4.2.

¹⁸⁰ Venezuela, Statement at the First Periodical Meeting on International Humanitarian Law, Geneva, 19–23 January 1998.

¹⁸¹ ICRC archive document.

¹⁸² ICRC archive document. ¹⁸² UN Security Council, Res. 757, 30 May 1992, § 10.

¹⁸⁴ UN Security Council, Res. 864, 15 September 1993, § 13.

¹⁸⁵ UN Security Council, Res. 897, 4 February 1994, preamble and § 8.

¹⁸⁶ UN Security Council, Res. 923, 31 May 1994, preamble and § 5.

¹⁸⁷ UN Security Council, Res. 913, 22 April 1994, preamble.

United Nations and other organizations serving in Rwanda, and refrain from any acts of intimidation or violence against personnel engaged in humanitarian . . . work".¹⁸⁸ These demands were reiterated in a subsequent resolution a few weeks later.¹⁸⁹

190. In a resolution adopted in 1994 authorising the creation of a multinational force in Haiti, the UN Security Council demanded that "no acts of intimidation or violence be directed against personnel engaged in humanitarian or peace-keeping work".¹⁹⁰

191. In a resolution adopted in 1994 in the context of the conflict in Angola, the UN Security Council expressed its grave concern over "the disappearance of humanitarian relief workers on 27 August 1994" and demanded "their immediate release by the responsible parties".¹⁹¹ The latter demand was reiterated in a subsequent resolution.¹⁹²

192. In a resolution adopted in 1994, the UN Security Council strongly condemned "the attacks and harassment" against international personnel serving in Somalia.¹⁹³

193. In a resolution adopted in 1994, the UN Security Council condemned "the detention and maltreatment of . . . humanitarian relief workers and other international personnel" and demanded that all factions in Liberia "strictly respect the status of . . . humanitarian relief agencies working in Liberia, refrain from any acts of violence, abuse or intimidation against them".¹⁹⁴

194. In a resolution adopted in 1994 on the situation in Somalia, the UN Security Council strongly demanded that all parties in Somalia "refrain from any acts of intimidation or violence" against personnel engaged in humanitarian activities.¹⁹⁵

195. In a resolution adopted in 1996 on the situation in Burundi, the UN Security Council condemned "in the strongest terms all acts of violence perpetrated against . . . international humanitarian personnel".¹⁹⁶

196. In a resolution adopted in 1996 in the context of the conflict in Liberia, the UN Security Council condemned "all attacks against and intimidation of personnel of . . . the international organizations and agencies delivering humanitarian assistance".¹⁹⁷

197. In a resolution adopted in 1996, the UN Security Council condemned "the attacks on the United Nations personnel in the Taliban-held territories of Afghanistan, including the killing of the two Afghan staff-members of the

¹⁸⁸ UN Security Council, Res. 918, 17 May 1994, § 11.

¹⁸⁹ UN Security Council, Res. 925, 8 June 1994, § 11.

¹⁹⁰ UN Security Council, Res. 940, 31 July 1994, § 15.

¹⁹¹ UN Security Council, Res. 945, 29 September 1994, § 11.

¹⁹² UN Security Council, Res. 952, 27 October 1994, § 8.

¹⁹³ UN Security Council, Res. 946, 30 September 1994, preamble.

¹⁹⁴ UN Security Council, Res. 950, 21 October 1994, §§ 7 and 8.

¹⁹⁵ UN Security Council, Res. 954, 4 November 1994, § 7.

¹⁹⁶ UN Security Council, Res. 1049, 5 March 1996, § 2.

¹⁹⁷ UN Security Council, Res. 1071, 30 August 1996, § 8; Res. 1083, 27 November 1996, § 7.

World Food Programme and of the United Nations High Commissioner for Refugees in Jalalabad".¹⁹⁸

198. In a resolution adopted in 1999, the UN Security Council condemned "attacks and the use of force against United Nations and associated personnel, as well as personnel of international humanitarian organizations".¹⁹⁹

199. In 1993, in a statement by its President, the UN Security Council expressed the view that "attacks and other acts of violence, whether actual or threatened, including obstruction or detention of persons, against United Nations . . . personnel are wholly unacceptable".²⁰⁰

200. In 1994, in a statement by its President concerning the conflict in Bosnia and Herzegovina, the UN Security Council condemned "recent attacks against the personnel of . . . UNHCR and other humanitarian organizations".²⁰¹ It reiterated this condemnation in a further statement by its President a few months later.²⁰²

201. In 1994, in a statement by its President in connection with the situation in Haiti, the UN Security Council stated that it would "hold responsible any authorities or individuals in Haiti who endanger the personal security and safety of all personnel involved in such [humanitarian] assistance".²⁰³

202. In 1994, in a statement by its President, the UN Security Council deplored "attacks and harassment directed against . . . international personnel serving in Somalia".²⁰⁴

203. In 1996, in a statement by its President, the UN Security Council expressed its grave concern at "attacks on personnel of international humanitarian organizations" in Burundi.²⁰⁵

204. In 1996, in a statement by its President in the context of the conflict in Somalia, the UN Security Council condemned "the harassment, beatings, abduction and killings of personnel of international humanitarian organizations".²⁰⁶

205. In 1996, in a statement by its President, the UN Security Council condemned "the incident on 3 April 1996 which resulted in the death of two UN-AVEM III personnel, the wounding of a third, and the death of a humanitarian

¹⁹⁸ UN Security Council, Res. 1193, 28 August 1998, § 6.

¹⁹⁹ UN Security Council, Res. 1265, 17 September 1999, § 9.

²⁰⁰ UN Security Council, Statement by the President, UN Doc. S/25493, 31 March 1993, p. 1.

²⁰¹ UN Security Council, Statement by the President, UN Doc. S/PRST/1994/1, 7 January 1994, p. 1.

²⁰² UN Security Council, Statement by the President, UN Doc. S/PRST/1994/11, 14 March 1994, p. 2.

²⁰³ UN Security Council, Statement by the President, UN Doc. S/PRST/1994/2, 10 January 1994.

²⁰⁴ UN Security Council, Statement by the President, UN Doc. S/PRST/1994/46, 25 August 1994, p. 1.

²⁰⁵ UN Security Council, Statement by the President, UN Doc. S/PRST/1996/1, 5 January 1996, p. 1.

²⁰⁶ UN Security Council, Statement by the President, UN Doc. S/PRST/1996/4, 24 January 1996, p. 1.

assistance official" and reiterated the importance it attached to "the safety and security of UNAVEM III and humanitarian assistance personnel".²⁰⁷

206. In 1997, in a statement by its President, the UN Security Council strongly condemned "the attacks on and kidnapping of international personnel, in particular UNMOT, UNHCR and ICRC, and others".²⁰⁸

207. In 1997, in a statement by its President, the UN Security Council expressed its

grave concern at the recent increase in attacks and the use of force against United Nations and other personnel associated with United Nations operations, as well as personnel of international humanitarian organizations, including murder, physical and psychological threats, hostage taking, shooting at vehicles and aircraft, mine-laying, looting of assets and other hostile acts.²⁰⁹

208. In 1997, in a statement by its President following the military coup d'état in Sierra Leone, the UN Security Council strongly condemned "the violence which has been inflicted on both local and expatriate communities, in particular United Nations and other international personnel serving in the country".²¹⁰

209. In 1997, in a statement by its President following a debate on the protection of humanitarian assistance to refugees and others in conflict situations, the UN Security Council expressed its grave concern at "all attacks or use of force against United Nations and other personnel associated with United Nations operations, as well as personnel of humanitarian organizations, in violation of the relevant rules of international law, including those of international humanitarian law".²¹¹

210. In 1997, in a statement by its President in the context of the conflict in Angola, the UN Security Council condemned "the mistreatment of the personnel of the United Nations and international humanitarian organizations in areas under UNITA control".²¹²

211. In 1998, in a statement by its President the UN Security Council strongly condemned "the armed attack in Angola on 19 May 1998 against personnel from the United Nations and the Angolan National Police, in which one person was killed and three people were seriously injured".²¹³

212. In 1998, in a statement by its President in the context of the conflict in Afghanistan, the UN Security Council stated that it was "concerned at recent reports of harassment of humanitarian organizations and at the unilateral decision by the Taliban to relocate humanitarian organizations' offices in Kabul".

²⁰⁷ UN Security Council, Statement by the President, UN Doc. S/PRST/1996/19, 24 April 1996.

²⁰⁸ UN Security Council, Statement by the President, UN Doc. S/PRST/1997/6, 7 February 1997.

²⁰⁹ UN Security Council, Statement by the President, UN Doc. S/PRST/1997/13, 12 March 1997, p. 1.

²¹⁰ UN Security Council, Statement by the President, UN Doc. S/PRST/1997/29, 27 May 1997.

²¹¹ UN Security Council, Statement by the President, UN Doc. S/PRST/1997/34, 19 June 1997.

²¹² UN Security Council, Statement by the President, UN Doc. S/PRST/1997/39, 23 July 1997, p. 1.

²¹³ UN Security Council, Statement by the President, UN Doc. S/PRST/1998/14, 22 May 1998, p. 1.

It called upon all factions "to facilitate the work of humanitarian agencies to the greatest extent possible".²¹⁴

213. In 1998, in a statement by its President, the UN Security Council condemned "the killing of the two Afghan staff members of the World Food Programme and of the United Nations High Commissioner for Refugees in Jalalabad".²¹⁵

214. In 1998, in a statement by its President, the UN Security Council condemned "all attacks or use of force against United Nations and other personnel associated with United Nations operations as well as personnel of humanitarian organizations, in violation of international law, including international humanitarian law".²¹⁶

215. In 1999, in a statement by its President, the UN Security Council expressed its special concern about "attacks on humanitarian workers, in violation of the rules of international law".²¹⁷

216. In 2000, in a statement by its President, the UN Security Council expressed its grave concern at "continued attacks against United Nations and associated personnel, and humanitarian personnel, which are in violation of international law including international humanitarian law" and strongly condemned "the acts of murder and various forms of physical and psychological violence, including abduction, hostage-taking, kidnapping, harassment and illegal arrest and detention to which such personnel have been subjected".²¹⁸

217. In 2000, in a statement by its President, the UN Security Council reiterated its call for combatants "to ensure the safety [and] security . . . of United Nations and associated personnel and humanitarian personnel".²¹⁹

218. In 2001, in a statement by its President in connection with the deaths of six ICRC staff members in the DRC, the UN Security Council expressed "profound sympathy to the Governments and peoples of Colombia, the Democratic Republic of the Congo and Switzerland" and strongly condemned "the wanton killing of those humanitarian workers".²²⁰

219. In a resolution adopted in 1994, in the context of the conflict in Bosnia and Herzegovina, the UN General Assembly condemned "the attacks on and continuous harassment of the United Nations Protection Force and on personnel working with the Office of United Nations High Commissioner for

²¹⁴ UN Security Council, Statement by the President, UN Doc. S/PRST/1998/22, 14 July 1998, p. 2.

²¹⁵ UN Security Council, Statement by the President, UN Doc. S/PRST/1998/24, 6 August 1998, p. 2.

²¹⁶ UN Security Council, Statement by the President, UN Doc. S/PRST/1998/30, 29 September 1998.

²¹⁷ UN Security Council, Statement by the President, UN Doc. S/PRST/1999/6, 12 February 1999, p. 1.

²¹⁸ UN Security Council, Statement by the President, UN Doc. S/PRST/2000/4, 11 February 2000, pp. 1 and 2.

²¹⁹ UN Security Council, Statement by the President, UN Doc. S/PRST/2000/7, 13 March 2000, p. 2.

²²⁰ UN Security Council, Statement by the President, UN Doc. S/PV.4315, 27 April 2001, p. 1.

Refugees and other humanitarian organizations, most of which are perpetrated by Bosnian Serb forces".²²¹

220. In a resolution on Sudan adopted in 1994, the UN General Assembly stated that it was "disturbed by the continuing failure of Sudan to provide a full impartial investigation of the killings of Sudanese nationals employed by foreign relief organizations and foreign Governments".²²² In a further resolution on Sudan in 1995, the General Assembly reiterated its call upon the government of Sudan "to ensure a full, thorough and prompt investigation by an independent judicial inquiry commission of the killings of Sudanese nationals employed by foreign relief organizations".²²³

221. In a resolution adopted in 1994, the UN General Assembly condemned "in the strongest terms the killing of personnel attached to humanitarian organizations operating in Rwanda".²²⁴ The condemnation was reiterated in 1995.²²⁵

222. In a resolution adopted in 1996 on assistance for the rehabilitation and reconstruction of Liberia, the UN General Assembly deplored "all attacks against and intimidation of personnel of the United Nations, its specialized agencies [and] non-governmental organizations".²²⁶

223. In a resolution adopted in 1995 in the context of the conflict in Bosnia and Herzegovina, Croatia and the FRY (Serbia and Montenegro), the UN General Assembly condemned "all attacks on personnel working with the Office of the United Nations High Commissioner for Refugees and other humanitarian organizations by parties to the conflict".²²⁷

224. In a resolution adopted in 1996, the UN General Assembly expressed concern about "continuing deliberate and indiscriminate aerial bombardments by the Government of the Sudan of civilian targets in southern Sudan, in clear violation of international humanitarian law, which . . . resulted in casualties to civilians, including relief workers".²²⁸

225. In a resolution adopted in 1996 on the Convention on the Safety of UN and Associated Personnel, the UN General Assembly expressed grave concern about the "continuing attacks and acts of violence against United Nations and associated personnel that have caused death or serious injury" and noted that "only a small number of States have become parties to the Convention". It further expressed the need "to promote and protect the safety and security of the personnel who act on behalf of the United Nations, attacks against whom are unjustifiable and unacceptable".²²⁹

²²¹ UN General Assembly, Res. 49/196, 23 December 1994, § 15.

²²² UN General Assembly, Res. 49/198, 23 December 1994, preamble.

²²³ UN General Assembly, Res. 50/197, 22 December 1995, § 9.

²²⁴ UN General Assembly, Res. 49/206, 23 December 1994, § 3.

²²⁵ UN General Assembly, Res. 50/200, 22 December 1995, § 4.

²²⁶ UN General Assembly, Res. 51/30 B, 5 December 1996, § 4.

²²⁷ UN General Assembly, Res. 50/193, 22 December 1995, § 14.

²²⁸ UN General Assembly, Res. 51/112, 12 December 1996, preamble.

²²⁹ UN General Assembly, Res. 51/137, 13 December 1996, preamble.

226. In a resolution adopted in 1997 on the safety and security of humanitarian personnel, the UN General Assembly deplored “the rising toll of casualties among humanitarian personnel in complex emergencies, in particular armed conflicts” and strongly condemned “any act or failure to act which obstructs or prevents humanitarian personnel from discharging their humanitarian functions, or which entails their being subjected to threats, the use of force or physical attack frequently resulting in injury or death”.²³⁰ The General Assembly further urged all States:

to ensure that any threat or act of violence committed against humanitarian personnel on their territory is fully investigated and to take all appropriate measures, in accordance with international law and national legislation, to ensure that the perpetrators of such acts are prosecuted.²³¹

227. In a resolution adopted in 1998, the UN General Assembly strongly condemned “the acts of physical violence and harassment to which those participating in humanitarian operations are too frequently exposed”.²³²

228. In a resolution adopted in 1998, the UN General Assembly deplored the killing of humanitarian aid workers in Kosovo.²³³

229. In a resolution adopted in 2000 on the safety and security of humanitarian personnel and the protection of UN personnel, the UN General Assembly strongly condemned “the acts of murder and other forms of physical violence, abduction, hostage-taking, kidnapping, harassment and illegal arrest and detention to which those participating in humanitarian operations are increasingly exposed” as well as “any act or failure to act . . . which entails [humanitarian and UN personnel] being subjected to threats, the use of force or physical attack frequently resulting in injury or death”. It affirmed “the need to hold accountable those who commit such acts”.²³⁴ The General Assembly further urged all States:

to ensure that any threat or act of violence committed against humanitarian personnel on their territory is fully investigated and to take appropriate measures, in accordance with international law and national legislation, to ensure that the perpetrators of such acts are prosecuted . . . to provide adequate and prompt information in the event of arrest or detention of humanitarian personnel or United Nations personnel [and] to take the necessary measures to ensure the speedy release of United Nations and other personnel carrying out activities in fulfilment of the mandate of a United Nations operation who have been arrested or detained in violation of their immunity, in accordance with the relevant conventions referred to in the present resolution and applicable international humanitarian law.²³⁵

²³⁰ UN General Assembly, Res. 52/167, 16 December 1997, § 2.

²³¹ UN General Assembly, Res. 52/167, 16 December 1997, § 6.

²³² UN General Assembly, Res. 53/87, 7 December 1998, preamble.

²³³ UN General Assembly, Res. 53/164, 9 December 1998, p. 3, § 11.

²³⁴ UN General Assembly, Res. 54/192, 17 December 1999, preamble and § 4.

²³⁵ UN General Assembly, Res. 54/192, 17 December 1999, §§ 6 and 7.

230. In a resolution adopted in 2000 on the situation of human rights in the Sudan, the UN General Assembly condemned “the murder of four Sudanese relief workers in April 1999 while in the custody of the Sudanese People’s Liberation Army/Movement (SPLA/M)” and expressed its deep concern at continuing serious violations of IHL by all parties, in particular “the difficulties encountered by United Nations and humanitarian staff in carrying out their mandate because of harassment, indiscriminate aerial bombings and the reopening of hostilities”.²³⁶

231. In resolutions adopted between 1991 and 1995, the UN Commission on Human Rights has repeatedly urged all the parties to the conflict in Afghanistan “to undertake all necessary measures to ensure the safety of all personnel of humanitarian organizations”.²³⁷

232. In resolutions adopted in 1994 and 1995, the UN Commission on Human Rights deplored the repeated attacks against UN personnel and the personnel of other humanitarian organisations and NGOs in Somalia.²³⁸

233. In a resolution adopted in 1994 on the human rights situation in the former Yugoslavia, the UN Commission on Human Rights condemned “the use of military force against relief operations”.²³⁹

234. In a resolution adopted in 1994 on the situation of human rights in the Sudan, the UN Commission on Human Rights called upon the government of Sudan “to ensure a full, thorough and prompt investigation by the independent judicial inquiry commission of the killings of Sudanese employees of foreign relief organizations, to bring to justice those responsible for the killings and to provide just compensation to the families of the victims”.²⁴⁰ Similar appeals were made in subsequent resolutions in 1995, 1996 and 1997.²⁴¹

235. In a resolution adopted in 1995 on the human rights situation in the former Yugoslavia, the UN Commission on Human Rights condemned “attacks on and continued harassment of . . . personnel working with the Office of the United Nations High Commissioner for Refugees and other humanitarian organizations, which have caused injuries and the death of those who seek to protect civilians and to deliver humanitarian assistance”. It demanded that all parties “ensure that all persons under their control cease all such attacks and acts of harassment”.²⁴²

236. In a resolution adopted in 1995 on the situation of human rights in Rwanda, the UN Commission on Human Rights condemned “in the strongest

²³⁶ UN General Assembly, Res. 55/116, 4 December 2000, preamble and § 2(a)(vii).

²³⁷ UN Commission on Human Rights, Res. 1991/78, 6 March 1991, § 12; Res. 1992/68, 4 March 1992, § 22; Res. 1994/84, 9 March 1994, § 19; Res. 1995/74, 8 March 1995, § 13.

²³⁸ UN Commission on Human Rights, Res. 1994/60, 4 March 1994, preamble and § 3; Res. 1995/56, 3 March 1995, preamble.

²³⁹ UN Commission on Human Rights, Res. 1994/72, 9 March 1994, § 7(d).

²⁴⁰ UN Commission on Human Rights, Res. 1994/79, 9 March 1994, § 11.

²⁴¹ UN Commission on Human Rights, Res. 1995/77, 8 March 1995, § 17; Res. 1996/73, 23 April 1996, § 16; Res. 1997/59, 15 April 1997, § 17.

²⁴² UN Commission on Human Rights, Res. 1995/89, 8 March 1995, § 17.

terms the kidnapping and killing . . . of personnel attached to humanitarian organizations operating in the country . . . all of which constitute blatant violations of international humanitarian law".²⁴³

237. In a resolution adopted in 1996 with respect to the conflict in Burundi, the UN Commission on Human Rights strongly condemned "the continued violence against the civilian population, including . . . international humanitarian aid workers".²⁴⁴ In 1997, again with reference to Burundi, the Commission strongly condemned "the murder of three ICRC delegates and urged the government of Burundi to bring the culprits to justice".²⁴⁵

238. In a resolution adopted in 1996, the UN Commission on Human Rights declared that it was "deeply concerned about continued acts of indiscriminate and deliberate aerial bombardment by the Government of the Sudan of civilian targets in southern Sudan, including humanitarian relief operations, in clear violation of international humanitarian law". It called upon the Sudanese government "to cease immediately the deliberate and indiscriminate aerial bombardment of civilian targets and relief operations".²⁴⁶

239. In a resolution adopted in 1997 on the situation of human rights in the Sudan, the UN Commission on Human Rights expressed its deep concern at "arrest of foreign relief workers without charge".²⁴⁷

240. In a resolution adopted in 1996 on the situation of human rights in the Sudan, the UN Commission on Human Rights expressed its deep concern about "continued acts of indiscriminate and deliberate aerial bombardment by the Government of the Sudan of civilian targets in southern Sudan, including humanitarian relief operations, in clear violation of international humanitarian law". It called upon the government of Sudan "to cease immediately the deliberate and indiscriminate aerial bombardment of . . . relief operations".²⁴⁸ The latter demand was reiterated in subsequent resolutions in 1997 and 1998.²⁴⁹

241. In a resolution adopted in 1996, the UN Commission on Human Rights stated that "the Burundian authorities are responsible for ensuring the safety of humanitarian and other aid workers" and appealed to "the authorities of Burundi to strengthen measures to guarantee the security and protection of the staff of international, governmental and non-governmental organizations so as to facilitate their work".²⁵⁰

242. In a resolution on Afghanistan adopted in 1998, the UN Commission on Human Rights condemned "actions by all parties that constitute interference with the delivery of humanitarian assistance to the civilian population of

²⁴³ UN Commission on Human Rights, Res. 1995/91, 8 March 1995, § 3.

²⁴⁴ UN Commission on Human Rights, Res. 1996/1, 27 March 1996, preamble.

²⁴⁵ UN Commission on Human Rights, Res. 1997/77, 18 April 1997, § 9.

²⁴⁶ UN Commission on Human Rights, Res. 1996/73, 23 April 1996, preamble.

²⁴⁷ UN Commission on Human Rights, Res. 1997/59, 15 April 1997, § 4.

²⁴⁸ UN Commission on Human Rights, Res. 1996/73, 23 April 1996, preamble and § 12.

²⁴⁹ UN Commission on Human Rights, Res. 1997/59, 15 April 1997, § 15; Res. 1998/67, 21 April 1998, § 15.

²⁵⁰ UN Commission on Human Rights, Res. 1996/1, 27 March 1996, preamble.

Afghanistan and which jeopardize the safety of humanitarian personnel". It urged all the Afghan parties "to fulfil their obligations and commitments regarding the safety of all personnel of diplomatic missions, the United Nations and other international organizations, as well as of their premises in Afghanistan".²⁵¹

243. In a resolution adopted in 2001 on the situation of human rights in the Sudan, the UN Commission on Human Rights expressed its deep concern at continuing serious violations of IHL by all parties to the conflict, in particular "the difficulties encountered by United Nations and humanitarian staff in carrying out their mandate because of harassment, indiscriminate aerial bombings and the reopening of hostilities".²⁵²

244. In 1997, in a progress report on UNOMIL, the UN Secretary-General included among apparent or alleged human rights violations in Liberia, "the harassment and detention of members of the international humanitarian community by ULIMO-J fighters at Vonzula, Grand Cape Mount County, resulting in the suspension of humanitarian assistance to the area on 20 December 1996".²⁵³

245. In 1995, a report on extrajudicial, summary or arbitrary executions, the Special Rapporteur of the UN Commission on Human Rights expressed his concern at the escalation of violence against international humanitarian workers in Burundi and referred to the 1994 Convention on the Safety of UN Personnel.²⁵⁴

246. In 1996, in a report on a mission to Burundi, the Special Rapporteur of the UN Commission on Human Rights on Extrajudicial, Summary or Arbitrary Executions mentioned a deliberate attack on a vehicle carrying ICRC delegates, following which he, jointly with the Special Rapporteur on the human rights situation in Burundi, had addressed a letter to the President and the Prime Minister of Burundi expressing their "extreme disgust at that act".²⁵⁵

247. In 1997, following the murder of three ICRC delegates in Burundi, the Special Rapporteur of the UN Commission on Human Rights for Burundi stated that he would not be satisfied "unless those responsible for this heinous crime are prosecuted and appropriately punished".²⁵⁶

248. In 1997, in a report on the situation of human rights in the Sudan, the Special Rapporteur of the Commission on Human Rights described the following incident:

²⁵¹ UN Commission on Human Rights, Res. 1998/70, 21 April 1998, § 5(c) and (e).

²⁵² UN Commission on Human Rights, Res. 2001/18, 20 April 2001, § 2(a)(vii).

²⁵³ UN Secretary-General, Twenty-first progress report on UNOMIL, UN Doc. S/1997/90, 29 January 1997, § 30.

²⁵⁴ UN Commission on Human Rights, Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions, Report on the mission to Burundi from 19 to 29 April 1995, UN Doc. E/CN.4/1996/4/Add.1, 24 July 1995, § 85.

²⁵⁵ UN Commission on Human Rights, Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions, Report, UN Doc. E/CN.4/1997/60/Add.1, 23 December 1996, §§ 85–86.

²⁵⁶ UN Commission on Human Rights, Special Rapporteur on the Situation of Human Rights in Burundi, Second report, UN Doc. E/CN.4/1997/12, 10 February 1997, § 97.

On 1 November 1996, members of another dissident SPLA group led by commander Kerubino Kwanyan Bol . . . seized an aircraft of the International Committee of the Red Cross which had landed by mistake at Wunrock airstrip and kidnapped three Red Cross workers and five SPLA-Mainstream soldiers who were returning from an ICRC hospital in Lokichokio, Kenya. Commander Kerubino accused the ICRC of transporting enemy soldiers, arms and ammunition into Southern Sudan, a charge denied as completely baseless by the ICRC. After more than five weeks of detention Kerubino agreed to release the Red Cross workers . . . The Special Rapporteur is not aware of any attempt by anyone to raise legal questions regarding the responsibility of commander Kerubino and his men for the kidnapping, which is a violation of Sudanese national legislation and a serious breach of international humanitarian law.²⁵⁷

249. The Code of Conduct for Humanitarian Assistance in Sierra Leone, annexed to the 1999 United Nations Inter-Agency Consolidated Appeal for Sierra Leone, contains certain guiding principles for States and non-State entities. The principles provide, *inter alia*, that:

Every effort should be made to ensure security and protection of UN, NGO and associated personnel engaged in humanitarian assistance activities. Protagonists shall be held directly accountable to the UN and the international community for attacks on UN and NGO staff and others connected with the UN and NGO humanitarian operations.²⁵⁸

250. The Principles of Engagement for Emergency Humanitarian Assistance in the Democratic Republic of the Congo, annexed to the 2000 United Nations Inter-Agency Consolidated Appeal for the Democratic Republic of the Congo, state that “the relevant authorities are responsible for creating conditions conducive to the implementing of humanitarian activities. This must cover the security of local and international staff as well as all assets.”²⁵⁹

Other International Organisations

251. In a resolution adopted in 1989, the Parliamentary Assembly of the Council of Europe declared that it was “preoccupied by the increase in breaches in the security of delegates of the ICRC, its installations and means of transport, and by the recent taking of ICRC delegates in Lebanon as hostages in the accomplishment of their mission”.²⁶⁰

252. In a resolution adopted in 1992 on the crisis in the former Yugoslavia, the Parliamentary Assembly of the Council of Europe strongly condemned

²⁵⁷ UN Commission on Human Rights, Special Rapporteur on the Situation of Human Rights in the Sudan, Report, 3 February 1997, § 27.

²⁵⁸ OCHA, United Nations Inter-Agency Consolidated Appeal for Sierra Leone (January–December 1999), December 1998, Annex I, Code of Conduct for Humanitarian Assistance in Sierra Leone, p. 88.

²⁵⁹ OCHA, United Nations Inter-Agency Consolidated Appeal for the Democratic Republic of the Congo (January–December 2000), November 1999, Annex II, Principles of Engagement for Emergency Humanitarian Assistance in the Democratic Republic of the Congo, p. 68, § 2.

²⁶⁰ Council of Europe, Parliamentary Assembly, Res. 921, 6 July 1989, § 8.

“attacks on convoys and personnel of international humanitarian organizations trying to bring relief to the afflicted population in Sarajevo and other places in Bosnia-Herzegovina” and demanded that “violators of humanitarian law are held personally accountable for these violations”.²⁶¹

253. In a recommendation adopted in 1992 on the crisis in the former Yugoslavia, the Parliamentary Assembly of the Council of Europe expressed “its admiration for the courage and dedication of UNPROFOR and the personnel of humanitarian organizations” and condemned all attacks on these persons.²⁶²

254. In a declaration by the Presidency in 1998 on the situation in Sierra Leone, the EU urged ECOMOG “to ensure that international humanitarian law is upheld and to ensure the security of those engaged in providing such relief”.²⁶³

255. In a resolution adopted in 1994 on respect for international humanitarian law and support for humanitarian action in armed conflict, the OAU Council of Ministers condemned “the attacks and killings of the staff of humanitarian organizations”.²⁶⁴

256. In a resolution adopted in 1996 on the situation in Burundi, the OAU Council of Ministers strongly condemned “the brutal and bastardly murder of . . . humanitarian aid-workers”.²⁶⁵

257. In a resolution adopted in 1996 on international humanitarian law, water and armed conflicts in Africa, the OAU Council of Ministers condemned “in the strongest possible terms the attacks and killings, including incitements to acts of violence and threats against the personnel of organizations that are exclusively humanitarian, neutral and impartial”.²⁶⁶

258. In a press release issued on December 1996 on the killing of six ICRC medical aid workers in Chechnya, the Chairman-in-Office of the OSCE stated that he was “horrified to learn of the atrocious crime which claimed the lives of six International Red Cross aid workers . . . in Novye Atagi” and “strongly condemned this act of violence . . . and terrorism”. He urged the competent authorities to clarify the circumstances of the act and to bring those responsible to justice.²⁶⁷

International Conferences

259. In 1992, the Committee of Senior Officials of the CSCE debated the situation in Bosnia and Herzegovina and condemned “attacks on international relief staff and on UNPROFOR”.²⁶⁸

²⁶¹ Council of Europe, Parliamentary Assembly, Res. 984, 30 June 1992, § 8.

²⁶² Council of Europe, Parliamentary Assembly, Rec. 1198, 5 November 1992, § 8.

²⁶³ EU, Declaration on the situation in Sierra Leone by the Presidency on behalf of the EU, 20 February 1998, § 2.

²⁶⁴ OAU, Council of Ministers, Res. 1526 (LX), 6–11 June 1994, § 5.

²⁶⁵ OAU, Council of Ministers, Res. 1649 (LXIV), 1–5 July 1996, § 4.

²⁶⁶ OAU, Council of Ministers, Res. 1662 (LXIV), 1–5 July 1996, § 10.

²⁶⁷ OSCE, Chairman-in-Office, Press Release No. 86/96, 17 December 1996, §§ 1 and 2.

²⁶⁸ CSCE, Decisions of the Committee of Senior Officials, September 1992, *Helsinki Monitor*, 1993, p. 92, § 4.

260. In a resolution on Bosnia and Herzegovina adopted in 1992, the 88th Inter-Parliamentary Conference in Stockholm strongly condemned “the escalation of violence by armed attacks against humanitarian . . . personnel” and insisted that “such attacks cease immediately”.²⁶⁹

261. In a resolution adopted in 1993, the 90th Inter-Parliamentary Conference in Canberra expressed regret that “the international relief and protection effort during armed conflicts . . . is encountering serious difficulties and dangers, including . . . attacks against humanitarian personnel”.²⁷⁰

262. In a resolution adopted in 1994, the Parliamentary Assembly of the CSCE condemned attacks against personnel of UNPROFOR and humanitarian organisations in Bosnia and Herzegovina.²⁷¹

263. In a resolution adopted in 1999 on the occasion of the 50th anniversary of the Geneva Conventions, the 102nd Inter-Parliamentary Conference in Berlin urged States “to halt arms transfers to parties that target relief workers [and] undermine humanitarian assistance”.²⁷²

264. The Plan of Action for the years 2000–2003 adopted by the 27th International Conference of the Red Cross and Red Crescent in 1999 states that “threats to, and attacks on, [humanitarian] personnel will be duly investigated and those alleged to have committed such attacks will be brought to justice under due process of law”.²⁷³

IV. Practice of International Judicial and Quasi-judicial Bodies

265. No practice was found.

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

266. Following the murder of two ICRC expatriates and one local staff member in May 1978 in Zimbabwe, the ICRC asked the highest authorities of the parties to the conflict to investigate the case and demanded that immediate measures be taken to ensure respect for the red cross emblem and the security of ICRC delegates.²⁷⁴

²⁶⁹ 88th Inter-Parliamentary Conference, Stockholm, 7–12 September 1992, Resolution on support to the recent international initiatives to halt the violence and put an end to the violations of human rights in Bosnia and Herzegovina, § 5.

²⁷⁰ 90th Inter-Parliamentary Conference, Canberra, 13–18 September 1993, Resolution on respect for international humanitarian law and support for humanitarian action in armed conflicts, preamble.

²⁷¹ CSCE, Parliamentary Assembly, Vienna Declaration, Chapter IV: Resolution on the former Yugoslavia, Doc. PA (94) 7, 8 July 1994, § 10.

²⁷² 102nd Inter-Parliamentary Conference, Berlin, 10–15 October 1999, Resolution on contribution of parliaments to ensuring respect for and promoting international humanitarian law on the occasion of the fiftieth anniversary of the Geneva Conventions, § 16.

²⁷³ 27th International Conference of the Red Cross and Red Crescent, Geneva, 31 October–6 November 1999, Res. I, Annex 2, Plan of Action for the years 2000–2003, Actions proposed for final goal 2.4, § 12.

²⁷⁴ Death of four members of ICRC delegations, *IRRC*, No. 204, 1978, pp. 166–167.

267. In the context of an internal conflict, the kidnapping of an ICRC medical worker was reported. In its communications with the armed opposition group responsible for this act, the ICRC reminded the group that it must respect the Geneva Conventions and the fundamental rules of IHL, because the commitment it made in 1980 was still applicable.²⁷⁵

268. At its Birmingham Session in 1993, the Council of Delegates adopted a resolution on armed protection of humanitarian assistance in which it expressed its deep concern about “the hazardous and dangerous conditions under which humanitarian assistance has had to be carried out in various disaster areas in recent years”.²⁷⁶

269. At its Birmingham Session in 1993, the Council of Delegates adopted a resolution on principles of humanitarian assistance in which it reminded States, in particular,

of the basis for and the nature of humanitarian assistance, as established by international humanitarian law, the Fundamental Principles and the Statutes of the International Red Cross and Red Crescent Movement:

- ...
- b) *with respect to States*: the duty – which is in the first instance theirs – to assist people who are placed *de jure* or *de facto* under their authority and, should they fail to discharge this duty, the obligation to authorize humanitarian organizations to provide such assistance, to grant such organizations access to the victims and to protect their action.²⁷⁷ [emphasis in original]

270. At its Seville Session in 1997, the Council of Delegates adopted a resolution on peace, international humanitarian law and human rights in which it expressed alarm at “the ever-more frequent threats to the safety and security of Red Cross and Red Crescent personnel and of the staff of other humanitarian organizations, in particular through intentional and often fatal violent attacks”.²⁷⁸

271. In a communication to the press issued in April 2001 following the killing of six ICRC staff members by unidentified assailants in the DRC, the ICRC condemned “in the strongest terms this attack and the flouting of the red cross emblem”.²⁷⁹

²⁷⁵ ICRC archive documents.

²⁷⁶ International Red Cross and Red Crescent Movement, Council of Delegates, Birmingham Session, 29–30 October 1993, Res. 5, preamble.

²⁷⁷ International Red Cross and Red Crescent Movement, Council of Delegates, Birmingham Session, 29–30 October 1993, Res. 11, § 1(b).

²⁷⁸ International Red Cross and Red Crescent Movement, Council of Delegates, Seville Session, 25–27 November 1997, Res. 8, Part 5, preamble.

²⁷⁹ ICRC, Communication to the Press No. 01/14, Six ICRC staff killed in Democratic Republic of the Congo, 27 April 2001.

VI. Other Practice

272. In the context of an internal conflict, an armed opposition group undertook not to attack ICRC personnel, vehicles and planes.²⁸⁰

273. In meetings with the ICRC in 1981 and 1982, an armed opposition group agreed to respect ICRC personnel and vehicles.²⁸¹

274. In 1985, in a meeting with the ICRC, the UN Secretary-General of an armed opposition group stated that the attacks on ICRC personnel and relief objects which had been committed by the forces of the group had taken place solely because ICRC personnel were located close to a combat area. With respect to an attack on an ICRC plane, the Secretary-General justified the attack on the grounds that his forces were "nervous and suspicious of any aircraft present in the region".²⁸²

275. In meetings with the ICRC in 1988 and 1989, several factions involved in an internal armed conflict stated that they had instructed their combatants not to attack ICRC personnel.²⁸³

276. In 1992, the government of a separatist entity guaranteed the safe conduct of ICRC personnel within the territory under its control.²⁸⁴

277. In 1992, an armed opposition group agreed to respect ICRC operations and the lives of ICRC delegates.²⁸⁵

278. In 1994, in a meeting with ICRC representatives, an official of an armed opposition group guaranteed the security of ICRC personnel in the territory it controlled.²⁸⁶

279. In 1994, in a letter addressed to the ICRC, an armed opposition group agreed to guarantee the safety of ICRC personnel and to instruct its forces not to attack ICRC personnel. It also pledged to respect Red Cross and Red Crescent installations and vehicles. Accordingly, it condemned the looting of an ICRC convoy and assured the ICRC of its continuing efforts to ensure the security of ICRC personnel and objects and to recover any lost property.²⁸⁷

280. In 1996, UNITA, a party to the conflict in Angola, committed itself to ensuring that relief personnel and objects would be spared from attack.²⁸⁸

281. In 1997, a military commander of an armed opposition group told ICRC representatives that he "would never attack the Red Cross". A leader of the same group also assured the ICRC that its combatants would respect Red Cross personnel in all circumstances.²⁸⁹

²⁸⁰ ICRC archive documents.

²⁸² ICRC archive document.

²⁸⁴ ICRC archive documents.

²⁸⁶ ICRC archive document

²⁸⁸ UNITA, Statement on the humanitarian situation in Angola, Bailundo, 1 January 1996.

²⁸⁹ ICRC archive document.

²⁸¹ ICRC archive documents.

²⁸³ ICRC archive documents.

²⁸⁵ ICRC archive document.

²⁸⁷ ICRC archive document.

B. Safety of Humanitarian Relief Objects

I. Treaties and Other Instruments

Treaties

282. Article 70(4) AP I provides that “the Parties to the conflict shall protect relief consignments and facilitate their rapid distribution”. Article 70 AP I was adopted by consensus.²⁹⁰

283. Article 7 of the 1994 Convention on the Safety of UN Personnel provides that:

1. United Nations and associated personnel, their equipment and premises shall not be made the object of attack or of any action that prevents them from discharging their mandate.
2. States Parties shall take all appropriate measures to ensure the safety and security of United Nations and associated personnel. In particular, States Parties shall take all appropriate steps to protect United Nations and associated personnel who are deployed in their territory from the crimes set out in article 9.

284. Article 9(1)(a) of the 1994 Convention on the Safety of UN Personnel provides that the intentional commission of “a violent attack upon the official premises, the private accommodation or the means of transportation of any United Nations or associated personnel likely to endanger his or her person or liberty” shall be made by each State Party a crime under its national law.

285. Pursuant to Article 8(2)(b)(iii) and (e)(iii) of the 1998 ICC Statute, “intentionally directing attacks against . . . installations, material, units or vehicles involved in a humanitarian assistance . . . mission . . . as long as they are entitled to the protection given to . . . civilian objects under the international law of armed conflict” constitutes a war crime in both international and non-international conflicts.

286. Article 4(b) of the 2002 Statute of the Special Court for Sierra Leone provides that:

The Special Court shall have the power to prosecute persons who committed the following serious violations of international humanitarian law:

- ...
- (b) Intentionally directing attacks against . . . installations, material, units or vehicles involved in a humanitarian assistance . . . mission . . . as long as they are entitled to the protection given to civilians or civilian objects under the international law of armed conflict.

Other Instruments

287. Based on several documents supplying evidence of outrages committed during the First World War, the 1919 Report of the Commission on Responsibility lists violations of the laws and customs of war which should be subject to criminal prosecution, including “destruction of relief ships”.

²⁹⁰ CDDH, *Official Records*, Vol. VI, CDDH/SR.43, 27 May 1977, p. 245.

288. In paragraph 2 of the 1992 Bahir Dar Agreement, the various Somali organisations attending the meeting on humanitarian issues convened by the Standing Committee on Somalia pledged to guarantee the security of relief objects.

289. Article 19(b) of the 1996 ILC Draft Code of Crimes against the Peace and Security of Mankind provides that “violent attack upon the official premises, the private accommodations or the means of transportation” of any UN and associated personnel involved in a UN operation likely to endanger his or her person constitutes a crime against the peace and security of mankind when committed intentionally and in a systematic manner or on a large scale with a view to preventing or impeding that operation from fulfilling its mandate.

290. Section 9.9 of the 1999 UN Secretary-General’s Bulletin states that “the United Nations force shall facilitate the work of relief operations which are humanitarian and impartial in character and conducted without any adverse distinction, and shall respect . . . vehicles and premises involved in such operations”.

291. The 2000 UNTAET Regulation No. 2000/15 establishes panels with exclusive jurisdiction over serious criminal offences, including war crimes. According to Section 6(1)(b)(iii) and (e)(iii), “intentionally directing attacks against . . . installations, material, units or vehicles involved in a humanitarian assistance . . . mission . . . as long as they are entitled to the protection given to . . . civilian objects under the international law of armed conflict” constitutes a war crime in both international and non-international armed conflicts.

II. National Practice

Military Manuals

292. Kenya’s LOAC Manual provides that “the Parties to the conflict shall protect relief consignments and facilitate their rapid distribution”.²⁹¹

293. The US Field Manual notes that, in case of occupation, if the occupied territory is inadequately supplied, “all Contracting Parties shall permit the free passage of [relief] consignments and shall guarantee their protection”.²⁹²

National Legislation

294. Australia’s War Crimes Act considers “any war crime within the meaning of the instrument of appointment of the Board of Inquiry [set up to investigate war crimes committed by enemy subjects]” as a war crime, including the destruction of relief ships.²⁹³

295. Australia’s ICC (Consequential Amendments) Act incorporates in the Criminal Code the war crimes defined in the 1998 ICC Statute, including

²⁹¹ Kenya, *LOAC Manual* (1997), Précis No. 4, p. 5.

²⁹² US, *Field Manual* (1956), § 388.

²⁹³ Australia, *War Crimes Act* (1945), Section 3.

“attacking... objects involved in a humanitarian assistance... mission” in international and non-international armed conflicts.²⁹⁴

296. Under the Criminal Code of the Federation of Bosnia and Herzegovina, it is a war crime to order that “an attack be launched against objects specifically protected by international law” or to carry out such an attack.²⁹⁵ The Criminal Code of the Republika Srpska contains the same provision.²⁹⁶

297. Under Burundi’s Draft Law on Genocide, Crimes against Humanity and War Crimes, “intentionally directing attacks against... installations, material, units or vehicles involved in a humanitarian assistance mission... as long as they are entitled to the protection given to... civilian objects under the international law of armed conflict” constitutes a war crime in both international and non-international armed conflicts.²⁹⁷

298. Canada’s Crimes against Humanity and War Crimes Act provides that the war crimes defined in Article 8(2) of the 1998 ICC Statute are “crimes according to customary international law” and, as such, indictable offences under the Act.²⁹⁸

299. China’s Law Governing the Trial of War Criminals provides that “destroying... relief ships” constitutes a war crime.²⁹⁹

300. Under Colombia’s Penal Code, attacking objects necessary for the assistance and relief of the civilian population is a punishable offence.³⁰⁰

301. Congo’s Genocide, War Crimes and Crimes against Humanity Act defines war crimes with reference to the categories of crimes set out in Article 8 of the 1998 ICC Statute.³⁰¹

302. Under Croatia’s Criminal Code, “the launching of an attack against objects under special protection of international law” is a war crime.³⁰²

303. The Draft Amendments to the Penal Code of El Salvador provide for a prison sentence for:

anyone who, in the context of an international or non-international armed conflict, attacks or destroys... storage of relief supplies, medical convoys, goods destined for the relief and assistance to the civilian population and other protected persons, without having taken adequate measures of protection and without imperative military necessity.³⁰³

304. Under Ethiopia’s Penal Code, anyone who “intentionally destroys or damages in the course of hostilities material, installations or depots” belonging to

²⁹⁴ Australia, *ICC (Consequential Amendments) Act* (2002), Schedule 1, §§ 268.37 and 268.79.

²⁹⁵ Bosnia and Herzegovina, Federation, *Criminal Code* (1998), Article 154(2).

²⁹⁶ Bosnia and Herzegovina, Republika Srpska, *Criminal Code* (2000), Article 433(2).

²⁹⁷ Burundi, *Draft Law on Genocide, Crimes against Humanity and War Crimes* (2001), Article 4(B)(c) and (D)(c).

²⁹⁸ Canada, *Crimes against Humanity and War Crimes Act* (2000), Section 4(1) and (4).

²⁹⁹ China, *Law Governing the Trial of War Criminals* (1946), Article 3(9).

³⁰⁰ Colombia, *Penal Code* (2000), Article 26.

³⁰¹ Congo, *Genocide, War Crimes and Crimes against Humanity Act* (1998), Article 4.

³⁰² Croatia, *Criminal Code* (1997), Article 158(2).

³⁰³ El Salvador, *Draft Amendments to the Penal Code* (1998), Article entitled “Destrucción de bienes e instalaciones de carácter sanitario”.

the ICRC or to corresponding humanitarian relief organisations (the Red Crescent, the Red Lion and Sun) commits a punishable offence.³⁰⁴

305. Germany's Law Introducing the International Crimes Code provides that:

Anyone who, in connection with an international or non-international armed conflict, ... carries out an attack against personnel, installations, material, units or vehicles involved in a humanitarian assistance or peacekeeping mission in accordance with the Charter of the United Nations, as long as they are entitled to the protection given to civilians or civilian objects under international humanitarian law, shall be liable to imprisonment for not less than three years. In less serious cases, particularly where the attack is not carried out with military means, the period of imprisonment shall be for not less than one year.³⁰⁵

306. Under Ireland's Geneva Conventions Act as amended, any "minor breach" of AP I, including violations of Article 70(4) AP I, is a punishable offence.³⁰⁶

307. The Definition of War Crimes Decree of the Netherlands includes "destruction of relief ships" in its list of war crimes.³⁰⁷

308. Under the International Crimes Act of the Netherlands, "intentionally directing attacks against ... installations, material, units or vehicles involved in humanitarian assistance ..., as long as they are entitled to the protection given to ... civilian objects under the international law of armed conflict" is a crime, whether committed in an international or a non-international armed conflict.³⁰⁸

309. Under New Zealand's International Crimes and ICC Act, war crimes include the crimes defined in Article 8(2)(b)(iii) and (e)(iii) of the 1998 ICC Statute.³⁰⁹

310. Under Norway's Military Penal Code as amended, "anyone who contravenes or is accessory to the contravention of provisions relating to the protection of persons or property laid down in ... the two additional protocols to [the Geneva] Conventions ... is liable to imprisonment".³¹⁰

311. Portugal's Penal Code considers attacks on objects necessary for the assistance and relief of the civilian population as a punishable offence.³¹¹

312. Under Slovenia's Penal Code, "an attack on buildings specially protected under international law" is a war crime.³¹²

313. Under Trinidad and Tobago's Draft ICC Act, it is a punishable offence to commit a war crime as defined in Article 8(2)(b)(iii) and (e)(iii) of the 1998 ICC Statute.³¹³

³⁰⁴ Ethiopia, *Penal Code* (1957), Article 293(b).

³⁰⁵ Germany, *Law Introducing the International Crimes Code* (2002), § 11.1(1).

³⁰⁶ Ireland, *Geneva Conventions Act as amended* (1962), Section 4(1) and (4).

³⁰⁷ Netherlands, *Definition of War Crimes Decree* (1946), Article 1.

³⁰⁸ Netherlands, *International Crimes Act* (2003), Articles 5(5)(o) and 6(3)(c).

³⁰⁹ New Zealand, *International Crimes and ICC Act* (2000), Section 11(2).

³¹⁰ Norway, *Military Penal Code as amended* (1902), § 108(b).

³¹¹ Portugal, *Penal Code* (1996), Article 241. ³¹² Slovenia, *Penal Code* (1994), Article 374(2).

³¹³ Trinidad and Tobago, *Draft ICC Act* (1999), Section 5(1)(a).

314. Under the UK ICC Act, it is a punishable offence to commit a war crime as defined in Article 8(2)(b)(iii) and (e)(iii) of the 1998 ICC Statute.³¹⁴

315. Under the Penal Code as amended of the SFRY (FRY), “the launching of an attack on facilities that are specifically protected under international law” is a war crime.³¹⁵

National Case-law

316. No practice was found.

Other National Practice

317. In an appeal issued in 1992, the Presidency of the Republika Srpska of Bosnia and Herzegovina stated “we shall make efforts to provide, as soon as possible, conditions for operations of the Red Cross and other humanitarian organizations and, in particular, to ensure respect for their representatives, vehicles and supplies and their safe work”.³¹⁶

318. The Report on the Practice of Brazil refers to an ICRC booklet compiled by the ICRC delegation in Brazil and used for the instruction of the Brazilian armed forces. The booklet highlights the duty of armed forces to respect relief objects.³¹⁷

319. According to the Report on the Practice of Egypt, “because of the importance of relief personnel and objects for the survival of the civilian population, Egypt believes that their protection is a *sine qua non conditio*”.³¹⁸

320. It was reported in the context of the conflict in Ethiopia, that “the Ethiopian air force had bombed relief convoys” and that “the EPLF, too, attacked food convoys, claiming that the regime was using them to ship weapons to its troops”.³¹⁹

321. In 1991, during a parliamentary debate on the situation in Sudan, a member of the German parliament said that the bombing of Red Cross and UN supply depots by governmental forces in southern Sudan was proof of “completely perverse behaviour”. His protest was shared by all parliamentary parties.³²⁰

322. According to the Report on the Practice of Iran, it is the *opinio juris* of Iran that relief objects are “immune from attack”.³²¹

³¹⁴ UK, *ICC Act* (2001), Sections 50(1) and 51(1) (England and Wales) and Section 58(1) (Northern Ireland).

³¹⁵ SFRY (FRY), *Penal Code as amended* (1976), Article 143.

³¹⁶ Bosnia and Herzegovina, Republika Srpska, Appeal of the Presidency concerning the International Committee of the Red Cross Operations, Pale, 7 June 1992.

³¹⁷ Report on the Practice of Brazil, 1997, Chapter 4.2.

³¹⁸ Report on the Practice of Egypt, 1997, Chapter 4.2.

³¹⁹ Thomas P. Ofcansky and LaVerle Berry (eds.), *Ethiopia: A Country Study*, Government Printing Office, Washington D.C., Fourth edition, 1993, p. 328.

³²⁰ Germany, Lower House of Parliament, Statement by Dr. Werner Schuster, Member of Parliament, 21 June 1991, *Plenarprotokoll* 12/35, p. 2966.

³²¹ Report on the Practice of Iran, 1997, Chapter 4.2.

323. According to the Report on the Practice of Kuwait, it is the *opinio juris* of Kuwait that humanitarian relief objects must be protected.³²²

324. According to the Report on the Practice of Nigeria, during the conflict in Biafra, the Nigerian Commissioner for Information maintained that "Nigeria would continue to stand by its promise to the ICRC to keep some 'corridors of mercy' safe from military activities so that relief supplies could at all times be channelled to Biafra through these corridors". As no practice deviated from this, the report concludes that the *opinio juris* of Nigeria is that the protection of relief objects is part of customary international law.³²³

325. The Report on UK Practice states that "as regards protection of relief personnel and objects, the UK has, both in words and in action, demonstrated support for this principle, as in Iraq, and in the former Yugoslavia".³²⁴

326. In 1992, in a report submitted pursuant to paragraph 5 of Security Council Resolution 771 (1992) on grave breaches of GC IV committed in the former Yugoslavia, the US included among "deliberate attacks on non-combatants" reports that "a convoy of United Nations trucks carrying aid supplies to Bosnian civilians was mortared" and that a "G-222 aircraft, which was carrying five tons of blankets to Sarajevo on a United Nations relief mission, was shot down by up to three ground-to-air missiles".³²⁵ In another such report, the US referred to a report that "an International Committee of the Red Cross (ICRC) convoy carrying food and medical relief on 18 May was attacked as it entered Sarajevo, despite the security guarantees obtained from the parties concerned".³²⁶

327. According to the Report on US Practice, it is the *opinio juris* of the US that "buildings used for relief and other charitable purposes are not subject to bombardment".³²⁷

328. In 1993, in a meeting with ICRC representatives, a government official insisted that incidents in which ICRC personnel and objects were targeted were the work of "uncontrolled elements" and that "strict orders had been issued to respect the ICRC".³²⁸

III. Practice of International Organisations and Conferences

United Nations

329. In a resolution adopted in 1994, the UN Security Council demanded that "all parties in Rwanda strictly respect the . . . premises of the United Nations

³²² Report on the Practice of Kuwait, 1997, Chapter 4.2.

³²³ Report on the Practice of Nigeria, 1997, Chapter 4.2.

³²⁴ Report on UK Practice, 1997, Chapter 4.2.

³²⁵ US, Former Yugoslavia: Grave Breaches of the Fourth Geneva Convention, annexed to Letter dated 22 September 1992 to the UN Secretary-General, UN Doc. S/24583, 23 September 1992, p. 8.

³²⁶ US, Former Yugoslavia: Grave Breaches of the Fourth Geneva Convention (Third Submission), annexed to Letter dated 5 November 1992 to the UN Secretary-General, UN Doc. S/24791, 10 November, p. 19.

³²⁷ Report on US Practice, 1997, Chapter 4.2. ³²⁸ ICRC archive document.

and other organizations serving in Rwanda".³²⁹ This demand was reiterated in a subsequent resolution.³³⁰

330. In a resolution adopted in 1994 on the conflict in Liberia, the UN Security Council demanded that all factions "return forthwith" equipment seized from humanitarian relief agencies.³³¹

331. In a resolution adopted in 1996, the UN Security Council condemned the looting of equipment, supplies and personal property of international organisations and agencies delivering humanitarian assistance in Liberia and called for "the immediate return of looted property".³³² It reiterated this statement in a resolution later the same year.³³³

332. In a resolution adopted in 1996, the UN Security Council demanded that "all parties and others concerned in Angola take all necessary measures to ensure the safety of United Nations and other international . . . premises and to guarantee the safety . . . of humanitarian supplies throughout the country".³³⁴ This demand was reiterated in a subsequent resolution later in the same year.³³⁵

333. In a resolution adopted in 1996 in the context of the conflict in Liberia, the UN Security Council condemned "the looting of . . . equipment, supplies, and personal property" of personnel of international organizations and agencies delivering humanitarian assistance.³³⁶

334. In a resolution adopted in 1999, the UN Security Council strongly condemned "attacks on objects protected under international law" and called on all parties "to put an end to such practices".³³⁷

335. In 1994, in a statement by its President on the situation in Rwanda, the UN Security Council called upon all parties "to ensure the safe passage for humanitarian assistance".³³⁸

336. In 1994, in a statement by its President concerning the conflict in Bosnia and Herzegovina, the UN Security Council noted with particular concern "reports of the recurrent obstruction and looting of humanitarian aid convoys destined for the civilian population of Maglaj".³³⁹

337. In 1997, in a statement by its President following the military coup d'état in Sierra Leone, the UN Security Council called for "an end to the looting of premises and equipment belonging to the United Nations and international aid agencies".³⁴⁰

³²⁹ UN Security Council, Res. 918, 17 May 1994, § 11.

³³⁰ UN Security Council, Res. 925, 8 June 1994, § 11.

³³¹ UN Security Council, Res. 950, 21 October 1994, § 8.

³³² UN Security Council, Res. 1059, 31 May 1996, § 6.

³³³ UN Security Council, Res. 1071, 30 August 1996, § 8.

³³⁴ UN Security Council, Res. 1075, 11 October 1996, § 18.

³³⁵ UN Security Council, Res. 1087, 11 December 1996, § 16.

³³⁶ UN Security Council, Res. 1083, 27 November 1996, § 7.

³³⁷ UN Security Council, Res. 1265, 17 September 1999, § 2.

³³⁸ UN Security Council, Statement by the President, UN Doc. S/PRST/1994/21, 30 April 1994, p. 2.

³³⁹ UN Security Council, Statement by the President, UN Doc. S/PRST/1994/11, 14 March 1994.

³⁴⁰ UN Security Council, Statement by the President, UN Doc. S/PRST/1997/29, 27 May 1997.

338. In 1997, in a statement by its President, the UN Security Council expressed its deep concern about “the deteriorating humanitarian situation in Sierra Leone, and at the continued looting and commandeering of relief supplies of international agencies”.³⁴¹

339. In 1997, in a statement by its President concerning the situation in Afghanistan, the UN Security Council expressed “serious concern over the looting of United Nations premises and food supplies” and urged all parties “to prevent their recurrence”.³⁴²

340. In 2000, in statement by its President, the UN Security Council strongly condemned “acts of destruction and looting” of the property of UN and associated personnel and of humanitarian personnel.³⁴³

341. In a resolution adopted in 1996 in the context of the conflict in Liberia, the UN General Assembly deplored “the looting of . . . equipment, supplies and personal property” of the UN, its specialised agencies and NGOs.³⁴⁴

342. In a resolution adopted in 1996 on the situation of human rights in Afghanistan, the UN General Assembly demanded that “all Afghan parties fulfil their obligations and commitments regarding the safety of United Nations personnel and other international personnel as well as their premises in Afghanistan”.³⁴⁵ This demand was reiterated in a subsequent resolution in 1997.³⁴⁶

343. In a resolution adopted in 1999 on the safety and security of humanitarian personnel and protection of UN personnel, the UN General Assembly strongly condemned “acts of destruction and looting” of the property of those participating in humanitarian operations.³⁴⁷ The General Assembly urged all States “to take the necessary measures . . . to respect and ensure respect for the inviolability of United Nations premises”.³⁴⁸

344. In a resolution adopted in 2000 on the situation of human rights in the Sudan, the UN General Assembly urged the SPLM/A “not to misappropriate humanitarian assistance”.³⁴⁹

345. In a resolution adopted in 1995 on the situation of human rights in Sudan, the UN Commission on Human Rights expressed its outrage at “the use of military force by all parties to the conflict to disrupt or attack relief efforts

³⁴¹ UN Security Council, Statement by the President, UN Doc. S/PRST/1997/42, 6 August 1997, § 7.

³⁴² UN Security Council, Statement by the President, UN Doc. S/PRST/1997/55, 16 December 1997, p. 2.

³⁴³ UN Security Council, Statement by the President, UN Doc. S/PRST/2000/4, 11 February 2000, p. 2.

³⁴⁴ UN General Assembly, Res. 51/30 B, 5 December 1996, § 4.

³⁴⁵ UN General Assembly, Res. 51/108, 12 December 1996, § 8.

³⁴⁶ UN General Assembly, Res. 52/145, 12 December 1997, § 9.

³⁴⁷ UN General Assembly, Res. 54/192, 17 December 1999, preamble.

³⁴⁸ UN General Assembly, Res. 54/192, 17 December 1999, § 2.

³⁴⁹ UN General Assembly, Res. 55/116, 4 December 2000, § 3(g).

aimed at assisting civilian populations" and called for "an end to such practices and for those responsible for such actions to be brought to justice".³⁵⁰

346. In 1992, in a report on the situation in Somalia, the UN Secretary-General noted that the two main factions of the United Somali Congress had agreed that a number of sites in Mogadishu, namely the port, airports, hospitals, NGO locations and routes to and from food and non-food distribution points be declared "corridors and zones of peace". He added that the "corridors of peace" for the safe passage of relief workers and supplies were "of paramount importance".³⁵¹

347. The Principles of Engagement for Emergency Humanitarian Assistance in the Democratic Republic of the Congo, annexed to the 2000 United Nations Inter-Agency Consolidated Appeal for the Democratic Republic of the Congo, state that:

The relevant authorities are responsible for creating conditions conducive to the implementing of humanitarian activities. This must cover the security of local and international staff as well as all assets. The restitution of requisitioned assets is an essential indication of the goodwill of the authorities. Agencies look to the local authorities to take responsibility for ensuring the return of assets wherever possible.³⁵²

Other International Organisations

348. In a resolution adopted in 1989 on the activities of the International Committee of the Red Cross, the Parliamentary Assembly of the Council of Europe stated that it was "preoccupied by the increase in breaches in the security of delegates of the ICRC, its installations and means of transport".³⁵³

349. In a resolution adopted in 1992 on the crisis in the former Yugoslavia, the Parliamentary Assembly of the Council of Europe strongly condemned attacks on convoys and personnel of international organisations bringing relief to the population in Bosnia and Herzegovina and demanded that "violators of humanitarian law [be] held personally accountable for these violations".³⁵⁴

350. In a declaration by the Presidency in 1998, the EU called upon all parties to the conflict in Sudan "to respect and guarantee the security of all ... relief flights and their crews and other means of humanitarian transport and supply depots".³⁵⁵

³⁵⁰ UN Commission on Human Rights, Res. 1995/77, 8 March 1995, § 18.

³⁵¹ UN Secretary-General, Report on the situation in Somalia, UN Doc. S/23829/add.1, 21 April 1992, Addendum, Consolidated inter-agency 90-day Plan of Action for Emergency Humanitarian Assistance to Somalia, §§ 59 and 96.

³⁵² UNOCHA, United Nations Inter-Agency Consolidated Appeal for the Democratic Republic of Congo (January–December 2000), November 1999, Annex II, Principles of Engagement for Emergency Humanitarian Assistance in the Democratic Republic of Congo, § 2.

³⁵³ Council of Europe, Parliamentary Assembly, Res. 921, 6 July 1989, § 8.

³⁵⁴ Council of Europe, Parliamentary Assembly, Res. 984, 30 June 1992, § 8.

³⁵⁵ EU, Declaration on Sudan by the Presidency on behalf of the EU, 14 August 1998, § 11.

International Conferences

351. The Final Declaration adopted by the International Conference for the Protection of War Victims in 1993 urged all States to “make every effort” to protect relief goods and convoys as defined in international humanitarian law.³⁵⁶

352. In a resolution adopted in 1993, the 90th Inter-Parliamentary Conference in Canberra expressed regret that “the international relief and protection effort during armed conflicts... is encountering serious difficulties and dangers, including... attacks against humanitarian personnel, food supplies and relief”.³⁵⁷

IV. Practice of International Judicial and Quasi-judicial Bodies

353. No practice was found.

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

354. In the context of an internal conflict, attacks by the forces of an armed opposition group on ICRC warehouses were reported, as was the destruction of the premises of the ICRC delegation. In all its communications, the ICRC reminded the armed opposition group that it must respect the Geneva Conventions and the fundamental rules of IHL, because the commitment it made in 1980 was still applicable.³⁵⁸

355. In a joint statement issued in 1991, the Yugoslav Red Cross and the Hungarian Red Cross expressed their deep concern about “the protracting internal conflict in Yugoslavia” and urged the parties to the conflict “to refrain from armed actions against relief convoys”.³⁵⁹

356. In a communication to the press in 1993, the ICRC enjoined the parties to the conflict in Somalia “to facilitate relief operations... and to respect the personnel, vehicles and premises involved”.³⁶⁰

357. In 1994, in a Memorandum on Respect for International Humanitarian Law in Angola, the ICRC stated that “the personnel, vehicles and premises of relief agencies shall be protected”.³⁶¹

358. In 1994, in a Memorandum on Compliance with International Humanitarian Law by the Forces Participating in Opération Turquoise in the

³⁵⁶ International Conference for the Protection of War Victims, Geneva, 30 August–1 September 1993, Final Declaration, § II(9), *ILM*, Vol. 33, 1994, p. 301.

³⁵⁷ 90th Inter-Parliamentary Conference, Canberra, 13–18 September 1993, Resolution on respect for international humanitarian law and support for humanitarian action in armed conflicts, preamble.

³⁵⁸ ICRC archive documents.

³⁵⁹ Yugoslav Red Cross and Hungarian Red Cross, Joint Statement, Subotica, 25 October 1991.

³⁶⁰ ICRC, Communication to the Press No. 93/17, Somalia: ICRC appeals for compliance with international humanitarian law, 17 June 1993.

³⁶¹ ICRC, Memorandum on Respect for International Humanitarian Law in Angola, 8 June 1994, § IV, *IRRC*, No. 320, 1997, p. 505.

Great Lakes region, the ICRC stated that “relief operations aimed at the civilian population which are exclusively humanitarian, impartial and non-discriminatory shall be facilitated and respected. The personnel, vehicles and premises of relief agencies shall be protected.”³⁶²

VI. *Other Practice*

359. In a resolution adopted at its Edinburgh Session in 1969, the Institute of International Law stated that “those objects which, by their nature or use, serve primarily humanitarian or peaceful purposes” cannot be considered as military objectives.³⁶³

360. In 1981 and 1982, an armed opposition group agreed to respect ICRC personnel and vehicles.³⁶⁴

361. In 1982 and 1984, an armed opposition group undertook not to attack ICRC personnel, vehicles and planes.³⁶⁵

362. In 1985, in a meeting with ICRC representatives, the UN Secretary-General of an armed opposition group stated that the attacks on ICRC personnel and relief objects which had been undertaken by the forces of the armed group had taken place solely because ICRC personnel were located close to a combat area. With respect to an attack on an ICRC plane, the Secretary-General justified it on the grounds that his forces were “nervous and suspicious of any aircraft present in the region”.³⁶⁶

363. In 1988, in a meeting with the ICRC, an armed opposition group agreed to respect ICRC personnel and objects in the course of an internal conflict.³⁶⁷

364. In 1992, an armed opposition group agreed to respect ICRC personnel and vehicles.³⁶⁸

365. The Guiding Principles on the Right to Humanitarian Assistance, adopted by the Council of the IHL in 1993, state that “humanitarian assistance can, if appropriate, be made available by way of ‘humanitarian corridors’, which should be respected and protected by the competent authorities of the parties involved and if necessary by the United Nations authority”.³⁶⁹

366. In 1994, in a letter addressed to the ICRC, an armed opposition group pledged to respect Red Cross and Red Crescent installations and vehicles. It condemned the looting of an ICRC convoy and assured the ICRC of its continuing

³⁶² ICRC, Memorandum on Compliance with International Humanitarian Law by the Forces Participating in Opération Turquoise, 23 June 1994, § IV, reprinted in Marco Sassoli and Antoine A. Bouvier, *How Does Law Protect in War?*, ICRC, Geneva, 1999, p. 1309.

³⁶³ Institute of International Law, Edinburgh Session, Resolution on the Distinction between Military Objectives and Non-Military Objects in General and Particularly the Problems Associated with Weapons of Mass Destruction, 9 September 1969, § 3(b).

³⁶⁴ ICRC archive documents.

³⁶⁵ ICRC archive documents. ³⁶⁶ ICRC archive document.

³⁶⁷ ICRC archive document. ³⁶⁸ ICRC archive document.

³⁶⁹ IHL, Guiding Principles on the Right to Humanitarian Assistance, Principle 10, *IRRC*, No. 297, 1993, p. 524.

efforts to ensure the security of ICRC personnel and objects and to recover any lost property.³⁷⁰

367. In 1994, in a meeting with the ICRC, a military leader of an armed opposition group committed the group to ensuring that the security of ICRC installations, personnel, equipment and activities within its territory were guaranteed in accordance with the provisions of the Geneva Conventions.³⁷¹

368. In 1994, in a meeting with the ICRC, an armed opposition group undertook to guarantee the security of ICRC installations, personnel, equipment and activities in the territory under its control in accordance with the Geneva Conventions.³⁷²

369. At the International Symposium on Water in Armed Conflicts held in Montreux (Switzerland) in 1994, the group of international experts present agreed to “aim for absolute protection of water supplies and systems”.³⁷³

370. In 1996, during the conflict in Angola, UNITA committed itself to ensuring that relief personnel and objects would be spared from attack.³⁷⁴

³⁷⁰ ICRC archive document. ³⁷¹ ICRC archive documents. ³⁷² ICRC archive document.

³⁷³ International Symposium on Water in Armed Conflicts, Montreux, November 1994, *ICRC News*, 24 November 1994, quoted in Marco Sassòli and Antoine A. Bouvier, *How Does Law Protect in War?*, ICRC, Geneva, 1999, pp. 458–459.

³⁷⁴ UNITA, Statement on the humanitarian situation in Angola, Bailundo, 1 January 1996.

PERSONNEL AND OBJECTS INVOLVED IN A PEACEKEEPING MISSION

Personnel and Objects Involved in a Peacekeeping Mission
(practice relating to Rule 33)

§§ 1–127

Personnel and Objects Involved in a Peacekeeping Mission

I. Treaties and Other Instruments

Treaties

1. The preamble to the 1994 Convention on the Safety of UN Personnel states that:

The States Parties to this Convention [are] deeply concerned over the growing number of deaths and injuries resulting from deliberate attacks against United Nations and associated personnel and [bear] in mind that attacks against, or other mistreatment of, personnel who act on behalf of the United Nations are unjustifiable and unacceptable, by whomsoever committed.

2. According to Article 1(a)(i) of the 1994 Convention on the Safety of UN Personnel, the Convention applies to “persons engaged or deployed by the Secretary-General of the United Nations as members of the military, police or civilian components of a United Nations operation”. Article 2(2) states that:

This Convention shall not apply to a United Nations operation authorized by the Security Council as an enforcement action under Chapter VII of the Charter of the United Nations in which any of the personnel are engaged as combatants against organized armed forces and to which the law of international armed conflict applies.

3. Article 7 of the 1994 Convention on the Safety of UN Personnel states that:

1. United Nations and associated personnel, their equipment and premises shall not be made the object of attack or of any action that prevents them from discharging their mandate.
2. States Parties shall take all appropriate measures to ensure the safety and security of United Nations and associated personnel. In particular, States Parties shall take all appropriate steps to protect United Nations and associated personnel who are deployed in their territory from the crimes set out in Article 9 [murder, kidnapping or other attack].

4. Pursuant to Article 8(2)(b)(iii) and (e)(iii) of the 1998 ICC Statute, the following constitutes a war crime in both international and non-international armed conflicts:

intentionally directing attacks against personnel, installations, material, units or vehicles involved in a . . . peacekeeping mission in accordance with the Charter of the United Nations, as long as they are entitled to the protection given to civilians or civilian objects under the international law of armed conflict.

5. Article 4(b) of the 2002 Statute of the Special Court for Sierra Leone provides that:

The Special Court shall have the power to prosecute persons who committed the following serious violations of international humanitarian law:

...

(b) Intentionally directing attacks against personnel, installations, material, units or vehicles involved in a . . . peacekeeping mission in accordance with the Charter of the United Nations, as long as they are entitled to the protection given to civilians or civilian objects under the international law of armed conflict.

Other Instruments

6. Article 19 of the 1996 ILC Draft Code of Crimes against the Peace and Security of Mankind provides that:

1. The following crimes constitute crimes against the peace and security of mankind when committed intentionally and in a systematic manner or on a large scale against United Nations and associated personnel involved in a United Nations operation with a view to preventing or impeding that operation from fulfilling its mandate:

- (a) Murder, kidnapping or other attack upon the person or liberty of any such personnel;
- (b) Violent attack upon the official premises, the private accommodations or the means of transportation of any such personnel likely to endanger his or her person or liberty.

2. This article shall not apply to a United Nations operation authorized by the Security Council as an enforcement action under Chapter VII of the United Nations in which any of the personnel are engaged as combatants against organized armed forces and to which the law of international conflict applies.

7. The commentary on Article 19(2) of the 1996 Draft Code of Crimes against the Peace and Security of Mankind states that:

Attacks against United Nations and associated personnel constitute violent crimes of exceptionally serious gravity which have serious consequences not only for the victims, but also for the international community . . . Attacks against such personnel are in effect directed against the international community and strike at the very heart of the international legal system established for the purpose of maintaining international peace and security . . . The international community has a special

responsibility to ensure the effective prosecution and punishment of the individuals who are responsible for criminal attacks against United Nations and associated personnel.

8. Paragraph 1 of the 1999 UN Secretary-General's Bulletin provides that:

- 1.1 The fundamental principles and rules of international humanitarian law set out in the present bulletin are applicable to United Nations forces when in situations of armed conflict they are actively engaged therein as combatants, to the extent and for the duration of their engagement. They are accordingly applicable in enforcement actions, or in peacekeeping operations when the use of force is permitted in self-defence.
- 1.2 The promulgation of this bulletin does not affect the protected status of members of peacekeeping operations under the 1994 Convention on the Safety of United Nations and Associated Personnel or their status as non-combatants, as long as they are entitled to the protection given to civilians under the international law of armed conflict.

9. The 2000 UNTAET Regulation No. 2000/15 establishes panels with exclusive jurisdiction over serious criminal offences, including war crimes. According to Section 6(1)(b)(iii) and (e)(iii), the following constitutes a war crime in both international and non-international armed conflicts:

intentionally directing attacks against personnel, installations, material, units or vehicles involved in a . . . peacekeeping mission in accordance with the Charter of the United Nations, as long as they are entitled to the protection given to civilians or civilian objects under the international law of armed conflict.

II. National Practice

Military Manuals

10. Cameroon's Instructors' Manual states that:

It is prohibited for belligerents to open fire on interposition forces and on their materiel, [as] these forces' mission is not to fight one or the other party to the conflict (except in case of self-defence) but to interpose themselves between such parties in order to ensure respect for a cease-fire.¹

11. Germany's Military Manual states that:

When a United Nations' force or mission performs functions of peacekeeping, observation or similar functions, each party to the conflict shall, if requested . . . take such measures as may be necessary to protect the force or mission while carrying out its duties . . . The protection of the force or mission shall always be ensured.²

¹ Cameroon, *Instructors' Manual* (1992), p. 110.

² Germany, *Military Manual* (1992), § 418.

12. New Zealand's Military Manual states that:

1. United Nations Forces are usually engaged in peacekeeping operations. On such occasions they have no combat function, although they may defend themselves if attacked. Their duty is to supervise or observe a situation between contestants, even combatants, and report back. Sometimes, their duty is to seek to interpose themselves between such forces with the intention that their presence under authority of a United Nations resolution and wearing United Nations insignia will protect them from attack, and thus create a cordon sanitaire between the antagonists.
...
2. When participating in peacekeeping operations, United Nations Forces are not present in State territory in any hostile capacity and are not engaged in any sort of armed conflict. In fact, their principal purpose is to prevent any such conflict not only as it would affect themselves but also as it affects the parties they are seeking to separate and keep apart. As a result, since their activities do not amount to participation in an armed conflict, the Geneva Conventions of 1949 concerning the wounded, sick and shipwrecked, or prisoner of war do not govern their activities or protect them.
3. Since the IV GC operates to protect any non-combatant in the hands of a Party to a conflict, members of a United Nations Peacekeeping Force falling into the hands of a Party to a conflict would be covered by this Convention. It is difficult, however, to consider such personnel, who are members of the armed forces of the States providing contingents to the Force and who are wearing uniform and United Nations insignia, as civilians as that term is normally understood.³

13. Nigeria's Military Manual states that:

UN peace keeping Force should remain impartial, objective and neutral. Whenever it is perceived to be a party to a conflict, this does not exclude the applicability of International Humanitarian Law to UN Peace Keeping Force when it engages in defensive or combat mission in pursuance of their mandate.⁴

14. Spain's LOAC Manual states that UN forces "must be respected [and] must not be made the object of attack".⁵

National Legislation

15. Australia's ICC (Consequential Amendments) Act incorporates into the Criminal Code the war crimes defined in the 1998 ICC Statute, including "attacking personnel or objects involved in a humanitarian assistance or peacekeeping mission" in international and non-international armed conflicts.⁶

16. Azerbaijan's Criminal Code provides that "directing attacks against personnel recruited to carry out peacekeeping missions" constitutes a war crime in international and non-international armed conflicts.⁷

³ New Zealand, *Military Manual* (1992), § 1904.

⁴ Nigeria, *Military Manual* (1994), p. 23, § 6.

⁵ Spain, *LOAC Manual* (1996), Vol. I, § 7.3.a.(9).

⁶ Australia, *ICC (Consequential Amendments) Act* (2002), Schedule 1, §§ 268.37 and 268.79.

⁷ Azerbaijan, *Criminal Code* (1999), Article 116(3).

17. Under Burundi's Draft Law on Genocide, Crimes against Humanity and War Crimes, the following constitutes a war crime in both international and non-international armed conflicts:

intentionally directing attacks against personnel, installations, material, units or vehicles involved in a . . . peacekeeping mission in accordance with the Charter of the United Nations, as long as they are entitled to the protection given to civilians or civilian objects under the international law of armed conflict.⁸

18. Canada's Crimes against Humanity and War Crimes Act provides that the war crimes defined in Article 8(2) of the 1998 ICC Statute are "crimes according to customary international law" and, as such, indictable offences under the Act.⁹

19. Congo's Genocide, War Crimes and Crimes against Humanity Act defines war crimes with reference to the categories of crimes set out in Article 8 of the 1998 ICC Statute.¹⁰

20. Under Georgia's Criminal Code, any war crime provided for by the 1998 ICC Statute, which is not explicitly mentioned in the Code, is a crime in both international and non-international armed conflicts, including

intentionally directing attacks against personnel, installations, material, units or vehicles involved in a . . . peacekeeping mission in accordance with the Charter of the United Nations, as long as they are entitled to the protection given to civilians or civilian objects under the international law of armed conflict.¹¹

21. Germany's Law Introducing the International Crimes Code punishes anyone who, in connection with an international or a non-international armed conflict,

directs an attack against personnel, installations, material, units or vehicles involved in a . . . peace-keeping mission in accordance with the Charter of the United Nations, as long as they are entitled to the protection given to civilians or civilian objects under international humanitarian law.¹²

22. Under Mali's Penal Code, the following constitutes a war crime in international armed conflicts:

intentionally directing attacks against personnel, installations, material, units or vehicles involved in a . . . peacekeeping mission in accordance with the Charter of the United Nations, as long as they are entitled to the protection given to civilians or civilian objects under the international law of armed conflict.¹³

⁸ Burundi, *Draft Law on Genocide, Crimes against Humanity and War Crimes* (2001), Article 4(B)(c) and (D)(c).

⁹ Canada, *Crimes against Humanity and War Crimes Act* (2000), Section 4(1) and (4).

¹⁰ Congo, *Genocide, War Crimes and Crimes against Humanity Act* (1998), Article 4.

¹¹ Georgia, *Criminal Code* (1999), Article 413(d).

¹² Germany, *Law Introducing the International Crimes Code* (2002), Article 1, § 10(1)(1).

¹³ Mali, *Penal Code* (2001), Article 31(i)(3).

23. Under the International Crimes Act of the Netherlands, the following is a crime, whether committed in an international or a non-international armed conflict:

intentionally directing attacks against personnel, installations, material, units and vehicles involved in . . . peace missions in accordance with the Charter of the United Nations, as long as they are entitled to the protection given to civilians or civilian objects under the international law of armed conflict.¹⁴

24. New Zealand's Crimes (Internationally Protected Persons and Hostages) Amendment Act implementing the 1994 Convention on the Safety of UN Personnel gives the courts of New Zealand extraterritorial jurisdiction over attacks against such personnel, their property and vehicles, which are criminalised by the Act.¹⁵

25. Under New Zealand's International Crimes and ICC Act, war crimes include the crimes defined in Article 8(2)(b)(iii) and (e)(iii) of the 1998 ICC Statute.¹⁶

26. Under Trinidad and Tobago's Draft ICC Act, it is a punishable offence to commit a war crime as defined in Article 8(2)(b)(iii) and (e)(iii) of the 1998 ICC Statute.¹⁷

27. The UK UN Personnel Act provides that:

If a person does outside the UK, any act to or in relation to a UN worker which, if he had done it in any part of the UK, would have made him guilty of [murder, manslaughter, culpable homicide, rape, assault causing injury, kidnapping, abduction or false imprisonment], he shall in that part of the UK be guilty of that offence.¹⁸

The Act contains a similar provision for the prosecution of threats of attacks against UN workers, within or outside the UK; attacks against UN vehicles and premises committed outside the UK; and threats of attacks against UN vehicles and premises, within or outside the UK.¹⁹ Within the framework of this Act, members of the military component of a UN operation engaged or deployed by the UN Secretary-General are UN workers.²⁰

28. Under the UK ICC Act, it is a punishable offence to commit a war crime as defined in Article 8(2)(b)(iii) and (e)(iii) of the 1998 ICC Statute.²¹

¹⁴ Netherlands, *International Crimes Act* (2003), Articles 5(5)(o) and 6(3)(c).

¹⁵ New Zealand, *Crimes (Internationally Protected Persons and Hostages) Amendment Act* (1998), Sections 3 and 4.

¹⁶ New Zealand, *International Crimes and ICC Act* (2000), Section 11(2).

¹⁷ Trinidad and Tobago, *Draft ICC Act* (1999), Section 5(1)(a).

¹⁸ UK, *UN Personnel Act* (1997), Article 1.

¹⁹ UK, *UN Personnel Act* (1997), Articles 2 and 3.

²⁰ UK, *UN Personnel Act* (1997), Article 4(1)(a).

²¹ UK, *ICC Act* (2001), Sections 50(1) and 51(1) (England and Wales) and Section 58(1) (Northern Ireland).

National Case-law

29. In its judgement in the *Violations of IHL in Somalia and Rwanda case* in 1997, a Belgian Military Court decided that the members of the UNOSOM II mission could not be considered as “combatants” since their primary task was not to fight against any of the factions, nor could they fall into the category of an “occupying force”.²²

30. In its judgement in the *Brocklebank case* in 1996, the Court Martial Appeal Court of Canada held that no armed conflict existed in Somalia at the relevant time, nor were the Canadian forces to be considered as a party to the conflict as they were engaged in a peacekeeping mission.²³

Other National Practice

31. During a debate in the UN General Assembly following the shelling of the UN compound at Qana on 18 April 1996, Australia stated that all attacks against UN peacekeepers were totally unacceptable and contrary to the norms of international law.²⁴

32. On 16 May 1967, the General Commander of the Egyptian armed forces sent a message to the Commander of UNEF stating that “our forces have massed in Sinai on our eastern borders, and to safeguard the safety of the UNEF troops stationed in the observation posts on our borders, I request that you order the immediate withdrawal of these troops”.²⁵

33. In 1994, during a debate in the UN Security Council, Finland condemned attacks against UNPROFOR.²⁶

34. In 1995, during a debate in the UN Security Council, Germany condemned attacks against UNPROFOR.²⁷

35. In 1996, in a report on UNOMIL, the UN Secretary-General noted that Liberia’s Council of State “condemned ULIMO-J for its attacks against ECOMOG”.²⁸

36. The Report on the Practice of Malaysia states that members of the Malaysian armed forces are trained to respect peacekeeping forces.²⁹

37. In 1995, during a debate in the UN Security Council, Russia condemned attacks against UNPROFOR.³⁰

²² Belgium, Military Court, *Violations of IHL in Somalia and Rwanda case*, Judgement, 17 December 1997.

²³ Canada, Court Martial Appeal Court, *Brocklebank case*, Judgement, 2 April 1996.

²⁴ Australia, Statement before the UN General Assembly, UN Doc. A/50/PV.116, 25 April 1996, p. 6.

²⁵ Egypt, Message from the Minister of Foreign Affairs of the United Arab Republic to the UN Secretary-General, 18 May 1967, Report on the Practice of Egypt, 1997, Chapter 1.1; see also UN Secretary-General, Special Report on UNEF, UN Doc. A/6669, 18 May 1967, § 2.

²⁶ Finland, Statement before the UN Security Council, UN Doc. S/PV.3367, 21 April 1994, p. 34.

²⁷ Germany, Statement before the UN Security Council, UN Doc. S/PV.3553, 12 July 1995, p. 11.

²⁸ UN Secretary-General, Sixteenth progress report on UNOMIL, UN Doc. S/1996/232, 1 April 1996, § 6.

²⁹ Report on the Practice of Malaysia, 1997, Answers to additional questions on Chapter 1.4.

³⁰ Russia, Statement before the UN Security Council, UN Doc. S/PV.3553, 12 July 1995, p. 9.

38. In 1991, in an appeal addressed to the President of the UN Security Council, the Ministry of Foreign Affairs of Ukraine stated that:

Shooting at the UNPROFOR military personnel is a gross violation of the principles and norms of international law and may be considered by the Governments of States, contributing their military contingents to the United Nations peace-keeping forces, as hostile actions against their citizens. The Government of Ukraine strongly demands that the sides in conflict, in particular the Governments of Bosnia and Herzegovina, as well as of Serbia undertake all necessary steps for immediate and unconditional cessation of hostile actions against the United Nations peace-keeping forces, the Ukrainian battalion among them in the Sarajevo sector.³¹

39. In 1995, during a debate in the UN Security Council, the UK condemned attacks against UNPROFOR.³²

40. In 1996, during a debate in the UN Security Council concerning the situation in Liberia, the UK expressed deep regret at the loss of life among ECOMOG forces and outrage that peacekeeping forces were subjected to attacks.³³

41. In 1992, in a report submitted pursuant to paragraph 5 of UN Security Council Resolution 771 (1992) on grave breaches of GC IV committed in the former Yugoslavia, the US noted that "five members of the United Nations Protection Force (UNPROFOR) contingent in Sarajevo had been killed by combatants".³⁴

42. In 1995, during a debate in the UN Security Council, the US condemned attacks against UNPROFOR.³⁵

III. Practice of International Organisations and Conferences

United Nations

43. In a resolution adopted in 1978, the UN Security Council demanded "full respect for the United Nations Force from all parties in Lebanon".³⁶

44. In a resolution on UNIFIL in Lebanon adopted in 1980, the UN Security Council condemned "acts that have led to loss of life among the personnel of the Force and the United Nations Truce Supervision Organization, their harassment and abuse, the disruption of communication, as well as the destruction of property and material".³⁷

³¹ Ukraine, Appeal of the Ministry of Foreign Affairs to the President of the UN Security Council, annexed to Letter dated 10 August 1992 to the President of the UN Security Council, UN Doc. S/24403, 10 August 1992, p. 2.

³² UK, Statement before the UN Security Council, UN Doc. S/PV.3553, 12 July 1995, p. 11.

³³ UK, Statement before the UN Security Council, UN Doc. S/PV.3621, 25 January 1996, p. 19.

³⁴ US, Former Yugoslavia: Grave Breaches of the Fourth Geneva Convention (Third Submission), annexed to Letter dated 5 November 1992 to the UN Secretary-General, UN Doc. S/24791, 10 November 1992, p. 19.

³⁵ US, Statement before the UN Security Council, UN Doc. S/PV.3553, 12 July 1995, p. 11.

³⁶ UN Security Council, Res. 427, 3 May 1978, § 4.

³⁷ UN Security Council, Res. 467, 24 April 1980, § 2.

45. In a resolution adopted in 1986, the UN Security Council condemned attacks committed against UNIFIL in Lebanon, referring to such acts as a "criminal action".³⁸

46. In a resolution adopted in 1992 in the context of events in the former Yugoslavia, the UN Security Council expressed its deep concern that "those United Nations Protection Force personnel remaining in Sarajevo have been subjected to deliberate mortar and small-arms fire, and that the United Nations Military Observers deployed in the Mostar region have had to be withdrawn".³⁹

47. In two resolutions adopted in 1992 and 1993, the UN Security Council condemned "armed attacks against the peace-keeping forces of ECOWAS in Liberia" and called upon the parties to the conflict to ensure their safety.⁴⁰

48. In a resolution adopted in 1992, the UN Security Council stated that it was dismayed by "attacks on the Pakistani contingent in Mogadishu of the United Nations Operation in Somalia".⁴¹

49. In a resolution adopted in 1993 in the context of the conflict in Croatia, the UN Security Council strongly condemned attacks by the Croatian forces "against UNPROFOR in the conduct of its duty of protecting civilians in the United Nations Protected Areas" and demanded "their immediate cessation".⁴²

50. In a resolution on Angola adopted in 1993, the UN Security Council condemned "attacks against UNAVEM II personnel in Angola" and demanded that "the Government and UNITA take all necessary measures to ensure their safety and security".⁴³

51. In a resolution on Bosnia and Herzegovina adopted in 1993, the UN Security Council strongly condemned "the actions taken by Bosnian Serb paramilitary units against UNPROFOR, in particular, their refusal to guarantee the safety and freedom of movement of UNPROFOR personnel" and demanded that "all parties guarantee the safety and full freedom of movement of UNPROFOR and of all other United Nations personnel".⁴⁴

52. In a resolution on Somalia adopted in 1993, the UN Security Council stated that it regarded the armed attacks launched by forces apparently belonging to the United Somali Congress against the personnel of UNOSOM II in June 1993 as "criminal attacks".⁴⁵

53. In a resolution on Somalia adopted in 1993, the UN Security Council condemned "all attacks on UNOSOM II personnel" and reaffirmed that "those who have committed or ordered the commission of such criminal acts will be held individually responsible for them".⁴⁶

³⁸ UN Security Council, Res. 587, 23 September 1986, §§ 1 and 2.

³⁹ UN Security Council, Res. 757, 30 May 1992, preamble.

⁴⁰ UN Security Council, Res. 788, 19 November 1992, § 4; Res. 813, 26 March 1993, § 6.

⁴¹ UN Security Council, Res. 794, 3 December 1992, preamble.

⁴² UN Security Council, Res. 802, 25 January 1993, § 2.

⁴³ UN Security Council, Res. 804, 29 January 1993, § 12.

⁴⁴ UN Security Council, Res. 819, 16 April 1993, preamble and § 10.

⁴⁵ UN Security Council, Res. 837, 6 June 1993, preamble.

⁴⁶ UN Security Council, Res. 865, 22 September 1993, § 3.

54. In a resolution adopted in 1993 on security and safety of UN forces and personnel, the UN Security Council urged States and parties to a conflict “to cooperate closely with the United Nations to ensure the security and safety of United Nations forces and personnel”.⁴⁷

55. In a resolution on Somalia adopted in 1994, the UN Security Council condemned “violence and armed attacks against persons engaged in . . . peace-keeping efforts” and re-emphasised the importance it attached to “the safety and security of United Nations and other personnel engaged in . . . peace-keeping throughout Somalia”.⁴⁸ The Council also demanded that “all Somali parties refrain from any acts of intimidation or violence against personnel engaged in . . . peace-keeping work in Somalia”.⁴⁹ These statements were repeated in two other resolutions on the same subject adopted later the same year.⁵⁰

56. In a resolution on Rwanda adopted in 1994, the UN Security Council strongly condemned “the attacks against UNAMIR and other United Nations personnel leading to the deaths of and injury to several UNAMIR personnel” and called upon all concerned “to put an end to these acts of violence and to respect fully international humanitarian law”.⁵¹

57. In a resolution adopted in 1994 in the context of the conflict in Bosnia and Herzegovina, the UN Security Council condemned “the harassment and the detention of UNPROFOR personnel by the Bosnian Serb forces and all obstacles to UNPROFOR’s freedom of movement”.⁵²

58. In a resolution adopted in 1994, the UN Security Council demanded “that all parties in Rwanda strictly respect the persons and premises of the United Nations and other organizations serving in Rwanda, and refrain from any acts of intimidation or violence against personnel engaged in . . . peace-keeping work”.⁵³ The Council reiterated this demand in a subsequent resolution.⁵⁴

59. In a resolution adopted in 1994 authorising the creation of a multinational force in Haiti, the UN Security Council demanded that “no acts of intimidation or violence be directed against personnel engaged in humanitarian or peace-keeping work”.⁵⁵

60. In a resolution on Somalia adopted in 1994, the UN Security Council strongly condemned “the attacks and harassment against UNOSOM II”.⁵⁶

61. In a resolution on Liberia adopted in 1994, the UN Security Council condemned “the detention and maltreatment of UNOMIL observers [and]

⁴⁷ UN Security Council, Res. 868, 29 September 1993, § 3.

⁴⁸ UN Security Council, Res. 897, 4 February 1994, preamble.

⁴⁹ UN Security Council, Res. 897, 4 February 1994, § 8.

⁵⁰ UN Security Council, Res. 923, 31 May 1994, preamble and § 5; Res. 954, 4 November 1994, preamble and § 7.

⁵¹ UN Security Council, Res. 912, 21 April 1994, § 5.

⁵² UN Security Council, Res. 913, 22 April 1994, preamble.

⁵³ UN Security Council, Res. 918, 17 May 1994, § 11.

⁵⁴ UN Security Council, Res. 925, 8 June 1994, § 11.

⁵⁵ UN Security Council, Res. 940, 31 July 1994, § 15.

⁵⁶ UN Security Council, Res. 946, 30 September 1994, preamble, § 4.

ECOMOG soldiers" and demanded that "all factions in Liberia strictly respect the status of ECOMOG and UNOMIL personnel, and . . . refrain from any acts of violence, abuse or intimidation against them and return forthwith equipment seized from them".⁵⁷

62. In a resolution adopted in 1995, the UN Security Council stated that it was "gravely preoccupied at the recent attacks on the United Nations Protection Force (UNPROFOR) personnel in the Republic of Bosnia and Herzegovina and at the fatalities resulting therefrom" and condemned "in the strongest terms such unacceptable acts directed at members of peace-keeping forces". The Council demanded that "all parties and others concerned refrain from any act of intimidation or violence against UNPROFOR and its personnel".⁵⁸

63. In a resolution adopted in 1995 on extension of the mandate of the UN Observer Mission in Georgia and the settlement of the conflict in Abkhazia, the UN Security Council called upon the parties "to improve their cooperation with UNOMIG and the CIS peace-keeping force" and "to honour their commitments with regard to the security and freedom of movement of all United Nations and CIS personnel".⁵⁹ In a resolution adopted in the same context in 1996, the UN Security Council reiterated these demands.⁶⁰

64. In a resolution adopted in 1995 on withdrawal of the Croatian government troops from the zone of separation in Croatia and full deployment of the UN Confidence Restoration Operation in Croatia, the UN Security Council condemned "in the strongest terms all unacceptable acts which were directed at the personnel of the United Nations peace-keeping forces" and stated it was determined "to obtain strict respect of the status of such personnel in the Republic of Croatia as provided for in the Agreement between the United Nations and the Government of the Republic of Croatia signed on 15 May 1995". It further reaffirmed "its determination to ensure the security and freedom of movement of the personnel of United Nations peace-keeping operations in the territory of the former Yugoslavia".⁶¹

65. In a resolution adopted in 1995, the UN Security Council demanded that "the Bosnian Serb forces release immediately and unconditionally all remaining detained UNPROFOR personnel" and that "all parties fully respect the safety of UNPROFOR personnel".⁶²

66. In a resolution adopted in 1995, the UN Security Council condemned "the offensive by the Bosnian Serb forces against the safe area of Srebrenica, and in particular the detention by the Bosnian Serb forces of UNPROFOR personnel". It also condemned "all attacks on UNPROFOR personnel".⁶³

⁵⁷ UN Security Council, Res. 950, 21 October 1994, §§ 7 and 8.

⁵⁸ UN Security Council, Res. 987, 19 April 1995, preamble and § 1.

⁵⁹ UN Security Council, Res. 993, 12 May 1995, § 8.

⁶⁰ UN Security Council, Res. 1036, 12 January 1996, § 8.

⁶¹ UN Security Council, Res. 994, 17 May 1995, preamble.

⁶² UN Security Council, Res. 998, 16 June 1995, § 1.

⁶³ UN Security Council, Res. 1004, 12 July 1995, preamble.

67. In a resolution adopted in 1995 in the context of the conflict in Croatia, the UN Security Council condemned in the strongest terms “the unacceptable acts by Croatian Government forces against personnel of the United Nations peace-keeping forces, including those which have resulted in the death of a Danish member of those forces and two Czech members”. It reaffirmed “its determination to ensure the security and freedom of movement of the personnel of the United Nations peace-keeping operations in the territory of the former Yugoslavia”. The Council also demanded that “the Government of the Republic of Croatia fully respect the status of United Nations personnel, refrain from any attacks against them, bring to justice those responsible for any such attacks, and ensure the safety and freedom of movement of United Nations personnel at all times”.⁶⁴

68. In a resolution on Liberia adopted in 1995, the UN Security Council demanded that “all factions in Liberia strictly respect the status of ECOMOG and UNOMIL personnel, as well as organizations and agencies delivering humanitarian assistance throughout Liberia”.⁶⁵

69. In a resolution adopted in 1995 in the context of the conflict in Bosnia and Herzegovina, the UN Security Council called upon “the parties to ensure the safety and security of UNPROFOR and confirmed that UNPROFOR will continue to enjoy all existing privileges and immunities, including during the period of withdrawal”.⁶⁶

70. In a resolution adopted in 1996 in the context of the conflict in Liberia, the UN Security Council expressed its grave concern about the attacks against personnel of ECOMOG and civilians and demanded “that such hostile acts cease forthwith”.⁶⁷

71. In a resolution adopted in 1996 in the context of the conflict in Liberia, the UN Security Council condemned “all attacks against personnel of ECOMOG [and] UNOMIL”.⁶⁸ This condemnation was reiterated several times the same year.⁶⁹

72. In two resolutions adopted in 1997 and 1998 in the context of the conflict in the Middle East, the UN Security Council condemned “all acts of violence committed in particular against [UNIFIL]” and urged the parties “to put an end to them”.⁷⁰

73. In a resolution adopted in 1997 in the context of the conflict in Tajikistan, the UN Security Council stated that it was deeply concerned “over continuing attacks on the personnel of the United Nations, the Collective Peace-keeping Forces of the Commonwealth of Independent States (CIS) and other

⁶⁴ UN Security Council, Res. 1009, 10 August 1995, preamble and § 6.

⁶⁵ UN Security Council, Res. 1014, 15 September 1995, § 13.

⁶⁶ UN Security Council, Res. 1031, 15 December 1995, § 37.

⁶⁷ UN Security Council, Res. 1041, 29 January 1996, preamble and § 4.

⁶⁸ UN Security Council, Res. 1059, 31 May 1996, § 6.

⁶⁹ UN Security Council, Res. 1071, 30 August 1996, § 8; Res. 1083, 27 November 1996, § 7.

⁷⁰ UN Security Council, Res. 1095, 28 January 1997, § 4; Res. 1122, 29 July 1997, § 4.

international personnel in Tajikistan". As a result, the Council strongly condemned "the acts of mistreatment against UNMOT and other international personnel" and urgently called upon the parties "to cooperate in bringing the perpetrators to justice, to ensure the safety and freedom of movement of the personnel of the United Nations, the CIS peacekeeping forces and other international personnel".⁷¹

74. In a resolution on Angola adopted in 1997, the UN Security Council expressed "its concern about the . . . attacks by UNITA on UNAVEM III posts and personnel".⁷²

75. In a resolution on Angola adopted in 1998, the UN Security Council condemned

the attacks by members of UNITA on MONUA personnel and on Angolan national authorities, and demanded that UNITA immediately stop such attacks, cooperate fully with MONUA and guarantee unconditionally the safety and freedom of movement of MONUA and other international personnel.⁷³

76. In a resolution on Angola adopted in 1998, the UN Security Council reiterated its condemnation of "the attacks by members of UNITA on the personnel of the United Nations Observer Mission in Angola, international personnel and Angolan national authorities, including the police", demanded that "UNITA immediately stop such attacks", and urged "MONUA to investigate promptly the recent attack in N'gove".⁷⁴

77. In two resolutions on Angola adopted in 1998, the UN Security Council demanded that UNITA stop "any attacks by its members on the personnel of MONUA, international personnel, the authorities of the GURN, including the police, and the civilian population" and called upon the GURN and in particular UNITA to "guarantee unconditionally the safety and the freedom of movement of all United Nations and international personnel".⁷⁵

78. In a resolution adopted in 1998 in the context of the conflict in Georgia, the UN Security Council condemned "the acts of violence against the personnel of UNOMIG" and "the attacks by armed groups, operating in the Gali region from the Georgian side of the Inguri River, against the CIS peacekeeping force". It demanded that "the parties, in particular the Georgian authorities, take determined measures to put a stop to such acts which subvert the peace process".⁷⁶

79. In a resolution adopted in 1998 in the context of the conflict in Tajikistan, the UN Security Council strongly condemned "the murder of four members of UNMOT". The Council acknowledged "the efforts of the Government of

⁷¹ UN Security Council, Res. 1099, 14 March 1997, preamble and § 4.

⁷² UN Security Council, Res. 1118, 30 June 1997, preamble.

⁷³ UN Security Council, Res. 1157, 20 March 1998, § 9.

⁷⁴ UN Security Council, Res. 1164, 29 April 1998, § 4.

⁷⁵ UN Security Council, Res. 1173, 12 June 1998, § 5; Res. 1180, 29 June 1998, § 5.

⁷⁶ UN Security Council, Res. 1187, 30 July 1998, § 11.

Tajikistan to enhance the protection of international personnel" and called upon the parties "to cooperate further in ensuring the safety and freedom of movement of the personnel of the United Nations, the CIS Peacekeeping Forces and other international personnel".⁷⁷

80. In a resolution adopted in 2000, the UN Security Council condemned "in the strongest terms the . . . detention of the personnel of UNAMSIL [by the RUF] in Sierra Leone".⁷⁸

81. In 1992, in a statement by its President, the UN Security Council condemned "the recent cowardly attack on UNPROFOR positions in Sarajevo resulting in loss of life and injuries among the Ukrainian servicemen" and reiterated its demand that "all parties and others concerned take the necessary measures to secure the safety of UNPROFOR personnel".⁷⁹

82. In 1993, in a statement by its President, the UN Security Council expressed the view that "attacks and other acts of violence, whether actual or threatened, including obstruction or detention of persons, against United Nations forces . . . are wholly unacceptable" and reiterated its demand that "States and other parties to various conflicts take all possible steps to ensure the safety and security of United Nations forces".⁸⁰

83. In 1993, in a statement by its President adopted after having heard "accounts of attacks against UNPROFOR by armed persons bearing uniforms of the Bosnian Government forces", the UN Security Council stated that "the members of the Council unreservedly condemn these acts of violence".⁸¹

84. In 1994, in a statement by its President, the UN Security Council condemned "attacks against the personnel of the United Nations Protection Force (UNPROFOR)".⁸²

85. In 1994, in a statement by its President concerning the situation in Rwanda, the UN Security Council condemned the killing of at least 10 Belgian peacekeepers, as well as the reported kidnapping of others, as "horrific attacks" and urged "respect for safety and security of . . . UNAMIR and other United Nations personnel".⁸³

86. In 1994, in a statement by its President, the UN Security Council expressed its deep concern at "recent incidents in the Republic of Bosnia and Herzegovina affecting the safety and freedom of movement of UNPROFOR personnel" and stated that "these incidents constitute clear violations of the Security Council's

⁷⁷ UN Security Council, Res. 1206, 12 November 1998, §§ 6 and 7.

⁷⁸ UN Security Council, Res. 1313, 4 August 2000, preamble.

⁷⁹ UN Security Council, Statement by the President, UN Doc. S/24379, 4 August 1992.

⁸⁰ UN Security Council, Statement by the President, UN Doc. S/25493, 31 March 1993, pp. 1 and 2.

⁸¹ UN Security Council, Statement by the President, UN Doc. S/26661, 28 October 1993.

⁸² UN Security Council, Statement by the President, UN Doc. S/PRST/1994/1, 7 January 1994, p. 1; see also Statement by the President, UN Doc. S/PRST/1994/11, 14 March 1994, p. 2.

⁸³ UN Security Council, Statement by the President, UN Doc. S/PRST/1994/16, 7 April 1994, p. 1.

resolutions, which bind the parties". The Council condemned such incidents and warned "those responsible of the serious consequences of their actions".⁸⁴ 87. In 1994, in a statement by its President in the context of the conflict in Somalia, the UN Security Council stated that it was "appalled by the killing near Baidoa on 22 August of seven Indian soldiers and the wounding of nine more serving with UNOSOM-II" and strongly condemned this "premeditated attack on United Nations peace-keepers".⁸⁵

88. In 1994, in a statement by its President, the UN Security Council strongly condemned "the deliberate attack on Bangladeshi United Nations peace-keepers on 12 December 1994 in Velika Kladusa, in the region of Bihac in the Republic of Bosnia and Herzegovina". The Council stated it was "outraged at this incident of direct attack on UNPROFOR personnel" and demanded that "such attacks do not recur". It further warned "the perpetrators of the attack that their heinous act of violence carries corresponding individual responsibility".⁸⁶

89. In 1995, in a statement by its President following the fatal shooting of a French peacekeeper by a sniper in Sarajevo, the UN Security Council condemned "in the strongest terms such acts directed at peace-keepers who are serving the cause of peace in the Republic of Bosnia and Herzegovina" and reiterated that such attacks "should not remain unpunished".⁸⁷

90. In 1995, in a statement by its President, the UN Security Council strongly condemned "attacks by Croatian Government forces on personnel of the United Nations peace-keeping forces which have resulted in casualties, including the death of one member of the peace-keeping forces" and demanded that "such attacks cease immediately and that all detained personnel be released".⁸⁸

91. In 1996, in a statement by its President in the context of the conflict in Angola, the UN Security Council condemned "the incident on 3 April 1996 which resulted in the death of two UNAVEM III personnel [and] the wounding of a third" and reiterated "the importance it attaches to the safety and security of UNAVEM III".⁸⁹

92. In 1997, in a statement by its President in the context of the conflict in Croatia, the UN Security Council condemned "the incident that occurred at Vukovar on 31 January 1997 and that resulted in the death of an UNTAES peacekeeper and injuries to other UNTAES personnel".⁹⁰

⁸⁴ UN Security Council, Statement by the President, UN Doc. S/PRST/1994/19, 14 April 1994.

⁸⁵ UN Security Council, Statement by the President, UN Doc. S/PRST/1994/46, 25 August 1994, p. 1.

⁸⁶ UN Security Council, Statement by the President, UN Doc. S/PRST/1994/79, 13 December 1994.

⁸⁷ UN Security Council, Statement by the President, UN Doc. S/PRST/1995/19, 14 April 1995.

⁸⁸ UN Security Council, Statement by the President, UN Doc. S/PRST/1995/38, 4 August 1995, p. 1.

⁸⁹ UN Security Council, Statement by the President, UN Doc. S/PRST/1996/19, 24 April 1996, p. 2.

⁹⁰ UN Security Council, Statement by the President, UN Doc. S/PRST/1997/4, 31 January 1997, p. 3.

93. In 1997, in a statement by its President, the UN Security Council strongly condemned attacks on and the kidnapping of UNMOT personnel in Tajikistan.⁹¹

94. In 1997, in a statement by its President in the context of the conflict in Georgia, the UN Security Council reminded the parties of their obligation “to ensure the safety and freedom of movement of UNOMIG and the CIS peacekeeping force”.⁹²

95. In 1997, in a statement by its President, the UN Security Council condemned “the harassment of United Nations Observer Mission in Angola (MONUA) personnel in the exercise of their functions” in areas under UNITA control.⁹³

96. In 1998, in a statement by its President, the UN Security Council strongly condemned “the confirmed attacks by members of UNITA on the personnel of the United Nations Observer Mission in Angola (MONUA)”.⁹⁴

97. In 1998, in a statement by its President in the context of the conflict in Georgia, the UN Security Council strongly condemned “the deliberate acts of violence against the personnel of the United Nations Observer Mission in Georgia (UNOMIG) and of the Collective Peacekeeping Forces of the Commonwealth of Independent States” and demanded that “both sides take determined and prompt measures to put a stop to such acts”.⁹⁵

98. In a resolution adopted in 1992 on the situation in Bosnia and Herzegovina, the UN General Assembly condemned attacks against UNPROFOR in Sarajevo resulting in loss of life and injury to UNPROFOR personnel.⁹⁶

99. In a resolution adopted in 1994 on the situation of human rights in the former Yugoslavia, the UN General Assembly reiterated its condemnation of attacks against UNPROFOR.⁹⁷

100. In a resolution adopted in 1995, the UN General Assembly condemned “all attacks on the United Nations Peace Forces” in the conflict in the former Yugoslavia.⁹⁸

101. In a resolution adopted in 1993 on the situation of human rights in the former Yugoslavia, the UN Commission on Human Rights condemned “the attacks on the United Nations Protection Force, which have resulted in casualties and deaths of United Nations personnel”.⁹⁹

⁹¹ UN Security Council, Statement by the President, UN Doc. S/PRST/1997/6, 7 February 1997.

⁹² UN Security Council, Statement by the President, UN Doc. S/PRST/1997/25, 8 May 1997, p. 2.

⁹³ UN Security Council, Statement by the President, UN Doc. S/PRST/1997/39, 23 July 1997, p. 1.

⁹⁴ UN Security Council, Statement by the President, UN Doc. S/PRST/1998/14, 22 May 1998, p. 1.

⁹⁵ UN Security Council, Statement by the President, UN Doc. S/PRST/1998/34, 25 November 1998, p. 2.

⁹⁶ UN General Assembly, Res. 47/121, 18 December 1992, preamble.

⁹⁷ UN General Assembly, Res. 49/196, 23 December 1994, § 15.

⁹⁸ UN General Assembly, Res. 50/193, 22 December 1995, § 14.

⁹⁹ UN Commission on Human Rights, Res. 1993/7, 23 February 1993, § 15.

102. In a resolution adopted in 1994, the UN Commission on Human Rights condemned continued attacks and other acts of violence committed against UN personnel, in particular contingents belonging to UNOSOM II in Somalia.¹⁰⁰

103. In a resolution adopted in 1994 in the context of the conflict in the former Yugoslavia, the UN Commission on Human Rights condemned "the attacks on and continuous harassment of the United Nations Protection Force".¹⁰¹

104. In a resolution adopted in 1995 on the situation of human rights in the former Yugoslavia, the UN Commission on Human Rights condemned "attacks on and continued harassment of the United Nations Protection Force".¹⁰²

105. In a resolution adopted in 1995 on the situation of human rights in Rwanda, the UN Commission on Human Rights condemned "in the strongest terms the kidnapping and killing of military peacekeeping personnel ... all of which constitute blatant violations of international humanitarian law".¹⁰³

106. In January 1992, in a report on UNIFIL in Lebanon, the UN Secretary-General reported "a substantial increase in the number of firings by IDF/DFP at or close to UNIFIL positions" and stated that "these incidents were vigorously protested to the Israeli military authorities".¹⁰⁴ In July 1992, in another report on the same subject, the UN Secretary-General reported "175 instances of firing by IDF/DFP at or close to UNIFIL positions" and stated that "deliberate firing at UNIFIL positions had been the subject of frequent protests to the Israeli authorities".¹⁰⁵

107. In 1992, in report concerning UNPROFOR, the UN Secretary-General referred to fire originating from "small arms" directed at peacekeeping personnel in the UN Protected Area. Attacks conducted by drunk YPA or Croatian army soldiers also triggered official complaints.¹⁰⁶

108. In 1992, in a report on the implementation of UN Security Council Resolution 783 (1992), the UN Secretary-General characterised as a "disturbing development" the increase in attacks on UNTAC personnel and helicopters in Cambodia.¹⁰⁷

109. After an on-site investigation into the shelling of the UN compound at Qana on 18 April 1996, the UN Secretary-General's Military Adviser reported that:

Israeli officers stated that the Israeli forces were not aware at the time of the shelling that a large number of Lebanese civilians had taken refuge in the Qana compound. I did not pursue this question since I considered it irrelevant because the United

¹⁰⁰ UN Commission on Human Rights, Res. 1994/60, 4 March 1994, § 3.

¹⁰¹ UN Commission on Human Rights, Res. 1994/72, 9 March 1994, § 12.

¹⁰² UN Commission on Human Rights, Res. 1995/89, 8 March 1995, §17.

¹⁰³ UN Commission on Human Rights, Res. 1995/91, 8 March 1995, § 3.

¹⁰⁴ UN Secretary-General, Report on UNIFIL, UN Doc. S/23452, 21 January 1992, § 20.

¹⁰⁵ UN Secretary-General, Report on UNIFIL, UN Doc. S/24341, 21 July 1992, § 24.

¹⁰⁶ UN Secretary-General, Further report pursuant to Security Council resolution 749 (1992), UN Doc. S/23844, 24 April 1992, § 13.

¹⁰⁷ UN Secretary-General, Report on the implementation of Security Council resolution 783 (1992), UN Doc. S/24800, 15 November 1992, § 15.

Nations compound was not a legitimate target, whether or not civilians were in it. The Israeli officers emphasized that it was not Israeli policy to target civilians or the United Nations.¹⁰⁸

110. In a letter submitting the Military Adviser's report to the UN Security Council in 1996, the UN Secretary-General stated that he viewed "with utmost gravity the shelling of the [compound at Qana], as [he] would hostilities directed against any United Nations peace-keeping position".¹⁰⁹

111. In 1996, in a report on UNIFIL in Lebanon, the UN Secretary-General expressed his "regret that the UN once again had cause to call upon the parties . . . to respect the non-combatant status of . . . UN peacekeepers".¹¹⁰

112. In 1996, in a report on the situation in Tajikistan, the UN Secretary-General condemned an attack aimed at two members of the CIS peacekeeping force.¹¹¹

113. In 1997, in a report concerning the situation in Abkhazia, Georgia, the UN Secretary-General reported that "mine-laying and attacks on the CIS peacekeeping force and the Abkhaz authorities also continued during the reporting period" and that "the CIS force, in conjunction with UNOMIG, again used the quadripartite meetings to protest against such actions".¹¹² In a further such report in 1998, the UN Secretary-General condemned "attacks against peacekeepers of the United Nations and the CIS".¹¹³

114. In 1998, in a report on UNIFIL in Lebanon, the UN Secretary-General reported that UNIFIL had "at times encountered hostile reactions by both armed elements and IDF/DFP" and stated that "UNIFIL strongly protested [these] incidents".¹¹⁴

115. In 1998, in an interim report on the situation in Tajikistan, the UN Secretary-General described the murder of four unarmed members of UNMOT involved in a peace mission in Tajikistan and stated he could not find words strong enough to condemn such an act.¹¹⁵

116. In 2000, in his report on the establishment of a Special Court for Sierra Leone, the UN Secretary-General stated that:

¹⁰⁸ UN Secretary-General, Report dated 1 May 1996 of the Secretary-General's Military Adviser concerning the shelling of the UN compound at Qana on 18 April 1996, UN Doc. S/1996/337, 7 May 1996, §§ 7-8.

¹⁰⁹ UN Secretary-General, Letter dated 7 May 1996 to the President of the UN Security Council, UN Doc. S/1996/337, 7 May 1996, p. 1.

¹¹⁰ UN Secretary-General, Report on UNIFIL, UN Doc. S/1996/575, 20 July 1996, § 40.

¹¹¹ UN Secretary-General, Report on the situation in Tajikistan, UN Doc. S/1996/1010, 5 December 1996, § 11.

¹¹² UN Secretary-General, Report on the situation in Abkhazia, Georgia, UN Doc. S/1997/47, 20 January 1997, § 22.

¹¹³ UN Secretary-General, Report on the situation in Abkhazia, Georgia, UN Doc. S/1998/647, 14 July 1998, § 40.

¹¹⁴ UN Secretary-General, Report on UNIFIL, UN Doc. S/1998/652, 16 July 1998, § 8.

¹¹⁵ UN Secretary-General, Interim report on the situation in Tajikistan, UN Doc. S/1998/754, 13 August 1998, §§ 10 and 25.

Other serious violations of international humanitarian law falling within the jurisdiction of the Court include:

- ...
- (b) Attacks against peacekeeping personnel involved in a humanitarian assistance or a peacekeeping mission, as long as they are entitled to the protection given to civilians under the international law of armed conflict... Attacks against peacekeeping personnel, to the extent that they are entitled to protection recognized under international law to civilians in armed conflict, do not represent a new crime. Although established for the first time as an international crime in the Statute of the International Criminal Court, it was not viewed at the time of the adoption of the Rome Statute as adding to the already existing customary international law crime of attacks against civilians and persons hors de combat. Based on the distinction between peacekeepers as civilians and peacekeepers turned combatants, the crime defined in article 4 of the Statute of the Special Court is a specification of a targeted group within the generally protected group of civilians which because of its humanitarian or peacekeeping mission deserves special protection.¹¹⁶

117. In 1994, in its final report on grave breaches of the Geneva Conventions and other violations of IHL committed in the former Yugoslavia, the UN Commission of Experts Established pursuant to Security Council Resolution 780 (1992) stated that if

individuals attacked or authorized attacks on United Nations forces... they would be committing a grave breach of article 85, paragraph 3(a), of Protocol I by making the civilian population or individual civilians the object of attack. In the Sarajevo context, United Nations peace-keepers are non-combatants and entitled to be treated as civilians.¹¹⁷

Other International Organisations

118. In a communiqué issued in 1992, ECOWAS “unreservedly condemned the unprovoked and premeditated aggression by the NPFL against ECOMOG forces in Liberia, and expressed full support for the defensive action taken by ECOMOG”.¹¹⁸

119. In 1994, during a debate in the UN Security Council, the EU condemned attacks against UNPROFOR.¹¹⁹

120. In 1992, the OIC Conference of Ministers of Foreign Affairs adopted a resolution in which it condemned attacks against UNPROFOR.¹²⁰

¹¹⁶ UN Secretary-General, Report on the establishment of a Special Court for Sierra Leone, UN Doc. S/2000/915, 4 October 2000, §§ 15(b) and 16.

¹¹⁷ UN Commission of Experts Established pursuant to Security Council Resolution 780 (1992), Final Report, UN Doc. S/1994/674, 27 May 1994, § 204.

¹¹⁸ ECOWAS, Final communiqué of the first Summit Meeting of the Committee of Nine of ECOWAS on the Liberian Crisis, Abuja, 7 November 1992, annexed to Letter dated 13 November 1992 from Benin to the President of the UN Security Council, UN Doc. S/24812, 16 November 1992, § 9.

¹¹⁹ EU, Statement before the UN Security Council, UN Doc. S/PV.3367, 21 April 1994, p. 13.

¹²⁰ OIC, Conference of Ministers of Foreign Affairs, Res. 1/6-EX, 1–2 December 1992.

121. In 1994, during a debate in the UN Security Council, the OIC condemned attacks against UNPROFOR.¹²¹

International Conferences

122. In 1992, the 88th Inter-Parliamentary Conference in Stockholm adopted a resolution on Bosnia and Herzegovina strongly condemning “the escalation of violence by armed attacks against . . . peace-keeping personnel” and insisting “that such attacks cease immediately”.¹²²

123. The Final Declaration adopted by the International Conference for the Protection of War Victims in 1993 demanded that “the members of peace-keeping forces be permitted to fulfil their mandate without hindrance and that their physical integrity be respected”.¹²³

124. In 1993, the 90th Inter-Parliamentary Conference in Canberra adopted a resolution deploring “the lack of protection for peace-keepers and peace-makers under current humanitarian law”.¹²⁴

IV. Practice of International Judicial and Quasi-judicial Bodies

125. In the first indictment in the *Karadžić and Mladić case* before the ICTY in 1995, the accused were charged with their role in the “taking of civilians, that is UN peacekeepers, as hostages”.¹²⁵

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

126. To fulfil its task of disseminating IHL, the ICRC has delegates around the world teaching armed and security forces that “a United Nations Force engaged to separate opposing armed forces is not a Party to the conflict . . . Located between opposing armed forces and not being a Party to the conflict, the United Nations Force has no enemy. Its situation is analogous to that of the armed forces of a neutral State.”¹²⁶

VI. Other Practice

127. No practice was found.

¹²¹ OIC, Statement before the UN Security Council, UN Doc. S/PV.3367, 21 April 1994, p. 25.

¹²² 88th Inter-Parliamentary Conference, Stockholm, 7–12 September 1992, Resolution on support to the recent international initiatives to halt the violence and put an end to the violations of human rights in Bosnia and Herzegovina, § 5.

¹²³ International Conference for the Protection of War Victims, Geneva, 30 August–1 September 1993, Final Declaration, § I(7), *ILM*, Vol. 33, 1994, p. 299.

¹²⁴ 90th Inter-Parliamentary Conference, Canberra, 13–18 September 1993, Resolution on respect for international humanitarian law and support for humanitarian action in armed conflicts, preamble.

¹²⁵ ICTY, *Karadžić and Mladić case*, First Indictment, 24 July 1995, § 48.

¹²⁶ Frédéric de Mulinen, *Handbook on the Law of War for Armed Forces*, ICRC, Geneva, 1987, § 248.

JOURNALISTS

Journalists (practice relating to Rule 34)

§§ 1–60

Journalists

Note: This chapter deals with civilian journalists; the case of war correspondents accredited to the armed forces, as provided for in Article 13 of the 1907 HR and Article 4(A)(4) GC III, is only addressed incidentally.

I. Treaties and Other Instruments

Treaties

1. Article 79 AP I provides that:

1. Journalists engaged in dangerous professional missions in areas of armed conflict shall be considered as civilians within the meaning of Article 50, paragraph 1.
2. They shall be protected as such under the Conventions and this Protocol, provided that they take no action adversely affecting their status as civilians, and without prejudice to the right of war correspondents accredited to the armed forces to the status provided for in 4 A 4) of the Third Convention.
3. They may obtain an identity card . . . This card, which shall be issued by the government of the State of which the journalist is a national or in whose territory he resides or in which the news medium employing him is located, shall attest to his status as a journalist.

Article 79 AP I was adopted by consensus.¹

Other Instruments

2. Paragraph 4 of the 1991 Memorandum of Understanding on the Application of IHL between Croatia and the SFRY provides that “all civilians shall be treated in accordance with Articles 72 to 79 of Additional Protocol I”.
3. Paragraph 2.3 of the 1992 Agreement on the Application of IHL between the Parties to the Conflict in Bosnia and Herzegovina provides that “all civilians shall be treated in accordance with Articles 72 to 79 of Additional Protocol I”.

¹ CDDH, *Official Records*, Vol. VI, CDDH/SR.43, 27 May 1977, p. 256.

II. National Practice

Military Manuals

4. Argentina's Law of War Manual states that "journalists engaged in dangerous professional missions in areas of armed conflict are considered to be civilians and must be protected as such".²

5. Australia's Defence Force Manual states that:

Civilian journalists engaged in dangerous professional missions in areas of armed conflict... are to be afforded the protection that normally applies to civilians. Granting of this protection is subject to the journalists not engaging in conduct that is inconsistent with their civilian status... Protection does not extend to war correspondents who are members of the military forces of a nation. War correspondents are detained as PW upon capture whereas civilian journalists are deemed protected persons and would not normally be detained.³

6. Benin's Military Manual cites journalists and journalists on dangerous mission as examples of civilians.⁴

7. Cameroon's Instructors' Manual provides that "journalists carrying out an assignment in a zone of hostilities fall into the category of [civilians]".⁵

8. Canada's LOAC Manual states that "journalists engaged in dangerous professional missions in areas of armed conflict shall be considered civilians. As such, they are non-combatants and may not be attacked. Should a journalist be detained, such journalist's status will be that of a civilian."⁶

9. France's LOAC Manual quotes Article 4(A)(4) GC III and Article 79(1) AP I and adds that "in case of capture, journalists enjoy either the status of prisoners of war or that of civilian persons and the rights and protections attached thereto, depending on whether they are war correspondents or not. They must be able to prove their status."⁷

10. Germany's Military Manual states that:

Journalists engaged in dangerous professional missions in areas of armed conflict are protected as civilians, provided that they take no action adversely affecting their status as civilians, and without prejudice to the right of war correspondents accredited to the armed forces to the status of persons accompanying the armed forces without actually being members thereof. Journalists may obtain an identity card which attests to their status.⁸

11. With reference to Israel's Law of War Booklet, the Report on the Practice of Israel states that "journalists and other members of the press would never

² Argentina, *Law of War Manual* (1989), § 4.10.

³ Australia, *Defence Force Manual* (1994), § 915; see also *Commanders' Guide* (1994), § 623.

⁴ Benin, *Military Manual* (1995), Fascicule I, p. 12.

⁵ Cameroon, *Instructors' Manual* (1992), p. 17.

⁶ Canada, *LOAC Manual* (1999), p. 3-3, § 23, see also p. 4-7, § 61.

⁷ France, *LOAC Manual* (2001), p. 75. ⁸ Germany, *Military Manual* (1992), § 515.

be intentionally targeted by the IDF. Obviously, such protection would be lost if these individuals actually participated in hostile activities.”⁹

12. Madagascar’s Military Manual states that “journalists engaged in a dangerous mission are civilians”.¹⁰

13. The Military Manual of the Netherlands states that:

Journalists engaged in “free newsgathering” must be considered as civilians. They must be protected as such provided they take no action adversely affecting this status . . . The humanitarian law of war does not prohibit armed forces in whose area of operations journalists are active to impose restrictions on journalists. Journalists are not the same as persons accredited to the armed forces as war correspondents.¹¹

14. New Zealand’s Military Manual states that “journalists engaged in dangerous professional missions in areas of armed conflict are regarded as civilians. They are protected as such under the Conventions and AP I so long as they take no action adversely affecting their status as civilians.”¹² The manual considers that Article 79 AP I

is a new provision and such journalists enjoy no special protection in relation to States which are not bound by AP I. In regard to such States, they may well be taken for spies if they are found in areas of armed conflict while equipped with, eg, cameras. Such journalists must be furnished with proper identity cards. Also, they must not be confused with war correspondents accredited to armed forces in the field.¹³

15. Nigeria’s Military Manual provides that “journalists engaged in dangerous professional missions in [an] area of armed conflict shall be considered as civilians within the meaning of Article 50, paragraph 1 [AP I]”.¹⁴ The manual further states that:

Journalists now turn victims of circumstance. A case in point is the brutal killing of two Nigerian journalists from Guardian Newspaper and Champion by Charles Taylor’s faction in Liberia. It is common news and knowledge that journalists in most of these international armed conflicts are arrested, detained, intimidated and above all killed. This therefore is a failure of the provision of the Geneva Conventions.¹⁵

16. Spain’s LOAC Manual states that journalists and war correspondents on mission in an area of armed conflict are civilians and may not be attacked.¹⁶

17. Togo’s Military Manual cites journalists on dangerous mission as an example of civilians.¹⁷

⁹ Report on the Practice of Israel, 1997, Chapter 1.1, referring to *Law of War Booklet* (1986), p. 14.

¹⁰ Madagascar, *Military Manual* (1994), Fiche No. 2-SO, § B.

¹¹ Netherlands, *Military Manual* (1993), pp. VIII-3/VIII-4.

¹² New Zealand, *Military Manual* (1992), § 1138.

¹³ New Zealand, *Military Manual* (1992), § 1138, footnote 94.

¹⁴ Nigeria, *Military Manual* (1994), p. 8, § 9(d). ¹⁵ Nigeria, *Military Manual* (1994), p. 32, § 9.

¹⁶ Spain, *LOAC Manual* (1996), Vol. I, § 4.5.b.(1).

¹⁷ Togo, *Military Manual* (1996), Fascicule I, p. 13.

National Legislation

18. Under Ireland's Geneva Conventions Act as amended, any "minor breach" of AP I, including violations of Article 79 AP I, is a punishable offence.¹⁸

19. Under Norway's Military Penal Code as amended, "anyone who contravenes or is accessory to the contravention of provisions relating to the protection of persons or property laid down in . . . the two additional protocols to [the Geneva] Conventions . . . is liable to imprisonment".¹⁹

National Case-law

20. In its judgement in the *Situation in Chechnya case* in 1995, Russia's Constitutional Court held that several orders and decrees issued by the Russian government in 1994 which deprived journalists working in the conflict zone of their accreditation were unconstitutional.²⁰

Other National Practice

21. The Report on the Practice of Botswana states that journalists must not be attacked.²¹

22. In 1971, during a debate in the Third Committee of the UN General Assembly, Brazil stated with respect to the protection of journalists that overwhelming support was to be found in the international community both for the basic principle that a distinction should be made between the treatment accorded to combatants and non-combatants and for the consequent adoption of measures to ensure the personal safety of journalists in areas of armed conflict.²²

23. In 1973, during a debate in the Third Committee of the UN General Assembly, the FRG stated that, since the protection of journalists during armed conflict was part of IHL, the provisions relating to the protection of civilians were also applicable in principle to journalists, unless they belonged to the armed forces.²³

24. On the basis of an interview with a high-ranking officer, the Report on the Practice of Jordan notes that no attacks by Jordanian armed forces against journalists covering armed conflict have been reported.²⁴

25. The Report on the Practice of South Korea mentions a case before a military tribunal in 1952, in which journalists who participated in subversive activities and killed civilians were considered to be war criminals. On this basis, the

¹⁸ Ireland, *Geneva Conventions Act as amended* (1962), Section 4(1) and (4).

¹⁹ Norway, *Military Penal Code as amended* (1902), § 108(b).

²⁰ Russia, Constitutional Court, *Situation in Chechnya case*, Judgement, 31 July 1995.

²¹ Report on the Practice of Botswana, 1998, Chapter 1.1.

²² Brazil, Statement before the Third Committee of the UN General Assembly, UN Doc. A/C.3/SR.1890, 1 December 1971, § 4.

²³ FRG, Statement before the Third Committee of the UN General Assembly, UN Doc. A/C.3/SR.1991, 10 October 1973, § 31.

²⁴ Report on the Practice of Jordan, 1997, Interview with a high-ranking army officer, Chapter 1.1.

report infers that journalists who are not participating in hostilities shall be protected.²⁵

26. According to the Report on the Practice of Nigeria, Nigeria's practice in relation to journalists is that they should not be arrested, detained, intimidated or killed in armed conflicts.²⁶

27. Based on replies by army officers to a questionnaire, the Report on the Practice of Rwanda states that journalists must not be attacked. When detained, they must be released as soon as their status as journalists has been established.²⁷

28. In 1987, the Deputy Legal Adviser of the US Department of State stated that "we also support the principle that journalists be protected as civilians under the Conventions, provided they take no action adversely affecting such status".²⁸

29. In 1992, in a report submitted pursuant to paragraph 5 of UN Security Council Resolution 771 (1992) on grave breaches of GC IV committed in the former Yugoslavia, the US included the killing of a television producer and the wounding of a camerawoman by sniper fire in Sarajevo among "deliberate attacks on non-combatants".²⁹

30. The Report on the Practice of Zimbabwe states that "persons such as journalists are certainly civilians not combatants. They should not be attacked. This point qualifies for customary rule status."³⁰

31. In 1991, a State condemned attacks on journalists, which it alleged were committed by the armed forces of the adversary.³¹

III. Practice of International Organisations and Conferences

United Nations

32. In several resolutions adopted between 1970 and 1975, the UN General Assembly expressed the belief that an international convention was needed to protect journalists engaged in dangerous missions in areas of armed conflict.

²⁵ Report on the Practice of South Korea, 1998, Chapter 1.1, referring to Document of a Military Tribunal, 28 April 1952.

²⁶ Report on the Practice of Nigeria, 1997, Chapter 1.1.

²⁷ Report on the Practice of Rwanda, 1997, Replies by army officers to a questionnaire, Chapter 1.1.

²⁸ US, Remarks of Michael J. Matheson, Deputy Legal Adviser, US Department of State, The Sixth Annual American Red Cross-Washington College of Law Conference on International Humanitarian Law: A Workshop on Customary International Law and the 1977 Protocols Additional to the 1949 Geneva Conventions, *American University Journal of International Law and Policy*, Vol. 2, 1987, p. 428.

²⁹ US, Former Yugoslavia: Grave Breaches of the Fourth Geneva Convention (Third Submission), annexed to Letter dated 5 November 1992 to the UN Secretary-General, UN Doc. S/24791, 10 November 1992, p. 19.

³⁰ Report on the Practice of Zimbabwe, 1998, Chapter 1.1.

³¹ ICRC archive document.

The rationale for such a convention was not only that journalists should be protected on humanitarian grounds, but also to enable them to receive and impart information fully and objectively in keeping with the purposes and principles of the 1945 UN Charter and the 1948 UDHR concerning freedom of information.³²

33. In a resolution adopted in 1996 on the situation of human rights in Afghanistan, the UN General Assembly strongly urged "all parties to the conflict to take all necessary measures to ensure the safety of . . . representatives of the media in Afghanistan".³³

34. In a resolution adopted in 1998 on the human rights situation in Kosovo, the UN General Assembly called upon the authorities of the FRY (Serbia and Montenegro), as well as armed Albanian groups, to refrain from any harassment and intimidation of journalists.³⁴

35. In 1993, the UN Commission on Human Rights appointed a Special Rapporteur on the Promotion and Protection of the Right to Freedom of Opinion and Expression. The mandate of the Rapporteur included the gathering of all relevant information on discrimination, threats or use of violence and harassment, including persecution and intimidation, against professionals in the field of information seeking to exercise or to promote the exercise of the right to freedom of opinion and expression.³⁵

36. In a resolution adopted in 1995, the UN Commission on Human Rights deplored continued attacks, acts of reprisal, abductions and other acts of violence committed against representatives of the international media in Somalia, sometimes resulting in serious injury or death.³⁶

37. In a resolution adopted in 1996 on the situation of human rights in Burundi, the UN Commission on Human Rights condemned the murder of journalists.³⁷

38. In a resolution adopted in 1999, the UN Commission on Human Rights recalled the 1995 Johannesburg Principles and expressed its concern at the widespread violence directed at persons exercising the right to freedom of opinion and expression. The Commission also expressed its concern that such violations "are facilitated and aggravated by several factors", including "abuse of states of emergency, exercise of the powers specific to states of emergency without formal declaration and too vague a definition of offences against State security".³⁸

³² UN General Assembly, Res. 2673 (XXV), 9 December 1970; Res. 2854 (XXVI), 20 December 1971, § 1; Res. 3058 (XXVIII), 2 November 1973, § 1; Res. 3500 (XXX), 15 December 1975, § 1.

³³ UN General Assembly, Res. 51/108, 12 December 1996, § 9.

³⁴ UN General Assembly, Res. 53/164, 9 December 1998, § 19.

³⁵ UN Commission on Human Rights, Res. 1993/45, 5 March 1993.

³⁶ UN Commission on Human Rights, Res. 1995/56, 3 March 1995, preamble.

³⁷ UN Commission on Human Rights, Res. 1996/1, 27 March 1996, § 11.

³⁸ UN Commission on Human Rights, Res. 1999/36, 26 April 1999, preamble and §§ 3–4.

39. In a resolution unanimously adopted in 1997 on condemnation of violence against journalists, the UNESCO General Conference invited the Director-General of the organisation "to condemn assassination and any physical violence against journalists as a crime against society".³⁹

40. The Practical Guide for Journalists, edited by UNESCO and Reporters Sans Frontières states that:

The most serious infringements of press freedom are those aimed specifically at journalists and their families:

- (a) Extrajudicial or arbitrary killings, attempted killings of this nature, murder threats and kidnappings . . .
- (b) Cruel, inhuman or degrading treatment or punishment, and torture . . .
- (c) Illegal arrest or detention . . .
- (d) Attacks and threats carried out because people have used their right to freedom of opinion, freedom of expression or freedom of association.⁴⁰

41. In its report in 1993, the UN Commission on the Truth for El Salvador described the ambush of four Dutch journalists accompanied by five or six members of the FMLN by a patrol of the Salvadoran armed forces. They were on their way to territory under FMLN control to interview members of the guerrilla. On the basis of the available evidence, the Commission concluded that the ambush was set up deliberately to surprise and kill the journalists and their escort. The Commission considered these murders to be in violation of "international human rights laws and international humanitarian law, which stipulates that civilians shall not be the object of attacks".⁴¹

Other International Organisations

42. In a recommendation adopted in 1996 on the protection of journalists in situations of conflict or tension, the Committee of Ministers of the Council of Europe reaffirmed the importance of Article 79 AP I "which provides that journalists shall be considered as civilians and shall be protected as such" and considered that "this obligation also applies with respect to non-international armed conflicts".⁴²

43. In a recommendation adopted in 1998 on the crisis in Kosovo, the Parliamentary Assembly of the Council of Europe stated that it deplored the violence used by the police against the independent local media and foreign journalists covering events in Kosovo and the threats of legal prosecutions.⁴³

³⁹ UNESCO, 29th General Conference, 21 October 12 November 1997, Res. 29, 12 November 1997, § 1(a).

⁴⁰ UNESCO and Reporters Sans Frontières, *Practical Guide for Journalists*, Paris, 1998, pp. 66–67.

⁴¹ UN Commission on the Truth for El Salvador, Report, UN Doc. S/25500, 1 April 1993, Annex, p. 75.

⁴² Council of Europe, Committee of Ministers, Recommendation R (96) 4 on the Protection of Journalists in Situations of Conflict and Tension, 3 May 1996, § 1, preamble.

⁴³ Council of Europe, Parliamentary Assembly, Rec. 1368, 22 April 1998, § 5.

44. In a written declaration in 1998 on the freedom of the press in the FRY, the Parliamentary Assembly of the Council of Europe noted that “the Yugoslav authorities are restricting the free movement of journalists, particularly foreign journalists,” and that “certain journalists have been subjected to defamation campaigns and even physical violence”.⁴⁴

45. In a resolution on Kosovo adopted in 1998, the European Parliament called on the Council of Ministers “to protest in the strongest terms possible to the Belgrade government about . . . threats by the Yugoslav authorities to treat the independent media in the region as enemies serving foreign powers and NATO agents”.⁴⁵

46. In a resolution on Chechnya adopted in 2000, the European Parliament, “taking into account the denial of full and unhindered access to the region for journalists”, urged “the Russian authorities to ensure that Russian and international journalists in the region can work without constraint”.⁴⁶

47. In a resolution adopted in 1998, the OAS General Assembly vehemently condemned assaults upon freedom of the press and crimes against journalists, without expressly excluding situations of armed conflict.⁴⁷

48. In 2001, in the Recommendations on Free Media in South-Eastern Europe: Protection of Journalists and their Role in Reconciliation, Promoting Interethnic Peace and Preventing Conflicts, the OSCE Representative on Freedom of the Media proposed that governments at all levels provide adequate protection to media professionals against attack and other forms of harassment and take measures to ensure that any such attacks were investigated and those responsible prosecuted.⁴⁸

International Conferences

49. In a resolution adopted in 1993, the 90th Inter-Parliamentary Conference in Canberra deplored “the growing number of journalists and other media agents killed, wounded or abducted on the battlefield” and called on “all States to ensure that journalists engaged in dangerous professional missions in areas of armed conflict benefit from the measures of protection set out in Article 79 [AP I]”.⁴⁹

⁴⁴ Council of Europe, Parliamentary Assembly, Written Declaration No. 284, Violation of the freedom of information and the freedom of the press in the Federal Republic of Yugoslavia, Doc. 8224, 5 October 1998, §§ 2–3.

⁴⁵ European Parliament, Resolution on the situation in Kosovo, 8 October 1998, § 9.

⁴⁶ European Parliament, Resolution on violations of human rights and humanitarian law in Chechnya, 16 March 2000, §§ H and 12.

⁴⁷ OAS, General Assembly, Res. 1550 (XXVIII-O/98), 2 June 1998, § 1.

⁴⁸ OSCE, Representative on Freedom of the Media, Recommendations on Free Media in South-Eastern Europe: Protection of Journalists and their Role in Reconciliation, Promoting Interethnic Peace and Preventing Conflicts, Zagreb, 28 February–2 March 2001.

⁴⁹ 90th Inter-Parliamentary Conference, Canberra, 13–18 September 1993, Resolution on respect for international humanitarian law and support for humanitarian action in armed conflicts, preamble and § 2[k].

50. In 2000, the OSCE Representative on Freedom of the Media and the German Ministry of Foreign Affairs organised a round table on the protection of journalists in conflict areas. The declaration issued at the end of the meeting stressed that the OSCE participating States committed themselves to protect journalists, particularly in case of armed conflict, and that the UN also expressed its strong support for measures to protect journalists. It further stated that more should be done to investigate murders of journalists. Concerning a distinctive sign for journalists, the declaration stressed that this was an issue for journalists themselves to decide.⁵⁰

IV. Practice of International Judicial and Quasi-judicial Bodies

51. No practice was found.

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

52. To fulfil its task of disseminating IHL, the ICRC has delegates around the world teaching armed and security forces that “journalists engaged on dangerous professional missions in areas of armed conflict are civilian persons”.⁵¹

VI. Other Practice

53. In a resolution on Angola adopted at its 22nd World Congress in 1995, the International Federation of Journalists called on the Angolan government and UNITA “to respect the fundamental and universal professional rights of Angolan journalists”. It urged both parties “to stop harassing, interfering with, detaining and murdering journalists working under the most difficult conditions trying to inform the world about the 20 years of civil war that killed and maimed thousands of innocent people and devastated the country”.⁵²

54. In a resolution on the safety of journalists adopted at its 23rd World Congress in 1998, the International Federation of Journalists stated that “more must be done to provide practical assistance to journalists on dangerous assignments and to journalists living and working in areas of conflict”.⁵³

55. In a resolution on the violation of journalists’ rights in India adopted at its 23rd World Congress in 1998, the International Federation of Journalists noted

⁵⁰ Round table with media professionals, officials from OSCE participating States, the UN and the Council of Europe on the protection of journalists in conflict areas, Berlin, 6 November 2000, Declaration.

⁵¹ Frédéric de Mulinen, *Handbook on the Law of War for Armed Forces*, ICRC, Geneva, 1987, § 54.

⁵² International Federation of Journalists, 22nd World Congress, Santander, 1–4 May 1995, Resolution on Angola.

⁵³ International Federation of Journalists, 23rd World Congress, Recife, 3–7 May 1998, Resolution on the Safety of Journalists.

with serious concern “continued violation of the journalists’ right to report the truth in situations of armed conflict between a) the state and insurgents, b) between ethnic groups and c) between terrorists and their agents”. It further stated that “journalists are often caught in cross-fire between these sides and are subject to all kinds of harassment, threats and even their physical elimination and thus are prevented by both sides to perform their journalistic work freely”.⁵⁴

56. In 1998, the International Federation of Journalists urged the UN Commission on Human Rights “to reiterate the importance of freedom of expression and to defend the right of journalists to exercise their profession free from corruption, harassment and fear”.⁵⁵

57. In 2000, in a statement before the UN Commission on Human Rights, the International Federation of Journalists stated that:

In 1999, murders [of journalists] took place in Chechnya, Colombia, East Timor, Federal Republic of Yugoslavia, India, Nigeria, Pakistan, Peru, Russia, Sierra Leone, Sri Lanka and Turkey. We do not believe that all these murders were carried out by agents of the state. However, most of these killings will remain unsolved, and some of the investigations will be directly or indirectly hindered by agents of the state. As long as the international community gives in to the continued killing of journalists, and the de facto amnesty granted to their killers, there can be no press freedom, no right to life. No respect for any human rights.

During 1999, more than 80 journalists and media staff were killed or murdered making it one of the worst years on record. Most of the victims were cut down in waves of violence in the Balkans, Russia and Sierra Leone. The 1999 Report reveals that 25 journalists and media workers died in the Federal Republic of Yugoslavia, of which 16 were victims of the NATO bombing of the Radio Television Serbia building in Belgrade in April.⁵⁶

58. In a press release in 2000, Article 19, an NGO campaigning for respect for the right to freedom of expression, denounced:

the disregard for the right to freedom of expression by the Yugoslav authorities in imposing the heaviest sentence ever on a journalist... for publishing articles denouncing the atrocities committed in Kosovo... despite the fact that this right is guaranteed by Article 19 of the ICCPR.

The organisation stated that it was “particularly concerned about the fact that a civilian was tried by a military court behind closed doors”.⁵⁷

⁵⁴ International Federation of Journalists, 23rd World Congress, Recife, 3–7 May 1998, Resolution on the Violation of Journalists’ Rights in India.

⁵⁵ International Federation of Journalists, Written statement submitted to the UN Commission on Human Rights, 16 March–24 April 1998.

⁵⁶ International Federation of Journalists, Statement before the UN Commission on Human Rights, 20 March–28 April 2000; see also Written statement submitted to the UN Commission on Human Rights, 20 March–24 April 1998.

⁵⁷ Article 19, Press Release, Article 19 condemns conviction of investigative journalist, 27 July 2000.

59. According to the Committee to Protect Journalists, press coverage of armed conflict continues to provoke the hostility of governments and rebel factions alike and to claim the lives of reporters. In its annual survey on attacks on journalists in 2000, the Committee reported and denounced numerous cases of attacks, murder, unjustified imprisonment and intimidation carried out against journalists covering armed conflict.⁵⁸

60. According to Reporters Sans Frontières, armed conflict remains one of the main topics for which journalists are prosecuted or put under pressure. In its Annual Report 2001, the organisation reported and denounced numerous cases of attacks, murder, unjustified imprisonment and intimidation carried out against journalists covering armed conflict.⁵⁹

⁵⁸ Committee to Protect Journalists, *Attacks on the Press 2000*, New York, 2001.

⁵⁹ Reporters Sans Frontières, *Annual Report 2001: Press Freedom Worldwide*, Paris, 2001.

PROTECTED ZONES

A. Hospital and Safety Zones and Neutralised Zones (practice relating to Rule 35)	§§ 1–61
B. Demilitarised Zones (practice relating to Rule 36)	§§ 62–184
Establishment of demilitarised zones	§§ 62–102
Attacks on demilitarised zones	§§ 103–184
C. Open Towns and Non-Defended Localities (practice relating to Rule 37)	§§ 185–347
Establishment of open towns	§§ 185–201
Establishment of non-defended localities	§§ 202–226
Attacks on open towns and non-defended localities	§§ 227–347

A. Hospital and Safety Zones and Neutralised Zones*I. Treaties and Other Instruments**Treaties***1. Article 23 GC I provides that:**

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

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

2. Article 14, first paragraph, GC IV provides for the establishment of “hospital and safety zones and localities so organized as to protect from the effects of war, wounded, sick and aged persons, children under fifteen, expectant mothers and mothers of children under seven”.

3. Article 15 GC IV provides that:

Any Party to the conflict may, either direct or through a neutral State or some humanitarian organization, propose to the adverse Party to establish, in the regions where fighting is taking place, neutralized zones intended to shelter from the effects of war the following persons, without distinction:

- a) wounded and sick combatants or non-combatants;
- b) civilian persons who take no part in hostilities, and who, while they reside in the zones, perform no work of a military character.

When the Parties concerned have agreed upon the geographical position, administration, food supply and supervision of the proposed neutralized zone, a written agreement shall be concluded and signed by the representatives of the Parties to the conflict. The agreement shall fix the beginning and the duration of the neutralization of the zone.

Other Instruments

4. On the basis of the 1991 Memorandum of Understanding on the Application of IHL between Croatia and the SFRY, neutralised zones were established under ICRC supervision at the Franciscan Monastery and the New Hospital in Dubrovnik.

5. Articles 1, 2(1) and 4(1) of the 1991 Agreement between Croatia and the SFRY on a Protected Zone around the Hospital of Osijek declared the area around the Osijek hospital a protected zone placed under ICRC supervision according to the principles of Articles 23 GC I and 14–15 GC IV. The Agreement restricted access to the zone to the following categories of persons: sick and wounded civilian and military personnel; family members visiting patients recovering in the hospital; persons over 65 years of age, children under 15, expectant mothers and mothers of children under seven; and the hospital's medical and administrative personnel. Under Article 2(4) of the Agreement, "Parties to the agreement shall take every measure to ensure free entrance to and exit from the protected zone for the ICRC delegates and the local staff". Under Article 13, "the competent authorities . . . will . . . give all necessary collaboration to the ICRC and the staff in charge of administering the protected zone".

II. National Practice

Military Manuals

6. Argentina's Law of War Manual (1969) contains a provision regarding the establishment of hospital and safety zones in order to shelter from the effects of war the wounded, sick, disabled and aged, as well as children under 15 years old, pregnant women and mothers of children under 7 years of age. The manual makes reference to Article 14 GC IV.¹

¹ Argentina, *Law of War Manual* (1969), § 4.004.

7. Argentina's Law of War Manual (1989) provides for the possibility of setting up hospital and safety zones and refers to Article 14 GC IV. It further envisages, with reference to Article 15 GC IV, the possibility of creating neutralised zones in combat areas to shelter persons not, or no longer, taking part in military activities.²

8. Australia's Defence Force Manual states that "hospital and safety zones are established for the protection from the effects of war of the wounded, sick and aged persons, children under 15 years, expectant mothers and mothers of children under seven years . . . by agreement between the parties".³ The manual adds that:

Neutralised zones may be established in regions where fighting is taking place to shelter wounded and sick combatants or noncombatants and civilian persons who take no part in hostilities and who perform no work of a military character. The zones are set up by written agreement.⁴

9. Cameroon's Disciplinary Regulations provides that each soldier must respect "hospital zones and localities".⁵

10. Canada's LOAC Manual describes hospital and safety zones and neutralised zones as areas that are entitled to protection from attack under the laws of armed conflict.⁶ It states that "such zones also protect those personnel responsible for organizing and administrating the zones as well as those caring for the wounded and sick". Furthermore, the manual states that "hospital zones should be located in sparsely populated areas away from legitimate targets".⁷ The manual provides that hospital and safety zones can be established either in time of peace or after the outbreak of hostilities, and even in occupied areas if necessary.⁸ As regards neutralised zones, the manual states that:

Any party to a conflict may, either directly or through a neutral State or some humanitarian organization, propose to the adverse party to establish, in the regions where the fighting is taking place, neutralized zones intended to shelter from the effects of the conflict the following persons, without distinction: wounded and sick combatants or non-combatants, and civilian persons who take no part in hostilities and who, while they reside in the zones, perform no work of a military character.⁹

The manual further states that any agreement setting up a neutralised zone "should provide details of the location, administration, provisioning and supervision of the proposed neutralized zone as well as fix its beginning and duration".¹⁰

² Argentina, *Law of War Manual* (1989), § 4.05.

³ Australia, *Defence Force Manual* (1994), § 940; see also *Commanders' Guide* (1994), § 940.

⁴ Australia, *Defence Force Manual* (1994), § 941; see also *Commanders' Guide* (1994), § 941.

⁵ Cameroon, *Disciplinary Regulations* (1975), Article 31.

⁶ Canada, *LOAC Manual* (1999), pp. 4-10 and 4-11, §§ 102, 106 and 108.

⁷ Canada, *LOAC Manual* (1999), p. 11-2, § 14.

⁸ Canada, *LOAC Manual* (1999), p. 4-10, §§ 103-104.

⁹ Canada, *LOAC Manual* (1999), p. 4-10, § 107.

¹⁰ Canada, *LOAC Manual* (1999), p. 11-2, § 14.

11. Ecuador's Naval Manual states that "when established by agreement between belligerents, hospital zones and neutralized zones are immune from bombardment in accordance with the terms of the agreement concerned".¹¹

12. France's LOAC Teaching Note includes safety zones and neutralised zones among the areas specially protected by IHL. It states that these zones are established by agreement and may not be attacked.¹²

13. France's LOAC Manual notes that the laws of armed conflict afford a special protection to certain areas, among which are safety zones and neutralised zones. It states that safety zones are established by agreement between the belligerents in order to shelter wounded, sick, disabled or aged persons, children, expectant mothers and mothers of children under the age of seven; neutralised zones are set up by written agreement between the belligerents with the aim of sheltering the wounded and sick, as well as the civilian population located therein. The manual prohibits attacks against both types of zones.¹³

14. Germany's Military Manual provides that "hospital and safety zones and localities shall be established on mutual agreement so as to protect wounded, sick and aged persons, children, expectant mothers and mothers of children under seven from any attack".¹⁴ The manual further provides that grave breaches of IHL are in particular "launching attacks against... neutralized zones".¹⁵

15. Hungary's Military Manual instructs soldiers to respect hospital zones and localities. More generally, it provides that protected zones shall be respected and shall be taken over without combat.¹⁶ The manual also stresses the possibility of non-hostile contacts with the enemy, *inter alia*, for the creation of neutralised zones.¹⁷

16. Italy's LOAC Elementary Rules Manual states that "where protected zones or localities (hospital zones...) have been agreed upon, the competent commanders shall issue instructions for action and behaviour near and towards such zones or localities".¹⁸ The manual also provides that "protected zones shall be respected".¹⁹

17. Italy's IHL Manual qualifies "attacks on... hospital and safety zones which must be respected and protected at all times" as a war crime.²⁰

18. Kenya's LOAC Manual states that:

Hospital and safety zones may be set up in peacetime to contain hospitals, shelters for the wounded and sick, the old and infants, children under 15 years of age,

¹¹ Ecuador, *Naval Manual* (1989), § 8.5.1.3.

¹² France, *LOAC Teaching Note* (2000), p. 5.

¹³ France, *LOAC Manual* (2001), pp. 125–126.

¹⁴ Germany, *Military Manual* (1992), § 512, see also § 463.

¹⁵ Germany, *Military Manual* (1992), § 1209.

¹⁶ Hungary, *Military Manual* (1992), pp. 19 and 72.

¹⁷ Hungary, *Military Manual* (1992), p. 79.

¹⁸ Italy, *LOAC Elementary Rules Manual* (1991), § 47.

¹⁹ Italy, *LOAC Elementary Rules Manual* (1991), § 70.

²⁰ Italy, *IHL Manual* (1991), Vol. I, § 85.

expectant mothers and mothers with children under 7 years of age. Upon the outbreak and during the course of hostilities, the parties concerned may conclude agreements on mutual recognition of the zones and localities they have created.²¹

The manual further states that:

As an emergency measure, the commanders of the Parties to the conflict may establish, in the regions where fighting is taking place, neutralized zones intended to shelter from the effects of war the following persons, without distinction:

- (a) wounded and sick combatants or non-combatants;
- (b) civilian persons who take no part in hostilities and who, while they reside in the zones, perform no work of a military character.

To effect such a zone, a written agreement shall be concluded and signed by the representatives of the Parties to the conflict.²²

19. Madagascar's Military Manual states that the establishment of safety zones and protected zones is concluded by an agreement and that these zones should be respected.²³

20. The Military Manual of the Netherlands states that the protection offered to hospital and safety zones concerns "the wounded and sick, disabled and aged persons, children under 15 years, expectant mothers and mothers with children under 7 years" and specifies that "the rules governing hospital or safety zones must be laid down in an agreement between the parties to the conflict".²⁴ The manual also underlines the possibility for the parties to set up neutralised zones through a written agreement for the protection of "the wounded and sick, whether military or civilian, and civilians who neither take part in the hostilities nor carry out work of a military character".²⁵

21. New Zealand's Military Manual provides that:

A State may declare during peacetime that, in the event of armed conflict, a particular area shall be a safety or hospital zone for the protection of wounded, sick, the aged, expectant mothers and children. On the outbreak of hostilities, the combatants may agree to recognize such areas and zones as being immune from attack and outside the area of hostilities. After the commencement of the conflict, safety and hospital zones may be established in occupied territory as well.²⁶

In a section on "General measures for the protection of civilians", the manual reaffirms the possibility of setting up hospital and safety zones, stating that:

In time of peace or after the outbreak of hostilities, belligerents may establish such zones and localities . . . for the protection from the effects of war of wounded, sick and aged persons, children under fifteen, expectant mothers and mothers of children

²¹ Kenya, *LOAC Manual* (1997), Précis No. 4, p. 6.

²² Kenya, *LOAC Manual* (1997), Précis No. 4, p. 7.

²³ Madagascar, *Military Manual* (1994), Fiche No. 6-O, § 16 and Fiche No. 7-O, § 15.

²⁴ Netherlands, *Military Manual* (1993), p. V-17, § 15.

²⁵ Netherlands, *Military Manual* (1993), pp. V-17/V-18, § 16.

²⁶ New Zealand, *Military Manual* (1992), § 412(2).

under seven. Agreements may be concluded between the belligerents concerning mutual recognition of the zones and localities so created. To facilitate the institution and recognition of hospital and safety zones and localities recourse may be had to the good offices of the Protecting Powers and the International Committee of the Red Cross.²⁷

Concerning the establishment of neutralised zones, the manual states that an agreement is required. It adds that:

In the area of operations a neutralised zone may be set up for the protection of wounded and sick or other persons *hors de combat* as well as non-combatants taking no part in the hostilities or in activities of a military character. The area of the zone and its agreed duration should be detailed in the agreement.²⁸

22. Nigeria's Military Manual states that "preplanned protected zones are established by agreement between belligerent parties".²⁹

23. Senegal's IHL Manual provides for the possibility of establishing neutralised zones by agreement in order to provide protection, without discrimination, for the wounded and sick as well as for persons not taking a direct part in military operations and, while residing in the zone, not performing any activity connected with such operations.³⁰

24. Spain's LOAC Manual refers to Articles 23 GC I and 14 GC IV concerning hospital and safety zones and to Article 15 GC IV concerning neutralised zones.³¹ The manual states that hospital and safety zones, which are intended to shelter from the effects of war the wounded and sick, the old, children under 15 years of age, expectant mothers and mothers with children under 7 years of age, may be established by agreement between the parties to a conflict, and prohibits attacks on such areas. Equally prohibited are attacks against neutralised zones, which may be established by agreement in order to protect wounded and sick combatants and non-combatants, as well as civilians not taking any part in hostilities.³² The manual also stresses that, while hospital and safety zones can be set up in areas located outside the combat zone, neutralised zones are established in the regions where hostilities are taking place.³³

25. Sweden's IHL Manual provides for the possibility in peacetime of declaring, by special agreement, a given part of a State's territory a neutralised area. It explains that this means that "no acts of war whatsoever may be directed against or take place within that area. This restriction is intended to apply for the full duration of the conflict." It adds that:

²⁷ New Zealand, *Military Manual* (1992), § 1106.

²⁸ New Zealand, *Military Manual* (1992), § 412(3).

²⁹ Nigeria, *Military Manual* (1994), p. 43, § 14. ³⁰ Senegal, *IHL Manual* (1999), p. 20.

³¹ Spain, *LOAC Manual* (1996), Vol. I, §§ 1.3.e.(3)-(4) and 7.3.b.(5).

³² Spain, *LOAC Manual* (1996), Vol. I, § 4.5.b.(3)(b).

³³ Spain, *LOAC Manual* (1996), Vol. I, § 9.5.(a)-(b).

It is also possible for the parties to reach an agreement during a conflict that all acts of war shall cease temporarily within a given part of a conflict area. Such agreements are commonly made to afford protection to civilian populations, and specially to such exposed groups as children, old people, and the sick and the wounded.³⁴

The manual is guided by the rules embodied in Articles 23 GC I and 14–15 GC IV.³⁵

26. Switzerland's Military Manual states that it is forbidden for any troop member to enter hospital and safety zones and neutralised zones.³⁶

27. Switzerland's Basic Military Manual refers to Article 23 GC I and provides that "the belligerent parties may at any time establish, by agreement, hospital zones and localities in order to shelter the wounded and sick, military or civilian, together with the necessary personnel, from the effects of war".³⁷

28. The UK Military Manual provides for the possibility of establishing, by agreement between the parties before or after the outbreak of hostilities, hospital and safety zones and localities, either in occupied territory or in the territory of a belligerent.³⁸ It further allows any belligerent to propose to the opposing belligerent, either directly or through a neutral State or a humanitarian organisation, the establishment of neutralised zones in the area of combat, "to shelter from the effects of war wounded or sick combatants or non-combatants and civilian persons who take no part in the hostilities and who perform no work of a military character".³⁹

29. The UK LOAC Manual provides that "safety zones may be set up to contain hospitals, shelters for the wounded and sick, the old and infirm, children under 15 years of age, expectant mothers and mothers with children under 7 years of age".⁴⁰

30. The US Field Manual restates Articles 23 GC I and 14–15 GC IV and specifies that these agreements setting up hospital and safety zones and neutralised zones "may be concluded either by the governments concerned or by subordinate military commanders".⁴¹

31. The US Air Force Pamphlet states that:

The Geneva Conventions of 1949 provide for protected or safety zones established by agreement between the parties to the conflict. Safety zones established under the Geneva Conventions of 1949, or by other agreement among parties to a conflict, are immune from bombardment in accordance with the terms of the agreement.⁴²

32. The US Air Force Commander's Handbook, in a section entitled "Neutralized and Demilitarized Zones", provides that:

³⁴ Sweden, *IHL Manual* (1991), Section 3.4.1, p. 84.

³⁵ Sweden, *IHL Manual* (1991), Section 3.4.2, p. 84.

³⁶ Switzerland, *Military Manual* (1984), p. 18.

³⁷ Switzerland, *Basic Military Manual* (1987), Article 86.

³⁸ UK, *Military Manual* (1958), §§ 26 and 363.

³⁹ UK, *Military Manual* (1958), § 27. ⁴⁰ UK, *LOAC Manual* (1981), Section 9, p. 34, § 2.

⁴¹ US, *Field Manual* (1956), §§ 224 and 253. ⁴² US, *Air Force Pamphlet* (1976), § 5-5(b).

By agreement, the parties to a conflict may establish certain zones where civilians, the sick and wounded, or other noncombatants may gather to be safe from attack. A party to conflict cannot establish such a zone by itself; neutralized zones need only be respected if established by agreement between the parties, either in oral or written, or by parallel declarations. Such an agreement may be concluded either before or during hostilities.

United States forces need not respect such a zone unless the United States has agreed to respect it. Even in an unrecognized zone, of course, only legitimate military objectives . . . may be attacked.⁴³

33. The US Naval Handbook states that “when established by agreement between the belligerents, hospital zones and neutralized zones are immune from bombardment in accordance with the terms of the agreement concerned”.⁴⁴

34. The YPA Military Manual of the SFRY (FRY) contains provisions regarding the establishment of and respect for hospital and safety zones and neutralised zones, which mirror the relevant provisions of the Geneva Conventions.⁴⁵

National Legislation

35. Argentina’s Draft Code of Military Justice punishes any soldier who “wilfully violates the protection due to . . . hospital and safety zones and neutralised zones . . . which are properly marked”.⁴⁶

36. Under Colombia’s Penal Code, it is a war crime to attack or destroy, without imperative military necessity, “hospital zones . . . properly marked with the distinctive emblems of the red cross or red crescent”.⁴⁷

37. Italy’s Law of War Decree as amended provides that “a royal decree can establish rules to guarantee, on the basis of reciprocity, respect for and protection of towns or localities used exclusively by the medical services or for the protection of the civilian population”.⁴⁸

38. Under the Draft Amendments to the Penal Code of El Salvador, “anyone who, in the context of an international or non-international armed conflict, attacks or destroys . . . hospital zones, without having taken adequate measures of protection and without imperative military necessity” is punishable by imprisonment.⁴⁹

39. Nicaragua’s Draft Penal Code states that “whoever, in the circumstances of an international or internal armed conflict, without having previously taken appropriate measures of protection and without any justification based on

⁴³ US, *Air Force Commander’s Handbook* (1980), § 3-6(b).

⁴⁴ US, *Naval Handbook* (1995), § 8.5.1.5; see also § 8.6.2.2 (protected places and objects).

⁴⁵ SFRY (FRY), *YPA Military Manual* (1988), §§ 83–84.

⁴⁶ Argentina, *Draft Code of Military Justice* (1998), Article 292, introducing a new Article 876(2) in the *Code of Military Justice as amended* (1951).

⁴⁷ Colombia, *Penal Code* (2000), Article 155.

⁴⁸ Italy, *Law of War Decree as amended* (1938), Article 46.

⁴⁹ El Salvador, *Draft Amendments to the Penal Code* (1998), Article entitled “Destrucción de bienes e instalaciones de carácter sanitario”.

imperative military necessity, attacks or destroys sanitary . . . zones" commits a punishable "offence against international law".⁵⁰

40. Poland's Penal Code provides for the punishment of "any person who, during hostilities, attacks a . . . neutralized zone".⁵¹

41. Spain's Penal Code provides for the punishment of "anyone who, in the event of armed conflict, should . . . knowingly violate the protection due to . . . health and security areas [and/or] neutralised areas . . . which are duly identified with signs or the appropriate distinctive signals".⁵²

National Case-law

42. No practice was found.

Other National Practice

43. According to the Report on the Practice of Egypt, "Egypt thinks that protection of . . . demilitarized zones . . . consists in refraining from launching attacks against . . . these areas", which implies that "attacks against such places are prohibited".⁵³

44. According to the Report on the Practice of France, France has consistently upheld the general principle of protection of safety zones, the principle implying that it is prohibited to launch attacks or bombardments against these zones. The report notes that France was the initiator of the concept of safety zones.⁵⁴

45. During the war in the South Atlantic, at the UK's suggestion, and without any special agreement in writing, the parties to the conflict established a neutral zone at sea. This zone, called the Red Cross Box, with a diameter of approximately 20 nautical miles, was located on the high seas to the north of the islands. Without hampering military operations, it enabled hospital ships to hold position and exchange British and Argentine wounded.⁵⁵

46. According to the Report on the Practice of the SFRY (FRY), "the *opinio iuris* and the customary nature of rules relevant to the establishment of neutralised zones in the FRY is absolutely clear".⁵⁶

III. Practice of International Organisations and Conferences

United Nations

47. In 1970, the UN General Assembly, "bearing in mind the need for measures to ensure the better protection of human rights in armed conflicts of all

⁵⁰ Nicaragua, *Draft Penal Code* (1999), Article 468.

⁵¹ Poland, *Penal Code* (1997), Article 122(1).

⁵² Spain, *Penal Code* (1995), Article 612(1).

⁵³ Report on the Practice of Egypt, 1997, Chapter 1.8.

⁵⁴ Report on the Practice of France, 1998, Chapter 1.8.

⁵⁵ Sylvie S. Junod, *Protection of the Victims of Armed Conflict: Falkland-Malvinas Islands (1982): International Humanitarian Law and Humanitarian Action*, ICRC, Geneva, 2nd edition, December 1985, pp. 23–24, and 26.

⁵⁶ Report on the Practice of the SFRY (FRY), 1997, Chapter 1.8.

types", adopted Resolution 2675 (XXV) in which it stated that "places or areas designated for the sole protection of civilians, such as hospital zones or similar refuges, should not be the object of military operations".⁵⁷

Other International Organisations

48. In 1995, the Council of Europe's Commission of Inquiry for the conflict in Chechnya commented on UN General Assembly Resolution 2675 (XXV) relative to the protection of civilian medical establishments, saying that it did not make any distinction between international and non-international conflicts. The Commission recalled the Geneva Conventions and the UN General Assembly resolutions on the protection of civilian populations in times of armed conflict, and emphasised that one of the basic principles of the protection of civilian populations was that "places or areas designated for the sole protection of civilians, such as hospital zones or similar refuges, should not be the object of military operations".⁵⁸

International Conferences

49. The 25th International Conference of the Red Cross in 1986 adopted a resolution on the protection of the civilian population in armed conflicts which "encourages an expanded use of protective zones in all armed conflicts".⁵⁹

50. The Plan of Action for the years 2000–2003 adopted in 1999 by the 27th International Conference of the Red Cross and Red Crescent proposed that all the parties to an armed conflict take effective measures to ensure that:

an attempt is made whenever possible to enhance the safety of protected persons, and in the framework of international humanitarian law or the United Nations Charter, to create a humanitarian space through the establishment of safety zones, humanitarian corridors, and other forms of special protection for civilian populations and other persons protected under international humanitarian law.⁶⁰

IV. Practice of International Judicial and Quasi-judicial Bodies

51. No practice was found.

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

52. To fulfil its task of disseminating IHL, the ICRC has delegates around the world teaching armed and security forces that "preplanned protected zones

⁵⁷ UN General Assembly, Res. 2675 (XXV), 9 December 1970, preamble and § 7.

⁵⁸ Council of Europe, Commission of Inquiry for the conflict in Chechnya, Opinion, Doc. 7231, 2 February 1995, pp. 3–4.

⁵⁹ 25th International Conference of the Red Cross, Geneva, 23–31 October 1986, Res. VIII, § 5.

⁶⁰ 27th International Conference of the Red Cross and Red Crescent, Geneva, 31 October–6 November 1999, Res. I, Annex 2, Plan of Action for the years 2000–2003, Actions proposed for final goal 1.1, § 1(h).

are established by agreement between belligerent Parties . . . [including] hospital zones and localities". They specify that "this term includes in practice also the 'safety zones and localities'".⁶¹

53. During Bangladesh's war of independence, three neutralised zones were established in a college, a hospital and the Sheraton Hotel. These zones, all administered by the ICRC, were respected.⁶²

54. During the Vietnam War in 1975, the headquarters of the Vietnamese Red Cross and a neighbouring building in Saigon were declared neutralised zones by the ICRC. They gave shelter to the wounded and sick, the disabled, orphans and lost children.⁶³

55. In 1975, in Nicosia (Cyprus), more than 2,000 civilians found shelter in three neutralised zones administered by the ICRC.⁶⁴

56. In 1975, the ICRC had a neutralised zone set up in Phnom Penh (Cambodia) during the final battle for the city. Around 2,000 foreign nationals were allowed to take refuge in Le Phnom hotel, where the agreed zone was located and respected.⁶⁵

57. In 1990, the ICRC issued a press release concerning the creation of a hospital zone around the premises of the Jaffna Hospital in Sri Lanka. The ICRC communicated the rules concerning the establishment of the hospital zone to both the Sri Lankan government and the LTTE and stated that they were to be implemented as of 6 November 1990. The rules were as follows:

The premises of Jaffna Hospital are placed under ICRC protection. They will be regarded by the Parties as a *Hospital zone*:

- the compound will be clearly marked with red crosses for easy identification from the ground and the air;
- no armed personnel will be allowed within the compound;
- no military vehicle will be stationed at the entrance of the hospital compound;
- no vehicle other than those of the hospital, the Sri Lanka Red Cross and the ICRC will be admitted into the compound.

⁶¹ Frédéric de Mulinen, *Handbook on the Law of War for Armed Forces*, ICRC, Geneva, 1987, § 418 and footnote.

⁶² Yves Sandoz, "The Establishment of Safety Zones for Persons Displaced Within Their Country of Origin", in Najeeb Al-Nauimi and Richard Meese (eds.), *International Legal Issues Arising Under the United Nations Decade of International Law*, Martinus Nijhoff, The Hague, 1995, p. 909.

⁶³ Yves Sandoz, "The Establishment of Safety Zones for Persons Displaced Within Their Country of Origin", in Najeeb Al-Nauimi and Richard Meese (eds.), *International Legal Issues Arising Under the United Nations Decade of International Law*, Martinus Nijhoff, The Hague, 1995, p. 910.

⁶⁴ Yves Sandoz, "The Establishment of Safety Zones for Persons Displaced Within Their Country of Origin", in Najeeb Al-Nauimi and Richard Meese (eds.), *International Legal Issues Arising Under the United Nations Decade of International Law*, Martinus Nijhoff, The Hague, 1995, pp. 909–910.

⁶⁵ Yves Sandoz, "The Establishment of Safety Zones for Persons Displaced Within Their Country of Origin", in Najeeb Al-Nauimi and Richard Meese (eds.), *International Legal Issues Arising Under the United Nations Decade of International Law*, Martinus Nijhoff, The Hague, 1995, pp. 910–911.

Around the Hospital, a safety area is established. The rules governing this safety area (which includes the hospital compound) are:

- the area will be clearly marked in such a way that it can be easily identified both from the ground and from the air;
- the area will remain void of any military or political installation;
- no military action will be undertaken either from or against the safety area;
- no military base, installation or position of any kind will be established or maintained within the area;
- no military personnel will be stationed and no military equipment will be stored at any time within the said area;
- no weapon will be activated from outside the safety area against persons or buildings within the safety area.

In cases of severe or persistent violation of these rules, the ICRC may unilaterally withdraw its protection of the hospital.⁶⁶

58. In 1992, in a position paper on the establishment of protected zones for endangered civilians in Bosnia and Herzegovina, the ICRC outlined the conditions that would need to be met in order for such zones to be established in the region. These conditions were:

- The protected zone(s) must meet appropriate hygiene standards.
- The protected zone(s) must be in an area where the necessary protection may be assumed.
- The international responsibility for such zone(s) must be clearly established.
- The parties concerned must give their agreement to the concept and to the location of the protected zone(s).
- Duly mandated international troops, such as UNPROFOR, must assure the internal and external security of this zone(s), as well as for part of the logistics.
- International organizations must help with the entire installation of the zone(s) – housing, shelter, heating, sanitation – and with the logistics. In addition, the organizations involved must take responsibility for the food deliveries, the cooking and the medical services.

The ICRC is willing and ready to offer its services to help with the establishment and running of such zones.⁶⁷

59. During the conflict in the former Yugoslavia, the ICRC organised meetings between the parties to the conflict with a view, *inter alia*, to establishing protected zones to afford special protection for the sick and wounded and other particularly vulnerable groups of non-combatants. As a result of the talks, the hospital and the Franciscan convent in Dubrovnik and the Osijek hospital were declared protected zones between mid-December 1991 and early January 1992. The parties agreed to place such zones under ICRC supervision.⁶⁸

⁶⁶ ICRC, Press Release, ICRC Colombo, 6 November 1990.

⁶⁷ ICRC, Position Paper on the Establishment of Protected Zones for Endangered Civilians in Bosnia-Herzegovina, 30 October 1992, quoted in Marco Sassòli and Antoine A. Bouvier, *How Does Law Protect in War?*, ICRC, Geneva, 1999, pp. 1127–1129.

⁶⁸ ICRC, Communication to the Press No. 92/1, Conflict in Yugoslavia. Review of ICRC activities, 2 January 1992.

60. In a communication to the press issued in 1992, the ICRC condemned a number of incidents that had occurred within the protected zone of Osijek hospital and strongly urged the parties to the conflict to take all necessary measures to ensure respect for the protected zone, which could not be the object of attack in any circumstances.⁶⁹

VI. Other Practice

61. No practice was found.

B. Demilitarised Zones

Establishment of demilitarised zones

I. Treaties and Other Instruments

Treaties

62. Under paragraph D of the 1949 Karachi Agreement, India and Pakistan agreed that “no troops shall be stationed from south of Minimarg to the cease-fire line”.

63. Article I(6) and (10) of the 1953 Panmunjom Armistice Agreement stipulates that neither side shall execute any hostile act within, from, or against the established demilitarised zone and that the total number of military personnel from each side allowed to enter the zone cannot exceed 1,000 persons at one time under any circumstance.

64. The 1974 Disengagement Agreement between Israel and Syria created a demilitarised zone on the Syrian side of the Golan Heights. This agreement is subject to international supervision.

65. Article 60 AP I provides that:

2. The agreement [to establish a demilitarized zone] shall be an express agreement, may be concluded verbally or in writing, either directly or through a Protecting Power or any impartial humanitarian organization, and may consist of reciprocal and concordant declarations. The agreement may be concluded in peacetime, as well as after the outbreak of hostilities, and should define and describe, as precisely as possible, the limits of the demilitarized zone and, if necessary, lay down the methods of supervision.
3. The subject of such an agreement shall normally be any zone which fulfils the following conditions:
 - a) all combatants, as well as mobile weapons and mobile military equipment, must have been evacuated;
 - b) no hostile use shall be made of fixed military installations or establishments;

⁶⁹ ICRC, Communication to the Press No. 92/7, Yugoslavia: Dialogue continues as plenipotentiaries meet in Geneva, 27 March 1992; Press Release No. 1710, Yugoslavia: New attack on Osijek hospital, 24 April 1992.

- c) no acts of hostility shall be committed by the authorities or by the population; and
- d) any activity linked to the military effort must have ceased.

The Parties to the conflict shall agree upon the interpretation to be given to the conditions laid down in sub-paragraph d) and upon persons to be admitted to the demilitarized zone other than those mentioned in paragraph 4.

4. The presence, in this zone, of persons specially protected under the Conventions and this Protocol, and of police forces retained for the sole purpose of maintaining law and order, is not contrary to the conditions laid down in paragraph 3.

Article 60 AP I was adopted by consensus.⁷⁰

66. The 1979 Peace Treaty between Israel and Egypt created a demilitarised zone in the Sinai, subject to international supervision. Egyptian civilian police are allowed to operate in the demilitarised zone set up pursuant to the agreement.

Other Instruments

67. Article 3 of the 1993 Agreement on Demilitarisation of Srebrenica and Žepa provided that every military or paramilitary unit should either withdraw from the demilitarised zones or hand over their weapons. Under Article 5, ammunition, mines, explosives and combat supplies in the demilitarised zones were to be handed over to UNPROFOR, under whose control the demilitarised zones were placed.

II. National Practice

Military Manuals

68. Argentina's Law of War Manual provides for the possibility of establishing demilitarised zones and refers to the conditions set out for this purpose in Article 60 AP I.⁷¹

69. Australia's Defence Force Manual states that:

Demilitarised zones are areas in which, by express agreement between the parties to the conflict, military operations are not conducted. The aim of these zones is common to that of non-defended localities. The differences between the two areas relate to how they are established and their situation. A non-defended locality may be created by unilateral declaration, whereas a demilitarised zone is created by express agreement between the parties. From the commander's point of view, protection granted to each zone is identical. Therefore, as long as sufficient notice is given of the zones and they are adequately marked, they are protected from attack.⁷²

70. Cameroon's Instructors' Manual, while defining demilitarised zones as zones where all military activities have ceased, states that conditions regarding

⁷⁰ CDDH, *Official Records*, Vol. VI, CDDH/SR.42, 27 May 1977, p. 215.

⁷¹ Argentina, *Law of War Manual* (1989), § 4.06.

⁷² Australia, *Defence Force Manual* (1994), § 737.

demilitarised zones are established by an express agreement between the belligerents.⁷³

71. Canada's LOAC Manual requires an agreement between the parties to a conflict in order to establish a demilitarised zone. According to the manual, the conditions that must normally be satisfied by a demilitarised zone are the same as those listed in Article 60(3) AP I.⁷⁴

72. Croatia's LOAC Compendium states that the following are not allowed in a demilitarised zone: a) the presence of combatants; b) the presence of mobile weapons; c) the presence of mobile military equipment; d) any act of hostility; and e) any activity related to the conduct of military operations.⁷⁵

73. Germany's Military Manual states that:

The prerequisites for establishing [a demilitarized zone] are equal to those applying to non-defended localities (Article 59 para. 2, 60 para. 3 AP I). Demilitarized zones are created by an agreement concluded between the parties to the conflict either in peacetime or in case of conflict. It is prohibited for each party to the conflict to attack or occupy such zones (Article 60 para 1 AP I).⁷⁶

74. Hungary's Military Manual states that the establishment of a demilitarised zone requires that there are "no combatants; no mobile weapons; no mobile military equipment; no hostile acts; no activity linked to the military effort".⁷⁷

75. Kenya's LOAC Manual, in a section entitled "Demilitarized Zones" states that:

These specific protected zones which are open to all non-combatants are regulated by an express agreement concluded verbally or in writing between the two Parties to the conflict. Such an agreement may be concluded in peacetime as well as after the outbreak of hostilities.

The conditions to be fulfilled by both demilitarized zones and non-defended localities are the same in practice. They are:

- a) that all combatants as well as mobile weapons and mobile military equipment must be evacuated;
- b) that no hostile use shall be made of fixed military installations or establishments;
- c) that no acts of hostility shall be committed by the authorities or by the population; and
- d) that any activity linked to the military effort must cease.⁷⁸

76. Madagascar's Military Manual provides that the term "demilitarised zone" means a zone from which all combatants as well as all mobile weapons and military material have been evacuated, and in which fixed military establishments are not used for harmful purposes, no hostile act can be committed by

⁷³ Cameroon, *Instructors' Manual* (1992), p. 20, § 227.

⁷⁴ Canada, *LOAC Manual* (1999), p. 4-11, §§ 115-116.

⁷⁵ Croatia, *LOAC Compendium* (1991), p. 11.

⁷⁶ Germany, *Military Manual* (1992), § 461.

⁷⁷ Hungary, *Military Manual* (1992), p. 23.

⁷⁸ Kenya, *LOAC Manual* (1997), Précis No. 4, pp. 6-7.

the authorities and the population, and all activities linked to the military effort have ceased. It states that demilitarised zones are created by agreement between the parties concerned.⁷⁹

77. The Military Manual of the Netherlands describes the establishment of demilitarised zones on the basis of Article 60 AP I.⁸⁰

78. New Zealand's Military Manual provides that "the parties to a conflict may agree that a particular area shall constitute a demilitarised zone, in which case military operations may only be carried on in that area to the extent permitted by the agreement". With respect to the rules and the procedure to be adopted in relation to the establishment of demilitarised zones, the manual refers to Article 60 AP I. It also notes that agreements establishing the zones may be oral or in writing, may be arranged either directly or through the medium of a protecting power or any impartial humanitarian organisation or may also arise by way of reciprocal and concordant declarations.⁸¹

79. Nigeria's Military Manual notes that preplanned protected zones, including demilitarised zones, are established by agreement between belligerent parties or can be internationally recognised.⁸²

80. Spain's LOAC Manual notes that demilitarised zones are areas established by an agreement between the belligerents and designed to protect especially vulnerable sectors of the population from the effects of war. The manual refers to Article 60 AP I.⁸³

81. Sweden's IHL Manual refers to Article 60 AP I as embodying "new provisions" on demilitarised zones. It stresses that, unlike non-defended localities, demilitarised zones cannot be established merely through a unilateral declaration; an agreement between the parties, made either before or during a conflict, is necessary. The manual adds that:

Article 60 does not only imply prohibition of the setting-up of fixed defence establishments within [a demilitarised area]... [I]t is also prohibited to undertake military operations within the zone – always provided that the parties do not decide otherwise. A demilitarised zone shall not be open to occupation by the adversary, as in the case with non-defended localities.

The manual recalls that "the conditions required for a [demilitarised] area are the same as for non-defended localities", with the only difference that the condition relating to activity supporting military operations "has been extended to apply to any activity connected with the military".⁸⁴

82. Switzerland's Basic Military Manual states, with reference to Article 60 AP I, that demilitarised zones can be established by military commanders of

⁷⁹ Madagascar, *Military Manual* (1994), Fiche No. 3-SO, § I.

⁸⁰ Netherlands, *Military Manual* (1993), p. V-16/V-17, § 14.

⁸¹ New Zealand, *Military Manual* (1992), § 412(4).

⁸² Nigeria, *Military Manual* (1994), p. 43, § 14.

⁸³ Spain, *LOAC Manual* (1996), Vol. I, §§ 1.3.e.(2) and 7.3.b.(5).

⁸⁴ Sweden, *IHL Manual* (1991), Section 3.4.3, pp. 87–88.

the parties to the conflict.⁸⁵ It points out that demilitarised zones, as well as non-defended localities, may be established through specific reciprocal declarations and that a unilateral declaration is not sufficient to create them.⁸⁶ The conditions for the setting-up of a demilitarised zone are the same as for non-defended localities, namely: all combatants as well as mobile weapons and military equipment must be evacuated; no hostile use shall be made of fixed military installations or establishments; no acts of hostility shall be committed by the authorities or by the population; any activity in support of the military effort must cease; and the zone must be marked by distinctive signs.⁸⁷

83. The US Air Force Pamphlet states that “both the 1923 Draft Hague Rules [of Air Warfare] and the 1949 Geneva Conventions recognize the right of states, by agreement, to create safety zones or demilitarized zones”.⁸⁸

84. The US Air Force Commander’s Handbook, in a section entitled “Neutralized and Demilitarized Zones”, provides that:

By agreement, the parties to a conflict may establish certain zones where civilians, the sick and wounded, or other noncombatants may gather to be safe from attack.

A party to conflict cannot establish such a zone by itself; neutralized zones need only be respected if established by agreement between the parties, either in oral or written, or by parallel declarations. Such an agreement may be concluded either before or during hostilities.

United States forces need not respect such a zone unless the United States has agreed to respect it. Even in an unrecognized zone, of course, only legitimate military objectives . . . may be attacked.⁸⁹

85. The YPA Military Manual of the SFRY (FRY) contains provisions regarding the establishment of demilitarised zones, which mirror the conditions prescribed by AP I.⁹⁰

National Legislation

86. The Draft Amendments to the Penal Code of El Salvador define demilitarised zones in accordance with Article 60(3) AP I.⁹¹

87. Nicaragua’s Draft Penal Code defines demilitarised zones in accordance with Article 60(3) AP I.⁹²

National Case-law

88. No practice was found.

⁸⁵ Switzerland, *Basic Military Manual* (1987), Article 12(2).

⁸⁶ Switzerland, *Basic Military Manual* (1987), Article 32(2) and (4).

⁸⁷ Switzerland, *Basic Military Manual* (1987), Article 32(2).

⁸⁸ US, *Air Force Pamphlet* (1976), § 5-4(c).

⁸⁹ US, *Air Force Commander’s Handbook* (1980), § 3-6(b).

⁹⁰ SFRY (FRY), *YPA Military Manual* (1988), § 78.

⁹¹ El Salvador, *Draft Amendments to the Penal Code* (1998), Article entitled “Ataque a zonas desmilitarizadas”.

⁹² Nicaragua, *Draft Penal Code* (1999), Article 467(2).

Other National Practice

89. The Report on the Practice of Colombia notes that the government has ordered the demilitarisation of certain regions of the country in order to enable a constructive dialogue to be developed concerning the demobilisation and reintegration of armed opposition groups. Another purpose of these zones is to carry out humanitarian operations, such as the release of persons deprived of freedom.⁹³

90. According to the Report on the Practice of Kuwait, the Kuwaiti government considers that military troops or their materiel are barred from entering the demilitarised zone in northern Kuwait. This protection is ensured by representatives of the Ministry of the Interior, who are not allowed to enter the area with high-calibre weapons. Allegations of violations by the Iraqi party must be transmitted to UNIKOM for appropriate action.⁹⁴

91. The Act Establishing the Demilitarized Zone, annexed to the 1990 Effective and Definitive Cease-fire Agreement between the Government of the Republic of Nicaragua and the Nicaraguan Resistance, provides that "in the demilitarized zone, there shall be no artillery, no offensive troops of any kind, no militia and no paramilitary or security forces" and that "the police of the villages situated within the demilitarized zone shall be disarmed".⁹⁵

92. The Report on US Practice considers that US *opinio juris* generally conforms to the rules and conditions prescribed in Article 60 AP I.⁹⁶

93. According to the Report on the Practice of the SFRY (FRY), "the *opinio iuris* and the customary nature of rules relevant to the establishment of demilitarised zones in the FRY is absolutely clear".⁹⁷

*III. Practice of International Organisations and Conferences**United Nations*

94. In 1994, in a statement by its President concerning the conflict in Croatia, the UN Security Council denounced the continuing violation of the demilitarised status of Prevlaka. Referring, *inter alia*, to the movement of heavy weapons and of Croatian special police and the entry of a navy missile boat of the SFRY into the demilitarised zone, the Security Council underlined its concern in this regard and called upon the parties to cease such violations.⁹⁸

⁹³ Report on the Practice of Colombia, 1998, Chapter 1.8.

⁹⁴ Report on the Practice of Kuwait, 1997, Chapter 1.8.

⁹⁵ Nicaragua, Act Establishing the Demilitarized Zone, Effective and Definitive Cease-fire Agreement between the Government of the Republic of Nicaragua and the Nicaraguan Resistance, annexed to Note verbale dated 23 April to the UN Secretary-General, UN Doc. A/44/941-S/21272, 25 April 1990, Annex II, pp. 8–9, §§ 2 and 4.

⁹⁶ Report on US Practice, 1997, Chapter 1.8.

⁹⁷ Report on the Practice of the SFRY (FRY), 1997, Chapter 1.8.

⁹⁸ UN Security Council, Statement by the President, UN Doc. S/PRST/1997/23, 25 April 1997.

95. In a report in 1990, the UN Secretary-General referred to complaints made to ONUCA by leaders of the Nicaraguan resistance concerning the continued presence of armed civilians and militia personnel in some of the demilitarised zones.⁹⁹

96. In a report concerning UNIKOM in 1997, the UN Secretary-General denounced a number of violations in the demilitarised zone on the Iraq–Kuwait border. He noted that 10 of the 14 ground violations were related to the presence of military and armed personnel in this zone. Insofar as air violations were concerned, they involved overflights by aircraft of types used by the coalition forces.¹⁰⁰

97. In a 1998 report regarding UNCRO in Croatia, whose mandate included the demilitarisation of the Prevlaka peninsula, the UN Secretary-General considered the presence of Yugoslav troops in the north-western part of the demilitarised zone as the most significant long-standing violation in this area.¹⁰¹

Other International Organisations

98. No practice was found.

International Conferences

99. No practice was found.

IV. Practice of International Judicial and Quasi-judicial Bodies

100. No practice was found.

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

101. To fulfil its task of disseminating IHL, the ICRC has delegates around the world teaching armed and security forces that “preplanned protected zones are established by agreement between belligerent Parties...[including]... demilitarized zones”.¹⁰²

VI. Other Practice

102. No practice was found.

⁹⁹ UN Secretary-General, Report on ONUCA, UN Doc. S/21341, 4 June 1990, § 2.

¹⁰⁰ UN Secretary-General, Report on UNIKOM, UN Doc. S/1997/255, 26 March 1997, § 4.

¹⁰¹ UN Secretary-General, Report on the UN Observer Mission in Prevlaka, UN Doc. S/1998/578, 26 June 1998, § 5.

¹⁰² Frédéric de Mulinen, *Handbook on the Law of War for Armed Forces*, ICRC, Geneva, 1987, § 418.

Attacks on demilitarised zones

I. Treaties and Other Instruments

Treaties

103. Article I(6) of the 1953 Panmunjon Armistice Agreement provides that “neither side shall execute any hostile act . . . against the demilitarised zone”.

104. Article 60(1) AP I provides that “it is prohibited for the Parties to the conflict to extend their military operations to zones on which they have conferred by agreement the status of demilitarized zone, if such extension is contrary to the terms of this agreement”.

105. Article 60(7) AP I provides that:

If one of the Parties to the conflict commits a material breach of the provisions of paragraphs 3 or 6 [concerning the conditions to be fulfilled by a zone to be established as a demilitarized zone and the prohibition to use the zone for purposes related to the conduct of military operations], the other Party shall be released from its obligations under the agreement conferring upon the zone the status of demilitarized zone. In such an eventuality, the zone loses its status but shall continue to enjoy the protection provided by the other provisions of this Protocol and the other rules of international law applicable in armed conflict.

Article 60 AP I was adopted by consensus.¹⁰³

106. Under Article 85(3)(d) AP I, “making . . . demilitarized zones the object of attack” is a grave breach of the Protocol. Article 85 AP I was adopted by consensus.¹⁰⁴

Other Instruments

107. Pursuant to Article 20(e)(iii) of the 1996 ILC Draft Code of Crimes against the Peace and Security of Mankind, “attack, or bombardment, by whatever means, of . . . demilitarized zones” is a war crime.

II. National Practice

Military Manuals

108. Argentina’s Law of War Manual prohibits attacks on demilitarised zones by any means whatsoever and states that the prohibition of such attacks subsists only as long as such zones comply with the conditions set out in Article 60 AP I.¹⁰⁵ It further qualifies attacks against demilitarised zones as grave breaches of IHL.¹⁰⁶

¹⁰³ CDDH, *Official Records*, Vol. VI, CDDH/SR.42, 27 May 1977, p. 215.

¹⁰⁴ CDDH, *Official Records*, Vol. VI, CDDH/SR.44, 30 May 1977, p. 291.

¹⁰⁵ Argentina, *Law of War Manual* (1989), § 4.06.

¹⁰⁶ Argentina, *Law of War Manual* (1989), § 8.03.

109. Australia's Defence Force Manual states that "generally, demilitarised zones are protected from attack".¹⁰⁷ It further provides that "making... demilitarised zones the object of attack" constitutes a grave breach or a serious war crime likely to warrant institution of criminal proceedings.¹⁰⁸

110. Benin's Military Manual prohibits attacks on demilitarised zones.¹⁰⁹

111. Cameroon's Instructors' Manual mentions the duty to avoid hostilities from the air over demilitarised zones and emphasises that, while these zones cannot be made the object of an attack, it is also prohibited to launch an attack from a demilitarised zone.¹¹⁰

112. Canada's LOAC Manual states that "it is prohibited for parties to a conflict to conduct military operations in or to attack an area that they have agreed to treat as a demilitarized zone".¹¹¹ It further states that an area loses its status as a demilitarised zone if used "for purposes related to the conduct of military operations where it has agreed not to do so".¹¹² The manual considers that "making... demilitarized zones the object of attack" constitutes a grave breach of AP I.¹¹³

113. Croatia's Commanders' Manual imposes a duty to issue appropriate instructions when military activities are conducted near demilitarised zones, in order to ensure the protection of such zones.¹¹⁴

114. Ecuador's Naval Manual provides that demilitarised zones established by agreement must not be attacked.¹¹⁵

115. In prohibiting attacks against demilitarised areas, France's LOAC Manual is guided by Article 60(1) AP I.¹¹⁶

116. Germany's Military Manual provides that "it is prohibited for each party to the conflict to attack or occupy [demilitarized] zones".¹¹⁷ It points out that, if one of the parties to the conflict breaches the provisions concerning the conditions for the establishment of demilitarised zones, the zone in question will lose its special protection".¹¹⁸ The manual further provides that grave breaches of IHL are in particular "launching attacks against... demilitarized zones".¹¹⁹

117. Hungary's Military Manual states that "commanders shall issue orders and/or instructions to regulate behaviour in the vicinity of protected zones".¹²⁰

¹⁰⁷ Australia, *Defence Force Manual* (1994), § 943, see also § 737 and *Commanders' Guide* (1994), § 928.

¹⁰⁸ Australia, *Defence Force Manual* (1994), § 1315(k); see also *Commander's Guide* (1994), § 1305(k).

¹⁰⁹ Benin, *Military Manual* (1995), Fascicule III, p. 12.

¹¹⁰ Cameroon, *Instructors' Manual* (1992), p. 113, § 423(1).

¹¹¹ Canada, *LOAC Manual* (1999), p. 4-11, § 115.

¹¹² Canada, *LOAC Manual* (1999), p. 4-11, § 118(b).

¹¹³ Canada, *LOAC Manual* (1999), p. 16-3, § 16(d).

¹¹⁴ Croatia, *Commanders' Manual* (1992), Article 48.

¹¹⁵ Ecuador, *Naval Manual* (1989), § 8.5.1.3. ¹¹⁶ France, *LOAC Manual* (2001), p. 125.

¹¹⁷ Germany, *Military Manual* (1992), § 461. ¹¹⁸ Germany, *Military Manual* (1992), § 462.

¹¹⁹ Germany, *Military Manual* (1992), § 1209.

¹²⁰ Hungary, *Military Manual* (1992), p. 65.

It further states that such zones “shall be respected and be taken over without combat”.¹²¹

118. Italy’s LOAC Elementary Rules Manual states that “where protected zones or localities (. . . demilitarised zones . . .) have been agreed upon, the competent commanders shall issue instructions for action and behaviour near and towards such zones or localities”.¹²² The manual also provides that “protected zones shall be respected”.¹²³

119. Italy’s IHL Manual qualifies “indiscriminate attacks against . . . demilitarised zones” as war crimes.¹²⁴

120. According to Kenya’s LOAC Manual, demilitarised zones are protected from “attack and military operations”.¹²⁵

121. The Military Manual of the Netherlands states that “the parties to the conflict are prohibited from extending their military operations to demilitarised zones” and provides that “attacking . . . demilitarised zones” in violation of IHL constitutes a grave breach.¹²⁶

122. New Zealand’s Military Manual states that:

Any material breach of [the conditions for a zone to be established as a demilitarised zone] releases the other Party from its obligations under the agreement and the zone loses its special status. It shall, however, continue to enjoy the normal protection provided by the customary and treaty law of armed conflict.¹²⁷

The manual further states that “making . . . demilitarized zones the object of attack” constitutes a grave breach of AP I.¹²⁸

123. Nigeria’s Military Manual states that “preplanned protected zones are established by agreement between belligerent parties . . . [including] demilitarised zones”.¹²⁹

124. South Africa’s LOAC Manual qualifies attacks against demilitarised zones as grave breaches of AP I.¹³⁰

125. According to Spain’s LOAC Manual, demilitarised zones are areas in which military operations may not be carried out and against which attacks are prohibited. The manual refers to Article 60 AP I.¹³¹ The manual further states that “launching an attack against demilitarised zones” constitutes a war crime.¹³²

126. Switzerland’s Basic Military Manual prohibits attacks on demilitarised zones by any means.¹³³ It considers that demilitarised zones lose their protected

¹²¹ Hungary, *Military Manual* (1992), p. 72.

¹²² Italy, *LOAC Elementary Rules Manual* (1991), § 47.

¹²³ Italy, *LOAC Elementary Rules Manual* (1991), § 70.

¹²⁴ Italy, *IHL Manual* (1991), Vol. I, § 85.

¹²⁵ Kenya, *LOAC Manual* (1997), Précis No. 2, p. 13.

¹²⁶ Netherlands, *Military Manual* (1993), p. V-16, § 14 and p. IX-5.

¹²⁷ New Zealand, *Military Manual* (1992), § 412(5).

¹²⁸ New Zealand, *Military Manual* (1992), § 1703(3)(d).

¹²⁹ Nigeria, *Military Manual* (1994), p. 43, § 14. ¹³⁰ South Africa, *LOAC Manual* (1996), § 41.

¹³¹ Spain, *LOAC Manual* (1996), Vol. I, §§ 4.5.b.(3)(b) and 7.3.b.(5).

¹³² Spain, *LOAC Manual* (1996), Vol. I, § 11.8.b.(1).

¹³³ Switzerland, *Basic Military Manual* (1987), Article 32(1).

status as soon as they are improperly used for military purposes.¹³⁴ The manual further provides that “launching an attack against . . . demilitarised zones” constitutes a grave breach of AP I.¹³⁵

127. Togo’s Military Manual prohibits attacks on demilitarised zones.¹³⁶

128. The US Air Force Pamphlet states that:

Doubtless the creation of [safety or demilitarized] zones would be one of the most effective measures to enhance protection of one’s own civilian population, and if the conditions required to make a zone were fulfilled and maintained, virtually all civilian casualties would be avoided in this zone”.¹³⁷

129. The US Air Force Commander’s Handbook, in a section entitled “Neutralized and Demilitarized Zones”, provides that:

By agreement, the parties to a conflict may establish certain zones where civilians, the sick and wounded, or other noncombatants may gather to be safe from attack.

A party to conflict cannot establish such a zone by itself; neutralized zones need only be respected if established by agreement between the parties, either in oral or written, or by parallel declarations. Such an agreement may be concluded either before or during hostilities.

United States forces need not respect such a zone unless the United States has agreed to respect it. Even in an unrecognized zone, of course, only legitimate military objectives . . . may be attacked.¹³⁸

130. The US Naval Handbook provides that “an agreed demilitarized zone is also exempt from bombardment”.¹³⁹

131. The YPA Military Manual of the SFRY (FRY) prohibits attacks against demilitarised zones.¹⁴⁰

National Legislation

132. Argentina’s Draft Code of Military Justice punishes any soldier who “wilfully violates the protection due to . . . demilitarised zones which are properly marked”.¹⁴¹

133. Under Armenia’s Penal Code, “targeting . . . demilitarised zones” during an armed conflict constitutes a crime against the peace and security of mankind.¹⁴²

¹³⁴ Switzerland, *Basic Military Manual* (1987), Article 32(4).

¹³⁵ Switzerland, *Basic Military Manual* (1987), Article 193(1)(d).

¹³⁶ Togo, *Military Manual* (1996), Fascicule III, p. 12.

¹³⁷ US, *Air Force Pamphlet* (1976), § 5-4(c).

¹³⁸ US, *Air Force Commander’s Handbook* (1980), § 3-6(b).

¹³⁹ US, *Naval Handbook* (1995), § 8.5.1.3; see also § 8.6.2.2 (protected places and objects).

¹⁴⁰ SFRY (FRY), *YPA Military Manual* (1988), § 78.

¹⁴¹ Argentina, *Draft Code of Military Justice* (1998), Article 292, introducing a new Article 876(2) in the *Code of Military Justice as amended* (1951).

¹⁴² Armenia, *Penal Code* (2003), Article 390.3(4).

- 134.** Australia's Geneva Conventions Act as amended provides that "a person who, in Australia or elsewhere, commits a grave breach . . . of [AP I] is guilty of an indictable offence".¹⁴³
- 135.** Australia's ICC (Consequential Amendments) Act incorporates in the list of war crimes of the Criminal Code grave breaches of AP I, including "attacking . . . demilitarised zones".¹⁴⁴
- 136.** Azerbaijan's Criminal Code provides that "directing attacks against . . . demilitarised zones" constitutes a war crime in international and non-international armed conflicts.¹⁴⁵
- 137.** The Criminal Code of Belarus provides that it is a war crime to "direct attacks against demilitarised zones".¹⁴⁶
- 138.** Belgium's Law concerning the Repression of Grave Breaches of the Geneva Conventions and their Additional Protocols as amended provides that "making demilitarised zones the object of attack" constitutes a crime under international law.¹⁴⁷
- 139.** Under the Criminal Code of the Federation of Bosnia and Herzegovina, it is a war crime to order that "demilitarised zones be indiscriminately targeted" or to carry out such targeting.¹⁴⁸ The Criminal Code of the Republika Srpska contains the same provision.¹⁴⁹
- 140.** Canada's Geneva Conventions Act as amended provides that "every person who, whether within or outside Canada, commits a grave breach [of AP I] . . . is guilty of an indictable offence".¹⁵⁰
- 141.** The Geneva Conventions and Additional Protocols Act of the Cook Islands punishes "any person who in the Cook Islands or elsewhere commits, or aids or abets or procures the commission by another person of, a grave breach . . . of [AP I]".¹⁵¹
- 142.** Under Croatia's Criminal Code, "indiscriminate attacks affecting . . . demilitarised zones" are war crimes.¹⁵²
- 143.** Cyprus's AP I Act punishes "any person who, whatever his nationality, commits in the Republic or outside the Republic any grave breach of the provisions of the Protocol, or takes part or assists or incites another person in the commission of such a breach".¹⁵³
- 144.** The Czech Republic's Criminal Code as amended provides for the punishment of "a commander who, contrary to the provisions of international law

¹⁴³ Australia, *Geneva Conventions Act as amended* (1957), Section 7(1).

¹⁴⁴ Australia, *ICC (Consequential Amendments) Act* (2002), Schedule 1, § 268.98.

¹⁴⁵ Azerbaijan, *Criminal Code* (1999), Article 116(7).

¹⁴⁶ Belarus, *Criminal Code* (1999), Article 136(2).

¹⁴⁷ Belgium, *Law concerning the Repression of Grave Breaches of the Geneva Conventions and their Additional Protocols as amended* (1993), Article 1(3)(14).

¹⁴⁸ Bosnia and Herzegovina, Federation, *Criminal Code* (1998), Article 154(2).

¹⁴⁹ Bosnia and Herzegovina, Republika Srpska, *Criminal Code* (2000), Article 433(2).

¹⁵⁰ Canada, *Geneva Conventions Act as amended* (1985), Section 3(1).

¹⁵¹ Cook Islands, *Geneva Conventions and Additional Protocols Act* (2002), Section 5(1).

¹⁵² Croatia, *Criminal Code* (1993), Article 120(2).

¹⁵³ Cyprus, *AP I Act* (1979), Section 4(1).

on means and methods of warfare, intentionally: ... (b) leads an attack against a ... demilitarised zone".¹⁵⁴

145. Under the Draft Amendments to the Penal Code of El Salvador, "anyone who, in the context of an international or non-international armed conflict, attacks demilitarised zones" is punishable by imprisonment.¹⁵⁵

146. Under Estonia's Penal Code, "an attack against ... a demilitarised zone" is a war crime.¹⁵⁶

147. Under Georgia's Criminal Code, "making ... demilitarised zones the object of attack" in an international or non-international armed conflict is a punishable crime.¹⁵⁷

148. Germany's Law Introducing the International Crimes Code provides for the punishment of anyone who, "in connection with an international armed conflict or with an armed conflict not of an international character, ... directs an attack by military means against ... demilitarised zones".¹⁵⁸

149. Under Hungary's Criminal Code as amended, "a military commander who, in violation of the rules of international law concerning warfare, ... takes offensive against ... a weapon-free zone" commits a war crime.¹⁵⁹

150. Ireland's Geneva Conventions Act as amended provides that grave breaches of AP I are punishable offences.¹⁶⁰ It adds that any "minor breach" of AP I, including violations of Article 60 AP I, is also a punishable offence.¹⁶¹

151. Under Jordan's Draft Military Criminal Code, "attacks against ... demilitarised zones" are considered war crimes.¹⁶²

152. Under the Draft Amendments to the Code of Military Justice of Lebanon, "attacks against ... demilitarised zones" are considered war crimes, provided that they are committed intentionally and cause death or serious injury to body or health.¹⁶³

153. Under Lithuania's Criminal Code as amended, "a military attack against ... a demilitarised zone" constitutes a war crime.¹⁶⁴

154. Under the International Crimes Act of the Netherlands, it is a crime, during an international armed conflict, to commit "the following acts, when they are committed intentionally and in violation of the relevant provisions of Additional Protocol (I) and cause death or serious injury to body or health: ... making ... demilitarised zones the object of attack".¹⁶⁵

¹⁵⁴ Czech Republic, *Criminal Code as amended* (1961), Article 262(2)(b).

¹⁵⁵ El Salvador, *Draft Amendments to the Penal Code* (1998), Article entitled "Ataque a zonas desmilitarizadas".

¹⁵⁶ Estonia, *Penal Code* (2001), § 106.

¹⁵⁷ Georgia, *Criminal Code* (1999), Article 411(1)(d).

¹⁵⁸ Germany, *Law Introducing the International Crimes Code* (2002), Article 1, § 11(1)(2).

¹⁵⁹ Hungary, *Criminal Code as amended* (1978), Section 160(b).

¹⁶⁰ Ireland, *Geneva Conventions Act as amended* (1962), Section 3(1).

¹⁶¹ Ireland, *Geneva Conventions Act as amended* (1962), Section 4(1) and (4).

¹⁶² Jordan, *Draft Military Criminal Code* (2000), Article 41(A)(12).

¹⁶³ Lebanon, *Draft Amendments to the Code of Military Justice* (1997), Article 146(12).

¹⁶⁴ Lithuania, *Criminal Code as amended* (1961), Article 337.

¹⁶⁵ Netherlands, *International Crimes Act* (2003), Article 5(2)(c)(iv).

155. New Zealand's Geneva Conventions Act as amended provides that "any person who in New Zealand or elsewhere commits, or aids or abets or procures the commission by another person of, a grave breach . . . of [AP I] is guilty of an indictable offence".¹⁶⁶

156. Nicaragua's Draft Penal Code states that "whoever, in the circumstances of an international or internal armed conflict, without having previously taken appropriate measures of protection and without any justification based on imperative military necessity, attacks or destroys . . . demilitarised zones" commits a punishable "offence against international law".¹⁶⁷

157. According to Niger's Penal Code as amended, "putting under attack . . . demilitarised zones" is a war crime.¹⁶⁸

158. Under Norway's Military Penal Code as amended, "anyone who contravenes or is accessory to the contravention of provisions relating to the protection of persons or property laid down in . . . the two additional protocols to [the Geneva] Conventions . . . is liable to imprisonment".¹⁶⁹

159. Slovakia's Criminal Code as amended provides for the punishment of "a commander who, contrary to the provisions of international law on means and methods of warfare, intentionally: . . . (b) leads an attack against a . . . demilitarised zone".¹⁷⁰

160. Under Slovenia's Penal Code, "a random attack . . . on demilitarised areas" is a war crime.¹⁷¹

161. Spain's Penal Code provides for the punishment of "anyone who, in the event of armed conflict, should . . . knowingly violate the protection due to . . . demilitarised zones . . . which are duly identified with signs or the appropriate distinctive signals".¹⁷²

162. Tajikistan's Criminal Code, in the section on "Serious violations of international humanitarian law", provides for the punishment of "wilful breaches of norms of international humanitarian law committed in an international or non-international armed conflict, i.e. . . . making . . . demilitarised zones the object of attack".¹⁷³

163. The UK Geneva Conventions Act as amended punishes "any person, whatever his nationality, who, whether in or outside the United Kingdom, commits, or aids, abets or procures the commission by any other person of, a grave breach of . . . [AP I]".¹⁷⁴

¹⁶⁶ New Zealand, *Geneva Conventions Act as amended* (1958), Section 3(1).

¹⁶⁷ Nicaragua, *Draft Penal Code* (1999), Article 468.

¹⁶⁸ Niger, *Penal Code as amended* (1961), Article 208.3(14).

¹⁶⁹ Norway, *Military Penal Code as amended* (1902), § 108(b).

¹⁷⁰ Slovakia, *Criminal Code as amended* (1961), Article 262(2)(b).

¹⁷¹ Slovenia, *Penal Code* (1994), Article 374(2).

¹⁷² Spain, *Penal Code* (1995), Article 612(1).

¹⁷³ Tajikistan, *Criminal Code* (1998), Article 403(1).

¹⁷⁴ UK, *Geneva Conventions Act as amended* (1957), Section 1(1).

164. Yemen's Military Criminal Code, in a part on war crimes, provides for the punishment of "unjustified attacks against demilitarised zones".¹⁷⁵

165. The Penal Code as amended of the SFRY (FRY) provides for the punishment of "any person who may order the following in violation of the rules of international law during armed conflict or occupation: . . . indiscriminate attacks on . . . demilitarised zones".¹⁷⁶

166. Zimbabwe's Geneva Conventions Act as amended punishes "any person, whatever his nationality, who, whether in or outside Zimbabwe, commits any such grave breach of . . . [AP I]".¹⁷⁷

National Case-law

167. No practice was found.

Other National Practice

168. The Report on the Practice of Angola notes that Article 60 AP I prohibits attacks against demilitarised zones.¹⁷⁸

169. In a letter dated 6 March 1994 addressed to the UNPROFOR Command, the Commander-in-chief of the Headquarters of Bosnian Armed Forces denounced the killing and imprisonment of civilians in the demilitarised zones of Srebrenica and Žepa. The UN forces were requested to re-establish the previous positions of the lines, which had been shifted by the adverse party in the attempt to take over the demilitarised zone, and to deploy observers in the zones.¹⁷⁹

170. The Report on the Practice of Botswana states that demilitarised zones established by agreement between the belligerents shall not be attacked.¹⁸⁰

171. According to the Report on the Practice of Egypt, "Egypt thinks that protection of . . . demilitarized zones . . . consists in refraining from launching attacks against . . . these areas", which implies that "attacks against such places are prohibited".¹⁸¹

172. The Report on the Practice of Iran notes that Iran objected on several occasions to the bombardment of demilitarised zones by Iraqi forces during the Iran–Iraq War, but adds that no other relevant practice could be found in this regard and that, therefore, no conclusion can be drawn from Iranian practice concerning the prohibition on the targeting of demilitarised zones.¹⁸²

173. In 1996, in a letter to the President of the UN Security Council, North Korea transmitted a statement concerning the situation in the area of the military

¹⁷⁵ Yemen, *Military Criminal Code* (1998), Article 21(8).

¹⁷⁶ SFRY (FRY), *Penal Code as amended* (1976), Article 142(2).

¹⁷⁷ Zimbabwe, *Geneva Conventions Act as amended* (1981), Section 3(1).

¹⁷⁸ Report on the Practice of Angola, 1998, Chapter 5.

¹⁷⁹ Report on the Practice of Bosnia and Herzegovina, 2000, Chapter 1.8.

¹⁸⁰ Report on the Practice of Botswana, 1998, Chapter 1.8.

¹⁸¹ Report on the Practice of Egypt, 1997, Chapter 1.8.

¹⁸² Report on the Practice of Iran, 1997, Chapter 1.8.

demarcation line. In the statement, claiming that the South Korean military authorities had disregarded the armistice agreement, the spokesperson of the Panmunjom Mission of the Korean People's Army drew up a list of alleged violations of the demilitarised zone. He declared, *inter alia*, that South Korea had introduced tanks, various kinds of artillery pieces and heavy weapons, as well as a large number of armed military personnel, into the zone, and had even built large military facilities there. According to the spokesperson, the area's status did not correspond to the real meaning of a demilitarised zone since it had been armed and turned into a new attack position. The spokesperson thus stated that the Korean People's Army did not consider itself any longer bound by the article of the armistice agreement concerning the demilitarised zone, and announced that since the status of this zone could not be maintained any longer, "self-defensive measures" would be considered.¹⁸³

174. The Report on the Practice of Nigeria states that it is Nigeria's *opinio juris* that the protection of demilitarised zones is part of customary international law.¹⁸⁴

175. The Report on the Practice of Pakistan notes that a demilitarised zone was created under the 1949 Karachi Agreement. The report emphasises that Pakistan has been respecting the said zone and has periodically reported violations of it by India to the UN Observer Group. The report, referring to a statement by a spokesperson of Pakistan's Foreign Office made in 1997, also underlines that Pakistan has formally opposed any suggestion of terminating UNMOGIP.¹⁸⁵

176. The Report on the Practice of Rwanda notes that, although no practice was found regarding demilitarised zones, the President of the Military Tribunal confirmed that such zones would be protected according to the modalities agreed upon by the belligerents.¹⁸⁶

177. The Report on the Practice of Syria asserts that Syria considers Article 60 AP I to be part of customary international law.¹⁸⁷

178. In 1987, the Deputy Legal Adviser of the US Department of State affirmed that "we support the principle that attacks shall not be made against appropriately declared or agreed demilitarized zones".¹⁸⁸

¹⁸³ North Korea, Letter dated 5 April 1996 to the President of the UN Security Council, UN Doc. S/1996/253, 5 April 1996.

¹⁸⁴ Report on the Practice of Nigeria, 1997, Chapter 1.8.

¹⁸⁵ Report on the Practice of Pakistan, 1998, Chapter 1.8, referring to Statement by the Foreign Office spokesperson, 24 April 1997.

¹⁸⁶ Report on the Practice of Rwanda, 1997, Chapter 1.8, referring to an interview with the President of Rwanda's Military Tribunal, 23 October 1997.

¹⁸⁷ Report on the Practice of Syria, 1997, Chapter 1.8.

¹⁸⁸ US, Remarks of Michael J. Matheson, Deputy Legal Adviser, US Department of State, The Sixth Annual American Red Cross-Washington College of Law Conference on International Humanitarian Law: A Workshop on Customary International Law and the 1977 Protocols Additional to the 1949 Geneva Conventions, *American University Journal of International Law and Policy*, Vol. 2, 1987, p. 427.

179. The Report on US Practice considers that US *opinio juris* generally conforms to the rules and conditions prescribed in Article 60 AP I.¹⁸⁹

III. Practice of International Organisations and Conferences

180. No practice was found.

IV. Practice of International Judicial and Quasi-judicial Bodies

181. No practice was found.

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

182. To fulfil its task of disseminating IHL, the ICRC has delegates around the world teaching armed and security forces that an attack against a demilitarised zone constitutes a grave breach of the law of war.¹⁹⁰

183. In a working paper on war crimes submitted in 1997 to the Preparatory Committee for the Establishment of an International Court, the ICRC proposed that “making demilitarized zones the objects of attack”, when committed in an international armed conflict, be subjected to the jurisdiction of the Court.¹⁹¹

VI. Other Practice

184. No practice was found.

C. Open Towns and Non-Defended Localities

Establishment of open towns

I. Treaties and Other Instruments

Treaties

185. No practice was found.

Other Instruments

186. Article 16 of the 1956 New Delhi Draft Rules states that “when a locality is declared to be an “open town”, the adverse party shall be duly notified. The latter is bound to reply, and if it agrees to recognize the locality in question as an open town, shall cease from all attacks on the said town, and refrain from

¹⁸⁹ Report on US Practice, 1997, Chapter 1.8.

¹⁹⁰ Frédéric de Mulinen, *Handbook on the Law of War for Armed Forces*, ICRC, Geneva, 1987, § 418.

¹⁹¹ ICRC, Working paper on war crimes submitted to the Preparatory Committee for the Establishment of an International Criminal Court, New York, 14 February 1997, § 1(b)(iv).

any military operation the sole object of which is its occupation." It goes on to say that:

When, on the outbreak or in the course of hostilities, a locality is declared to be an "open town" the adverse Party shall be duly notified. The latter is bound to reply, and if it agrees to recognize the locality in question as an open town, shall cease all attacks on the said town, and refrain from any military operation the sole object of which is its occupation.

In the absence of any special conditions which may, in any particular case, be agreed upon with the adverse Party, a locality, in order to be declared an "open town", must satisfy the following conditions:

- (a) it must not be defended or contain any armed force;
- (b) it must discontinue all relations with any national or allied armed forces;
- (c) it must stop all activities of a military nature or for a military purpose in those of its installations or industries which might be regarded as military objectives;
- (d) it must stop all military transit through the town.

The adverse Party may make the recognition of the status of "open town" conditional upon verification of the fulfilment of the conditions stipulated above. All attacks shall be suspended during the institution and operation of the investigatory measures.

The presence in the locality of civil defence services, or of the services responsible for maintaining public order, shall not be considered as contrary to the conditions laid down in paragraph 2. If the locality is situated in occupied territory, this provision applies also to the military occupation forces essential for the maintenance of public law and order.

When an "open town" passes into other hands, the new authorities are bound, if they cannot maintain its status, to inform the civilian population accordingly.

II. National Practice

Military Manuals

187. Argentina's Law of War Manual provides for the possibility of establishing undefended areas and refers to the conditions set out for this purpose in Article 60 AP I.¹⁹²

188. Belgium's Law of War Manual states that "an area is considered as an 'undefended area' or as an 'open town' when it is undefended to the point that it can be taken without a single shot or without any losses (e.g. due to the presence of mines)". It adds that the presence of wounded military personnel and weapons does not change the status of the area as an open town or undefended area. The manual points out two procedures to obtain the status of "open town", namely, a unilateral declaration or an agreement between the belligerents.¹⁹³

189. Bosnia and Herzegovina's Military Instructions provides that:

¹⁹² Argentina, *Law of War Manual* (1989), § 4.06.

¹⁹³ Belgium, *Law of War Manual* (1983), p. 30.

In order to ensure full protection of such place [an open town], it is necessary that the other side to the conflict also recognises the status of the city and to reach an agreement on the necessary preconditions in that regard. These preconditions are usually related to the following: the places should not be defended and no armed forces should be deployed in it; no military units should cross its territory for the purpose of transporting military material; no activities of military importance should be undertaken in industrial plants; and there should be no liaison with local armed forces and allied armed forces.¹⁹⁴

190. France's LOAC Manual defines as an open town "any inhabited area located in the combat zone or in its proximity, which is open to enemy occupation in order to avoid fighting and destruction". It lists the following four conditions that must be fulfilled in order for a town to be considered an open town: all combatants as well as mobile weapons and military material must be evacuated; no hostile use shall be made of fixed military installations and establishments; the authorities and the population shall abstain from committing any act of hostility; no activities in support of military operations shall be undertaken. The manual gives Paris in 1940 and Rome in 1943 as examples of open towns during the Second World War.¹⁹⁵

191. Switzerland's Basic Military Manual notes that during the Second World War localities that were declared to be open were understood to be undefended should the enemy reach their periphery. It also points out different conditions that need to be fulfilled to obtain the status of "undefended areas".¹⁹⁶

192. The UK Military Manual defines an open or undefended town as:

A town which is so completely undefended from within or without that the enemy may enter and take possession of it without fighting or incurring casualties. It follows that no town located behind the immediate front line can be deemed open or undefended, since the attacker must fight his way to it. Any town behind the enemy front line is thus a defended town and is open to ground or other bombardment, subject to the conditions imposed on all bombardment, namely, that as far as possible, the latter must be limited to military objectives... A town in the front line with no means of defence, not defended from the outside and into which the enemy may enter and of which he may take possession at any time without fighting or incurring casualties, e.g., from crossing unmarked minefields, is undefended even if it contains munitions factories.¹⁹⁷

The manual goes on to say that, *prima facie*, a fortified place is considered as defended, unless there are visible signs of surrender. However, a locality need not be fortified to be deemed "defended", and it may be held thus if a military force is occupying it or marching through it. It states that a town should be considered to be defended (and thus liable to bombardment) even if defended posts are detached and located at a distance from the city:

¹⁹⁴ Bosnia and Herzegovina, *Military Instructions* (1992), § 6.

¹⁹⁵ France, *LOAC Manual* (2001), p. 124.

¹⁹⁶ Switzerland, *Basic Military Manual* (1987), Article 32.

¹⁹⁷ UK, *Military Manual* (1958), § 290.

The town and defended posts form an indivisible whole, inasmuch as the town may contain workshops and provide supplies which are invaluable to the defence and may serve to shelter the troops holding the defence points when they are not on duty.¹⁹⁸

193. The YPA Military Manual of the SFRY (FRY) provides that the establishment of an open town requires agreement between the parties and restates the conditions contained in Article 16 of the 1956 New Delhi Draft Rules.¹⁹⁹

National Legislation

194. No practice was found.

National Case-law

195. In the *Priebke case* in 1996, Italy's Military Tribunal of Rome examined the status of Rome as an "open town" in 1944. The Tribunal concluded that the city did not enjoy such status, arguing that neither a unilateral declaration nor the voluntary behaviour of one of the parties was sufficient to establish an obligation upon the other party. Only after acceptance was obtained from the other party (or parties), i.e., when an agreement was reached, could the status of open town become legally binding for the belligerents.²⁰⁰

Other National Practice

196. In February 1994, in the context of the internal conflict in the Chiapas in Mexico, two villages – San Miguel, in the municipality of Ocosingo, and Guadalupe el Tepeyac, in the municipality of Las Margaritas – were established as free villages with the aim of creating areas of *détente* and to support the civilian population in the conflict zone. The Mexican army would provide facilities for the movement and transit of people, food and medical care to each of these villages.²⁰¹

197. According to the Report on the Practice of the SFRY (FRY), "the *opinio iuris* and the customary nature of rules relevant to the establishment of these zones [open towns and undefended places] in FRY is absolutely clear".²⁰²

III. Practice of International Organisations and Conferences

198. No practice was found.

¹⁹⁸ UK, *Military Manual* (1958), § 289.

¹⁹⁹ SFRY (FRY), *YPA Military Manual* (1988), § 81.

²⁰⁰ Italy, Military Tribunal of Rome, *Priebke case*, Judgement No. 385, 1 August 1996.

²⁰¹ Mexico, Commissioner for Peace and Reconciliation in the State of Chiapas, Press Conference, 1 February 1994, § 2.

²⁰² Report on the Practice of the SFRY (FRY), 1997, Chapter 1.8.

IV. Practice of International Judicial and Quasi-judicial Bodies

199. No practice was found.

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

200. No practice was found.

VI. Other Practice

201. No practice was found.

Establishment of non-defended localities

I. Treaties and Other Instruments

Treaties

202. Article 59(2) AP I provides that:

The appropriate authorities of a Party to the conflict may declare as a non-defended locality any inhabited place near or in a zone where armed forces are in contact which is open for occupation by an adverse Party. Such a locality shall fulfil the following conditions:

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

Article 59(3) specifies that “the presence, in this [non-defended] locality, of persons specially protected under the Conventions and this Protocol, and of police forces retained for the sole purpose of maintaining law and order, is not contrary to the conditions laid down in paragraph 2”. Article 59(5) provides for the possibility for parties to a conflict to agree on the establishment of non-defended localities under other conditions. It states that:

The Parties to the conflict may agree on the establishment of non-defended localities even if such localities do not fulfil the conditions laid down in paragraph 2. The agreement should define and describe, as precisely as possible, the limits of the non-defended locality; if necessary, it may lay down the methods of supervision.

Article 59 AP I was adopted by consensus.²⁰³

²⁰³ CDDH, *Official Records*, Vol. VI, CDDH/SR.42, 27 May 1977, p. 215.

Other Instruments

203. Articles 10 and 11 of the 1938 ILA Draft Convention for the Protection of Civilian Populations against New Engines of War provide that:

Art. 10. For the purpose of better enabling a State to obtain protection for the non-belligerent part of its civil population, a State may, if it thinks fit, declare a specified part or parts of its territory to be a "safety zone" or "safety zones" and, subject to the conditions following, such safety zones shall enjoy immunity from attack or bombardment by whatsoever means, and shall not form the legitimate object of any act of war.

Art. 11. A safety zone shall consist of either:

- (a) a camp specially erected for that purpose and so situated as to ensure that there is no defended town, port, village or building within "x" kilometres of any part of such camp, or
- (b) an undefended town, port, village or building as defined in Article 2 [a town, port, village or isolated building shall be considered undefended provided that not only (a) no combatant troops, but also (b) no military, naval or air establishment, or barracks, arsenal, munition stores or factories, aerodromes or aeroplane workshops or ships of war, naval dockyards, forts, or fortifications for defensive or offensive purposes, or entrenchments (in this Convention referred to as "belligerent establishments") exist within its boundaries or within a radius of "x" kilometres from such boundaries].

*II. National Practice**Military Manuals*

204. Argentina's Law of War Manual provides for the possibility of establishing non-defended localities and refers to the conditions set out for this purpose in Article 59 AP I.²⁰⁴

205. Australia's Defence Force Manual states that:

727. A non-defended locality is any inhabited or uninhabited place near or in a zone where opposing armed forces are in contact and which has been declared by parties to the conflict as open for occupation by a party to the conflict. In order to be considered a non-defended locality, the following conditions must be fulfilled:

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

728. The presence in this locality of protected persons and police forces retained for the sole purpose of maintaining law and order, does not change the character of a non-defended locality.

729. A non-defended locality may be declared by a party to the conflict. That declaration must describe the geographical limits of the locality and be addressed to the relevant party to the conflict which must acknowledge its receipt and from

²⁰⁴ Argentina, *Law of War Manual* (1989), § 4.06.

that time treat the locality as a non-defended locality unless the conditions for establishment of the locality are not met.²⁰⁵

206. Canada's LOAC Manual provides that "any inhabited place near or in a zone where armed forces are in contact" may be declared by a party to a conflict as a non-defended locality and, thereby, become open for occupation by the adverse party. The conditions that, under the manual, must be normally satisfied by a non-defended locality are the same as those listed in Article 59(2) AP I.²⁰⁶ The manual also provides for the possibility for the parties to a conflict to agree to establish a non-defended locality even when the said conditions are not all satisfied.²⁰⁷

207. France's LOAC Manual is guided by Article 59 AP I as regards the conditions that must be fulfilled in order for an area to be declared a non-defended locality.²⁰⁸

208. Germany's Military Manual provides that:

A locality shall be considered as non-defended if it has been declared so by its competent authorities, if it is open for occupation and fulfils the following conditions: all combatants, as well as mobile weapons and mobile military equipment, must have been evacuated; no hostile use shall be made of fixed military installations and establishments; no acts of hostility shall be committed by the authorities or by the population; and no activities in support of military operations shall be undertaken.²⁰⁹

The manual refers to Article 59(2) AP I. It adds that "a locality shall not on suspicion be deemed non-defended unless the behaviour of the adversary substantiates such a supposition".²¹⁰ It goes on to say that, if one of the parties to the conflict breaches the provisions concerning the conditions for the establishment of non-defended localities, the locality in question will lose its special protection, even if the protection of the civilian population and civilian objects continue to be applicable.²¹¹

209. Kenya's LOAC Manual, in a section entitled "Non-Defended Localities", states that:

Such areas are improvised protected zones from which military objectives and activities have been removed, and which:

- are situated near or in a zone where combat is taking place; and
- are open for occupation by the enemy.

They can be established through a unilateral declaration and notification thereof given to the enemy Party. However, for greater safety, formal agreements should

²⁰⁵ Australia, *Defence Force Manual* (1994), §§ 727-729; see also *Commanders' Guide* (1994), § 921.

²⁰⁶ Canada, *LOAC Manual* (1999), p. 4-11, §§ 110-111.

²⁰⁷ Canada, *LOAC Manual* (1999), p. 4-11, § 112. ²⁰⁸ France, *LOAC Manual* (2001), p. 31.

²⁰⁹ Germany, *Military Manual* (1992), § 459.

²¹⁰ Germany, *Military Manual* (1992), § 460.

²¹¹ Germany, *Military Manual* (1992), § 462.

be passed between the two Parties (under customary law and Hague regulations undefended localities that can be occupied, cannot be bombarded even if there is no notification).

According to the manual, the conditions to be fulfilled by non-defended localities are the same as for demilitarised zones (see *supra*).²¹²

210. The Military Manual of the Netherlands provides that:

The authorities of a party to the conflict may declare as a non-defended locality any inhabited place near a zone where armed operations are launched. It is thus a unilateral declaration. Such a locality shall fulfil the following conditions:

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

The declaration shall be addressed to the adverse party and shall define the limits of the non-defended locality. The parties to the conflict may also decide by an agreement on the establishment of non-defended localities even if such localities do not fulfil the above-mentioned conditions.

A locality loses its status as a non-defended locality when it ceases to fulfil the conditions required or the conditions of the agreement concluded between the parties.²¹³

211. New Zealand's Military Manual defines an "undefended place" as:

one from which all combatants, as well as mobile weapons and mobile military equipment, have been removed; where no hostile use is made of fixed military installations or establishments; where no hostile acts are committed by the authorities or the population; and where no activities in support of military operations are undertaken.

The manual specifies that such requirements "relate to places behind enemy lines, for if the place is in a combat zone and open to occupation by enemy forces, the problem does not arise".²¹⁴ Furthermore, the manual notes that, while "under customary law, the adverse Party had to agree to treat a place as undefended, by AP I the appropriate authorities of a Party to the conflict may declare as undefended any inhabited place near or in a zone where the armed forces of the Parties are in contact, rendering it open for occupation by the adverse Party".²¹⁵ Referring to the possibility, under Article 59(5) AP I, that the parties to a conflict agree to treat as undefended any place which does not

²¹² Kenya, *LOAC Manual* (1997), Précis No. 4, pp. 6–7.

²¹³ Netherlands, *Military Manual* (1993), p. V-15, § 13.

²¹⁴ New Zealand, *Military Manual* (1992), p. 4-15, § 412(6).

²¹⁵ New Zealand, *Military Manual* (1992), p. 4-16, § 412(7).

fulfil the conditions laid down in AP I, the manual states that “this provision merely confirms the position under customary law”.²¹⁶

212. Sweden’s IHL Manual states that “the chief rule relating to non-defended localities” embodied in Article 59 AP I has the status of customary law.²¹⁷ With respect to the setting-up of a non-defended locality, the manual recalls that it “shall not be preceded by negotiation between the parties, but it is based solely on a declaration issued by the defender”. The manual then states that:

For the locality to receive protection, all military resistance must cease immediately. All combatants, together with mobile weapons and moveable material must be withdrawn. Fixed military installations and establishments such as fortifications may not be used against the other party . . . No hostile acts may be committed either by the authorities or by the local population, nor may any activities be undertaken in support of the withdrawing party’s military operations.²¹⁸

According to the manual, “the above conditions imply that the locality is left open to occupation by the adversary”.²¹⁹

213. Switzerland’s Basic Military Manual states that:

Through reciprocal specific declarations, the Parties to the conflict can designate non-defended localities or demilitarised zones (the latter already in peacetime). These localities or zones have to fulfil the following conditions:

- a. all combatants, as well as mobile weapons and military equipment, must be evacuated;
- b. no hostile use shall be made of fixed military installations or establishments;
- c. no acts of hostility shall be committed by the authorities or by the population;
- d. any activity in support to the military effort must cease;
- e. the localities/zones must be marked by a distinctive sign.

Police forces may be maintained in these localities and zone for the purpose of maintaining law and order.

Non-defended localities/zones must not be abused for military purposes, for they will lose their protected status.²²⁰

214. The US Air Force Pamphlet states that:

A party to a conflict may declare, as undefended, inhabited localities which are near or in areas where land forces are in contact when the localities are open for occupation by an adverse party. Bombardment in such a locality would be unlawful, if the following conditions were met and maintained: (1) no armed forces or other combatants present, (2) no mobile weapons or mobile military equipment present, (2) no hostile use of fixed military establishments or installations, (4) no acts of warfare by the authorities or the population, and (5) no activities in support of military operations.²²¹

²¹⁶ New Zealand, *Military Manual* (1992), p. 4-16, § 412(7), footnote 62.

²¹⁷ Sweden, *IHL Manual* (1991), Section 2.2.3.

²¹⁸ Sweden, *IHL Manual* (1991), Section 3.4.3, p. 86.

²¹⁹ Sweden, *IHL Manual* (1991), Section 3.4.3, p. 87.

²²⁰ Switzerland, *Basic Military Manual* (1987), Article 32, see also Article 12(2).

²²¹ US, *Air Force Pamphlet* (1976), § 5-3(e).

215. The YPA Military Manual of the SFRY (FRY) contains provisions regarding the establishment of undefended areas, which mirror the conditions prescribed by AP I.²²²

National Legislation

216. The Draft Amendments to the Penal Code of El Salvador define non-defended localities in accordance with Article 59(2) AP I.²²³

217. Nicaragua's Draft Penal Code defines non-defended localities in accordance with Article 59(2) AP I.²²⁴

National Case-law

218. No practice was found.

Other National Practice

219. The Report on the Practice of Israel notes that during the Arab-Israeli conflict, no use was made of the concept of "non-defended localities" and that, as a consequence, Israel and the IDF have no experience of this concept.²²⁵

220. According to the Report on the Practice of Japan, the Japanese government explained to the Diet in 1984 that "authorities which may declare non-defended localities and may open them to enemy occupation are States party to a conflict or authorities responsible for the defense of the localities in question". They are "generally speaking, States or military authorities", but "a local government is not excluded from those authorities if it possesses command authority and has the power to promise an opponent not to defend itself".²²⁶

221. The Report on the Practice of Syria asserts that Syria considers Article 59 AP I to be part of customary international law.²²⁷

222. According to the Report on the Practice of the SFRY (FRY), "the *opinio iuris* and the customary nature of rules relevant to the establishment of these zones [open towns and undefended places] in FRY is absolutely clear".²²⁸

III. Practice of International Organisations and Conferences

223. No practice was found.

²²² SFRY (FRY), *YPA Military Manual* (1988), § 77.

²²³ El Salvador, *Draft Amendments to the Penal Code* (1998), Article entitled "Ataque a localidades no defendidas".

²²⁴ Nicaragua, *Draft Penal Code* (1999), Article 466(2).

²²⁵ Report on the Practice of Israel, 1997, Chapter 1.8.

²²⁶ Japan, Explanation by the Government at the House of Councillors Standing Committee on Foreign Affairs, 31 July 1984, *Minutes of the House of Councillors Standing Committee on Foreign Affairs*, No. 13, pp. 3-5, Report on the Practice of Japan, 1998, Chapter 1.8.

²²⁷ Report on the Practice of Syria, 1997, Chapter 1.8.

²²⁸ Report on the Practice of the SFRY (FRY), 1997, Chapter 1.8.

IV. Practice of International Judicial and Quasi-judicial Bodies

224. No practice was found.

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

225. To fulfil its task of disseminating IHL, the ICRC has delegates around the world teaching armed and security forces that non-defended localities are “improvised protected zones . . . from which military objectives and activities have been taken out and which: a) are situated near or in a zone where armed forces are in contact; and b) are open for occupation by the enemy”.²²⁹

VI. Other Practice

226. No practice was found.

Attacks on open towns and non-defended localities*I. Treaties and Other Instruments**Treaties*

227. Article 25 of the 1899 HR provides that “the attack or bombardment of towns, villages, habitations or buildings which are not defended, is prohibited”.

228. Article 25 of the 1907 HR provides that “the attack or bombardment, by whatever means, of towns, villages, dwellings, or buildings which are undefended is prohibited”.

229. Article 1(1) of the 1907 Hague Convention (IX) prohibits “the bombardment by naval forces of undefended ports, towns, villages, dwellings or buildings”.

230. Article 59(1) AP I provides that “it is prohibited for the Parties to the conflict to attack, by any means whatsoever, non-defended localities”. Article 59(7) provides that “a locality loses its status as a non-defended locality when it ceases to fulfil the conditions laid down in paragraph 2 or in the agreement referred to in paragraph 5”. Article 59 AP I was adopted by consensus.²³⁰

231. Under Article 85(3)(d) AP I, “making non-defended localities . . . the object of attack” is a grave breach of the Protocol. Article 85 AP I was adopted by consensus.²³¹

232. Pursuant to Article 8(2)(b)(v) of the 1998 ICC Statute, “attacking or bombarding, by whatever means, towns, villages, dwellings or buildings which are

²²⁹ Frédéric de Mulinen, *Handbook on the Law of War for Armed Forces*, ICRC, Geneva, 1987, § 419.

²³⁰ CDDH, *Official Records*, Vol. VI, CDDH/SR.42, 27 May 1977, p. 215.

²³¹ CDDH, *Official Records*, Vol. VI, CDDH/SR.44, 30 May 1977, p. 291.

undefended and which are not military objectives" constitutes a war crime in international armed conflicts.

Other Instruments

233. Article 15 of the 1874 Brussels Declaration states that "fortified places are alone liable to be besieged. Open towns, agglomerations of dwellings, or villages which are not defended can neither be attacked nor bombarded."

234. Article 32(c) of the 1880 Oxford Manual states that it is forbidden "to attack and to bombard undefended places".

235. Based on several documents supplying evidence of outrages committed during the First World War, the 1919 Report of the Commission on Responsibility lists violations of the laws and customs of war which should be subject to criminal prosecution, including the "deliberate bombardment of undefended places".

236. Article 2 of the 1938 ILA Draft Convention for the Protection of Civilian Populations against New Engines of War provides that "the bombardment by whatever means of towns, ports, villages or buildings which are undefended is prohibited in all circumstances".

237. In paragraph 3 of the 1993 Franco-German Declaration on the War in Bosnia and Herzegovina, France and Germany stated that they "considered the establishment of safe areas necessary for the protection of the Bosnian civilian population" in the former Yugoslavia.

238. According to Article 3 of the 1993 ICTY Statute, among the violations of the laws or customs of war in respect to which the Tribunal is competent *ratione materiae*, is "attack, or bombardment, by whatever means, of undefended towns, villages, dwellings, or buildings".

239. Under Article 20(e) of the 1996 ILC Draft Code of Crimes against the Peace and Security of Mankind, "attack, or bombardment, by whatever means, of undefended towns, villages, dwellings or buildings" is a war crime.

240. The 2000 UNTAET Regulation No. 2000/15 establishes panels with exclusive jurisdiction over serious criminal offences, including war crimes. According to Section 6(1)(b)(v), "attacking or bombarding, by whatever means, towns, villages, dwellings or buildings which are undefended and which are not military objectives" constitutes a war crime in international armed conflicts.

II. National Practice

Military Manuals

241. Argentina's Law of War Manual (1969) states that "it is prohibited to attack or bombard undefended cities, localities, dwellings or buildings".²³²

²³² Argentina, *Law of War Manual* (1969), § 1.011.

242. Argentina's Law of War Manual (1989) states that it is prohibited to "attack, by whatever means, non-defended localities".²³³ It further qualifies attacks against non-defended localities as grave breaches of IHL.²³⁴

243. Australia's Defence Force Manual states that "towns, villages, dwellings or buildings which are undefended are also protected from attack".²³⁵ With respect to non-defended localities, the manual states that "military objectives within a non-defended locality, from which hostile acts are being conducted, can be attacked, subject to weapon and targeting considerations . . . Otherwise, non-defended localities cannot be attacked."²³⁶ The manual further provides that "making non-defended localities . . . the object of attack" constitutes a grave breach or a serious war crime likely to warrant institution of criminal proceedings.²³⁷

244. Belgium's Teaching Manual for Soldiers contains a slide illustrating the prohibition of bombardment of a village in which no combatants or military objects are located.²³⁸

245. Bosnia and Herzegovina's Military Instructions provides that "it is prohibited to attack a place which has been declared an 'open city'".²³⁹

246. Canada's LOAC Manual states that "it is prohibited for parties to a conflict to attack, by any means whatsoever, non-defended localities".²⁴⁰ Under the manual, a non-defended locality loses its status when it ceases to fulfil the conditions described by the manual (which are the same as those listed in Article 59 AP I) or in an agreement between adverse parties to establish that non-defended locality.²⁴¹ The manual further provides that "making non-defended localities . . . the object of attack" constitutes a grave breach of AP I.²⁴²

247. Croatia's Commanders' Manual states that it is a commander's duty to give relevant instructions concerning the protection of undefended areas when military activities are conducted in the vicinity of such areas.²⁴³

248. Croatia's LOAC Compendium qualifies "unlawful attacks on . . . undefended localities" as war crimes.²⁴⁴

249. Ecuador's Naval Manual states that "belligerents are forbidden to bombard a city or town that is undefended and that is open to immediate entry by their own or allied forces. A city or town behind enemy lines is, by definition,

²³³ Argentina, *Law of War Manual* (1989), § 4.06.

²³⁴ Argentina, *Law of War Manual* (1989), § 8.03.

²³⁵ Australia, *Defence Force Manual* (1994), § 534, see also § 732 (siege warfare).

²³⁶ Australia, *Defence Force Manual* (1994), §§ 726 and 732.

²³⁷ Australia, *Defence Force Manual* (1994), § 1315(k); see also *Commanders' Guide* (1994), § 1305(k).

²³⁸ Belgium, *Manual for Soldiers* (undated), p. 86 and slide 7/2.

²³⁹ Bosnia and Herzegovina, *Military Instructions* (1992), § 6.

²⁴⁰ Canada, *LOAC Manual* (1999), p. 4-11, § 109.

²⁴¹ Canada, *LOAC Manual* (1999), p. 4-11, § 114.

²⁴² Canada, *LOAC Manual* (1999), p. 16-3, § 16(d).

²⁴³ Croatia, *Commanders' Manual* (1992), § 48.

²⁴⁴ Croatia, *LOAC Compendium* (1991), p. 56.

neither undefended nor open, and military targets therein may be destroyed or bombed.

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250. France's LOAC Teaching Note includes non-defended localities among the zones that are specially protected by IHL. It states that, while occupation of non-defended localities is permitted, attacks against such localities are prohibited, provided they are completely demilitarised.²⁴⁶

251. France's LOAC Manual includes undefended localities in the list of specially protected objects and states that it is prohibited for the parties to a conflict to attack them by any means whatsoever.²⁴⁷ The manual also prohibits attacks on open towns.²⁴⁸

252. Germany's Military Manual prohibits "the attack or bombardment of non-defended localities".²⁴⁹ The manual further provides that grave breaches of IHL are in particular "launching attacks against non-defended localities".²⁵⁰

253. Hungary's Military Manual qualifies "unlawful attacks on . . . undefended localities" as war crimes.²⁵¹

254. Indonesia's Air Force Manual states that:

The bombardment of undefended towns, villages and buildings is prohibited if:

- (a) there are no armed forces or combatants in these areas;
- (b) there are no weapons or other mobile equipment;
- (c) there are no installations or permanent military equipment in order to achieve a military purpose;
- (d) there is no act of war by the authority or its inhabitants;
- (e) there is no activity which supports military operations.²⁵²

255. Italy's IHL Manual qualifies "indiscriminate attacks against . . . non-defended localities" as war crimes.²⁵³

256. Italy's LOAC Elementary Rules Manual states that "where protected zones or localities (. . . non-defended localities) have been agreed upon, the competent commanders shall issue instructions for action and behaviour near and towards such zones or localities".²⁵⁴ The manual also provides that "protected zones shall be respected".²⁵⁵

257. Kenya's LOAC Manual provides that it is forbidden "to attack or bombard undefended towns, villages, dwellings or buildings".²⁵⁶

258. South Korea's Military Regulation 187 qualifies "attacks against non-defended localities" as war crimes.²⁵⁷

²⁴⁵ Ecuador, *Naval Manual* (1989), § 8.5.1.3. ²⁴⁶ France, *LOAC Teaching Note* (2000), p. 5.

²⁴⁷ France, *LOAC Manual* (2001), p. 31. ²⁴⁸ France, *LOAC Manual* (2001), p. 124.

²⁴⁹ Germany, *Military Manual* (1992), § 458.

²⁵⁰ Germany, *Military Manual* (1992), § 1209.

²⁵¹ Hungary, *Military Manual* (1992), p. 90.

²⁵² Indonesia, *Air Force Manual* (1990), § 59. ²⁵³ Italy, *IHL Manual* (1991), Vol. I, § 85.

²⁵⁴ Italy, *LOAC Elementary Rules Manual* (1991), § 47.

²⁵⁵ Italy, *LOAC Elementary Rules Manual* (1991), § 70.

²⁵⁶ Kenya, *LOAC Manual* (1997), Précis No. 4, p. 2, see also p. 6.

²⁵⁷ South Korea, *Military Regulation 187* (1991), Article 4(2).

- 259.** South Korea's Operational Law Manual states that attacks on undefended cities, towns, houses and buildings are prohibited.²⁵⁸
- 260.** According to the Military Manual of the Netherlands, "parties to a conflict may not attack undefended areas and this is a result of the 'open town doctrine'".²⁵⁹ The manual further states that "attacking... undefended areas" in violation of IHL constitutes a grave breach.²⁶⁰
- 261.** The Military Handbook of the Netherlands prohibits attacks on "undefended cities, villages and buildings".²⁶¹
- 262.** New Zealand's Military Manual recalls that "the law of armed conflict forbids attack by any means of undefended places".²⁶² It provides that "a locality which ceases to fulfil the conditions laid down for it to qualify as an undefended place, loses its status, but remains protected by the other rules of armed conflict relating to bombardment, attack, means and methods of combat, and the like".²⁶³ The manual further states that "making non-defended localities... the object of attack" constitutes a grave breach of AP I.²⁶⁴
- 263.** According to Nigeria's Manual on the Laws of War, "firing on undefended localities" is a war crime.²⁶⁵
- 264.** Russia's Military Manual states that "the bombardment by military aircraft or vessels of cities, ports, villages, dwellings or buildings... which are undefended and not used for military purposes" is a prohibited method of warfare.²⁶⁶
- 265.** South Africa's LOAC Manual states that "it is prohibited to attack or bombard, by whatever means, undefended towns, villages, dwellings or buildings. A facility which is occupied by medical units alone is not regarded as defended."²⁶⁷ The manual further states that "firing on localities which are undefended and without military significance" constitute a grave breach of IHL.²⁶⁸
- 266.** Spain's LOAC Manual prohibits attacks against open towns and non-defended localities.²⁶⁹ The manual further states that "launching an attack against... non-defended localities" constitutes a war crime.²⁷⁰
- 267.** Sweden's IHL Manual refers to Article 59 AP I and states that the chief rule relating to non-defended localities has the status of customary law.²⁷¹

²⁵⁸ South Korea, *Operational Law Manual* (1996), pp. 131–132.

²⁵⁹ Netherlands, *Military Manual* (1993), p. V-15, § 13.

²⁶⁰ Netherlands, *Military Manual* (1993), p. IX-5.

²⁶¹ Netherlands, *Military Handbook* (1995), p. 7-36.

²⁶² New Zealand, *Military Manual* (1992), § 412(6).

²⁶³ New Zealand, *Military Manual* (1992), § 412(8).

²⁶⁴ New Zealand, *Military Manual* (1992), 1703(3)(d).

²⁶⁵ Nigeria, *Manual on the Laws of War* (undated), § 6.

²⁶⁶ Russia, *Military Manual* (1990), § 5(n). ²⁶⁷ South Africa, *LOAC Manual* (1996), § 28(e).

²⁶⁸ South Africa, *LOAC Manual* (1996), § 38(b).

²⁶⁹ Spain, *LOAC Manual* (1996), Vol. I, § 4.5.b.(3)(b).

²⁷⁰ Spain, *LOAC Manual* (1996), Vol. I, § 11.8.b.(1).

²⁷¹ Sweden, *IHL Manual* (1991), Section 2.2.3, p. 19.

268. Switzerland's Basic Military Manual states that "it is prohibited to attack or bombard, by whatever means, undefended cities, villages, housing areas or buildings".²⁷² It further provides that "launching an attack against non-defended localities" constitutes a grave breach of AP I.²⁷³

269. The UK Military Manual states, with reference to Article 25 of the 1907 HR, that the distinction between "defended" and "undefended" localities still exists and is not invalidated by the considerable destructive power of modern artillery and guided missiles. It clearly states the prohibition of any attack against undefended localities.²⁷⁴ The manual further states that "in addition to the 'grave breaches' of the 1949 [Geneva] Conventions . . . the following are examples of punishable violations of the laws of war, or war crimes: . . . (c) firing on undefended localities".²⁷⁵

270. The UK LOAC Manual states that it is forbidden "to attack or bombard undefended towns, villages, dwellings or buildings".²⁷⁶

271. The US Field Manual reproduces Article 25 of the 1907 HR and states that "in addition to the 'grave breaches' of the Geneva Conventions of 1949, the following acts are representative of violations of the law of war ('war crimes'): . . . d. Firing on localities which are undefended and without military significance."²⁷⁷

272. The US Air Force Pamphlet reproduces Article 25 of the 1907 HR and states that:

Cities behind enemy lines and not open to occupation may contain military objectives. The application of this undefended rule to aerial warfare, where the object of the attack was not to occupy the city but to achieve some specific military advantage by destroying a particular military objective, caused disagreements in the past. In the US view, it has been recognized by the practice of nations that any place behind enemy lines is a defended place because it is not open to unopposed occupation. Thus, although such a city is incapable of defending itself against aircraft, nonetheless if it is in enemy held territory and not open to occupation, military objectives in the city can be attacked.²⁷⁸

273. The US Air Force Commander's Handbook states that:

Towns, villages, cities, refugee camps, and other areas containing a concentration of civilians should not be bombarded if they are undefended and open to occupation or capture by friendly ground forces in the vicinity. Any military objectives that might exist in these towns (for example, military supplies) can be seized or destroyed by the ground forces.²⁷⁹

²⁷² Switzerland, *Basic Military Manual* (1987), Article 32(1).

²⁷³ Switzerland, *Basic Military Manual* (1987), Article 193(1)(d).

²⁷⁴ UK, *Military Manual* (1958), § 290. ²⁷⁵ UK, *Military Manual* (1958), § 626(c).

²⁷⁶ UK, *LOAC Manual* (1981), Section 4, p. 14, § 5(c).

²⁷⁷ US, *Field Manual* (1956), §§ 39 and 504(d).

²⁷⁸ US, *Air Force Pamphlet* (1976), § 5-3(e).

²⁷⁹ US, *Air Force Commander's Handbook* (1980), § 3-6(a).

274. The US Instructor's Guide states that "the attack or shelling by any means whatsoever of undefended towns, villages, dwellings, or buildings is prohibited. This means that military targets can be attacked wherever they are located, but a town with no military targets must be spared."²⁸⁰ The manual also provides that "in addition to the grave breaches of the Geneva Conventions, the following acts are further examples of war crimes: . . . firing on facilities which are undefended and without military significance".²⁸¹

275. The US Rules of Engagement for Operation Desert Storm prohibits firing at civilian populated areas or buildings which are not defended nor are being used for military purposes.²⁸²

276. The US Naval Handbook states that:

Belligerents are forbidden to bombard a city or town that is undefended and that is open to immediate entry by their own or allied forces. A city or town behind enemy lines is, by definition, neither undefended nor open, and military targets therein may be destroyed or bombarded.²⁸³

277. The YPA Military Manual of the SFRY (FRY) prohibits attacks against open towns and non-defended localities.²⁸⁴

National Legislation

278. Argentina's Draft Code of Military Justice punishes any soldier who "wilfully violates the protection due to . . . non-defended localities . . . which are properly marked".²⁸⁵

279. Under Armenia's Penal Code, "targeting undefended areas" during an armed conflict constitutes a crime against the peace and security of mankind.²⁸⁶

280. Australia's War Crimes Act considers "any war crime within the meaning of the instrument of appointment of the Board of Inquiry [set up to investigate war crimes committed by enemy subjects]" as a war crime, including the deliberate bombardment of undefended places.²⁸⁷

281. Australia's Geneva Conventions Act as amended provides that "a person who, in Australia or elsewhere, commits a grave breach . . . of [AP I] is guilty of an indictable offence".²⁸⁸

282. Australia's ICC (Consequential Amendments) Act incorporates in the Criminal Code the war crimes defined in the 1998 ICC Statute, including "attacking undefended places" in international armed conflicts.²⁸⁹

²⁸⁰ US, *Instructor's Guide* (1985), p. 6. ²⁸¹ US, *Instructor's Guide* (1985), p. 13.

²⁸² US, *Rules of Engagement for Operation Desert Storm* (1991), § B.

²⁸³ US, *Naval Handbook* (1995), § 8.5.1.3, see also § 8.6.2.2 (protected places and objects).

²⁸⁴ SFRY (FRY), *YPA Military Manual* (1988), §§ 77 and 81.

²⁸⁵ Argentina, *Draft Code of Military Justice* (1998), Article 292, introducing a new Article 876(2) in the *Code of Military Justice as amended* (1951).

²⁸⁶ Armenia, *Penal Code* (2003), Article 390.3(4).

²⁸⁷ Australia, *War Crimes Act* (1945), Section 3.

²⁸⁸ Australia, *Geneva Conventions Act as amended* (1957), Section 7(1).

²⁸⁹ Australia, *ICC (Consequential Amendments) Act* (2002), Schedule 1, § 268.39, see also § 268.98 (grave breach of AP I).

283. Azerbaijan's Criminal Code provides that "directing attacks against non-defended localities" constitutes a war crime in international and non-international armed conflicts.²⁹⁰

284. The Criminal Code of Belarus provides that it is a war crime to "direct attack against non-defended localities".²⁹¹

285. Belgium's Law concerning the Repression of Grave Breaches of the Geneva Conventions and their Additional Protocols as amended provides that "making non-defended localities . . . the object of attack" constitutes a crime under international law.²⁹²

286. Under the Criminal Code of the Federation of Bosnia and Herzegovina, it is a war crime to order that "non-defended localities . . . be indiscriminately targeted" or to carry out such targeting.²⁹³ The Criminal Code of the Republika Srpska contains the same provision.²⁹⁴

287. Under Burundi's Draft Law on Genocide, Crimes against Humanity and War Crimes, "attacking or bombarding, by whatever means, towns, villages, dwellings or buildings which are undefended and which are not military objectives" constitutes a war crime in international armed conflicts.²⁹⁵

288. Canada's Geneva Conventions Act as amended provides that "every person who, whether within or outside Canada, commits a grave breach [of AP I] . . . is guilty of an indictable offence".²⁹⁶

289. Canada's Crimes against Humanity and War Crimes Act provides that the war crimes defined in Article 8(2) of the 1998 ICC Statute are "crimes according to customary international law" and, as such, indictable offences under the Act.²⁹⁷

290. China's Law Governing the Trial of War Criminals provides that "deliberate bombing of non-defended areas" constitutes a war crime.²⁹⁸

291. Congo's Genocide, War Crimes and Crimes against Humanity Act defines war crimes with reference to the categories of crimes set out in Article 8 of the 1998 ICC Statute.²⁹⁹

292. The Geneva Conventions and Additional Protocols Act of the Cook Islands punishes "any person who in the Cook Islands or elsewhere commits, or aids or abets or procures the commission by another person of, a grave breach . . . of [AP I]".³⁰⁰

²⁹⁰ Azerbaijan, *Criminal Code* (1999), Article 116(7).

²⁹¹ Belarus, *Criminal Code* (1999), Article 136(7).

²⁹² Belgium, *Law concerning the Repression of Grave Breaches of the Geneva Conventions and their Additional Protocols as amended* (1993), Article 1(14).

²⁹³ Bosnia and Herzegovina, Federation, *Criminal Code* (1998), Article 154(2).

²⁹⁴ Bosnia and Herzegovina, Republika Srpska, *Criminal Code* (2000), Article 433(2).

²⁹⁵ Burundi, *Draft Law on Genocide, Crimes against Humanity and War Crimes* (2001), Article 4(B)(e).

²⁹⁶ Canada, *Geneva Conventions Act as amended* (1985), Section 3(1).

²⁹⁷ Canada, *Crimes against Humanity and War Crimes Act* (2000), Section 4(1) and (4).

²⁹⁸ China, *Law Governing the Trial of War Criminals* (1946), Article 3(27).

²⁹⁹ Congo, *Genocide, War Crimes and Crimes against Humanity Act* (1998), Article 4.

³⁰⁰ Cook Islands, *Geneva Conventions and Additional Protocols Act* (2002), Section 5(1).

293. Under Croatia's Criminal Code, "indiscriminate attacks affecting . . . non-defended localities" are war crimes.³⁰¹

294. Cyprus's AP I Act punishes "any person who, whatever his nationality, commits in the Republic or outside the Republic any grave breach of the provisions of the Protocol, or takes part or assists or incites another person in the commission of such a breach".³⁰²

295. The Czech Republic's Criminal Code as amended provides for the punishment of "a commander who, contrary to the provisions of international law on means and methods of warfare, intentionally: . . . (b) leads an attack against a defenceless place".³⁰³

296. Under the Draft Amendments to the Penal Code of El Salvador, "anyone who, in the context of an international or non-international armed conflict, attacks a non-defended locality" is punishable by imprisonment.³⁰⁴

297. Under Estonia's Penal Code, "an attack against . . . a settlement or structure without military protection" is a war crime.³⁰⁵

298. Under Georgia's Criminal Code, "making non-defended localities . . . the object of attack" in an international or non-international armed conflict is a punishable crime.³⁰⁶

299. Germany's Law Introducing the International Crimes Code provides for the punishment of anyone who, "in connection with an international armed conflict or with an armed conflict not of an international character, . . . directs an attack by military means against . . . undefended towns, villages, dwellings or buildings".³⁰⁷

300. Under Hungary's Criminal Code as amended, "a military commander who, in violation of the rules of international law concerning warfare, . . . takes offensive against . . . a weapon-free zone" commits a war crime.³⁰⁸

301. Ireland's Geneva Conventions Act as amended provides that grave breaches of AP I are punishable offences.³⁰⁹ It adds that any "minor breach" of AP I, including violations of Article 59(1) AP I, is also a punishable offence.³¹⁰

302. Under Jordan's Draft Military Criminal Code, "attacks against positions which have no means of defence" are considered war crimes.³¹¹

303. Under the Draft Amendments to the Code of Military Justice of Lebanon, "attacks against non-defended areas" are considered war crimes, provided that

³⁰¹ Croatia, *Criminal Code* (1993), Article 120(2).

³⁰² Cyprus, *AP I Act* (1979), Section 4(1).

³⁰³ Czech Republic, *Criminal Code as amended* (1961), Article 262(2)(b).

³⁰⁴ El Salvador, *Draft Amendments to the Penal Code* (1998), Article entitled "Ataque a localidades non defendidas".

³⁰⁵ Estonia, *Penal Code* (2001), § 106.

³⁰⁶ Georgia, *Criminal Code* (1999), Article 411(1)(d).

³⁰⁷ Germany, *Law Introducing the International Crimes Code* (2002), Article 1, § 11(1)(2).

³⁰⁸ Hungary, *Criminal Code as amended* (1978), Section 160(b).

³⁰⁹ Ireland, *Geneva Conventions Act as amended* (1962), Section 3(1).

³¹⁰ Ireland, *Geneva Conventions Act as amended* (1962), Section 4(1) and (4).

³¹¹ Jordan, *Draft Military Criminal Code* (2000), Article 41(A)(12).

they are committed intentionally and cause death or serious injury to body or health.³¹²

304. Under Lithuania's Criminal Code as amended, "a military attack against an undefended settlement" constitutes a war crime.³¹³

305. Under Mali's Penal Code, "attacking or bombarding, by whatever means, towns, villages, dwellings or buildings which are not defended and which do not constitute military objectives" constitutes a war crime in international armed conflict.³¹⁴

306. Under the Definition of War Crimes Decree of the Netherlands, the "deliberate bombardment of undefended places" constitutes a war crime.³¹⁵

307. Under the International Crimes Act of the Netherlands, it is a crime, during an international armed conflict, to commit "the following acts, when they are committed intentionally and in violation of the relevant provisions of Additional Protocol (I) and cause death or serious injury to body or health: . . . making non-defended localities . . . the object of attack".³¹⁶ Likewise, "attacking or bombarding, by whatever means, towns, villages, dwellings or buildings which are undefended and which are not military objectives" constitutes a crime, when committed in time of international armed conflict.³¹⁷

308. New Zealand's Geneva Conventions Act as amended provides that "any person who in New Zealand or elsewhere commits, or aids or abets or procures the commission by another person of, a grave breach . . . of [AP I] is guilty of an indictable offence".³¹⁸

309. Under New Zealand's International Crimes and ICC Act, war crimes include the crime defined in Article 8(2)(b)(v) of the 1998 ICC Statute.³¹⁹

310. Nicaragua's Draft Penal Code provides for a prison sentence for anyone who, in the context of an international or non-international armed conflict, "carries out an attack against non-defended localities".³²⁰

311. According to Niger's Penal Code as amended, "putting under attack non-defended localities" is a war crime.³²¹

312. Under Norway's Military Penal Code as amended, "anyone who contravenes or is accessory to the contravention of provisions relating to the protection of persons or property laid down in . . . the two additional protocols to [the Geneva] Conventions . . . is liable to imprisonment".³²²

313. Poland's Penal Code provides for the punishment of "any person who, during hostilities, attacks a non-defended locality or object".³²³

³¹² Lebanon, *Draft Amendments to the Code of Military Justice* (1997), Article 146(12).

³¹³ Lithuania, *Criminal Code as amended* (1961), Article 337.

³¹⁴ Mali, *Penal Code* (2001), Article 31(i)(6).

³¹⁵ Netherlands, *Definition of War Crimes Decree* (1946), Article 1.

³¹⁶ Netherlands, *International Crimes Act* (2003), Article 5(2)(c)(iv).

³¹⁷ Netherlands, *International Crimes Act* (2003), Article 5(5)(c).

³¹⁸ New Zealand, *Geneva Conventions Act as amended* (1958), Section 3(1).

³¹⁹ New Zealand, *International Crimes and ICC Act* (2000), Section 11(2).

³²⁰ Nicaragua, *Draft Penal Code* (1999), Article 466.

³²¹ Niger, *Penal Code as amended* (1961), Article 208.3(14).

³²² Norway, *Military Penal Code as amended* (1902), § 108(b).

³²³ Poland, *Penal Code* (1997), Article 122(1).

314. Slovakia's Criminal Code as amended provides for the punishment of "a commander who, contrary to the provisions of international law on means and methods of warfare, intentionally: . . . (b) leads an attack against an unprotected place".³²⁴

315. Under Slovenia's Penal Code, "a random attack on . . . non-defended areas" is a war crime.³²⁵

316. Spain's Penal Code provides for the punishment of "anyone who, in the event of armed conflict, should . . . knowingly violate the protection due to . . . undefended areas . . . which are duly identified with signs or the appropriate distinctive signals".³²⁶

317. Tajikistan's Criminal Code, in the section on "Serious violations of international humanitarian law", provides for the punishment of "wilful breaches of norms of international humanitarian law committed in an international or non-international armed conflict, i.e. . . . making non-defended areas . . . the object of attack".³²⁷

318. Under Trinidad and Tobago's Draft ICC Act, it is a punishable offence to commit a war crime as defined in Article 8(2)(b)(v) of the 1998 ICC Statute.³²⁸

319. The UK Geneva Conventions Act as amended punishes "any person, whatever his nationality, who, whether in or outside the United Kingdom, commits, or aids, abets or procures the commission by any other person of, a grave breach of . . . [AP I]".³²⁹

320. Under the UK ICC Act, it is a punishable offence to commit a war crime as defined in Article 8(2)(b)(v) of the 1998 ICC Statute.³³⁰

321. Under the US War Crimes Act as amended, violations of Article 25 of the 1907 HR are war crimes.³³¹

322. Venezuela's Code of Military Justice as amended provides for the punishment of "those who should bomb inhabited places which are not fortified, which are not occupied by enemy forces and which do not oppose resistance".³³²

323. Under the Penal Code as amended of the SFRY (FRY), "indiscriminate attacks on . . . non-defended localities" are a war crime.³³³ In a footnote related to the "use of prohibited means of combat", the Code further provides that "the following methods of combat are banned under international law: . . . bombing

³²⁴ Slovakia, *Criminal Code as amended* (1961), Article 262(2)(b).

³²⁵ Slovenia, *Penal Code* (1994), Article 374(2).

³²⁶ Spain, *Penal Code* (1995), Article 612(1).

³²⁷ Tajikistan, *Criminal Code* (1998), Article 403(1).

³²⁸ Trinidad and Tobago, *Draft ICC Act* (1999), Section 5(1)(a).

³²⁹ UK, *Geneva Conventions Act as amended* (1957), Section 1(1).

³³⁰ UK, *ICC Act* (2001), Sections 50(1) and 51(1) (England and Wales) and Section 58(1) (Northern Ireland).

³³¹ US, *War Crimes Act as amended* (1996), Section 2441(c)(2).

³³² Venezuela, *Code of Military Justice as amended* (1998), Article 474(10).

³³³ SFRY (FRY), *Penal Code as amended* (1976), Article 142(2).

and other forms of attacks on non-defended towns, villages and other localities and buildings".³³⁴

324. Zimbabwe's Geneva Conventions Act as amended punishes "any person, whatever his nationality, who, whether in or outside Zimbabwe, commits any such grave breach of . . . [AP I]".³³⁵

National Case-law

325. In the *Perišić and Others case* in 1997 in a trial *in absentia* before a Croatian district court, several persons were convicted of ordering the shelling of the city of Zadar and its surroundings on the basis of Article 25 of the 1907 HR, common Article 3 of the 1949 Geneva Conventions and Articles 13–14 AP II, as incorporated in Article 120 of Croatia's Criminal Code.³³⁶

326. In its judgement in the *Shimoda case* in 1963, Japan's District Court of Tokyo stated that "dropping an atomic bomb on undefended towns should . . . be deemed the same as blind bombing, if it is not an attack on defended towns. Such an act should be recognized as violating international law at that time."³³⁷

Other National Practice

327. The Report on the Practice of Angola recalls Article 59 AP I and the prohibition on waging hostilities against undefended areas.³³⁸

328. The Report on the Practice of Bosnia and Herzegovina states that "it is forbidden to attack a place which has been declared an 'open city'".³³⁹

329. The Report on the Practice of Botswana states that, in general, non-defended localities should not be attacked and cites Article 59 AP I.³⁴⁰

330. During the Korean War, the Chinese government blamed US forces for the bombardment of undefended areas. In a statement before the 18th International Conference of the Red Cross in Toronto in 1952, the head of the Chinese delegation denounced the fact that "undefended cities and villages were wantonly bombarded" and "a large number of peaceful civilians killed".³⁴¹

331. The Report on the Practice of China states that an occupying power shall not damage or destroy a city and its facilities in case of enemy withdrawal from the occupied territory, the reason being that the city is then, in fact, undefended.³⁴²

³³⁴ SFRY (FRY), *Penal Code as amended* (1976), Commentary on Article 148(1)(a).

³³⁵ Zimbabwe, *Geneva Conventions Act as amended* (1981), Section 3(1).

³³⁶ Croatia, District Court of Zadar, *Perišić and Others case*, Judgement, 24 April 1997.

³³⁷ Japan, District Court of Tokyo, *Shimoda case*, Judgement, 7 December 1963.

³³⁸ Report on the Practice of Angola, 1998, Chapter 5.

³³⁹ Report on the Practice of Bosnia and Herzegovina, 2000, Chapter 1.8.

³⁴⁰ Report on the Practice of Botswana, 1998, Chapter 1.8.

³⁴¹ China, Statement of 30 July 1952 at the 18th International Conference of the Red Cross, Toronto, 26 July–7 August 1952, reprinted in *Documents on Foreign Affairs of the People's Republic of China*, World Knowledge Press, Beijing, Vol. 2, pp. 82–83.

³⁴² Report on the Practice of China, 1997, Chapter 1.8.

332. In its written comments on other written statements submitted to the ICJ in the *Nuclear Weapons case* in 1995, Egypt declared that “the attack or bombardment, by whatever means, of towns, villages, dwellings, or buildings which are undefended is prohibited”.³⁴³

333. According to the Report on the Practice of Egypt, “Egypt thinks that protection of open towns [and] undefended areas . . . consists in refraining from launching attacks against . . . these areas”, which implies that “attacks against such places are prohibited”.³⁴⁴

334. The Report on the Practice of France states that attacks against protected zones are prohibited.³⁴⁵

335. The Report on the Practice of India states that “in cases of internal conflict there will be rare occasions when special protection is necessary for open towns or undefended areas”.³⁴⁶

336. The Report on the Practice of Iran notes that, Iran objected on several occasions to the bombardment of undefended areas by Iraqi armed forces during the Iran–Iraq War.³⁴⁷

337. According to the Report on the Practice of Iraq, all official documents, including military communiqués and political speeches, issued during the Iran–Iraq War confirm that open cities were not subjected to strikes of any kind.³⁴⁸

338. The Report on the Practice of Nigeria states that it is Nigeria’s *opinio juris* that the protection of undefended areas is part of customary international law.³⁴⁹

339. The Report on the Practice of Rwanda notes that no practice could be found concerning undefended areas. However, referring to an interview held with the President of the Military Tribunal, it also states that such zones would be protected according to the modalities of the agreement concluded between the belligerents.³⁵⁰

340. In 1987, the Deputy Legal Adviser of the US Department of State affirmed that “we support the principle that attacks shall not be made against appropriately declared or agreed non-defended localities”.³⁵¹

³⁴³ Egypt, Written comments on other written statements submitted to the ICJ, *Nuclear Weapons case*, September 1995, p. 21, § 50.

³⁴⁴ Report on the Practice of Egypt, 1997, Chapter 1.8.

³⁴⁵ Report on the Practice of France, 1999, Chapter 1.8.

³⁴⁶ Report on the Practice of India, 1997, Chapter 1.8.

³⁴⁷ Report on the Practice of Iran, 1997, Chapter 1.8.

³⁴⁸ Report on the Practice of Iraq, 1998, Chapter 1.8.

³⁴⁹ Report on the Practice of Nigeria, 1997, Chapter 1.8.

³⁵⁰ Report on the Practice of Rwanda, 1997, Chapter 1.8, referring to an interview with the President of Rwanda’s Military Tribunal, 23 October 1997.

³⁵¹ US, Remarks of Michael J. Matheson, Deputy Legal Adviser, US Department of State, The Sixth Annual American Red Cross–Washington College of Law Conference on International Humanitarian Law: A Workshop on Customary International Law and the 1977 Protocols Additional to the 1949 Geneva Conventions, *American University Journal of International Law and Policy*, Vol. 2, 1987, p. 427.

341. According to the Report on US Practice, the *opinio juris* of the US concerning open towns and undefended areas generally follows the conditions and rules prescribed in Articles 59 and 60 AP I.³⁵²

342. According to the Report on the Practice of Zimbabwe, non-defended areas are not to be attacked, but they may be occupied.³⁵³

III. Practice of International Organisations and Conferences

343. No practice was found.

IV. Practice of International Judicial and Quasi-judicial Bodies

344. No practice was found.

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

345. To fulfil its task of disseminating IHL, the ICRC has delegates around the world teaching armed and security forces that non-defended localities are “improvised protected zones” and that an attack against a non-defended locality constitutes a grave breach of the law of war.³⁵⁴

346. In a working paper on war crimes submitted in 1997 to the Preparatory Committee for the Establishment of an International Court, the ICRC proposed that the following war crime, when committed in an international armed conflict, be subject to the jurisdiction of the Court: “making non-defended localities the objects of attack”.³⁵⁵

VI. Other Practice

347. No practice was found.

³⁵² Report on US Practice, 1997, Chapter 1.8.

³⁵³ Report on the Practice of Zimbabwe, 1998, Chapter 1.8.

³⁵⁴ Frédéric de Mulinen, *Handbook on the Law of War for Armed Forces*, ICRC, Geneva, 1987, §§ 419 and 420.

³⁵⁵ ICRC, Working paper on war crimes submitted to the Preparatory Committee for the Establishment of an International Criminal Court, 14 February 1997, § 1(b)(iv).

CULTURAL PROPERTY

A. Attacks against Cultural Property (practice relating to Rule 38)	§§ 1–281
B. Use of Cultural Property for Military Purposes (practice relating to Rule 39)	§§ 282–354
C. Respect for Cultural Property (practice relating to Rule 40)	§§ 355–430
D. Export and Return of Cultural Property in Occupied Territory (practice relating to Rule 41)	§§ 431–482
Export of cultural property from occupied territory	§§ 431–449
Return of cultural property exported or taken from occupied territory	§§ 450–482

A. Attacks against Cultural Property

I. Treaties and Other Instruments

Treaties

1. Article 27 of the 1899 HR provides that:

In sieges and bombardments all necessary steps should be taken to spare as far as possible edifices devoted to religion, art, science, and charity . . . provided they are not being used at the time for military purposes.

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

2. Article 27 of the 1907 HR provides that:

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

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

3. Article 5 of the 1907 Hague Convention (IX) provides that:

In bombardments by naval forces all the necessary measures must be taken by the commander to spare as far as possible sacred edifices, buildings used for artistic,

scientific or charitable purposes, . . . on the understanding that they are not used at the same time for military purposes.

It is the duty of the inhabitants to indicate such monuments, edifices or places by visible signs, which shall consist of large, stiff rectangular panels divided diagonally into two coloured triangular portions, the upper portion black, the lower portion white.

4. Article 1 of the 1935 Roerich Pact provides that:

The historic monuments, museums, scientific, artistic, educational and cultural institutions shall be considered as neutral and as such respected and protected by belligerents.

...

The same respect and protection shall be accorded to the historic monuments, museums, scientific, artistic, educational and cultural institutions in time of peace as well as in war.

5. Article 5 of the 1935 Roerich Pact provides that "the monuments and institutions mentioned in Article 1 [historic monuments, museums, scientific, artistic, educational and cultural institutions] shall cease to enjoy the privileges recognised in the present Treaty in case they are made use of for military purposes".

6. Article 1 of the 1954 Hague Convention defines cultural property, for the purposes of the Convention, irrespective of origin or ownership, as:

- (a) movable or immovable property of great importance to the cultural heritage of every people, such as monuments of architecture, art or history, whether religious or secular; archaeological sites; groups of buildings which, as a whole, are of historical or artistic interest; works of art; manuscripts, books and other objects of artistic, historical or archaeological interest; as well as scientific collections and important collections of books or archives or of reproductions of the property defined above;
- (b) buildings whose main and effective purpose is to preserve or exhibit the movable cultural property defined in sub-paragraph (a) such as museums, large libraries and depositories of archives, and refuges intended to shelter, in the event of armed conflict, the movable cultural property defined in sub-paragraph (a);
- (c) centres containing a large amount of cultural property as defined in sub-paragraphs (a) and (b), to be known as "centres containing monuments".

7. Article 4 of the 1954 Hague Convention provides that:

- 1. The High Contracting Parties undertake to respect cultural property situated within their own territory as well as within the territory of other High Contracting Parties . . . by refraining from any act of hostility directed against such property.
- 2. The obligations mentioned in paragraph 1 of the present Article may be waived only in cases where military necessity imperatively requires such a waiver.

8. Article 19(1) of the 1954 Hague Convention provides that:

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

9. Article 28 of the 1954 Hague Convention provides that:

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

10. Article 53 AP I provides that:

Without prejudice to the provisions of the Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict of 14 May 1954, and of other relevant international instruments, it is prohibited:

- a) to commit any acts of hostility directed against the historic monuments, works of art or places of worship which constitute the cultural or spiritual heritage of peoples.

Article 53 AP I was adopted by consensus.¹

11. Article 85(4)(d) AP I considers the following a grave breach of the Protocol:

making the clearly-recognized historic monuments, works of art or places of worship which constitute the cultural or spiritual heritage of peoples and to which special protection has been given by special arrangement, for example, within the framework of a competent international organization, the object of attack, causing as a result extensive destruction thereof, where there is no evidence of the violation by the adverse Party of Article 53, sub-paragraph *b*), and when such historic monuments, works of art and places of worship are not located in the immediate proximity of military objectives.

Article 85 AP I was adopted by consensus.²

12. Upon ratification of AP I, Canada stated that:

It is the understanding of the Government of Canada in relation to Article 53 that:

- a. such protection as is afforded by the Article will be lost during such time as the protected property is used for military purposes; and
- b. the prohibitions contained in sub-paragraphs (a) and (b) of this Article can only be waived when military necessity imperatively requires such a waiver.³

13. Upon ratification of AP I, France declared that "if property protected under Article 53 AP I is used for military purposes, it loses the protection which it could enjoy according to the provisions of the Protocol".⁴

¹ CDDH, *Official Records*, Vol. VI, CDDH/SR.42, 27 May 1977, p. 206.

² CDDH, *Official Records*, Vol. VI, CDDH/SR.44, 30 May 1977, p. 291.

³ Canada, Reservations and statements of understanding made upon ratification of AP I, 20 November 1990, § 9.

⁴ France, Reservations and declarations made upon ratification of AP I, 11 April 2001, § 13.

14. Upon ratification of AP I, Ireland stated that “it is the understanding of Ireland in relation to the protection of cultural objects in Article 53 that if the objects protected by this Article are unlawfully used for military purposes they will thereby lose protection from attacks directed against such unlawful military use”.⁵

15. Upon ratification of AP I, Italy stated that “if and so long as the objectives protected by Article 53 are unlawfully used for military purposes, they will thereby lose protection”.⁶

16. Upon ratification of AP I, the Netherlands stated, with respect to Article 53 AP I, that “it is the understanding of the Government of the Kingdom of the Netherlands that if and for as long as the objects and places protected by this Article, in violation of paragraph (b), are used in support of the military effort, they will thereby lose such protection”.⁷

17. Upon signature and upon ratification of AP I, the UK stated, in relation to Article 53 AP I, that “if the objects protected by this Article are unlawfully used for military purposes they will thereby lose protection from attacks directed against such unlawful military uses”.⁸

18. Article 16 AP II provides that:

Without prejudice to the provisions of the Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict of 14 May 1954, it is prohibited to commit any acts of hostility directed against historic monuments, works of art or places of worship which constitute the cultural or spiritual heritage of peoples, and to use them in support of the military effort.

Article 16 AP II was adopted by 35 votes in favour, 15 against and 32 abstentions.⁹

19. Pursuant to Article 8(2)(b)(ix) and (e)(iv) of the 1998 ICC Statute, “intentionally directing attacks against buildings dedicated to religion, education, art, science or charitable purposes, [or] historic monuments . . . provided they are not military objectives” constitutes a war crime in both international and non-international conflicts.

20. Article 1(b) of the 1999 Second Protocol to the 1954 Hague Convention adopts the same definition as Article 1 of the 1954 Hague Convention.

21. Article 6 of the 1999 Second Protocol to the 1954 Hague Convention provides that:

With the goal of ensuring respect for cultural property in accordance with Article 4 of the [1954 Hague] Convention:

⁵ Ireland, Declarations and reservations made upon ratification of AP I, 19 May 1999, § 10.

⁶ Italy, Declarations made upon ratification of AP I, 27 February 1986, § 9.

⁷ Netherlands, Declarations made upon ratification of AP I, 26 June 1987, § 8.

⁸ UK, Declarations made upon signature of AP I, 12 December 1977, § g; Reservations and declarations made upon ratification of AP I, 28 January 1998, § k.

⁹ CDDH, *Official Records*, Vol. VII, CDDH/SR.53, 6 June 1977, p. 143.

- (a) a waiver on the basis of imperative military necessity pursuant to Article 4 paragraph 2 of the Convention may only be invoked to direct an act of hostility against cultural property when and for as long as:
 - (i) that cultural property has, by its function, been made into a military objective; and
 - (ii) there is no feasible alternative available to obtain a similar military advantage to that offered by directing an act of hostility against that objective;
- ...
- (c) the decision to invoke imperative military necessity shall only be taken by an officer commanding a force the equivalent of a battalion in size or larger, or a force smaller in size where circumstances do not permit otherwise;
- (d) in case of an attack based on a decision taken in accordance with sub-paragraph (a), an effective advance warning shall be given whenever circumstances permit.

22. Article 7 of the 1999 Second Protocol to the 1954 Hague Convention provides that:

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

- (a) do everything feasible to verify that the objectives to be attacked are not cultural property protected under Article 4 of the Convention;
- (b) take all feasible precautions in the choice of means and methods of attack with a view to avoiding, and in any event to minimizing, incidental damage to cultural property protected under Article 4 of the Convention;
- (c) refrain from deciding to launch any attack which may be expected to cause incidental damage to cultural property protected under Article 4 of the Convention which would be excessive in relation to the concrete and direct military advantage anticipated; and
- (d) cancel or suspend an attack if it becomes apparent:
 - (i) that the objective is cultural property protected under Article 4 of the Convention;
 - (ii) that the attack may be expected to cause incidental damage to cultural property protected under Article 4 of the Convention which would be excessive in relation to the concrete and direct military advantage anticipated.

23. Article 15 of the 1999 Second Protocol to the 1954 Hague Convention provides that:

1. Any person commits an offence within the meaning of this Protocol if that person intentionally and in violation of the Convention or this Protocol commits any of the following acts:
 - ...
 - (c) extensive destruction or appropriation of cultural property protected under the Convention and this Protocol;
 - (d) making cultural property protected under the Convention and this Protocol the object of attack.
- (2) Each Party shall adopt such measures as may be necessary to establish as criminal offences under its domestic law the offences set forth in this Article and to make such offences punishable by appropriate penalties.

24. Article 22(1) of the 1999 Second Protocol to the 1954 Hague Convention states that “this Protocol shall apply in the event of an armed conflict not of an international character, occurring within the territory of one of the Parties”.

Other Instruments

25. Article 35 of the 1863 Lieber Code provides that:

Classical works of art, libraries, scientific collections, or precious instruments, such as astronomical telescopes, as well as hospitals, must be secured against all avoidable injury, even when they are contained in fortified places whilst besieged or bombarded.

26. Article 17 of the 1874 Brussels Declaration provides that:

In such cases [of bombardment of a defended town or fortress, agglomeration of dwellings, or village] all necessary steps must be taken to spare, as far as possible, buildings dedicated to art, science, or charitable purposes, hospitals . . . provided they are not being used at the time for military purposes.

It is the duty of the besieged to indicate the presence of such buildings by distinctive and visible signs to be communicated to the enemy beforehand.

27. Article 34 of the 1880 Oxford Manual provides that:

In case of bombardment all necessary steps must be taken to spare, if it can be done, buildings dedicated to religion, art, science and charitable purposes . . . on the condition that they are not being utilized at the time, directly or indirectly, for defense.

It is the duty of the besieged to indicate the presence of such buildings by visible signs notified to the assailant beforehand.

28. Based on several documents supplying evidence of outrages committed during the First World War, the 1919 Report of the Commission on Responsibility lists violations of the laws and customs of war which should be subject to criminal prosecution, including “wanton destruction of religious, charitable, educational and historic buildings and monuments”.

29. Article 25 of the 1923 Hague Rules of Air Warfare provides that:

In bombardment by aircraft, all necessary steps must be taken by the commander to spare as far as possible buildings dedicated to public worship, art, science, or charitable purposes, historic monuments . . . provided such buildings, objects or places are not at the time used for military purposes. Such buildings, objects and places must by day be indicated by marks visible to aircraft . . .

A belligerent who desires to secure by night the protection for the hospitals and other privileged buildings above mentioned must take the necessary measures to render the special signs referred to sufficiently visible.

30. Article 26 of the 1923 Hague Rules of Air Warfare provides that:

The following special rules are adopted for the purpose of enabling States to obtain more efficient protection for important historic monuments situated within their

territory, provided that they are willing to refrain from the use of such monuments and a surrounding zone for military purposes, and to accept a special regime for their inspection.

- (1) A State shall be entitled, if it sees fit, to establish a zone of protection round such monuments situated in its territory. Such zones shall, in time of war, enjoy immunity from bombardment.
- (2) The monuments round which a zone is to be established shall be notified to other Powers in peace time through the diplomatic channel; the notification shall also indicate the limits of the zones. The notification may not be withdrawn in time of war.
- (3) The zone of protection may include, in addition to the area actually occupied by the monument or group of monuments, an outer zone, not exceeding 500 metres in width, measured from the circumference of the said area.
- (4) Marks clearly visible from aircraft either by day or by night will be employed for the purpose of ensuring the identification by belligerent airmen of the limits of the zones.

31. Pursuant to Article 22(2)(f) of the 1991 ILC Draft Code of Crimes against the Peace and Security of Mankind, "wilful attacks on property of exceptional religious, historical or cultural value" constitute exceptionally serious war crimes.

32. Paragraph 6 of the 1991 Memorandum of Understanding on the Application of IHL between Croatia and the SFRY provides that hostilities shall be conducted in accordance with Article 53 AP I.

33. Paragraph 2.5 of the 1992 Agreement on the Application of IHL between the Parties to the Conflict in Bosnia and Herzegovina provides that hostilities shall be conducted in accordance with Article 53 AP I.

34. Article 3(d) of the 1993 ICTY Statute includes among the violations of the laws or customs of war in respect of which the Tribunal has jurisdiction "seizure of, destruction or wilful damage done to institutions dedicated to religion, charity and education, the arts and sciences, historic monuments and works of art and science".

35. Article 1(2) of the 1997 Revised Lauswolt Document states that "it is prohibited to commit any acts of hostility directed against cultural property".

36. Article 12(1) of the 1997 Revised Lauswolt Document provides that:

All the provisions of this instrument, the provisions of the Convention and its 1954 Protocol which relate to safeguarding of, and respect for, cultural property shall apply in the event of an armed conflict not of an international character, occurring within the territory of one of the States Parties.

37. Section 6.6 of the 1999 UN Secretary-General's Bulletin states that "the United Nations force is prohibited from attacking monuments of art, architecture or history, archaeological sites, works of art, places of worship and museums and libraries which constitute the cultural or spiritual heritage of peoples".

38. The 2000 UNTAET Regulation No. 2000/15 establishes panels with exclusive jurisdiction over serious criminal offences, including war crimes.

According to Section 6(1)(b)(ix) and (e)(iv), “intentionally directing attacks against buildings dedicated to religion, education, art, science or charitable purposes, [or] historic monuments . . . provided they are not military objectives” constitutes a war crime in both international and non-international conflicts.

II. National Practice

Military Manuals

39. Argentina’s Law of War Manual (1969) provides that:

In the event of bombardment, assault or siege, all necessary precautions shall be adopted, as far as possible, to respect buildings devoted to worship, the arts, the sciences and to charity, as well as historic monuments, provided such buildings and monuments, which must display special, visible signs, are not used for military purposes.¹⁰

The manual further states, with respect to combat operations, that “the destruction of enemy property shall be permissible as far as required by military operations and subject to the limitations imposed by the requirement of respect for artistic, scientific and historical property”.¹¹

40. Argentina’s Law of War Manual defines cultural property in accordance with Article 1 of the 1954 Hague Convention.¹² It states that “it is absolutely prohibited to commit hostile acts against cultural property”.¹³ The manual further qualifies “attacks directed against clearly recognised cultural property” as a grave breach.¹⁴ With respect to non-international armed conflicts in particular, the manual states that “cultural objects and places of worship which constitute the cultural or spiritual heritage of peoples enjoy special protection; they may not be attacked”.¹⁵

41. Australia’s Commanders’ Guide states that:

Additional Protocol I and specific cultural property conventions generally prohibit attacks against historical, religious and cultural objects and buildings. However, this protection may be lost if the facility is used for military purposes, e.g. a museum or church that contains an enemy sniper may be attacked to neutralise the threat. Care must be taken to ensure that only reasonable force is used.¹⁶

The manual further states that:

960. LOAC provides that buildings dedicated to religion, art, science or charitable purposes, and historic monuments are immune from attack so long as they are not being used for military purposes and are marked with distinctive and visible signs and notified to the adverse party.

¹⁰ Argentina, *Law of War Manual* (1969), § 1.010.

¹¹ Argentina, *Law of War Manual* (1969), § 1.018.

¹² Argentina, *Law of War Manual* (1989), § 4.43.

¹³ Argentina, *Law of War Manual* (1989), § 4.44.

¹⁴ Argentina, *Law of War Manual* (1989), § 8.03.

¹⁵ Argentina, *Law of War Manual* (1989), § 7.09.

¹⁶ Australia, *Commanders’ Guide* (1994), § 409.

961. LOAC also extends immunity to cultural property of great importance to cultural heritage. This is irrespective of origin, ownership or whether the property is movable or immovable. LOAC requires such property to be protected, safeguarded and respected and not made the object of reprisals. Such protection is not absolute and is lost if cultural property is used for military purposes.¹⁷

42. Australia's Defence Force Manual states that:

926. LOAC provides for the specific protection of cultural objects and places of worship, which supplements the general protection given to civilian objects. Buildings dedicated to religion, science or charitable purposes, and historic monuments, are given immunity from attack as far as possible, so long as they are not being used for military purposes. Such places are to be marked with distinctive and visible signs which must be notified to the other party.

927. Cultural property is also protected. Cultural property includes movable and immovable objects of great importance to the cultural heritage of people, whether their state is involved in the conflict or not, such as historical monuments, archaeological sites, books, manuscripts or scientific papers and the buildings or other places in which such objects are housed. Obligations are placed upon all parties to respect cultural property . . . by refraining from any act of hostility directed against such property. These obligations may be waived where military necessity requires such waiver, as in the case where the object is used for military purposes.

928. Historic monuments, places of worship and works of art, which constitute the cultural and spiritual heritage of peoples, are protected from acts of hostility.¹⁸

43. Belgium's Law of War Manual states that "an adversary must abstain for all acts of hostility towards" cultural property under general protection but is "liberated of its obligations if the State, in whose territory the cultural property is located, uses it for military purposes".¹⁹

44. Belgium's Teaching Manual for Soldiers states that "certain objects and buildings must not be attacked. Unless an order to the contrary has been given, they must be avoided. This concerns buildings with a high cultural value (churches, museums, libraries, etc.) and the persons who guard them."²⁰

45. Benin's Military Manual states that:

Marked cultural property whose immunity has been lifted for reasons of military necessity must, nevertheless, be respected to the extent permitted by the tactical situation. If not already done, the distinctive emblems used to mark the protected property whose immunity has been lifted must be removed.²¹

46. Bosnia and Herzegovina's Military Instructions provides that "it is prohibited to expose cultural facilities to military activities and undertake any kind of hostile actions which may result in their damage or destruction".²²

47. Burkina Faso's Disciplinary Regulations provides that, according to the customs of war, soldiers in combat must "spare buildings dedicated to religion,

¹⁷ Australia, *Commanders' Guide* (1994), §§ 960–961.

¹⁸ Australia, *Defence Force Manual* (1994), §§ 926–928, see also §§ 540–542.

¹⁹ Belgium, *Law of War Manual* (1983), p. 29.

²⁰ Belgium, *Teaching Manual for Soldiers* (undated), p. 8, see also p. 22 and slides 6b/1 and 6b/4.

²¹ Benin, *Military Manual* (1995), Fascicule II, p. 8.

²² Bosnia and Herzegovina, *Military Instructions* (1992), Item 9, § 1.

art, science or charitable purpose, and historic monuments, provided they are not being used for military purposes".²³

48. Cameroon's *Instructors' Manual* distinguishes between "cultural property and places worship . . . which represent a high cultural value or which have an important religious dedication whose immunity may not be withdrawn . . . and which require no special marking" on the one hand, and "marked cultural property" on the other hand.²⁴

49. Cameroon's *Disciplinary Regulations* provides that each soldier must "spare buildings dedicated to religion, art, science or charitable purposes, and historic monuments . . . provided they are not being used for military purposes".²⁵

50. Canada's *LOAC Manual* states that:

63. The following actions are prohibited:
 - a. to commit any acts of hostility directed against the historic monuments, works of art or places of worship which constitute the cultural or spiritual heritage of peoples; or
 - ...
64. Care must be taken to avoid locating military personnel and material in or near protected cultural objects and places of worship.
65. Cultural objects and places of worship should be marked with the international sign [of the blue shield]. However, the absence of such a sign does not deprive such objects of protection.
66. Not all cultural objects and places of worship are protected as cultural or religious property by the LOAC. Only those cultural objects and places of worship which constitute the "cultural or spiritual heritage of peoples" are so protected. Therefore, a small village church may not be protected by the cultural protection provisions of the LOAC, but a major cathedral (e.g., Vatican) is likely entitled to protection. However, the fact that an object is not a cultural object does not mean that it is not a "civilian object". It would be entitled to protection under that status.
67. It is recognized that it may be difficult to distinguish between cultural objects and places of worship which are protected and those which are not protected. However, cultural objects and places of worship which are not protected nevertheless remain civilian objects and are protected as such.
68. Cultural objects and places of worship being used by the adverse party in support of its military effort may become legitimate targets.
69. Whether you attack cultural objects and places of worship which have become legitimate targets will depend on your mission. If so, the principle of proportionality is particularly important, as the location or object should not be damaged any more than what the mission requires.
70. Where possible, the opposing force should be warned to stop using a cultural object or place of worship for military purposes before an attack is launched.²⁶

²³ Burkina Faso, *Disciplinary Regulations* (1994), Article 35(1).

²⁴ Cameroon, *Instructors' Manual* (1992), p. 19, § 224.

²⁵ Cameroon, *Disciplinary Regulations* (1975), Article 31.

²⁶ Canada, *LOAC Manual* (1999), p. 4-7, §§ 63-70, see also p. 6-4, § 39.

The manual defines as a grave breach of AP I:

attacks against clearly-recognized historic monuments, works of art or places of worship which constitute the cultural or spiritual heritage of peoples, where there is no evidence of prior use of such objects in support of the adverse party's military effort and where such places are not located in the immediate proximity of legitimate targets.²⁷

With respect to non-international armed conflicts in particular, the manual states that "it is forbidden to commit any hostile acts directed against historic monuments, works of art or places of worship which constitute the cultural or spiritual heritage of peoples".²⁸

51. Canada's Code of Conduct provides that:

1. As a general rule, buildings or property dedicated to cultural or religious purposes may not be attacked. . . .
2. . . . Thus every attempt should be made to avoid unnecessary desecration or destruction of cultural objects and places of worship.
3. The identification of religious locations and objects is usually obvious. Churches, mosques and synagogues, cemeteries and other places of religious significance such as monasteries and temples are protected. The proper identification of cultural objects may not be as readily apparent. Cultural property is property of great importance to the cultural heritage of a people such as monuments of architecture, art or history, whether religious or not, archaeological sites, archives, buildings, manuscripts, works of art, large libraries, etc. These objects are protected.
4. Some cultural and religious locations may be marked with a distinctive blue and white sign. . . . However, not all religious and cultural property is marked with such a sign. Religious and cultural property should be respected whether or not it is marked with a sign. Thus a church or mosque should be protected even though the distinctive sign for cultural property may not be displayed on the exterior of the church.
5. Cultural and religious property should not be targeted. . . . If cultural or religious property is used for a military purpose, it loses its protection. Thus, care must be taken to avoid locating military personnel and material in or near these locations. If the opposing force is using a religious or cultural site for military purposes it becomes a legitimate target. Whether you attack this legitimate target will depend on your mission. If so, the principle of proportionality is particularly important as the location or object should not be damaged any more than what the mission requires. For example, the destruction of all or a portion of a church steeple may or may not be justified if it is being used by a sniper. The decision to attack would be based on the level of threat that the sniper presents and the military mission. The tactical method selected for the attack should not place CF personnel under undue risk yet should cause the least possible damage to the church. Where possible, the opposing force must be warned to stop using a cultural or religious site for a military purpose before an attack.²⁹

²⁷ Canada, *LOAC Manual* (1999), p. 16-3, § 17(d), see also p. 16-4, § 21(d) ("attacking a privileged or protected building").

²⁸ Canada, *LOAC Manual* (1999), p. 17-5, § 40.

²⁹ Canada, *Code of Conduct* (2001), Rule 9, §§ 1-5.

52. Colombia's Basic Military Manual considers that "abstaining from attacks against objects . . . which are part of its culture" is a way to protect the civilian population.³⁰ It defines cultural property as "all the objects that are the expression of a people's culture and that, because of their importance, must be protected against the effects of hostilities (monuments of architecture, archaeological sites, works of art, manuscripts, museums, archives, libraries, etc.)."³¹

53. Congo's Disciplinary Regulations provides that "buildings dedicated to religion, art, science or charitable purposes, and historic monuments must be spared, provided they are not being used by the enemy for military purposes".³²

54. According to Croatia's LOAC Compendium, acts of hostility against cultural objects are prohibited. However, cultural objects under general protection lose their immunity in cases of imperative military necessity. The existence of such necessity must be established by the local commander.³³ The Compendium further qualifies "unlawful attacks on cultural objects" as war crimes.³⁴

55. Croatia's Commanders' Manual states that:

13. Specifically protected objects . . . may not be attacked.

14. The immunity of a marked cultural object may be withdrawn in case of imperative military necessity.

...

55. [In attack] the immunity of a marked cultural object shall only be withdrawn when the fulfilment of the mission absolutely so requires. Advance warning shall give time for safeguard measures and information on withdrawal of immunity.

...

69. Marked cultural objects whose immunity has been withdrawn shall still be respected to the extent the fulfilment of the mission permits.³⁵

56. The Military Manual of the Dominican Republic instructs soldiers as follows:

You may not attack certain types of property. You are required to take as much care as possible not to damage or destroy buildings dedicated to cultural or humanitarian purposes or their contents. Examples are buildings dedicated to religion, art, science, or charitable purposes; historical monuments; hospital and places where the sick and wounded are collected and cared for; and schools and orphanages for children. These places are considered protected property as long as they are not being used at the time by the enemy for military operations or purposes.³⁶

57. Ecuador's Naval Manual provides that "buildings devoted to religion, the arts, or charitable purposes, historic monuments and other religious, cultural

³⁰ Colombia, *Basic Military Manual* (1995), p. 22, § 2, see also p. 29, § 2(a).

³¹ Colombia, *Basic Military Manual* (1995), pp. 25–26, § 3.

³² Congo, *Disciplinary Regulations* (1986), Article 32.

³³ Croatia, *LOAC Compendium* (1991), p. 10.

³⁴ Croatia, *LOAC Compendium* (1991), p. 56.

³⁵ Croatia, *Commanders' Manual* (1992), §§ 13–14, 55 and 69.

³⁶ Dominican Republic, *Military Manual* (1980), p. 4.

or charitable facilities should not be bombarded, provided they are not used for military purposes".³⁷

58. France's Disciplinary Regulations as amended provides that soldiers in combat must "spare buildings dedicated to religion, art, science or charitable purposes, and historic monuments, provided they are not being used for military purposes".³⁸

59. France's LOAC Summary Note provides that "the specific immunity granted to certain persons and objects by the law of war [including marked cultural property] must be strictly observed... They may not be attacked."³⁹ The manual specifies that "the immunity of specifically protected objects may only be lifted under certain conditions and under the personal responsibility of the commander. Military necessity justifies only those measures which are indispensable for the accomplishment of the mission."⁴⁰ The manual qualifies "attacks against marked property" as a war crime.⁴¹

60. France's LOAC Teaching Note states that "the law of armed conflict grants specific protection to certain specially marked installations and zones", including certain works and installations containing dangerous forces.⁴² It further states that:

In general, cultural property (religious building, place of worship, monument, museum, important work of art...) is protected. Its immunity may be lifted only in case of imperative military necessity and according to an order received from higher authority. In such a case, prior warning must be given to allow the civilian population to seek refuge or to evacuate the combat area. The means of combat must be proportionate in order to limit, as much as possible, damage to such cultural property.⁴³

61. France's LOAC Manual restates the definition of cultural property set out in Article 1 of the 1954 Hague Convention.⁴⁴ It further states that:

The protection enjoyed by such property may be lifted only if military necessity so demands or if such property is used for military purposes by the enemy. Only a commander of a division or larger unit has the authority to lift the immunity. This measure must be notified to the adverse party sufficient time in advance.⁴⁵

62. Germany's Military Manual provides that:

901. The term "cultural property" means, irrespective of origin or ownership, movable or immovable objects of great importance to the cultural heritage of all peoples (e.g. monuments of architecture, art or history, be they of secular or religious nature, archaeological sites and collections).

³⁷ Ecuador, *Naval Manual* (1989), § 8.5.1.6, see also § 8.6.2.2 (protected objects).

³⁸ France, *Disciplinary Regulations as amended* (1975), Article 9 bis (1).

³⁹ France, *LOAC Summary Note* (1992), §§ 2.2–2.3.

⁴⁰ France, *LOAC Summary Note* (1992), § 2.4.

⁴¹ France, *LOAC Summary Note* (1992), § 3.4.

⁴² France, *LOAC Teaching Note* (2000), p. 5.

⁴³ France, *LOAC Teaching Note* (2000), p. 6.

⁴⁴ France, *LOAC Manual* (2001), p. 29.

⁴⁵ France, *LOAC Manual* (2001), p. 30.

902. Apart from this actual cultural property, a number of indirect cultural objects shall also be protected. These indirect cultural objects include:

- buildings for preserving or exhibiting cultural property (museums, archives etc.);
- refuges intended to shelter cultural objects; and
- centres containing monuments, i.e. centres containing a large amount of cultural property.

Protected cultural objects in the Federal Republic of Germany are documented in regional Lists of Cultural Objects which are available with the territorial command authorities.

903. . . . Any acts of hostility directed against cultural property shall be avoided.

904. In addition, civilian objects, such as churches, theatres, universities, museums, orphanages, homes for the elderly and other objects, shall also be spared as far as possible, even if they are of no historical or artistic value.

905. General protection shall be granted to all cultural objects and does not require any entry in a special register. Cultural property placed under general protection shall neither be attacked nor otherwise damaged. . .

906. An exception to this rule shall be permissible only in cases of imperative military necessity. The decision is to be taken by the competent military commander. Cultural property which the enemy uses for military purposes shall also be spared as far as possible.⁴⁶

The manual further provides that grave breaches of IHL are in particular "extensive destruction of cultural property and places of worship".⁴⁷

63. Germany's IHL Manual states that "movable or immovable property of great importance to the cultural heritage of every people (e.g. architectural, artistic or historical monuments, places of worship, libraries) shall neither be attacked nor damaged in any other way".⁴⁸

64. Hungary's Military Manual provides that cultural property comprises both religious and secular cultural objects representing the cultural or spiritual heritage of peoples. Their protection may only be withdrawn in case of "imperative military necessity" under the authority of a commander.⁴⁹ The manual qualifies "unlawful attacks on cultural objects" as war crimes.⁵⁰

65. Indonesia's Air Force Manual provides that "places of worship, cultural objects and places used for humanitarian purposes must not be attacked nor made the target of air bombardment, unless they are used for military purposes and that there is no obvious sign of such objects".⁵¹ It does not refer to any specific level of protection for cultural property, but states that "it is prohibited to destroy cultural objects and places of worship".⁵²

66. With reference to Israel's Law of War Booklet, the Report on the Practice of Israel states that "the IDF does not intentionally target historic monuments, works of art or places of worship". It further points out that "the policy may

⁴⁶ Germany, *Military Manual* (1992), §§ 901–906, see also § 463.

⁴⁷ Germany, *Military Manual* (1992), § 1209. ⁴⁸ Germany, *IHL Manual* (1996), § 701.

⁴⁹ Hungary, *Military Manual* (1992), p. 21. ⁵⁰ Hungary, *Military Manual* (1992), p. 90.

⁵¹ Indonesia, *Air Force Manual* (1990), § 60(c).

⁵² Indonesia, *Air Force Manual* (1990), § 127(e).

not apply in cases of such structures being used for hostile purposes or in cases in which military necessity imperatively requires otherwise".⁵³

67. Israel's Manual on the Laws of War states, in a section entitled "places of prayer and cultural property":

These are buildings dedicated to religion, art, science or similar property that form a part of the spiritual heritage of a people. Though one could maintain that the existence of such edifices has an impact on the military morale of the adversary's side, they are not considered a legitimate target.

A provision imposing the obligation to spare such buildings in the course of war, inasmuch as possible, appeared for the first time in the Hague Conventions. The massive destruction of cultural property during World War II (ancient bridges, cathedrals) resulted in the laws of war devoting a convention, following the war, to define the ban on attacking or damaging cultural property, known as the 1954 Hague Convention Cultural Property. IDF soldiers are obligated to comply with this convention whenever it is likely to be relevant, by virtue of GHQ Regulation 33.0133. It clearly follows from here, that an attack on mosques or churches, which pose no direct danger to our armed forces, is prohibited.⁵⁴

68. Italy's LOAC Elementary Rules Manual states that:

13. Specifically protected objects . . . may not be attacked.

14. The immunity of a marked cultural object may be withdrawn in case of imperative military necessity.

...

55. [In attack] the immunity of a marked cultural object shall only be withdrawn when the fulfilment of the mission absolutely so requires. Advance warning shall give time for safeguard measures and information on withdrawal of immunity.

...

69. Marked cultural objects whose immunity has been withdrawn shall still be respected to the extent the fulfilment of the mission permits.⁵⁵

69. Italy's IHL Manual states that "cultural property and places of worship are entitled to protection in all circumstances provided they are not illicitly used for military purposes".⁵⁶ The manual qualifies "indiscriminate attacks against . . . cultural property" as war crimes.⁵⁷

70. Kenya's LOAC Manual states that:

Objects representing a high cultural value, or with an important religious dedication independent of any cultural value, such as historical monuments, works of art and places of worship which constitute the cultural or spiritual heritage of peoples, enjoy full protection. Their immunity may not be withdrawn, contrary to that of marked cultural objects. Their value is generally self-evident and does not require special identification means.

⁵³ Report on the Practice of Israel, 1997, Chapter 4.3, referring to *Law of War Booklet* (1986), p. 6.

⁵⁴ Israel, *Manual on the Laws of War* (1998), pp. 33–34.

⁵⁵ Italy, *LOAC Elementary Rules Manual* (1991), §§ 13–14, 55 and 69.

⁵⁶ Italy, *IHL Manual* (1991), Vol. I, § 12.

⁵⁷ Italy, *IHL Manual* (1991), Vol. I, § 85.

Other objects representing a cultural value as such, independently of their religious or secular character, may come under:

- (a) general protection; or
- (b) special protection.⁵⁸

The manual further states that "certain property and buildings must not be attacked except when an order to the contrary has been given. This comprises buildings of cultural value (temples, museums, libraries, etc.) and the persons who look after them".⁵⁹ It specifies that "in attack, withdrawal of immunity of cultural objects marked with distinctive protective signs (in the exceptional case of unavoidable military necessity) shall, when the tactical situation permits, be limited in time and restricted to the less important parts of the object."⁶⁰

71. South Korea's Military Law Manual provides that special attention shall be paid to cultural property during armed conflicts.⁶¹

72. South Korea's Operational Law Manual provides that marked cultural properties shall be respected as long as possible.⁶²

73. Madagascar's Military Manual states that "historic monuments, works of art and places of worship which constitute the cultural or spiritual heritage of peoples enjoy full protection. Their immunity may not be withdrawn, contrary to that of marked cultural objects".⁶³ With respect to marked cultural property, defined in accordance with Article 1 of the 1954 Hague Convention, the manual states that "the immunity of marked cultural property may be withdrawn in case of imperative military necessity".⁶⁴

74. Mali's Army Regulations provides that, according to the laws and customs of war, soldiers in combat must "spare buildings dedicated to religion, art, science or charitable purposes, and historic monuments, provided they are not being used for military purposes".⁶⁵

75. Morocco's Disciplinary Regulations provides that, according to the laws and customs of war, soldiers in combat must "spare buildings dedicated to religion, art, science or charitable purposes, and historical monuments, provided they are not being used for military purposes".⁶⁶

76. The Military Manual of the Netherlands restates the definition of cultural property provided for in Article 1 of the 1954 Hague Convention. The manual states that respect for cultural objects implies that "no acts of hostility may be committed against them" but that an exception can be made "in case military

⁵⁸ Kenya, *LOAC Manual* (1997), Précis No. 2, p. 12.

⁵⁹ Kenya, *LOAC Manual* (1997), Précis No. 2, p. 15.

⁶⁰ Kenya, *LOAC Manual* (1997), Précis No. 4, p. 8.

⁶¹ South Korea, *Military Law Manual* (1996), p. 87.

⁶² South Korea, *Operational Law Manual* (1996), p. 134.

⁶³ Madagascar, *Military Manual* (1994), Fiche No. 3-SO, § F.

⁶⁴ Madagascar, *Military Manual* (1994), Fiche No. 3-O, § 14 and Fiche No. 3-SO, § G, see also Fiche No. 6-O, §§ 26 and 36, Fiche No. 7-O, § 14.

⁶⁵ Mali, *Army Regulations* (1979), Article 36.

⁶⁶ Morocco, *Disciplinary Regulations* (1974), Article 25(1).

necessity requires such an exception. Hence, the protection is not at all absolute".⁶⁷ It further provides that "attacking marked historic monuments, works of art or places of worship which are protected" in violation of IHL constitutes a grave breach.⁶⁸ With respect to non-international armed conflicts in particular, the manual states that "acts of hostility against historic monuments, works of art and places of worship are prohibited".⁶⁹ It recalls that, according to Article 19 of the 1954 Hague Convention, the provisions of that Convention on respect for cultural property apply, as a minimum, in non-international armed conflicts.⁷⁰

77. The Military Handbook of the Netherlands states that it is prohibited to attack "buildings that are used for worship, museums, historical monuments and other important cultural objects, unless they are used by the enemy for military purposes".⁷¹ The manual further states that "cultural property, such as historical monuments, places of worship and museums may not be attacked, damaged or destroyed".⁷²

78. The IFOR Instructions of the Netherlands provides that "it is also prohibited to attack property with a strictly civilian or religious character, unless this property is used for military purposes".⁷³

79. New Zealand's Military Manual restates Article 27 of the 1907 HR and refers to Article 5 of the 1907 Hague Convention (IX). It then quotes the definition of cultural property found in Article 1 of the 1954 Hague Convention and points out that "the protection of cultural property is not, however, absolute. If cultural property is used for military purposes, an opposing belligerent is released from the obligation to ensure immunity so long as the particular violation persists." The manual further states that for many of the parties to the 1907 HR, the 1907 Hague Convention (IX) and the 1954 Hague Convention, "their protection and obligations are overlaid by the protection and obligations of [Article 53] AP I". With respect to this overlap, the manual notes that:

At the time AP I was being negotiated it was clear, therefore, that not all historical, cultural and religious establishments are protected by this article; only such places as the Blue Mosque, the Coliseum, St. Paul's Cathedral, the Dome of the Rock, and the like. The special protection is confined to a limited class of objects which, because of their recognised importance, constitute a part of the cultural heritage of mankind. This approach may be regarded as culturally narrow today and could well result in a move to widen the protection.⁷⁴

⁶⁷ Netherlands, *Military Manual* (1993), p. V-6, § 5.

⁶⁸ Netherlands, *Military Manual* (1993), p. IX-6.

⁶⁹ Netherlands, *Military Manual* (1993), p. XI-7.

⁷⁰ Netherlands, *Military Manual* (1993), p. XI-1, § 1.

⁷¹ Netherlands, *Military Handbook* (1995), p. 7-36.

⁷² Netherlands, *Military Handbook* (1995), p. 7-43.

⁷³ Netherlands, *IFOR Instructions* (1995), § 12.

⁷⁴ New Zealand, *Military Manual* (1992), § 520 and footnote 78, see also § 632.

The manual further qualifies the following act as a grave breach of AP I:

making the clearly-recognised historic monuments, works of art or places of worship which constitute the cultural or spiritual heritage of peoples and to which special protection has been accorded by special arrangement, the object of attack causing extensive destruction thereof, where there is no evidence of prior use of such objects in support of the adverse Party's military effort, and when such places are not located in the immediate proximity of military objectives.⁷⁵

With respect to non-international armed conflicts in particular, the manual restates Article 16 AP II.⁷⁶

80. Nigeria's Operational Code of Conduct provides that, during military operations, all officers and men of the armed forces shall observe the rules whereby "no property, building, etc. will be destroyed maliciously".⁷⁷

81. Nigeria's Manual on the Laws of War states that "in an attack, steps must be taken to spare, as far as possible, buildings dedicated to public worship, art, science or charitable purposes and historic monuments".⁷⁸ The manual qualifies "bombardment of . . . privileged buildings" as a war crime.⁷⁹

82. The Soldier's Rules of the Philippines instructs soldiers to respect all objects bearing "emblems designating cultural property".⁸⁰

83. The Joint Circular on Adherence to IHL and Human Rights of the Philippines states that members of the armed forces and the national police shall respect all objects bearing "emblems designating cultural property".⁸¹

84. Russia's Military Manual states that "the bombardment by military aircraft or vessels of historic monuments [and] churches . . . which are undefended and not used for military purposes" and "the destruction of cultural property, historical monuments, places of worship, and other buildings which represent the cultural or spiritual heritage of a people" are prohibited methods of warfare.⁸²

85. Senegal's Disciplinary Regulations provides that soldiers in combat must "spare buildings dedicated to religion, art, science or charitable purposes, and historic monuments, provided they are not being used for military purposes".⁸³

86. South Africa's LOAC Manual states that "attacking clearly recognised historic monuments, works of art or places of worship and causing extensive damage where these objects have not been used in support of the military effort" constitutes a grave breach of IHL.⁸⁴

⁷⁵ New Zealand, *Military Manual* (1992), § 1703(4)(d), see also § 1703(5) ("attacking a privileged or protected building").

⁷⁶ New Zealand, *Military Manual* (1992), § 1822.

⁷⁷ Nigeria, *Operational Code of Conduct* (1967), § 4(f).

⁷⁸ Nigeria, *Manual on the Laws of War* (undated), § 13.

⁷⁹ Nigeria, *Manual on the Laws of War* (undated), § 6.

⁸⁰ Philippines, *Soldier's Rules* (1989), § 10.

⁸¹ Philippines, *Joint Circular on Adherence to IHL and Human Rights* (1991), § 2(a)(5).

⁸² Russia, *Military Manual* (1990), § 5(n) and (s).

⁸³ Senegal, *Disciplinary Regulations* (1990), Article 34(1).

⁸⁴ South Africa, *LOAC Manual* (1996), § 38(a).

87. Spain's LOAC Manual defines cultural objects in accordance with Article 1 of the 1954 Hague Convention.⁸⁵ The manual states that "the immunity of cultural property under general protection may only be lifted in case of imperative military necessity".⁸⁶ It also states that "historic monuments, works of art or places of worship which constitute the cultural or spiritual heritage of peoples may not be the object of acts of hostility. They may not be attacked, destroyed or damaged".⁸⁷ The manual further states that "launching an attack against cultural property which is not located in the vicinity of military objectives which causes extensive damage to such property" constitutes a war crime.⁸⁸

88. Sweden's Military Manual states that it is forbidden to wilfully destroy cultural property such as museum collections, churches, historical monuments and other cultural sites.⁸⁹

89. Sweden's IHL Manual states that:

Since the Second World War, great interest has been devoted to creating protection in international law for cultural values. According to the 1954 Hague Convention on the protection of cultural values, the parties shall respect cultural objects of different kinds so that these may receive protection as far as possible – exceptions are made if military necessity can be claimed. By cultural values are understood according to the Convention both fixed and movable property of great importance for a people's cultural and spiritual heritage. As such are considered buildings of historical or religious importance, collections of historically important buildings, museums and libraries, works of art, books and scientific collections. The Convention also contains precise rules for the marking of buildings, historic monuments, etc., and provisions covering the storage of movable cultural objects in special shelters. . . . A condition is that none of these cultural values may be used for military purposes. If this should happen, the adversary is no longer obliged to extend protection to these objects.

During the [CDDH] it was again wished to introduce rules for protecting cultural objects. Initially, it was not clear whether the protection should include all or only certain cultural objects in a country waging war. Some states wished the provisions of the cultural convention to be supplemented so that all objects of this nature would receive specific safeguards. Other states, however, reacted strongly against including all churches and historic buildings, etc. in the protected category. A rule like this would have been very difficult to follow in practice, which would probably have meant the protection being weakened. The final solution was that *only those cultural values that were considered to belong to a people's "cultural and spiritual heritage" would be included in this special protection.*

The new provision in Additional Protocol I (AP I Art. 53) could be seen as a replacement for the 1954 Cultural Convention, which, however, is not at all the intention. The Additional Protocol article is only intended to be a confirmation of the rules existing in a much more precise form in the 1954 Convention. A further reason for introducing Article 53 was that many states had not ratified the 1954 Convention.

⁸⁵ Spain, *LOAC Manual* (1996), Vol. I, § 1.3.d.(1).

⁸⁶ Spain, *LOAC Manual* (1996), Vol. I, § 2.4.b.(2), see also § 7.3.b.(2).

⁸⁷ Spain, *LOAC Manual* (1996), Vol. I, § 4.5.b.(2)(b), see also § 7.3.b.(2).

⁸⁸ Spain, *LOAC Manual* (1996), Vol. I, § 11.8.b.(1). ⁸⁹ Sweden, *Military Manual* (1976), p. 30.

All civilian objects enjoying special protection according to Articles 53–56 also have general protection according to Article 52, but this is clearly stated in the Protocol text only in the case of the places used for religious purposes. . . . As Article 53 aims at giving these objects protection equivalent to that of hospitals, the intention has obviously been that no such object shall be used for military purposes of any kind. If such an object should be so used, there is no longer any requirement upon the adversary to respect the safeguard.

This is not, however, the same as saying that an attack may be launched against, for example, a cathedral or national museum without further ado. The party contemplating such an attack must first judge whether the object can, according to the criteria of Article 52:2, make an effective contribution to its adversary's military operations; and above all whether their total or partial destruction would afford a clear military advantage. The commander who is to make these assessments should also bear in mind that a wilful attack on the object in question may later be judged to be a grave breach of international humanitarian law (AP I Art. 85:4).

In Article 53 [AP I] it is not only prohibited to attack the protected objects but to commit any kind of "hostile act" whatsoever against them, and this is a more far-reaching commitment. This can in fact also be taken to imply prohibition of intentional destruction instigated by one's own authorities. Burnt earth tactics, which are a permitted method of combat, may thus not include destruction of one's own cultural objects, which are safeguarded according to Article 53. It follows both from Article 53 and from the interpretation of some Western states that only the most important objects of a historical, cultural or religious nature may enjoy the protection of the article. In practice, therefore each party to Additional Protocol I must select which objects it considers shall enjoy this qualified protection. Additional Protocol I does not, however, state how this selection is to be made. One suitable way would be to select the objects using the criteria given in the Cultural Convention of 1954.⁹⁰ [emphasis in original]

90. Switzerland's Teaching Manual states that the immunity enjoyed by cultural property under general protection "may be lifted, in case of imperative military necessity, by a responsible commander".⁹¹

91. Switzerland's Basic Military Manual states that:

Art. 52. Cultural property consists of movable and immovable property of great importance for the cultural heritage.

Art. 53. In the event of armed conflict, the cultural property, movable or immovable, located in the territory of a Party to the conflict must be respected and safeguarded.

Art. 54. The obligation to respect may only be derogated from in case military necessity imperatively so demands.⁹²

The manual qualifies the following act as a grave breach of AP I:

making the clearly recognised historic monuments, works of art or places of worship which constitute the cultural or spiritual heritage of peoples and to which special protection has been given by special arrangement, for example, within the framework of a competent international organisation, the object of attack, causing

⁹⁰ Sweden, *IHL Manual* (1991), Section 3.2.1.5, pp. 56–58.

⁹¹ Switzerland, *Teaching Manual* (1986), p. 88.

⁹² Switzerland, *Basic Military Manual* (1987), Articles 52–54, see also Article 30(b).

as a result extensive destruction thereof, where there is no evidence of the violation by the adverse Party of Article 53, sub-paragraph b), and when such historic monuments, works of art and places of worship are not located in the immediate proximity of military objectives.⁹³

92. Togo's Military Manual states that:

Marked cultural property whose immunity has been lifted for reasons of military necessity must, nevertheless, be respected to the extent permitted by the tactical situation. If not already done, the distinctive emblems used to mark the protected property whose immunity has been lifted must be removed.⁹⁴

93. The UK Military Manual, while distinguishing between undefended and defended towns, states that a defended town is open to bombardment, subject to the limitations deriving from the principle of distinction, namely, "churches and monuments duly marked by signs . . . must not be deliberately attacked if they are not used for military purposes".⁹⁵ The manual further states that:

300. Although the bombardment of the private and public buildings of a defended town or fortress is lawful, all necessary steps must be taken to spare, as far as possible, buildings dedicated to public worship, art, science, or charitable purposes, historic monuments.

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

...

303. Buildings for which inviolability is thus claimed must not be used at the same time for military purposes, for instance, as offices and quarters for signalling stations or observation posts. If this condition is violated, the besieger is justified in disregarding the [protective] sign . . . Thus the bombardment of Strasbourg Cathedral in 1870 was generally held to have been justified for the reason that an artillery observation post was established in its tower. A similar position arose when the Abbey of Monte Cassino was shelled and bombed by the Allies in 1943. It was alleged that the Germans used the Abbey as . . . an observation post and store for military rations and ammunition.⁹⁶

94. The UK LOAC Manual states that:

In sieges, bombardments or attacks precautions must be taken to spare, as far as possible, buildings dedicated to religion, art, science or charitable purposes, historic monuments, important works of art . . . provided they are not being used for military purposes. Buildings of this sort should be distinctively marked, clearly identifying them as places to be spared. If a cathedral, museum or similar building is used for some military purpose then it may become a proper military target and there may be no alternative but to destroy it.⁹⁷

The manual further states that "in addition to the 'grave breaches' of the 1949 [Geneva] Conventions . . . the following are examples of punishable

⁹³ Switzerland, *Basic Military Manual* (1987), Article 193(2)(d).

⁹⁴ Togo, *Military Manual* (1996), Fascicule II, p. 8. ⁹⁵ UK, *Military Manual* (1958), § 290.

⁹⁶ UK, *Military Manual* (1958), §§ 300-301 and 303, and footnote 2.

⁹⁷ UK, *LOAC Manual* (1981), Section 4, p. 15 § 7.

violations of the laws of war, or war crimes: . . . (o) bombardment of . . . privileged buildings".⁹⁸

95. The US Field Manual reproduces Article 27 of the 1907 HR.⁹⁹ It also recalls that the US is party to the Roerich Pact, "which accords a neutralized and protected status to historic monuments, museums, scientific, artistic, educational and cultural institutions in the event of war".¹⁰⁰

96. The US Rules of Engagement for the Vietnam War stated that:

- (1) The enemy has shown by his actions that he takes advantage of areas or places normally considered as nonmilitary target areas. These areas are typified by those of religious background or historical value to the Vietnamese. When it is found that the enemy has sheltered himself or has installed defensive positions in such places or in public buildings and dwellings, the responsible senior brigade or higher commander in the area may order an attack to insure prompt destruction of the enemy. The responsible commander must identify positive enemy hostile acts either in the execution or preparation. Weapons and forces used will be those which will insure prompt defeat of enemy forces with minimum damage to structures in the area.

The exception to this policy is the palace compound in the Hue Citadel. For this specific area, commanders will employ massive quantities of CS agents and will take all other possible actions to avoid damage to the compound.¹⁰¹

97. The US Air Force Pamphlet provides that:

Buildings devoted to religion, art, or charitable purposes as well as historical monuments may not be made the object of aerial bombardment. Protection is based on their not being used for military purposes . . . When used by the enemy for military purposes, such buildings may be attacked if they are, under the circumstances, valid military objectives. Lawful military objectives located near protected buildings are not immune from aerial attack by reason of such location but, insofar as possible, necessary precautions must be taken to spare such protected buildings along with other civilian objects.¹⁰²

98. The US Air Force Commander's Handbook states that:

During military operations, reasonable measures should be taken to avoid damaging religious and cultural buildings, such as churches, temples, mosques, synagogues, museums, charitable institutions, historic monuments, archaeological sites, and works of art. These structures may lawfully be attacked if the enemy uses them for military purposes, though even then, the rules of engagement may place additional restrictions on US military operations. During World War II, for example, the Japanese city of Kyoto was never subjected to bombing because of the many historic and cultural monuments in the city.¹⁰³

⁹⁸ UK, *Military Manual* (1958), § 626(o).

⁹⁹ US, *Field Manual* (1956), § 45. ¹⁰⁰ US, *Field Manual* (1956), § 57.

¹⁰¹ US, *Rules of Engagement for the Vietnam War* (1971), § 6(c).

¹⁰² US, *Air Force Pamphlet* (1976), § 5-5(c).

¹⁰³ US, *Air Force Commander's Handbook* (1980), § 3-5(a).

99. The US Soldier's Manual instructs soldiers as follows:

Don't attack protected property. You are required to take as much care as possible not to damage or destroy buildings dedicated to cultural or humanitarian purposes or their contents. Examples are buildings dedicated to religion, art, science, or charitable purposes; historical monuments; hospital and places where the sick and wounded are collected and cared for; and schools and orphanages for children. These places are considered protected property as long as they are not being used at the time by the enemy for military operations or purposes.¹⁰⁴

100. The US Instructor's Guide states that:

And remember that in attacks and shellings all necessary measures must be taken to spare, as far as possible, nonmilitary facilities to include buildings dedicated to religion, art, science, or charitable purposes. The same applies to historic monuments and hospitals, provided these buildings and places are not being used for military purposes.¹⁰⁵

The manual further states that "in addition to the grave breaches of the Geneva Conventions, the following acts are further examples of war crimes: . . . firing on facilities which are undefended and without military significance such as churches".¹⁰⁶

101. The US Rules of Engagement for Operation Desert Storm state that "churches, shrines, schools, museums, national monuments, and any other historical or cultural sites will not be engaged except in self-defense".¹⁰⁷

102. The US Naval Handbook provides that "buildings devoted to religion, the arts, or charitable purposes; historic monuments; and other religious, cultural or charitable facilities should not be bombarded, provided they are not used for military purposes".¹⁰⁸

103. The Annotated Supplement to the US Naval Handbook states that "while the United States is not a Party to the 1954 Hague Convention, it considers it to reflect customary law".¹⁰⁹

104. The YPA Military Manual of the SFRY (FRY) prohibits the exposure of cultural property to combat actions and hostile acts which could destroy or damage the cultural property and obliges officers to assist in the preservation of cultural property on the basis of information received from the enemy. It permits attacks on cultural property "in case of military need", but places this exemption under the limitation that the "authority to make such a decision rests with high officers, division commanders and higher ranks". It further states that cultural property used for military purposes is deprived of its immunity, regardless of proper marking, as long as such a situation lasts.¹¹⁰

¹⁰⁴ US, *Soldier's Manual* (1984), p. 9. ¹⁰⁵ US, *Instructor's Guide* (1985), p. 7.

¹⁰⁶ US, *Instructor's Guide* (1985), p. 13.

¹⁰⁷ US, *Rules of Engagement for Operation Desert Storm* (1991), § C.

¹⁰⁸ US, *Naval Handbook* (1995), § 8.5.1.6, see also § 8.6.2.2 (protected objects).

¹⁰⁹ US, *Annotated Supplement to the Naval Handbook* (1997), § 8.5.1.6, footnote 122.

¹¹⁰ SFRY (FRY), *YPA Military Manual* (1988), §§ 86–87.

National Legislation

105. Argentina's Code of Military Justice as amended punishes "whoever attacks, without any necessity, . . . poorhouses, places of worship, monasteries, schools . . . which are marked by the appropriate distinctive signs" or "whoever destroys places of worship, monasteries, libraries, museums, archives or important works of art, unless required by the military operations".¹¹¹

106. Argentina's Draft Code of Military Justice punishes any soldier who "attacks . . . or carries out acts of hostility against clearly recognisable cultural property or places of worship, which constitute the cultural or spiritual heritage of peoples and which have been granted protection by special agreements, causing extensive destruction, provided they are not located near military objectives nor used in support of the enemy's military effort".¹¹²

107. Under Armenia's Penal Code, it is a crime against the peace and security of mankind to make, during an armed conflict,

the clearly-recognized historic monuments, works of art or places of worship which constitute the cultural or spiritual heritage of peoples and to which special protection has been granted, the object of attack, causing as a result extensive destruction thereof, when such historic monuments, works of art and places of worship are not located in the immediate proximity of military objectives and where there is no evidence of the use of such historic monuments, works of art and places of worship by the enemy for military purposes.¹¹³

108. Australia's Geneva Conventions Act as amended provides that "a person who, in Australia or elsewhere, commits a grave breach . . . of [AP I] is guilty of an indictable offence".¹¹⁴

109. Australia's ICC (Consequential Amendments) Act incorporates in the Criminal Code the war crimes defined in the 1998 ICC Statute, including "attacking protected objects . . . that are not military objectives [including] buildings dedicated to religion, education, art, science or charitable purposes [and] historic monuments" in international and non-international armed conflicts.¹¹⁵

110. Azerbaijan's Criminal Code provides that "directing attacks against specially protected historic, religious, educational, scientific [or] charitable . . . [buildings and] monuments, which are easily seen and distinguishable . . . without any military necessity" constitutes a war crime in international and non-international armed conflicts.¹¹⁶

¹¹¹ Argentina, *Code of Military Justice as amended* (1951), Articles 746(2) and 746(3) respectively.

¹¹² Argentina, *Draft Code of Military Justice* (1998), Article 293, introducing a new Article 877(1) in the *Code of Military Justice as amended* (1951).

¹¹³ Armenia, *Penal Code* (2003), Article 390.4(4).

¹¹⁴ Australia, *Geneva Conventions Act as amended* (1957), Section 7(1).

¹¹⁵ Australia, *ICC (Consequential Amendments) Act* (2002), Schedule 1, §§ 268.46 and 268.80, see also § 268.101 (grave breaches of AP I).

¹¹⁶ Azerbaijan, *Criminal Code* (1999), Article 116(8).

111. The Criminal Code of Belarus provides that it is a war crime to “direct attacks, without any military necessity, against historic monuments, works of art or places of worship which are clearly recognised and enjoy special protection”.¹¹⁷

112. Belgium’s Law concerning the Repression of Grave Breaches of the Geneva Conventions and their Additional Protocols as amended provides that it is a crime under international law to direct attacks against:

clearly recognised historic monuments, works of art or places of worship which constitute the cultural or spiritual heritage of peoples and to which special protection has been given by special arrangement, where there is no evidence of the adverse party having violated the prohibition of using such objects in support of the military effort, and where such objects are not located in the immediate proximity of military objectives.¹¹⁸

113. The Criminal Code of the Federation of Bosnia and Herzegovina, in a part dealing with “Criminal offences against humanity and international law”, provides that:

- (1) Whoever, in violation of the rules of international law at the time of war or armed conflict, destroys cultural or historical monuments, buildings or establishments devoted to science, art, education or humanitarian purposes, shall be punished . . .
- (2) If a clearly distinguishable object, which has been under special protection of international law as the people’s cultural and spiritual heritage, has been destroyed by an act defined in paragraph 1 of this Code, the perpetrator shall be punished [more severely].¹¹⁹

The Criminal Code of the Republika Srpska contains a similar provision.¹²⁰

114. Bulgaria’s Penal Code as amended provides that it is a “crime against the laws and customs of waging war” to destroy, damage or make unfit, in violation of the rules of international law for waging war, “cultural or historical monuments and objects, works of art, buildings and equipment intended for cultural, scientific or other humanitarian purposes”.¹²¹

115. Under Burundi’s Draft Law on Genocide, Crimes against Humanity and War Crimes, “intentionally directing attacks against buildings dedicated to religion, education, art, science or charitable purposes [or] historic monuments . . . provided they are not military objectives” is a war crime in both international and non-international conflicts.¹²²

¹¹⁷ Belarus, *Criminal Code* (1999), Article 136(8).

¹¹⁸ Belgium, *Law concerning the Repression of Grave Breaches of the Geneva Conventions and their Additional Protocols as amended* (1993), Article 1(3)(20).

¹¹⁹ Bosnia and Herzegovina, Federation, *Criminal Code* (1998), Article 164.

¹²⁰ Bosnia and Herzegovina, Republika Srpska, *Criminal Code* (2000), Article 443.

¹²¹ Bulgaria, *Penal Code as amended* (1968), Article 414(1).

¹²² Burundi, *Draft Law on Genocide, Crimes against Humanity and War Crimes* (2001), Article 4(B)(i) and (D)(d).

116. Canada's Geneva Conventions Act as amended provides that "every person who, whether within or outside Canada, commits a grave breach [of AP I] . . . is guilty of an indictable offence".¹²³

117. Canada's Crimes against Humanity and War Crimes Act provides that the war crimes defined in Article 8(2) of the 1998 ICC Statute are "crimes according to customary international law" and, as such, indictable offences under the Act.¹²⁴

118. Chile's Code of Military Justice provides for a prison sentence for "anyone who, contrary to instructions received, unnecessarily and maliciously . . . destroys places of worship, libraries, museums, archives or remarkable works of art".¹²⁵

119. China's Law Governing the Trial of War Criminals provides that "destroying religious, charitable, educational, historical constructions or memorials" constitutes a war crime.¹²⁶

120. Colombia's Military Penal Code punishes "anyone who during military service and without proper cause, destroys buildings, places of worship, archives, monuments or other public property".¹²⁷

121. Colombia's Penal Code provides for the punishment of

whoever, at the occasion of and during armed conflict, attacks or destroys, without any justification based on imperative military necessity, and without previously taking adequate and opportune measures of protection, historical monuments, works of art, educational institutions or places of worship, constituting the cultural or spiritual heritage of peoples, which are duly marked with the conventional signs.¹²⁸

122. Congo's Genocide, War Crimes and Crimes against Humanity Act defines war crimes with reference to the categories of crimes set out in Article 8 of the 1998 ICC Statute.¹²⁹

123. The Geneva Conventions and Additional Protocols Act of the Cook Islands punishes "any person who in the Cook Islands or elsewhere commits, or aids or abets or procures the commission by another person of, a grave breach . . . of [AP I]".¹³⁰

124. According to Croatia's Criminal Code, it is a war crime to destroy "cultural objects or facilities dedicated to science, art, education or those established for humanitarian purposes".¹³¹ It provides a heavier penalty if "a clearly recognizable facility is destroyed which belongs to the cultural and spiritual

¹²³ Canada, *Geneva Conventions Act as amended* (1985), Section 3(1).

¹²⁴ Canada, *Crimes against Humanity and War Crimes Act* (2000), Section 4(1) and (4).

¹²⁵ Chile, *Code of Military Justice* (1925), Article 261(2).

¹²⁶ China, *Law Governing the Trial of War Criminals* (1946), Article 3(27).

¹²⁷ Colombia, *Military Penal Code* (1999), Article 174.

¹²⁸ Colombia, *Penal Code* (2000), Article 156.

¹²⁹ Congo, *Genocide, War Crimes and Crimes against Humanity Act* (1998), Article 4.

¹³⁰ Cook Islands, *Geneva Conventions and Additional Protocols Act* (2002), Section 5(1).

¹³¹ Croatia, *Criminal Code* (1997), Article 167(1).

heritage of the people and which is under special protection of international law".¹³²

125. Cuba's Penal Code provides for the punishment of "anyone who intentionally destroys, damages or renders useless an object declared to be part of the cultural heritage or a national or local monument".¹³³

126. Cyprus's AP I Act punishes "any person who, whatever his nationality, commits in the Republic or outside the Republic any grave breach of the provisions of the Protocol, or takes part or assists or incites another person in the commission of such a breach".¹³⁴

127. The Czech Republic's Criminal Code as amended provides for the punishment of "a commander who, contrary to the provisions of international law on means and methods of warfare, intentionally: . . . (d) destroys or damages . . . a monument internationally-recognized as being of cultural importance".¹³⁵

128. The Code of Military Justice of the Dominican Republic provides for the punishment of any soldier who, "without necessity, attacks . . . places of worship . . . which are recognisable by the signs established for such cases".¹³⁶

129. The Draft Amendments to the Penal Code of El Salvador punish anyone who, during an international or a non-international armed conflict, attacks or destroys "clearly recognised cultural property or places of worship; works of art which constitute the cultural and spiritual heritage of peoples; and/or which have been granted protection pursuant to special agreements". It defines cultural property in accordance with Article 1 of the 1954 Hague Convention.¹³⁷

130. Under Estonia's Penal Code, "the destruction [or] damaging . . . of cultural monuments, churches, or other structures or objects of religious significance, works of art or science, archives of cultural value, libraries, museums or scientific collections, which are not being used for military purposes" is a war crime.¹³⁸

131. Under Georgia's Criminal Code, "destruction or damage of historical monuments, works of art or places of worship which constitute the cultural or spiritual heritage of peoples" in an international or non-international armed conflict is a punishable crime.¹³⁹

132. Germany's Law Introducing the International Crimes Code provides for the punishment of:

whoever in connection with an international armed conflict or with an armed conflict not of an international character . . . directs an attack by military means against . . . buildings dedicated to religion, education, art, science or charitable purposes [or] historic monuments.¹⁴⁰

¹³² Croatia, *Criminal Code* (1997), Article 167(2). ¹³³ Cuba, *Penal Code* (1987), Article 243.

¹³⁴ Cyprus, *AP I Act* (1979), Section 4(1).

¹³⁵ Czech Republic, *Criminal Code as amended* (1961), Article 262(2)(d).

¹³⁶ Dominican Republic, *Code of Military Justice* (1953), Article 201(2).

¹³⁷ El Salvador, *Draft Amendments to the Penal Code* (1998), Article entitled "Destrucción de bienes culturales".

¹³⁸ Estonia, *Penal Code* (2001), § 107. ¹³⁹ Georgia, *Criminal Code* (1999), Article 411(1)(j).

¹⁴⁰ Germany, *Law Introducing the International Crimes Code* (2002), Article 1, § 11(1)(2).

133. Under Hungary's Criminal Code as amended, "a military commander who, in violation of the rules of international law concerning warfare, carries out military operations which result in heavy damage to . . . internationally protected cultural property" commits a war crime.¹⁴¹

134. Ireland's Geneva Conventions Act as amended provides that grave breaches of AP I are punishable offences.¹⁴² It adds that any "minor breach" of AP I, including violations of Article 53 AP I, as well as any "contravention" of AP II, including violations of Article 16 AP II, are also punishable offences.¹⁴³

135. Italy's Wartime Military Penal Code punishes a commander who "omits to adopt measures provided for by the laws or by international conventions regarding respect for: . . . historical monuments and buildings intended for science, art, charity or for practising religion, provided that they are not at the same time used for military purposes and that they are marked by means of the distinctive signs foreseen by the international conventions, or in any case previously communicated to the enemy, and easily recognisable even from a great distance and at high altitude".¹⁴⁴ The Code further provides for the punishment of anyone who, in enemy territory and without military necessity, "sets fire to or destroys or seriously damages historical monuments, works of art or science, i.e., monuments dedicated to religion, charity, education, arts or science belonging to the enemy State".¹⁴⁵

136. Under Jordan's Antiquities Law, it is prohibited "to destroy, disfigure or cause any harm to antiquities".¹⁴⁶

137. Under Jordan's Draft Military Criminal Code, "attacks directed against historical monuments, places of worship and clearly recognized works of art, provided that they are not used for military purposes or situated in the immediate vicinity of military objects," are considered war crimes.¹⁴⁷

138. Kyrgyzstan's Criminal Code provides for the punishment of anyone who "intentionally destroys historical and cultural monuments".¹⁴⁸

139. Latvia's Criminal Code provides for the punishment of "intentional destruction of objects classified as cultural or national heritage".¹⁴⁹

140. Under the Draft Amendments to the Code of Military Justice of Lebanon, "attacks against historical monuments, places of worship and clearly recognized works of art, provided that they are not used for military purposes or situated in the immediate vicinity of military objectives," are considered war

¹⁴¹ Hungary, *Criminal Code as amended* (1978), Section 160(a).

¹⁴² Ireland, *Geneva Conventions Act as amended* (1962), Section 3(1).

¹⁴³ Ireland, *Geneva Conventions Act as amended* (1962), Section 4(1) and (4).

¹⁴⁴ Italy, *Wartime Military Penal Code* (1941), Article 179(1).

¹⁴⁵ Italy, *Wartime Military Penal Code* (1941), Article 187.

¹⁴⁶ Jordan, *Antiquities Law* (1966), Article 9.

¹⁴⁷ Jordan, *Draft Military Criminal Code* (2000), Article 41(A)(18).

¹⁴⁸ Kyrgyzstan, *Criminal Code* (1997), Article 172.

¹⁴⁹ Latvia, *Criminal Code* (1998), Section 79.

crimes if they are committed intentionally in violation of the Geneva Conventions and AP I.¹⁵⁰

141. Under Lithuania's Criminal Code as amended, the "destruction of historical monuments, cultural or religious objects, protected under international or state internal legal acts, which cannot be justified as military necessity . . . [and] which has caused extensive damage" constitutes a war crime.¹⁵¹

142. Under Mali's Penal Code, "deliberate attacks against buildings dedicated to religion, education, arts, science or charitable activities, provided that such buildings are not used for military purposes," constitute a war crime in international armed conflicts.¹⁵²

143. Mexico's Code of Military Justice as amended provides for the punishment of a soldier who, without any imperative military necessity so demanding, "destroys libraries, museums, archives, aqueducts and important works of art".¹⁵³

144. Under the Definition of War Crimes Decree of the Netherlands, the "wanton destruction of religious, charitable, educational and historic buildings and monuments" constitutes a war crime.¹⁵⁴

145. Under the International Crimes Act of the Netherlands, the following shall be guilty of a crime:

Anyone who commits, in the case of an international armed conflict, one of the grave breaches of the Additional Protocol (I), . . . namely:

...

(d) the following acts if committed intentionally and in violation of the Geneva Conventions and Additional Protocol (I): . . .

(iv) making clearly recognised historic monuments, works of art or places of worship which constitute the cultural or spiritual heritage of peoples and to which special protection has been given by special arrangement, for example within the framework of a competent international organisation, the object of attack, causing as a result extensive destruction thereof, where there is no evidence of the violation by the adverse Party of Article 53, subparagraph (b), of Additional Protocol (I) and when such historic monuments, works of art and places of worship are not located in the immediate proximity of military objectives . . .

...

Anyone who, in the case of an international armed conflict, intentionally and unlawfully commits one of the following acts . . . :

(a) making the object of attack cultural property that is under enhanced protection as referred to in articles 10 and 11 of the [1999 Second Protocol to the 1954 Hague Convention]; . . .

(d) making cultural property that is under protection as referred to in (c) [under the protection of the 1954 Hague Convention or of the 1999 Second Protocol thereto] the object of attack . . .

¹⁵⁰ Lebanon, *Draft Amendments to the Code of Military Justice* (1997), Article 146(18).

¹⁵¹ Lithuania, *Criminal Code as amended* (1961), Article 339.

¹⁵² Mali, *Penal Code* (2001), Article 31(i)(9).

¹⁵³ Mexico, *Code of Military Justice as amended* (1933), Article 209.

¹⁵⁴ Netherlands, *Definition of War Crimes Decree* (1946), Article 1.

...

Anyone who, in the case of an international armed conflict, commits one of the following acts:

...

(p) intentionally directing attacks against buildings dedicated to religion, education, art, science or charitable purposes, historic monuments, ... provided they are not military objectives ...

...

Anyone who, in the case of an armed conflict not of an international character, commits one of the following acts: ...

(d) intentionally directing attacks against buildings dedicated to religion, education, art, science or charitable purposes, historic monuments, ... provided they are not military objectives.¹⁵⁵

146. New Zealand's Geneva Conventions Act as amended provides that "any person who in New Zealand or elsewhere commits, or aids or abets or procures the commission by another person of, a grave breach ... of [AP I] is guilty of an indictable offence".¹⁵⁶

147. Under New Zealand's International Crimes and ICC Act, war crimes include the crimes defined in Article 8(2)(b)(ix) and (e)(iv) of the 1998 ICC Statute.¹⁵⁷

148. Nicaragua's Military Penal Code punishes a soldier who:

destroys or damages, without military necessity, the documentary and bibliographic heritage, architectural monuments and places of historical or environmental importance, movable property of historical, artistic, scientific or technical value, archaeological sites, property of ethnographical value and natural sites, gardens and parks of historical-artistic or anthropological value and, in general, all those which are part of the historical heritage.¹⁵⁸

149. Nicaragua's Draft Penal Code punishes anyone who, during an international or a non-international armed conflict, attacks or destroys "clearly recognised cultural property or places of worship; works of art which constitute the cultural and spiritual heritage of peoples; and/or which have been granted protection pursuant to special agreements". It defines cultural property in accordance with Article 1 of the 1954 Hague Convention.¹⁵⁹

150. Niger's Penal Code as amended contains a list of war crimes committed against persons and objects protected under the 1949 Geneva Conventions and their Additional Protocols of 1977, including:

attacks against historical monuments, works of art or places of worship clearly recognized [as such] which constitute the cultural or spiritual heritage of peoples being accorded a special protection by a particular arrangement if there exists

¹⁵⁵ Netherlands, *International Crimes Act* (2003), Articles 5(2)(d)(iv), 5(4)(a) and (d), 5(5)(p) and 6(3)(d).

¹⁵⁶ New Zealand, *Geneva Conventions Act as amended* (1958), Section 3(1).

¹⁵⁷ New Zealand, *International Crimes and ICC Act* (2000), Section 11(2).

¹⁵⁸ Nicaragua, *Military Penal Code* (1996), Article 61.

¹⁵⁹ Nicaragua, *Draft Penal Code* (1999), Article 469.

no evidence that the adversary has violated the prohibition to use such property as a support of his military efforts and if these objects are not situated in the immediate vicinity of military objects.¹⁶⁰

151. Under Norway's Military Penal Code as amended, "anyone who contravenes or is accessory to the contravention of provisions relating to the protection of persons or property laid down in . . . the two additional protocols to [the Geneva] Conventions . . . is liable to imprisonment".¹⁶¹

152. The Military Penal Code of Paraguay provides for the punishment of anyone "who destroys or damages public monuments [and/or] objects of science and works of art held in public or private collections".¹⁶²

153. Peru's Code of Military Justice provides for the punishment of soldiers who, in time of armed conflict, "without any necessity, attack . . . places of worship or convents . . . which are recognisable by the proper emblems" or who "destroy, on allied or enemy territory, libraries, archives . . . or works of art without being compelled to do so by the necessities of war".¹⁶³

154. Poland's Penal Code provides for the punishment of "any person who, in violation of international law, destroys [or] damages . . . cultural property in occupied or controlled territory or in the combat area" and provides for a harsher punishment "if the offence is directed against cultural property of particular importance".¹⁶⁴

155. Romania's Penal Code provides for the punishment of:

destruction of any kind, without military necessity, of monuments or constructions that have artistic, historic or archaeological value, of museums, important libraries, archives of historic or scientific value, works of art, manuscripts, valuable books, scientific collections or important book collections, archives, reproductions of the above items and in general of any cultural heritage of peoples.¹⁶⁵

156. Russia's Criminal Code provides for the punishment of "destruction of or damage to cultural and historical monuments . . . as well as objects or documents having historical or cultural value".¹⁶⁶ It provides a heavier penalty for "the same acts committed against particularly valuable objects or monuments of all-Russian significance".¹⁶⁷

157. Slovakia's Criminal Code as amended provides for the punishment of "a commander who, contrary to the provisions of international law on means and methods of warfare, intentionally: . . . (d) destroys or damages . . . an internationally recognized cultural monument".¹⁶⁸

158. According to Slovenia's Penal Code, it is a war crime to destroy "cultural or historical monuments and buildings, institutions dedicated to scientific,

¹⁶⁰ Niger, *Penal Code as amended* (1961), Article 208.3(20).

¹⁶¹ Norway, *Military Penal Code as amended* (1902), § 108(b).

¹⁶² Paraguay, *Military Penal Code as amended* (1980), Article 284.

¹⁶³ Peru, *Code of Military Justice* (1980), Article 95(2) and (3).

¹⁶⁴ Poland, *Penal Code* (1997), Article 125. ¹⁶⁵ Romania, *Penal Code* (1968), Article 360.

¹⁶⁶ Russia, *Criminal Code* (1996), Article 243(1).

¹⁶⁷ Russia, *Criminal Code* (1996), Article 243(2).

¹⁶⁸ Slovakia, *Criminal Code as amended* (1961), Article 262(2)(d).

cultural, education or humanitarian purposes".¹⁶⁹ It provides a heavier penalty in case of destruction of "an entity specially protected by international law as a site of national, cultural, spiritual or natural heritage".¹⁷⁰

159. Spain's Military Criminal Code punishes a soldier who:

destroys or damages, without military necessity, the documentary and bibliographic heritage, architectural monuments and places of historical or environmental importance, movable property of historical, artistic, scientific or technical value, archaeological sites, property of ethnographical value and natural sites, gardens and parks of historical-artistic or anthropological value and, in general, all those which are part of the historical heritage.¹⁷¹

160. Spain's Penal Code provides for the punishment of:

anyone who, in the event of armed conflict, should . . . attack or subject to . . . hostile acts the cultural property or religious sites which are recognised as clearly being part of the cultural or spiritual heritage of the people or which have been specifically protected by special agreements, causing extensive destruction, whenever this property is not located in the immediate vicinity of military objectives and is not used to support the military effort of the adversary.

...

Should the cultural assets in question be under special protection or the acts be of the utmost gravity, the higher penalty may be imposed.¹⁷²

161. Under Sweden's Penal Code as amended, "arbitrarily destroying and extensively damaging property which enjoys special protection under international law" constitutes a crime against international law.¹⁷³

162. Switzerland's Military Criminal Code as amended punishes anyone who "unlawfully destroys or damages cultural property or material placed under the protection of the distinctive sign of cultural property".¹⁷⁴

163. Switzerland's Law on the Protection of Cultural Property states that protection includes respect for cultural property, which means, *inter alia*, "to renounce acts which could expose these objects to destruction or deterioration".¹⁷⁵

164. Tajikistan's Criminal Code, in the section on "Serious violations of international humanitarian law", provides for the punishment of:

wilful breaches of norms of international humanitarian law committed in an international or non-international armed conflict, i.e. . . . the destruction of or damage to historical monuments, works of art or places of worship which constitute the cultural or spiritual heritage of peoples.¹⁷⁶

¹⁶⁹ Slovenia, *Penal Code* (1994), Article 384(1).

¹⁷⁰ Slovenia, *Penal Code* (1994), Article 384(2).

¹⁷¹ Spain, *Military Criminal Code* (1985), Article 77(7).

¹⁷² Spain, *Penal Code* (1995), Article 613(1)(a) and (2).

¹⁷³ Sweden, *Penal Code as amended* (1962), Chapter 22, § 6(7).

¹⁷⁴ Switzerland, *Military Criminal Code as amended* (1927), Article 111.

¹⁷⁵ Switzerland, *Law on the Protection of Cultural Property* (1966), Article 2(3).

¹⁷⁶ Tajikistan, *Criminal Code* (1998), Article 403(1).

165. Under Trinidad and Tobago's Draft ICC Act, it is a punishable offence to commit a war crime as defined in Article 8(2)(b)(ix) and (e)(iv) of the 1998 ICC Statute.¹⁷⁷

166. The UK Geneva Conventions Act as amended punishes "any person, whatever his nationality, who, whether in or outside the United Kingdom, commits, or aids, abets or procures the commission by any other person of, a grave breach of . . . [AP I]".¹⁷⁸

167. Under the UK ICC Act, it is a punishable offence to commit a war crime as defined in Article 8(2)(b)(ix) and (e)(iv) of the 1998 ICC Statute.¹⁷⁹

168. Under the US War Crimes Act as amended, violations of Article 27 of the 1907 HR are war crimes.¹⁸⁰

169. Uruguay's Military Penal Code as amended punishes military personnel, *equiparados* and even persons unconnected with the armed forces "for unjustified attacks on . . . places of worship, convents, museums, libraries, archives, monuments and in general any establishment or structure intended for the purposes of culture, art, religious worship or charity".¹⁸¹

170. Venezuela's Code of Military Justice as amended provides for the punishment of "those who, in the absence of military necessity, should destroy, in enemy or allied territory, places of worship, libraries or museums, archives, aqueducts and other works of art, as well as communication, telecommunication or other such installations".¹⁸²

171. The Penal Code as amended of the SFRY (FRY) punishes anyone who "in violation of international law applicable to war or armed conflict, destroys cultural or historic monuments and buildings, or scientific, art, educational or humanitarian institutions" and provides a heavier penalty "if a clearly discernible object from paragraph 1 of this article is destroyed and it represents the cultural and spiritual heritage of that people under special protection of international law".¹⁸³

172. Zimbabwe's Geneva Conventions Act as amended punishes "any person, whatever his nationality, who, whether in or outside Zimbabwe, commits any such grave breach of . . . [AP I]".¹⁸⁴

National Case-law

173. No practice was found.

¹⁷⁷ Trinidad and Tobago, *Draft ICC Act* (1999), Section 5(1)(a).

¹⁷⁸ UK, *Geneva Conventions Act as amended* (1957), Section 1(1).

¹⁷⁹ UK, *ICC Act* (2001), Sections 50(1) and 51(1) (England and Wales) and Section 58(1) (Northern Ireland).

¹⁸⁰ US, *War Crimes Act as amended* (1996), Section 2441(c)(2).

¹⁸¹ Uruguay, *Military Penal Code as amended* (1943), Article 58(12).

¹⁸² Venezuela, *Code of Military Justice as amended* (1998), Article 474(16).

¹⁸³ SFRY (FRY), *Penal Code as amended* (1976), Article 151.

¹⁸⁴ Zimbabwe, *Geneva Conventions Act as amended* (1981), Section 3(1).

Other National Practice

174. The Report on the Practice of Algeria asserts the “principle of inviolability of places of worship”.¹⁸⁵

175. At the CDDH, Australia stated that had Article 47 *bis* of draft AP I (now Article 53) been put to a vote, it would have abstained “because the article contains a prohibition against reprisals” even though it supported “proposals for rules to prohibit acts of hostility directed against historic monuments or works of art which constitute the cultural or spiritual heritage of peoples”.¹⁸⁶

176. A report submitted by the Australian government to the UNESCO Secretariat in 1994 emphasised that “all ADF personnel, prior to departure for services overseas, are briefed ‘on the necessity to respect [differences in culture] which would include respect for the cultural heritage of other peoples’”.¹⁸⁷

177. In a statement at a meeting of EU experts in 1998, Austria maintained that “it is this ‘formula’ [military necessity] which last but not least has led to the fact that a large number of reluctant States resolved to vote for the convention and to ratify it”.¹⁸⁸

178. In a fact sheet on military necessity prepared for the 1998 Vienna expert meeting on the revision of the 1954 Hague Convention, Austria stated that:

1. ...In modern IHL, military necessity does not function as a general waiver to the limitations imposed by IHL on the parties to an armed conflict, but can only be invoked in cases where conventional law explicitly so provides. In order to emphasize the exceptional character of this concept, it is often further qualified by narrowing terms.
- 2.1 While the arguments against the inclusion of a waiver clause based on military necessity in the text of the 1954 Hague Convention were mainly based on the fear that this would be regarded as a retrograde step in relation to previous international law and would diminish the protection, the arguments for the inclusion of such a waiver were manifold and superseded the former. For the inclusion of a waiver clause based on military necessity spoke the need to make the Convention militarily applicable, the recognition of humanitarian reasons (to allow for the primacy of the protection of human lives over that of objects), the desire to make the Convention acceptable to as many States as possible, and the intent to be in line with existing IHL, in particular with the Geneva Conventions of 1949. The compromise finally negotiated allows for the recognition of military necessity only by way of exception and solely in relation to specific obligations.
- 2.2 ... The 1954 Hague Convention does not define what constitutes imperative military necessity. It is therefore up to each State Party to interpret these terms along the rules of interpretation applicable to international treaties.

¹⁸⁵ Report on the Practice of Algeria, 1998, Chapter 4.3.

¹⁸⁶ Australia, Statement at the CDDH, *Official Records*, Vol. VI, CDDH/SR.42, 27 May 1977, pp. 219–220.

¹⁸⁷ Australia, Report to UNESCO on Measures to Implement the Convention for the Protection of Cultural Property in the Event of Armed Conflict and Associated Regulations, 1994, § 2.

¹⁸⁸ Austria, Statement at the Expert Meeting of the 15 EU Member States on the 1954 Hague Convention, Houthem St. Gerlach, February 1998, p. 2, § 5, ad. 1.

According to the wording of the waiver clause, and in light of the object and purpose of the Convention as well as the drafting history, it must be interpreted restrictively. It definitely goes beyond mere considerations of military convenience and involves a certain level of command to assess the situation and to decide on the application of the waiver.

...

The waiver clause currently contained in Art. 4 para. 2 of the Convention serves an important protective function. Without this clause, the protection of cultural property would automatically be lost when a party to the armed conflict uses the object for military purposes... As a consequence of its – unlawful – use the formerly protected cultural property would change its status and become a legitimate military target.

The existing waiver clause, however, ensures the protection of cultural property from damage or destruction even if the cultural property concerned or its surroundings are used for military purposes, since the obligation to respect cultural property, in particular the obligation to refrain from any act of hostility directed against such property, may only be waived in cases where military necessity imperatively requires such a waiver. Thus, according to Art. 4 para. 2 of the Convention, cultural property used in violation of the Convention must not be attacked without imperative military necessity to do so.

As it is formulated now, the waiver clause contained in Art. 4 para. 2 of the Convention reflects a proper balance between the military needs, on the one hand, and the need for the protection of cultural property against damage or destruction during armed conflict, on the other, and should, therefore, be retained. To further improve the protective function of the waiver clause, a common understanding of the States Parties as to the interpretation of its terms seems to be useful.

...

- 3.1 In addition to that, one might consider to introduce the following elements into the waiver clause or the protection regime in relation to cultural property under “normal” protection:
- compulsory warnings;
 - a minimum time for the other party to redress the situation;
 - a certain command level where the decision on the waiver has to be taken;
 - certain requirements with regard to an attack on the property concerned in case of imperative military necessity:
 - precautions in attack;
 - no alternative means reasonably available;
 - the limitation of means and methods to those which are strictly necessary to counter the threat posed.¹⁸⁹

179. In 1998, at the Vienna expert meeting on the revision of the 1954 Hague Convention, Argentina stressed “the desirability of including the notion of military necessity” in the 1997 Revised Lauswolt Document, “provided, however, that this notion be defined precisely to avoid abuses”.¹⁹⁰

¹⁸⁹ Austria, Fact Sheet on Military Necessity submitted to the Expert Meeting on the Revision of the 1954 Hague Convention, Vienna, 11–13 May 1998, §§ 1–3.

¹⁹⁰ Argentina, Comments submitted to the Expert Meeting on the Revision of the 1954 Hague Convention, Vienna, 11–13 May 1998.

180. At the CDDH, Canada noted that Article 47 *bis* of draft AP I (now Article 53)

was not intended to replace the existing customary law prohibitions reflected in Article 27 of the 1907 [HR] protecting a variety of cultural and religious objects. Rather, the article establishes a special protection for a limited class of objects which because of their recognised importance constitute a part of the cultural heritage of mankind. We were happy to note that the Article was made “without prejudice” to the provisions of the [1954 Hague Convention] thereby implicitly recognizing the exceptions provided for in the Convention.¹⁹¹

181. In 1992, during a debate in the UN Security Council on the situation in the former Yugoslavia, Cape Verde condemned “the widespread use of violence in Croatia and in Bosnia and Herzegovina”, including the destruction of “cultural and historical landmarks”.¹⁹²

182. The Report on the Practice of Chile states that it is Chile’s *opinio juris* that “the general principle of protecting cultural and religious objects is an integral part of customary international law”.¹⁹³

183. At the 18th International Conference of the Red Cross in Toronto in 1952, China levelled the accusation at the US that “in Korea, . . . cultural, religious and charitable installations were wilfully destroyed”.¹⁹⁴

184. Colombia’s National Plan for the Dissemination of IHL states that the immunity of the spiritual and cultural heritage is absolute, and that the destruction of religious and cultural objects can neither serve any military need whatsoever nor provide any military advantage.¹⁹⁵

185. In 1991, during the conflict in the former Yugoslavia, Croatia reported and condemned the destruction of and damage to cultural, historical and religious monuments by the Yugoslav army.¹⁹⁶

186. In its written comments on other written statements submitted to the ICJ in the *Nuclear Weapons case* in 1995, Egypt stated that “in bombardments all necessary precautions must be taken to spare buildings dedicated to religion, art, science, or charitable purposes [and] historic monuments”.¹⁹⁷

¹⁹¹ Canada, Statement at the CDDH, *Official Records*, Vol. VI, CDDH/SR.42, 27 May 1977, p. 224.

¹⁹² Cape Verde, Statement before the UN Security Council, UN Doc. S/PV.3082, 30 May 1992, § 6.

¹⁹³ Report on the Practice of Chile, 1997, Chapter 4.3.

¹⁹⁴ China, Statement of 30 July 1952 at the 18th International Conference of the Red Cross, Toronto, 26 July–7 August 1952, reprinted in *Documents on Foreign Affairs of the People’s Republic of China*, World Knowledge Press, Beijing, Vol. 2, pp. 82–83.

¹⁹⁵ Colombia, Presidency, Office of the High Commission for Peace, National Plan for the Dissemination of IHL, 1994, p. 7.

¹⁹⁶ Croatia, Ministry of Information, Report on the War against Croatia, August 1991, pp. 1–2; Ministry of Education and Culture, Report on cultural monuments, historic centres and sites damaged and destroyed during the war in Croatia, Institute for Protection of Cultural Monuments, 30 October 1991.

¹⁹⁷ Egypt, Written comments on other written statements submitted to the ICJ, *Nuclear Weapons case*, September 1995, § 50.

187. The Report on the Practice of Ethiopia reasserts the commitment of “states and governments of the Horn of Africa not to attack any objects of cultural value”.¹⁹⁸

188. At the CDDH, Finland explained its voted against Article 20 *bis* of draft AP II (now Article 16) as follows:

Our negative vote is not to be taken as an indication of a negative stand as regards the safeguarding of cultural property from the ravages of war in general. It is an indication of our strong feeling that the inclusion of a provision protecting cultural property in Protocol II, which lacks general rules on the methods and means of combat . . . which have been deleted, unbalances the protective humanitarian character of the Protocol.¹⁹⁹

189. In a position paper on the 1997 Revised Lauswolt Document, France expressed the view that “military necessity may be admitted only where an express provision allows recourse to it”. It concluded that the wording of Articles 4(2) and 11(2) of the 1954 Hague Convention should be maintained.²⁰⁰ This view was repeated in a position paper submitted in 1998 to the Vienna expert meeting on the revision of the 1954 Hague Convention, at which France referred to the principle whereby it was not permitted to use more violence than absolutely necessary.²⁰¹

190. In 1998, in a working document submitted to the Vienna expert meeting on the revision of the 1954 Hague Convention, France stated that:

1. The Convention for the protection of cultural property in the event of armed conflict, signed at The Hague on 14 May 1954, mentions the concept of military necessity in respect of all cultural property . . .
2. Although such provisions gave rise to much debate during the preparation of the text of the Convention, they are not new. The idea of military necessity is a classic part of the law of armed conflict. [reference to Article 23(g) 1907 HR and Article 53 GC IV]
3. If the idea of military necessity is expressly recognised in the law of war as well as in humanitarian law, it is not because it represents an attack on the general principle of limitation which should govern the behaviour of States during armed conflicts, but rather because it is an additional safety measure for the implementation of this principle of limitation. The recourse to military necessity is never arbitrary: military necessity only makes sense in conformity with the customary principles of international humanitarian law and of the law of war, in the context of the application in good faith of the international obligations which bind states.

¹⁹⁸ Report on the Practice of Ethiopia, 1998, Chapter 4.3.

¹⁹⁹ Finland, Statement at the CDDH, *Official Records*, Vol. VII, CDDH/SR.53, 6 June 1977, pp. 156–157.

²⁰⁰ France, Observations on the Revised Lauswolt Document, UNESCO Doc. DLT.97/CONF.208/2, October 1997, § 1.

²⁰¹ France, Position paper submitted to the Expert Meeting on the Revision of the 1954 Hague Convention, Vienna, 11–13 May 1998, § 2.

4. It is therefore wrong to think that military necessity represents a threat to cultural property: its implementation is closely constrained by four cumulative conditions:
 - military necessity is controlled, since the rule of law should include such an exception;
 - as for all exceptions, the application of military necessity should be limited in time;
 - military necessity can only justify means which are indispensable to achieve the aim;
 - the means of implementing military necessity must be legal.
5. It can be seen that these four conditions must be respected in all cases of the implementation of military necessity, either for property under general protection or for property under special protection. These conditions are linked to the customary principles of humanitarian law and of the law of war, and not to various levels of protection by which the property is covered.²⁰²

191. During the intergovernmental meeting on the revision of the 1954 Hague Convention in The Hague in 1999, the French delegation stressed that the protection from attack enjoyed by cultural property can be lifted only in case of military necessity.²⁰³

192. The Report on the Practice of France states that “the French authorities condemn all acts that are likely to seriously damage cultural and religious property, whether in the context of international or non-international armed conflicts”.²⁰⁴

193. At the CDDH, the FRG stated that:

Article 47 *bis* [of draft AP I (now Article 53)] establishes a special protection for a limited class of objects which, in the particular circumstances, constitute a part of the cultural or spiritual heritage of mankind. Such objects remain protected whether or not they have been restored. The illegal use of these objects for military purposes, however, will cause them to lose the protection provided for in Article 47 *bis* as a result of attacks which are to be directed against such military uses. In such a case the protected object becomes a military objective . . . Article 47 *bis* was not intended to replace the existing customary law prohibitions reflected in Article 27 of the 1907 [HR] protecting a variety of cultural and religious objects . . . Article 47 *bis* is limited to [AP I] and does not affect any obligations under the [1954 Hague Convention].²⁰⁵

194. In a debate in the German parliament in 1991 on the situation in the city of Dubrovnik, a member of parliament labelled attacks on Dubrovnik as “acts of barbarism”. This view was shared by a large majority of members of parliament.²⁰⁶

²⁰² France, Working document on military necessity submitted to the Expert Meeting on the Revision of the 1954 Hague Convention, Vienna, 11–13 May 1998, §§ 1–5.

²⁰³ France, Statement at the Diplomatic Conference on the Second Protocol to the 1954 Hague Convention, The Hague, 15–26 March 1999.

²⁰⁴ Report on the Practice of France, 1998, Chapter 4.3.

²⁰⁵ FRG, Statement at the CDDH, *Official Records*, Vol. VI, CDDH/SR.42, 27 May 1977, pp. 225 and 226.

²⁰⁶ Germany, Lower House of Parliament, Statement by a Member of Parliament, Dr. Christopher Zöpel, 17 October 1991, *Plenarprotokoll* 12/50, p. 4092.

195. In 1996, during a debate in the UN General Assembly, Germany called upon the parties to the conflict in Afghanistan “to preserve the cultural heritage of their country”.²⁰⁷

196. In 1997, in its position paper concerning a revision of the 1954 Hague Convention (Revised Lauswolt Document), Germany stated that “the definition of cultural property in Article 1 of the Convention should form the basis of the new legal instrument” because the non-exhaustive list contained in Article 1 had been “accepted by the international community” and the incorporation of definitions from other instruments was “inadvisable”. Germany further stated that:

The principle of military necessity as a core element of international humanitarian law cannot be dispensed with . . . The idea that, in certain cases and under certain circumstances, military necessity would take priority over the humanitarian protection of civilian objects . . . today is an integral part of Customary International Law . . . Military necessity does not take precedence over the law, but is subject to it. Including the concept of military necessity in the formulation of legal regulations takes account of the fact that international humanitarian law is very often necessarily a compromise between military and humanitarian requirements.²⁰⁸

197. In 1998, at the Vienna expert meeting on the revision of the 1954 Hague Convention, Hungary expressed its disapproval of the possible inclusion of the notion of “military necessity” in the Revised Lauswolt Document.²⁰⁹

198. At the CDDH, India explained its voted against Article 20 *bis* of draft AP II (now Article 16) as follows: “The Indian delegation objects strongly to the reference to any international convention, to which only sovereign States can be Parties, in Protocol II, which will apply to internal armed conflicts.”²¹⁰

199. The Report on the Practice of India states that in India “there are no specific regulations aimed at protecting cultural objects. Nevertheless, the general protection available under the law for protection of public property of all types, can be extended to cultural objects as well.”²¹¹ The report further points out that the protection ordinarily granted to religious objects is not afforded if such objects are used for terrorist activities. India used armed force in the past against such objects that could not be treated as civilian objects, for example during the military offensive against the Golden Temple in Amritsar in 1984.²¹²

200. At the CDDH, Indonesia voted against Article 20 *bis* of draft AP II (now Article 16) but explained that this “should not be interpreted as meaning that

²⁰⁷ Germany, Statement before the UN General Assembly, UN Doc. A/51/PV.84, 13 December 1996, p. 7.

²⁰⁸ Germany, Position paper concerning a revision of the 1954 Hague Convention, 1997, pp. 2–3.

²⁰⁹ Hungary, Comments submitted to the Expert Meeting on the Revision of the 1954 Hague Convention, Vienna, 11–13 May 1998.

²¹⁰ India, Statement at the CDDH, *Official Records*, Vol. VII, CDDH/SR.53, 6 June 1977, p. 159.

²¹¹ Report on the Practice of India, 1997, Chapter 2.7.

²¹² Report on the Practice of India, 1997, Chapter 1.3.

[the Indonesian] Government is against the principles contained in this article that historic monuments or works of art should be protected".²¹³

201. According to the Report on the Practice of Iran, Iran accused Iraq of bombarding cultural and historical property on many occasions during the Iran–Iraq War, including museums, ancient hills and places, mosques and schools, while Iran committed itself vis-à-vis UNESCO not to attack such property and accorded "special protection" to four holy cities in Iraq. The report concludes that Iran's *opinio juris* is that cultural property is immune from attack.²¹⁴ The report further states that an attack on a historic building can be considered a war crime.²¹⁵

202. In 1992, during a debate in the UN Security Council on the situation in the former Yugoslavia, Iran qualified the destruction of cultural property in times of armed conflict as a violation of human rights and deplored "gross violations of the human rights of the people of Bosnia and Herzegovina, including . . . wanton destruction of historical monuments, houses of worship and property".²¹⁶

203. The Report on the Practice of Iraq states that there exists an outright prohibition on attacks on cultural property "for any reason".²¹⁷

204. Israel's IDF General Staff Order 33.0133 of 1982 requires all IDF soldiers "to act, with regard to 'Cultural Property' situated within the State of Israel or any other country, in accordance with the provisions of the [1954 Hague] Convention". It provides, in particular, that IDF soldiers shall abstain from attacking or causing damage to historic monuments, works of art or places of worship.²¹⁸ However, according to the Report on the Practice of Israel, the prohibition not to target cultural property as contained in the Order does not apply to cases in which cultural property is used for "hostile purposes".²¹⁹

205. In 1998, at the Vienna expert meeting on the revision of the 1954 Hague Convention, Israel advocated the inclusion of an additional paragraph in draft Article 1 of the Revised Lauswolt Document, which would provide that "the provisions of this instrument shall not prejudice or derogate from accepted customary principles of the laws of war, including, *inter alia*, the principles of proportionality, distinction and military necessity".²²⁰

206. The Report on the Practice of Japan notes that Japan is not a party to the 1954 Hague Convention because of some problems connected to domestic

²¹³ Indonesia, Statement at the CDDH, *Official Records*, Vol. VII, CDDH/SR.53, 6 June 1977, p. 159.

²¹⁴ Report on the Practice of Iran, 1997, Chapter 4.3.

²¹⁵ Report on the Practice of Iran, 1997, Chapter 6.5.

²¹⁶ Iran, Statement before the UN Security Council, UN Doc. S/PV.3136, 16 November 1992, § 68.

²¹⁷ Report on the Practice of Iraq, 1998, Chapter 4.3.

²¹⁸ Israel, IDF General Staff Order 33.0133, Discipline-Conduct in Accordance with International Conventions to which Israel is a Party, 20 July 1982, § 9.

²¹⁹ Report on the Practice of Israel, 1997, Chapter 4.3.

²²⁰ Israel, Comments submitted to the Expert Meeting on the Revision of the 1954 Hague Convention, Vienna, 11–13 May 1998.

measures for the implementation of this Convention. It recalls, however, that Japan was among the countries at the CDDH which proposed adding a clause to the draft AP II concerning the protection of cultural property and chapels.²²¹

207. The Report on the Practice of Jordan notes that Islamic law lays down the principle of the inviolability of places of worship and states that Jordan has always respected this principle and has always protested against any violations of this principle by its adversaries.²²²

208. In 1981, in a memorandum submitted to the UN Secretary-General, the Lebanese Department of Foreign Affairs accepted the “application of international decisions concerning the conservation of the historical character of the city of Tyre and especially of the archaeological sites”.²²³

209. In 1993, during a debate in the UN Security Council, Libya requested that the people of Bosnia and Herzegovina “be supported and assisted in the exercise of its right of self-defence against . . . the destruction of its places of worship”.²²⁴

210. At the CDDH, the Netherlands stated that:

Article 47 *bis* [of draft AP I (now Article 53)] provided special protection for a limited category of objects which by virtue of their generally recognised importance constituted part of the cultural or spiritual heritage of mankind . . . The illegitimate use of those historical objects for military purposes would deprive them of the protection afforded by Article 47 *bis*.²²⁵

211. At the CDDH, the Netherlands explained its abstention on the vote on Article 20 *bis* of draft AP II (now Article 16) as follows:

Article 20 *bis* unconditionally prohibits, in an internal conflict, any acts of hostility directed against historic monuments or works of art, which constitute the cultural heritage of peoples. The article does not provide for any possible derogation from the prohibition it contains . . . We note that the very well-balanced system of the [1954 Hague Convention], through its Article 19 that provides the rule to be applied in internal conflicts, contains a possibility of derogation where imperative reasons of military necessity so require. [The Netherlands] would have preferred a possibility of derogation to be explicitly contained in Article 20 *bis*. It is our understanding, however, that a derogation for imperative reasons of military necessity is indeed implied in Article 20 *bis* by virtue of the clear reference to the [1954] Hague Convention. It goes without saying that cessation of immunity from attack during such time as the cultural object is used by adversary armed forces is an example of such military necessity.²²⁶

²²¹ Report on the Practice of Japan, 1998, Chapter 4.3.

²²² Report on the Practice of Jordan, 1997, Chapter 4.3.

²²³ Lebanon, Department of Foreign Affairs, Memorandum, annexed to Letter dated 13 July 1981 to the UN Secretary-General, UN Doc. S/14586, 14 July 1981.

²²⁴ Libya, Statement before the UN Security Council, UN Doc. S/PV.3247, 29 June 1993, § 101.

²²⁵ Netherlands, Statement at the CDDH, *Official Records*, Vol. VI, CDDH/SR.42, 27 May 1977, pp. 207–208.

²²⁶ Netherlands, Statement at the CDDH, *Official Records*, Vol. VII, CDDH/SR.53, 6 June 1977, pp. 161–162, see also Statement at the CDDH, *Official Records*, Vol. VII, CDDH/SR.52, 6 June 1977, pp. 126–127, §§ 11–13.

212. In an explanatory memorandum submitted to the Dutch parliament in the context of the ratification procedure of the Additional Protocols, the government of the Netherlands stated that cultural objects and places of worship “enjoy the general protection of civilian objects, as specified in Article 52 of Protocol I”.²²⁷

213. In 1998, at the Vienna expert meeting on the revision of the 1954 Hague Convention, the Netherlands stated that “as was the case in 1954, the Netherlands believes military necessity is a vital element to be included in a revised Convention”. It stressed that “although used as an exception to certain rules set forth in humanitarian law instruments, military necessity is not a tool by which military commanders conveniently dismiss the laws of armed conflict when it would be useful or advantageous to do so”. Concerning the notion of “imperative military necessity”, the Netherlands relied upon the definition that “an imperative necessity presupposes that the military objective cannot be reached in any other manner” and that it “requires a careful evaluation of the items which could be affected”. It went on to say that “although such considerations are inherent in the definition of military necessity, the emphasis placed on the requirement that the necessity must be ‘imperative’ further seeks to limit the likelihood that a military commander will invoke this exception to the protection”.²²⁸

214. At the CDDH, Norway explained that it would vote against Article 20 *bis* of draft AP II (now Article 16) because:

Some of the most essential guarantees for the protection of basic human rights had been deleted from draft Protocol II. Their conscience as human beings prevented the members of [the Norwegian] delegation from supporting the adoption of measures according more favourable treatment to cultural objects than to human beings. Their attitude did not relate in any way to the aims of Article 20 *bis* and [the Norwegian] delegation had accordingly voted for the Article in Committee.²²⁹

215. In 1994, during a debate in the UN Security Council, Pakistan considered the destruction of mosques and other Islamic structures in the former Yugoslavia as “inhuman behaviour”.²³⁰

216. According to the Report on the Practice of Russia, the destruction of cultural property, historic monuments or places of worship that constitute a part of the cultural or spiritual heritage of a people, is a prohibited method of warfare.²³¹

²²⁷ Netherlands, Lower House of Parliament, Explanatory memorandum to the ratification of the Additional Protocols of 12 December 1977 to the Geneva Conventions, 1983–1984 Session, Doc. 18277 (R 1247), No. 3, p. 28.

²²⁸ Netherlands, Comments submitted to the Expert Meeting on the revision of the 1954 Hague Convention, Vienna, 11–13 May 1998.

²²⁹ Norway, Statement at the CDDH, *Official Records*, Vol. VII, CDDH/SR.52, 6 June 1977, pp. 125–126, § 4.

²³⁰ Pakistan, Statement before the UN Security Council, UN Doc. S/PV.3370, 27 April 1994, p. 427.

²³¹ Report on the Practice of Russia, 1997, Chapter 1.6.

217. According to the Report on the Practice of Rwanda, most cultural and religious objects were not damaged by the belligerents during the non-international armed conflict which took place before 1994. Any damage which did occur was found to have been caused unintentionally. The report maintains, however, that during the “genocide in 1994”, cultural and religious objects were no longer respected.²³²

218. In 1998, at the Vienna expert meeting on the revision of the 1954 Hague Convention, Ukraine expressed the view that:

The irrelevance of entering the word “military necessity” when drafting the document is accounted for by the following reasons: military doctrine of Ukraine is of a defensive nature: the Constitution of Ukraine doesn’t define it; the internal legislation of Ukraine regarding the protection of national monuments doesn’t define it.²³³

219. In 1992, during a debate in the UN Security Council on the situation in the former Yugoslavia, the UAE stated that “there has been massive arbitrary destruction of historic, religious and archaeological sites regardless of the enormous international efforts made and the role of the United Nations Protection Force”.²³⁴

220. At the CDDH, the UK delegation declared that:

We note particularly the use of the expression “spiritual heritage” [in Article 47 *bis* of draft AP I (now Article 53)], which qualifies the reference to places of worship and makes it obvious that the protection given by this article extends only to those places of worship which do constitute such spiritual heritage. Many holy places are thus covered, but it is clear to [the UK] delegation that the article is not intended to apply to all places of worship without exception. Secondly, [the UK] delegation does not understand this article as being intended to replace the existing customary law prohibitions reflected in Article 27 of the 1907 [HR], which protect a variety of cultural and religious objects. Rather, this article establishes a special protection for a limited class of objects, which, because of their recognized importance, constitute a part of the heritage of mankind. It is the understanding of [the UK] delegation that if these objects are unlawfully used for military purposes, they will thereby lose effective protection as a result of attacks directed against such unlawful military uses”.²³⁵

221. At the CDDH, the UK explained its vote against Article 20 *bis* of Draft AP II (now Article 16 AP II) as follows:

In the case of Article 20 *bis*, we considered that to retain a provision on the protection of cultural objects and places of worship which did not appear in the simplified draft, when so many provisions for the protection of human victims of armed conflict had been deleted, would be a distortion of what should be the true aims of the

²³² Report on the Practice of Rwanda, 1997, Chapter 4.3.

²³³ Ukraine, Position paper submitted to the Expert Meeting on the Revision of the 1954 Hague Convention, Vienna, 11–13 May 1998, § C.

²³⁴ UAE, Statement before the UN Security Council, UN Doc. S/PV.3137, 16 November 1992, § 88.

²³⁵ UK, Statement at the CDDH, *Official Records*, Vol. VI, CDDH/SR.42, 27 May 1977, p. 238.

Protocol . . . Our negative vote should not be taken as indicating any lack of sympathy with the aim of the article. It is to be seen as an expression of our conviction that a proper balance should be found in the contents of the Protocol as a whole, a balance which in general seemed to us to have been struck in the simplified draft of Pakistan.²³⁶

222. In 1991, during a debate in the UN Security Council concerning the Gulf War, the UK asserted its compliance with the principle of avoiding damage to sites of religious and cultural significance.²³⁷

223. In 1991, in a report submitted to the UN Security Council on operations in the Gulf War, the UK stated that "British commanders have also been briefed on the locations and significance of sites of religious and cultural importance in Iraq, and operations will take account of this".²³⁸

224. In 1991, in a report submitted to the UN Security Council on operations in the Gulf War, the UK stated that "the entire campaign has been conducted against military infrastructure with the express directions to avoid causing civilian casualties as far as possible, and with specific briefing to avoid sites of cultural and historic significance".²³⁹

225. In 1991, in a report submitted to the UN Security Council on operations in the Gulf War, the UK government stated that:

Pilots have clear instructions to minimize civilian casualties and to avoid damage to sites of religious and cultural significance. Indeed, on a number of occasions, attacks have not been pressed home because pilots were not completely satisfied they could meet these conditions.²⁴⁰

226. On 26 May 1944, General Eisenhower, Supreme Allied Commander in Europe, preparing to invade Europe, issued the following order concerning the preservation of historical monuments:

1. Shortly we will be fighting our way across the Continent of Europe in battles designed to preserve our civilization. Inevitably, in the path of our advance will be found historical monuments and cultural centers which symbolize to the world all that we are fighting to preserve.
2. It is the responsibility of every commander to protect and respect these symbols whenever possible.
3. In some circumstances the success of the military operation may be prejudiced in our reluctance to destroy these revered objects. Then, as at Cassino, where the enemy relied on our emotional attachments to shield his defense, the lives of our men are paramount. So, where military necessity dictates, commanders

²³⁶ UK, Statement at the CDDH, *Official Records*, Vol. VII, CDDH/SR.53, 6 June 1977, p. 163.

²³⁷ UK, Statement before the UN Security Council, UN Doc. S/PV.2977, 14 February 1991, § 72.

²³⁸ UK, Letter dated 21 January 1991 to the President of the UN Security Council, UN Doc. S/22215, 21 January 1991.

²³⁹ UK, Letter dated 28 January 1991 to the President of the UN Security Council, UN Doc. S/22156, 28 January 1991, p. 1.

²⁴⁰ UK, Letter dated 13 February 1991 to the President of the UN Security Council, UN Doc. S/22218, 13 February 1991, p. 1.

may order the required action even though it involves destruction of some honored site.

4. But there are many circumstances in which damage and destruction are not necessary and cannot be justified. In such cases, through the exercise of restraint and discipline, commanders will preserve centers and objects of historical and cultural significance. Civil Affairs Staffs at higher echelons will advise commanders of the locations of historical monuments of this type, both in advance of the front lines and in occupied areas. This information, together with the necessary instructions, will be passed down through command channels to all echelons.²⁴¹

227. At the CDDH, the US stated that:

It is the understanding of the United States that [Article 47 *bis* of draft AP I (now Article 53)] was not intended to replace the existing customary law prohibitions reflected in Article 27 of the 1907 [HR] protecting a variety of cultural and religious objects. Rather the article establishes a special protection for a limited class of objects which because of their recognized importance constitute a part of the special heritage of mankind. Other monuments, works of art or places of worship which are not so recognized, none the less represent objects normally dedicated for civilian purposes and are therefore presumptively protected as civilian objects in accordance with the provisions of Article 47 [of draft AP I (now Article 52)].

We note that the use of these objects in support of the military effort is a violation of this article. Should they be used in support of the military effort it is our clear understanding that these objects will lose the special protection under this article.²⁴²

228. In 1987, in submitting AP II to the US Senate for advice and consent to ratification, the US President, commenting on Article 16, stated that:

To avoid confusion, US ratification should be subject to an understanding confirming that the special protection granted by this article is only required for a limited class of objects that, because of their recognized importance, constitute a part of the cultural or spiritual heritage of peoples, and that such objects will lose their protection if they are used in support of the military effort.²⁴³

229. In 1991, in a report submitted to the UN Security Council on operations in the Gulf War, the US stated that “despite false reports by Iraqi authorities there is no evidence of damage caused by coalition forces to the four main Shiah holy sites in Iraq”.²⁴⁴

²⁴¹ US, Memorandum from General Dwight D. Eisenhower, 26 May 1944, reprinted in US, *Annotated Supplement to the Naval Handbook* (1997), § 8.5.1.6, footnote 122.

²⁴² US, Statement at the CDDH, *Official Records*, Vol. VI, CDDH/SR.42, 27 May 1977, pp. 240–241.

²⁴³ US, Message from the US President transmitting AP II to the US Senate for advice and consent to ratification, Treaty Doc. 100-2, 29 January 1987, Comment on Article 16.

²⁴⁴ US, Letter dated 30 January 1991 to the President of the UN Security Council, UN Doc. S/22173, 30 January 1991, p. 1.

230. In 1991, in a report submitted to the UN Security Council on operations in the Gulf War, the US stated that the coalition air sorties were not flown against "religious targets".²⁴⁵

231. In 1992, in its final report to Congress on the conduct of the Gulf War, the US Department of Defense stated that:

Whether in territory Coalition forces occupied or in parts of Iraq still under Iraqi control, US and Coalition operations in Iraq were carefully attuned to the fact those operations were being conducted in an area encompassing "the cradle of civilization", near many archeological sites of great cultural significance. Coalition operations were conducted in a way that balanced maximum possible protection for those cultural sites against protection of Coalition lives and accomplishment of the assigned mission.

While Article 4(1) of the 1954 Hague Convention provides specific protection for cultural property, Article 4(2) permits waiver of that protection where military necessity makes such a waiver imperative; such "imperative military necessity" can occur when an enemy uses cultural property and its immediate surroundings to protect legitimate military targets in violation of Article 4(1). Coalition forces continued to respect Iraqi cultural property, even where Iraqi forces used such property to shield military targets from attack. However, some indirect damage may have occurred to some Iraqi cultural property due to the concussive effect of munitions directed against Iraqi targets some distance away from the cultural sites.²⁴⁶

The report further stated that "cultural and civilian objects are protected from direct, intentional attack unless they are used for military purposes, such as shielding military objects from attack".²⁴⁷

232. In 1992, during a debate in the Sixth Committee of the UN General Assembly, the US noted that "the coalition forces in the Gulf conflict, desiring to spare the historic temples at Ur, had not bombed them even though MiG aircraft had been stationed there".²⁴⁸

233. In 1993, in its report to Congress on the protection of natural and cultural resources during times of war, the US Department of Defense stated that "the United States considers the obligations to protect natural, civilian, and cultural property to be customary international law . . . Cultural property, civilian objects, and natural resources are protected from intentional attack so long as they are not utilized for military purposes."²⁴⁹ The report further states that:

²⁴⁵ US, Letter dated 8 February 1991 to the President of the UN Security Council, UN Doc. S/22216, 13 February 1991, p. 1.

²⁴⁶ US, Department of Defense, Final Report to Congress on the Conduct of the Persian Gulf War, Appendix O, The Role of the Law of War, 10 April 1992, *ILM*, Vol. 31, 1992, p. 621.

²⁴⁷ US, Department of Defense, Final Report to Congress on the Conduct of the Persian Gulf War, Appendix O, The Role of the Law of War, 10 April 1992, *ILM*, Vol. 31, 1992, p. 622.

²⁴⁸ US, Statement before the Sixth Committee of the UN General Assembly, UN Doc. A/C.6/47/SR.9, 6 October 1992, p. 11, § 51.

²⁴⁹ US, Department of Defense, Report to Congress on International Policies and Procedures Regarding the Protection of Natural and Cultural Resources During Times of War, 19 January 1993, p. 202, see also p. 204.

Other steps were taken to minimize collateral damage. Although intelligence collection involves utilization of very scarce resources, these resources were used to look for cultural property in order to properly identify it. Target intelligence officers identified the numerous pieces of cultural property or cultural property sites in Iraq; a “no-strike” target list was prepared, placing known cultural property off limits from attack, as well as some otherwise legitimate targets if attack of the latter might place nearby cultural property at risk of damage. Target folders were annotated regarding near-by cultural property, and large-format maps were utilized with “non-targets” such as cultural property highlighted. In examining large-format photographs of targets, each was reviewed and compared with other known data to locate and identify cultural property.

To the degree possible and consistent with allowable risk to aircraft and aircrews, aircraft and munitions were selected so that attacks on targets in proximity to cultural objects would provide the greatest possible accuracy and the least risk of collateral damage to the cultural property . . . Aircrews attacking targets in proximity to cultural property were directed not to expend their munitions if they lacked positive identification of their targets.²⁵⁰

234. In 1999, in submitting the 1954 Hague Convention and its 1999 Second Protocol to the US Senate for advice and consent to ratification, the US President noted that “United States policy and the conduct of operations are entirely consistent with the Convention’s provisions”. The letter also stated that:

In conformity with the customary practice of nations, the protection of cultural property is not absolute. If cultural property is used for military purposes, or in the event of imperative military necessity, the protection afforded by the Convention is waived, in accordance with the Convention’s terms.²⁵¹

235. The Report on US Practice states that “it is the *opinio juris* of the United States that cultural and religious objects should be respected to the extent permitted by military necessity”.²⁵²

236. In Order No. 579 issued in 1991, the YPA Chief of Staff stated that:

Any attack on cultural and other protected objects (churches, historical monuments, . . .) is strictly prohibited, except when these objects are used to launch attacks on YPA units. In such cases, the commanding officer in charge shall, before opening fire, warn the opposing side in an appropriate manner to stop fire and vacate the objects in question.²⁵³

237. In 1992, during the conflict in the former Yugoslavia, the SFRY denounced the destruction of churches, icons and religious books by Croatia.²⁵⁴

²⁵⁰ US, Department of Defense, Report to Congress on International Policies and Procedures Regarding the Protection of Natural and Cultural Resources During Times of War, 19 January 1993, p. 205.

²⁵¹ US, White House, Submission of the Hague Convention on Cultural Property to the Senate, Presidential Message, Congressional Record, 6 January 1999, pp. S35–S36, reprinted in *YIHL*, Vol. 2, 1999, p. 422.

²⁵² Report on US Practice, 1997, Chapter 4.3.

²⁵³ SFRY (FRY), Chief of General Staff of the YPA, Political Department, Order No. 579, 14 October 1991, § 3.

²⁵⁴ SFRY, Memorandum on Genocide in Croatia, 3 February 1992, p. 3.

238. In 1992, during a debate in the UN Security Council, the SFRY (FRY) qualified the destruction of “historical monuments representing the landmarks of Serbian civilization” in Bosnia and Herzegovina as “flagrant violations of human rights and breaches of humanitarian law”.²⁵⁵

239. In 1993, during a debate in the UN Security Council, the SFRY (FRY) strongly opposed “the shelling of cities, especially Sarajevo, and the destruction of villages, infrastructure, churches and cultural monuments”.²⁵⁶

240. The Report on the Practice of the SFRY (FRY) describes the armed conflict in Croatia as being characterised by the mass destruction of cultural, historical and religious objects and by violations of existing norms by both sides. According to the report, the YPA Chief of General Staff insisted that attacks on cultural and other protected property such as churches and historical monuments were prohibited. Furthermore, the report asserts the SFRY’s view that Article 16 AP II already enjoys customary law status. It maintains that, for this reason, the parties to the conflict between the SFRY and Croatia did not deal with the question of cultural property in their agreements on the application of IHL as they deemed it to be superfluous.²⁵⁷

241. According to the Report on the Practice of Zimbabwe, Zimbabwe believes that “an armed conflict should not be allowed to destroy the people’s heritage”.²⁵⁸

242. In 1993, during a conflict, a government justified the destruction of a church on the grounds that it was being used by an armed opposition group for storing weapons.²⁵⁹

III. Practice of International Organisations and Conferences

United Nations

243. In a resolution adopted in 1979, the UN Security Council took note of:

the efforts of the Government of Lebanon to obtain international recognition for the protection of the archaeological and cultural sites and monuments in the city of Tyre in accordance with international law and the Convention of The Hague of 1954, under which such cities, sites and monuments are considered to be a heritage of interest to all mankind.²⁶⁰

244. In a resolution adopted in 1999 on the protection of civilians in armed conflicts, the UN Security Council strongly condemned “attacks on objects protected under international law” and called on all parties “to put an end to such practices”.²⁶¹

²⁵⁵ SFRY, Statement before the UN Security Council, UN Doc. S/PV.3082, 16 November 1992, § 71.

²⁵⁶ SFRY, Statement before the UN Security Council, UN Doc. S/PV.3203, 20 April 1993, § 28.

²⁵⁷ Report on the Practice of the SFRY (FRY), 1997, Chapter 4.3.

²⁵⁸ Report on the Practice of Zimbabwe, 1998, Chapter 4.3. ²⁵⁹ ICRC archive document.

²⁶⁰ UN Security Council, Res. 459, 19 December 1979, § 5.

²⁶¹ UN Security Council, Res. 1265, 17 September 1999, § 2.

245. In a resolution adopted in 1992, the UN General Assembly expressed alarm that:

although the conflict in Bosnia and Herzegovina is not a religious conflict, it has been characterized by the systematic destruction and profanation of mosques, churches and other places of worship, as well as other sites of cultural heritage, in particular areas currently or previously under Serbian control.²⁶²

Similar concerns were expressed in 1994 and 1995.²⁶³

246. In a resolution adopted in 1996, the UN General Assembly stated that “the General Assembly, recognizing the importance of the protection of cultural property in the event of armed conflict, takes note of the efforts under way to facilitate the implementation of existing international instruments in this field”.²⁶⁴

247. In numerous resolutions adopted between 1977 and 1989, the UN Commission on Human Rights, referring mainly to GC IV, human rights instruments and “other relevant conventions and regulations”, condemned Israel for certain policies and practices in the occupied territories.²⁶⁵ According to the Commission, these policies included “the arming of settlers in the occupied territories to strike at Muslim and Christian religious and holy places”.²⁶⁶ In 1989, the Commission condemned Israel “for its attacks against holy places, such as mosques and churches, and its attempt to occupy Al Aqsa Mosque and to destroy it, as well as for obstructing the freedom of worship and religious practices”.²⁶⁷ In a resolution adopted in 1986, the UN Commission on Human Rights qualified the damage to cultural property in southern Lebanon as a violation of international human rights and strongly condemned Israel “for its human rights violations such as . . . the desecration of places of worship”.²⁶⁸

248. In a resolution on the situation of human rights in the territory of the former Yugoslavia adopted in 1994, the UN Commission on Human Rights denounced “the intentional destruction of mosques, churches and other places of worship”.²⁶⁹

²⁶² UN General Assembly, Res. 47/147, 18 December 1992, preamble.

²⁶³ UN General Assembly, Res. 49/196, 23 December 1994, preamble; Res. 50/193, 22 December 1995, preamble.

²⁶⁴ UN General Assembly, Res. 51/157, 16 December 1996, § 5.

²⁶⁵ UN Commission on Human Rights, Res. 1 (XXXIII), 15 February 1977, § 4; Res. 1 (XXXIV), 14 February 1978, § 4; Res. 1 (XXXV), 21 February 1979, § 3; Res. 1 (XXXVI), 13 February 1980, § 3; Res. 1 (XXXVII), 11 February 1981, § 7; Res. 1982/1, 11 February 1982, § 5; Res. 1983/1, 15 February 1983, § 5; Res. 1984/1, 20 February 1984, §§ 6–7; Res. 1985/1, 19 February 1985, §§ 6–8; Res. 1986/1, 20 February 1986, §§ 6–8; Res. 1987/2, 19 February 1987, §§ 6–8; Res. 1988/1, 15 February 1988, §§ 3–10; Res. 1989/2, 17 February 1989, § 4.

²⁶⁶ UN Commission on Human Rights, Res. 1984/1, § 7(d); Res. 1985/1, 19 February 1985, § 8(d); Res. 1986/1, 20 February 1986, § 8(d); Res. 1987/2, 19 February 1987, § 8(c) and (d); Res. 1988/1, 15 February 1988, § 7.

²⁶⁷ UN Commission on Human Rights, Res. 1989/2, 17 February 1989, § 4(d).

²⁶⁸ UN Commission on Human Rights, Res. 1986/43, 12 March 1986, § 1.

²⁶⁹ UN Commission of Human Rights, Res. 1994/72, 9 March 1994, § 7(e).

249. In a resolution adopted in 1998, the UN Commission on Human Rights expressed its deep concern over reports of the destruction and looting of the cultural and historical heritage of Afghanistan and urged the parties to protect and safeguard such heritage.²⁷⁰

250. In a resolution adopted in 1993, the UNESCO General Conference reaffirmed that "(a) the object and purpose of the 1954 Hague Convention are still valid and realistic" and "(b) the fundamental principles of protecting and preserving cultural property in the event of armed conflict could be considered part of customary international law".²⁷¹

251. In a resolution adopted in 1993, the UNESCO General Conference expressed grave concern at the "destruction of the cultural, historical and religious heritage of the Republic of Bosnia and Herzegovina (including mosques, churches and synagogues, schools and libraries, archives and cultural and educational buildings) under the abhorrent policy of 'ethnic cleansing'".²⁷²

252. In a joint declaration issued in 1991 on the situation in the former Yugoslavia, the Director-General of UNESCO and the UN Secretary-General launched a solemn appeal to all parties "to respect the principles enshrined in the Convention for the Protection of Cultural Property in the Event of Armed Conflict and in the Convention concerning the Protection of the World Cultural and Natural Heritage".²⁷³

253. In a press release issued in 1992 in the context of the conflict in Bosnia and Herzegovina, the Director-General of UNESCO declared that, under international law, attacks against the cultural and spiritual heritage of peoples constituted grave breaches that must be vigorously condemned and repressed.²⁷⁴

In a subsequent press release issued in 1997 in the same context, the Director-General described attacks on cultural and religious monuments as "criminal acts".²⁷⁵

254. In 1993, in his Report on the Reinforcement of UNESCO's Action for the Protection of the World Cultural and Natural Heritage, the UNESCO Director-General stated with respect to the scope of the 1954 Hague Convention that:

Although it was considered highly desirable that an international legal instrument which also protected the natural heritage should be developed, it was agreed that the scope of the 1954 Convention – because of its very distinctive character – should not be extended to include the natural heritage. The protection regime laid down for cultural property in the 1954 Convention did not meet the requirements of an adequate protection regime for the natural heritage.²⁷⁶

²⁷⁰ UN Commission on Human Rights, Res. 1998/70, 21 April 1998, §§ 2(g) and 5(h).

²⁷¹ UNESCO, General Conference, Res. 3.5, 13 November 1993, preamble.

²⁷² UNESCO, General Conference, Res. 4.8, 13 November 1993, § 1.

²⁷³ Director-General of UNESCO and UN Secretary-General, Joint declaration on the situation in the former Yugoslavia, 24 October 1991, *UNESCO Courier*, January 1992, p. 50.

²⁷⁴ UNESCO, Press Release, Bosnia-Herzegovina: Appeal by the Director-General of UNESCO, 21 May 1992.

²⁷⁵ UNESCO, Press Release No. 97-98, 17 June 1997.

²⁷⁶ Director-General of UNESCO, Report on the Reinforcement of UNESCO's Action for the Protection of the World Cultural and Natural Heritage, UNESCO Doc. 142 EX/15, 18 August 1993, p. 2, § 6.1.

255. In its Commentary on the Revised Lauswolt Document in 1997, UNESCO stated that the main point of discussion of the meeting of governmental experts on Article 1 of the 1954 Hague Convention was the inclusion of the notion of military necessity. The Commentary justified the wording in Article 12(1) by the need “to clarify that it is intended to increase the protection of cultural property, over that provided by Article 19 of the Hague Convention which mentions only ‘respect’”.²⁷⁷

256. In 1994, in a report on the situation of human rights in the territory of the former Yugoslavia, the Special Rapporteur of the UN Commission on Human Rights defined the destruction of the historic Ottoman bridge in Mostar, registered with UNESCO as a monument of major cultural importance, as a violation of IHL.²⁷⁸

257. In 1997, in a report on the situation of human rights in Afghanistan, the Special Rapporteur of the UN Commission on Human Rights recommended that “priority should be given to domestic and international efforts to preserve and protect the cultural patrimony of Afghanistan”.²⁷⁹

Other International Organisations

258. In 1993, in a report on the destruction by war of the cultural heritage in Croatia and Bosnia and Herzegovina, the Committee on Culture and Education of the Parliamentary Assembly of the Council of Europe described the conflicts in Croatia and Bosnia and Herzegovina as “a tragedy for the peoples of these countries and for all Europe”. It stated that these conflicts “have led to a major cultural catastrophe for all the communities of the war zone . . . and also for our European heritage” and that “the phrase ethnic cleansing . . . goes hand in hand with another kind of cleansing – cultural cleansing”.²⁸⁰ In another report on the same topic issued the following year, the Committee noted that, in response to the international reactions to the destruction of the Mostar Bridge by HVO forces, the Herzegovinan Chief of Staff had distributed a brochure describing international provisions concerning IHL, war crimes, cultural heritage and prisoners of war, and promised the severest punishment to members of the armed forces who did not respect the laws of war.²⁸¹

259. In a recommendation adopted in 1994 on the cultural situation in the former Yugoslavia, the Parliamentary Assembly of the Council of Europe stated

²⁷⁷ UNESCO, Commentary on the Revised Lauswolt Document, October 1997, pp. 3 and 16.

²⁷⁸ UN Commission on Human Rights, Special Rapporteur on the Situation of Human Rights in the Former Yugoslavia, Fifth periodic report, UN Doc. E/CN.4/1994/47, 20 February 1994, §§ 46 and 69.

²⁷⁹ UN Commission on Human Rights, Special Rapporteur on the Situation of Human Rights in Afghanistan, Final report, UN Doc. E/CN.4/1997/59, 20 February 1997, § 131.

²⁸⁰ Council of Europe, Parliamentary Assembly, Committee on Culture and Education, Information report on war damage to the cultural heritage in Croatia and Bosnia Herzegovina, Doc. 6756, 2 February 1993, §§ 1 and 5.

²⁸¹ Council of Europe, Parliamentary Assembly, Committee on Culture and Education, Fourth information report on war damage to the cultural heritage in Croatia and Bosnia Herzegovina, Doc. 6999, 19 January 1994, p. 23.

that “the cultural dimension is, however, constantly exploited by all sides as a means of fuelling the conflict, as a target for intervention, and as a weapon”. It stated that “one priority is that intergovernmental bodies in the area . . . should recognise and pay attention to the cultural dimension”.²⁸²

260. In a statement on the desecration and destruction of the Charar-i-Sharif shrine and mosque complex in 1995, the OIC Contact Group on Jammu and Kashmir strongly condemned “attacks against [the] religious and cultural heritage” of the people concerned and deplored the fact that “the desecration of the holy places of Muslims in India had become a pattern over the years”.²⁸³

261. In a resolution adopted in 1997 on the situation in Bosnia and Herzegovina, the OIC strongly condemned the deliberate destruction of historical, religious and cultural property.²⁸⁴

262. During a conflict, a regional organisation noted “the systematic and wilful destruction of churches and cultural monuments”.²⁸⁵

International Conferences

263. The draft report of Committee III of the CDDH requested that:

the new article be inserted in Part IV, in order to deal with the protection of cultural property along the lines of Article 47 *bis* [Article 53] of Protocol I. The text . . . conforms in general to the wording of Article 47 *bis* [Article 53], but without any reference to “reprisals”, which is a term that apparently will not be used in Protocol II.

The draft report further held that “the reference to the Hague Convention of 1954 . . . is intended to point in particular to Article 19 of that convention, which deals with non-international armed conflicts”.²⁸⁶

264. The Final Declaration adopted by the International Conference for the Protection of War Victims in 1993 urged all States to “make every effort to . . . reaffirm and ensure respect for the rules of international humanitarian law applicable during armed conflicts protecting cultural property [and] places of worship . . . and continue to examine the opportunity of strengthening them”.²⁸⁷

265. The Plan of Action for the years 2000–2003 adopted in 1999 by the 27th International Conference of the Red Cross and Red Crescent proposed that all the parties to an armed conflict take effective measures to ensure that “in the

²⁸² Council of Europe, Parliamentary Assembly, Rec. 1239, 14 April 1994, §§ 4 and 9.

²⁸³ OIC, Contact Group on Jammu and Kashmir, Statement on the desecration and destruction of the Charar-i-Sharif shrine and mosque complex, New York, 15 May 1995, annexed to Letter dated 16 May 1995 from Morocco to the President of the UN Security Council, UN Doc. S/1995/392, 16 May 1995, §§ 2–3.

²⁸⁴ OIC, Res. 1/5-EX, 26 September 1997, § 8. ²⁸⁵ ICRC archive document.

²⁸⁶ CDDH, *Official Records*, Vol. XI, CDDH/III/353, Report of Committee III, 21 April–11 June 1976, p. 437, Article 20 *bis*.

²⁸⁷ International Conference for the Protection of War Victims, Geneva, 30 August–1 September 1993, Final Declaration, § II(10), *ILM*, Vol. 33, 1994, p. 301.

conduct of hostilities, every effort is made – in addition to the total ban on directing attacks . . . – . . . to protect civilian objects including cultural property, places of worship and diplomatic facilities”.²⁸⁸

266. In a resolution adopted in 2000 on the destruction and desecration of the Islamic historical and cultural relics and shrines in the occupied Azeri territories resulting from the Republic of Armenia’s aggression against the Republic of Azerbaijan, the Islamic Summit Conference noted “the tremendous losses” inflicted by Armenia in the Azeri territories. According to the resolution, these included “complete or partial demolition of rare antiquities and places of Islamic civilization, history and architecture, such as mosques and other sanctuaries, mausoleums and tombs, archaeological sites, museums, libraries, artifact exhibition halls, government theatres and conservatories”, as well as the “destruction of a large number of precious property and millions of books and historic manuscripts and luminaries”. It strongly condemned such “barbaric acts”.²⁸⁹

267. In its Final Declaration, the African Parliamentary Conference on International Humanitarian Law for the Protection of Civilians during Armed Conflict in 2002, deeply concerned about the number and expansion of conflicts in Africa, denounced the destruction of movable and immovable property of importance to the cultural or spiritual heritage of Africa which seriously violates the rules of IHL.²⁹⁰

IV. Practice of International Judicial and Quasi-judicial Bodies

268. In the *Tadić case* in 1995, the ICTY Appeals Chamber held that “it cannot be denied that customary rules have developed to govern internal strife. These rules . . . cover such areas as . . . protection of civilian objects, in particular cultural property.”²⁹¹ The Appeals Chamber explicitly stated that Article 19 of the 1954 Hague Convention, which provides for the application of the provisions of the Convention relating to respect for cultural property “as a minimum” in non-international armed conflicts, constituted a treaty rule which had “gradually become part of customary law”.²⁹²

269. In its review of the indictment in the *Karadžić and Mladić case* in 1996, the ICTY Trial Chamber noted that among the counts included in the first indictment was also “the destruction of sacred sites (count 6)”, an offence which

²⁸⁸ 27th International Conference of the Red Cross and Red Crescent, Geneva, 31 October–6 November 1999, Res. I, Annex 2, Plan of Action for the years 2000–2003, Actions proposed for final goal 1.1, § 1(a).

²⁸⁹ Islamic Summit Conference, Ninth Session, Doha, November 2000, Res. 25/8-C (IS), preamble and § 1.

²⁹⁰ African Parliamentary Conference on International Humanitarian Law for the Protection of Civilians during Armed Conflict, Final Declaration, Niamey, 18–20 February 2002, preamble.

²⁹¹ ICTY, *Tadić case*, Interlocutory Appeal, 2 October 1995, § 127.

²⁹² ICTY, *Tadić case*, Interlocutory Appeal, 2 October 1995, § 98.

lay within the scope of the Tribunal's jurisdiction, for it could be characterised as a violation of the laws or customs of war.²⁹³ As to the evidence produced with respect to this count, the Trial Chamber pointed out that "according to estimates provided at hearing by an expert witness . . . a total of 1,123 mosques, 504 Catholic churches and five synagogues were destroyed or damaged [by Bosnian Serb forces], for the most part, in the absence of military activity or after the cessation thereof". It further noted that "aside from churches and mosques, other religious and cultural symbols like cemeteries and monasteries were targets of the attacks".²⁹⁴

270. In its Judgement in the *Blaškić case* in 2000, the ICTY Trial Chamber, with reference to destruction or wilful damage to institutions dedicated to religion or education, stated that:

The damage or destruction must have been committed intentionally to institutions which may clearly be identified as dedicated to religion or education and which were not being used for military purposes at the time of the acts. In addition, the institutions must not have been in the immediate vicinity of military objectives.²⁹⁵

The Trial Chamber found the accused guilty of violating "the laws or customs of war under Article 3(d) of the Statute" for the following acts: "destruction or wilful damage done to institutions dedicated to religion or education (count 14)".²⁹⁶

271. In its judgement in the *Kordić and Čerkez case* in 2001, the ICTY Trial Chamber stated that "educational institutions are undoubtedly immovable property of great importance to the cultural heritage of peoples in that they are without exception centres of learning, arts, and sciences, with their valuable collections of books and works of art and science".²⁹⁷ With reference to the 1954 Hague Convention, the Trial Chamber argued that "there is little difference between the conditions for the according of general protection and those for the provision of special protection" and stated that "the fundamental principle is that protection of whatever type will be lost if cultural property, including educational institutions, is used for military purposes, and this principle is consistent with the custom codified in Article 27 of the Hague Regulations".²⁹⁸ The Trial Chamber found the accused both guilty of violating "the laws or customs of war, as recognised by Article 3(d) (destruction or wilful damage done to institutions dedicated to religion or education) and pursuant to Article 7(1) of the Statute of the International Tribunal".²⁹⁹

²⁹³ ICTY, *Karadžić and Mladić case*, Review of the Indictment, 11 July 1996, § 6.

²⁹⁴ ICTY, *Karadžić and Mladić case*, Review of the Indictment, 11 July 1996, § 15.

²⁹⁵ ICTY, *Blaškić case*, Judgement, 3 March 2000, § 185.

²⁹⁶ ICTY, *Blaškić case*, Judgement, 3 March 2000, p. 267.

²⁹⁷ ICTY, *Kordić and Čerkez case*, Judgement, 26 February 2001, § 360.

²⁹⁸ ICTY, *Kordić and Čerkez case*, Judgement, 26 February 2001, § 362.

²⁹⁹ ICTY, *Kordić and Čerkez case*, Judgement, 26 February 2001, p. 308, Counts 43 and 44.

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

272. To fulfil its task of disseminating IHL, the ICRC has delegates around the world teaching armed and security forces that:

96. [Article 53 AP I] applies to: a) objects representing a high cultural value as such; b) objects with an important religious dedication independent of any cultural value.
97. Historic monuments, works of art and places of worship which constitute the cultural or spiritual heritage of peoples enjoy full protection. Their immunity may not be withdrawn, contrary to that of marked cultural objects. Their value is generally self-evident and does not require special identification means.
98. [Article 1 of the 1954 Hague Convention] applies to objects representing a cultural value as such, independently of their religious or secular character.
99. "Cultural object under general protection" means an object of great importance to the cultural heritage of every people, such as:
 - a) monument of architecture, art or history; archaeological sites: groups of buildings which as a whole are of historic or artistic interest;
 - b) buildings whose main purpose is to preserve movable cultural objects such as museums, large libraries, depositories of archives, shelters of cultural objects;
 - c) centres containing a large amount of immovable cultural objects.

...

225. The immunity of a cultural object under general protection may be withdrawn only in case of imperative military necessity. The competences for establishing this military necessity must be regulated.³⁰⁰

Delegates further stress that, an "unlawful attack of clearly-recognized cultural objects" constitutes a grave breach of the law of war.³⁰¹

273. In a joint statement issued in 1991, the Yugoslav Red Cross and the Hungarian Red Cross expressed their deep concern about "the protracting internal conflict in Yugoslavia" and urged the parties to the conflict "to save all ... cultural objects".³⁰²

274. In 1991, in the context of the conflict in the former Yugoslavia, the Slovene Red Cross condemned the destruction of cultural, historical and religious monuments.³⁰³

275. In a working paper on war crimes submitted in 1997 to the Preparatory Committee for the Establishment of an International Criminal Court, the ICRC, emphasising the customary law nature of most grave breaches of AP I, listed the following as a war crime to be subject to the jurisdiction of the ICC:

³⁰⁰ Frédéric de Mulinen, *Handbook on the Law of War for Armed Forces*, ICRC, Geneva, 1987, §§ 96–99 and 225.

³⁰¹ Frédéric de Mulinen, *Handbook on the Law of War for Armed Forces*, ICRC, Geneva, 1987, § 778(d).

³⁰² Yugoslav Red Cross and Hungarian Red Cross, Joint Statement, Subotica, 25 October 1991.

³⁰³ Slovene Red Cross, Protest and Appeal, 22 September 1991, § 1.

making the clearly-recognized historic monuments, works of art or places of worship which constitute the cultural or spiritual heritage of peoples and to which special protection has been given by special arrangement . . . the object of attack, causing as a result thereof, where there is no evidence of the use by the adverse Party of such objects in support of the military effort, and when such historic monuments, works of art and places of worship are not located in the immediate proximity of military objectives, when committed wilfully and in violation of international humanitarian law.³⁰⁴

The ICRC also included attacks directed against historic monuments, works of art or places of worship which constitute the cultural or spiritual heritage of peoples in a list of serious violations of IHL applicable in non-international armed conflicts.³⁰⁵

VI. Other Practice

276. In a resolution adopted during its Edinburgh Session in 1969, the Institute of International Law stated that “those objects which, by their nature or use, serve primarily humanitarian or peaceful purposes such as religious or cultural needs” cannot be considered as military objectives.³⁰⁶

277. In a mission report in 1983, the ICRC noted that an armed opposition group had issued orders to its forces not to direct attacks against churches.³⁰⁷

278. The Report on SPLM/A Practice states, with reference to the 1983 SPLM/A Manifesto and a resolution on human rights and civil liberties adopted in 1991 by the Politico-Military High Command of the SPLM/A, that “cultural objects which include religious monuments, buildings such as mosques and churches and various icons are respected by the SPLM/A”.³⁰⁸

279. In 1989, in a report on violations of the laws of war in Angola, Africa Watch considered that cultural property as defined by the 1954 Hague Convention must be considered as civilian objects.³⁰⁹

280. In 1993, following the bombing of a church by governmental forces during an internal conflict, the parish priest sent a letter to the ICRC, on behalf of his parishioners, in which he expressed their “vehement protest against this unprovoked and totally inhumane act, which destroyed a place of worship and

³⁰⁴ ICRC, Working paper on war crimes submitted to the Preparatory Committee for the Establishment of an International Criminal Court, 14 February 1997, § 1 (c)(iv).

³⁰⁵ ICRC, Working paper on war crimes submitted to the Preparatory Committee for the Establishment of an International Criminal Court, 14 February 1997, § 3 (x).

³⁰⁶ Institute of International Law, Edinburgh Session, Resolution on the Distinction between Military Objectives and Non-Military Objects in General and Particularly the Problems Associated with Weapons of Mass Destruction, 9 September 1969, § 3(b).

³⁰⁷ ICRC archive document.

³⁰⁸ Report on SPLM/A Practice, 1998, Chapter 4.2, referring to SPLM/A, Manifesto, July 1983, Article 24(C) and PMHC Resolution No. 15: Human Rights and Civil Liberties, 11 September 1991, § 15.2.

³⁰⁹ Africa Watch, *Angola: Violations of the Laws of War by Both Sides*, New York, April 1989, pp. 144–147.

killed the worshipping devotees". He argued that the action was "totally indefensible", given that the church was easy to locate and identify and that there was no military camp in its surroundings.³¹⁰

281. At the 1998 Vienna expert meeting on the revision of the 1954 Hague Convention, the ICA pointed out that since the Second World War, archives and libraries have suffered major losses mainly in the context of non-international conflicts, in particular in Bosnia and Herzegovina, Cambodia and Liberia.³¹¹

B. Use of Cultural Property for Military Purposes

I. Treaties and Other Instruments

Treaties

282. Article 4 of the 1954 Hague Convention provides that:

1. The High Contracting Parties undertake to respect cultural property situated within their own territory as well as within the territory of other High Contracting Parties by refraining from any use of the property and its immediate surroundings or of the appliances in use for its protection for purposes which are likely to expose it to destruction or damage in the event of armed conflict . . .
2. The obligations mentioned in paragraph 1 of the present Article may be waived only in cases where military necessity imperatively requires such a waiver.

283. Article 19(1) of the 1954 Hague Convention provides that:

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

284. Article 53 AP I provides that:

Without prejudice to the provisions of the Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict of 14 May 1954, and of other relevant international instruments, it is prohibited:

...

- (b) to use such objects [historic monuments, works of art or places of worship which constitute the cultural or spiritual heritage of peoples] in support of the military effort.

Article 53 AP I was adopted by consensus.³¹²

285. Upon ratification of AP I, Canada stated that "it is the understanding of the Government of Canada in relation to Article 53 that . . . the prohibitions

³¹⁰ ICRC archive document.

³¹¹ ICA, Expert Meeting on the Revision of the 1954 Hague Convention, Vienna, 11–13 May 1998, Summary of comments received from States Parties to the Hague Convention, the ICRC and the ICA, pp. 6 and 7.

³¹² CDDH, *Official Records*, Vol. VI, CDDH/SR.42, 27 May 1977, p. 206.

contained in sub-paragraphs (a) and (b) of this Article can only be waived when military necessity imperatively requires such a waiver".³¹³

286. Upon ratification of AP I, Ireland stated that "it is the understanding of Ireland in relation to the protection of cultural objects in Article 53 that if the objects protected by this Article are *unlawfully used for military purposes* they will thereby lose protection from attacks directed against such unlawful military use".³¹⁴ (emphasis added)

287. Upon ratification of AP I, Italy stated that "if and so long as the objectives protected by Article 53 are *unlawfully used for military purposes*, they will thereby lose protection".³¹⁵ (emphasis added)

288. Upon ratification of AP I, the Netherlands stated, with respect to Article 53 AP I, that "it is the understanding of the Government of the Kingdom of the Netherlands that if and for as long as the objects and places protected by this Article, *in violation of paragraph (b), are used in support of the military effort*, they will thereby lose such protection".³¹⁶ (emphasis added)

289. Upon signature and upon ratification of AP I, the UK stated, in relation to Article 53 AP I, that "if the objects protected by this Article are *unlawfully used for military purposes* they will thereby lose protection from attacks directed against such unlawful military uses".³¹⁷ (emphasis added)

290. Article 16 AP II provides that:

Without prejudice to the provisions of the Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict of 14 May 1954, it is prohibited... to use [historic monuments, works of art or places of worship which constitute the cultural or spiritual heritage of peoples] in support of the military effort.

Article 16 AP II was adopted by 35 votes in favour, 15 against and 32 abstentions.³¹⁸

291. Article 6(b) of the 1999 Second Protocol to the 1954 Hague Convention provides that:

A waiver on the basis of imperative military necessity pursuant to Article 4 paragraph 2 of the [1954 Hague] Convention may only be invoked to use cultural property for purposes which are likely to expose it to destruction or damage when and for as long as no choice is possible between such use of the cultural property and another feasible method for obtaining a similar military advantage.

³¹³ Canada, Reservations and statements of understanding made upon ratification of AP I, 20 November 1990, § 9.

³¹⁴ Ireland, Declarations and reservations made upon ratification of AP I, 19 May 1999, § 10.

³¹⁵ Italy, Declarations made upon ratification of AP I, 27 February 1986, § 9.

³¹⁶ Netherlands, Declarations made upon ratification of AP I, 26 June 1987, § 8.

³¹⁷ UK, Declarations made upon signature of AP I, 12 December 1977, § g; Reservations and declarations made upon ratification of AP I, 28 January 1998, § k.

³¹⁸ CDDH, *Official Records*, Vol. VII, CDDH/SR.53, 6 June 1977, p. 143.

292. Article 8 of the 1999 Second Protocol to the 1954 Hague Convention provides that “the Parties to the conflict shall, to the maximum extent feasible . . . avoid locating military objectives near cultural property”.

293. Article 21 of the 1999 Second Protocol to the 1954 Hague Convention provides that:

Without prejudice to Article 28 of the [1954 Hague] Convention, each Party shall adopt such legislative, administrative or disciplinary measures as may be necessary to suppress the following acts when committed intentionally:

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

294. Article 22(1) of the 1999 Second Protocol to the 1954 Hague Convention states that “this Protocol shall apply in the event of an armed conflict not of an international character, occurring within the territory of one of the Parties”.

Other Instruments

295. Article 26 of the 1923 Hague Rules of Air Warfare establishes special rules aimed at enabling States “to obtain more efficient protection for important historic monuments situated within their territory”. In particular, States may establish a zone of protection round such monuments, which shall enjoy immunity from bombardment in time of war. This faculty is subject to the condition that States “must abstain from using the monuments and the surrounding zones for military purposes, or for the benefit in any way whatever of its military organization, or from committing within such monument or zone any act with a military purpose in view”. A special regime of inspection is also envisaged for the purpose of ensuring that such condition is not violated.

296. Paragraph 6 of the 1991 Memorandum of Understanding on the Application of IHL between Croatia and the SFRY provides that hostilities shall be conducted in accordance with Article 53 AP I.

297. Paragraph 2.5 of the 1992 Agreement on the Application of IHL between the Parties to the Conflict in Bosnia and Herzegovina provides that hostilities shall be conducted in accordance with Article 53 AP I.

298. Article 1 of the 1997 Revised Lauswolt Document provides that:

1. In order to ensure respect for cultural property, that property should not be used for purposes which are likely to expose it to destruction or damage in the event of armed conflict.
2. It is prohibited . . . to use [cultural] property in support of [the] military effort.

299. Article 12(1) of the 1997 Revised Lauswolt Document provides that:

All the provisions of this instrument, the provisions of the Convention and its 1954 Protocol which relate to safeguarding of, and respect for, cultural property shall apply in the event of an armed conflict not of an international character, occurring within the territory of one of the States Parties.

300. Section 6.6 of the 1999 UN Secretary-General's Bulletin provides that "in its area of operation, the United Nations force shall not use such cultural property or their immediate surroundings for purposes which might expose them to destruction or damage".

II. National Practice

Military Manuals

301. Argentina's Law of War Manual states that "it is absolutely prohibited . . . to use [cultural property] in support of the war effort".³¹⁹ The manual restates this prohibition with respect to non-international armed conflicts in particular.³²⁰

302. Australia's Defence Force Manual states that "obligations are placed upon all parties to respect cultural property by not exposing it to destruction or damage in the event of armed conflict". The manual further specifies that "historic monuments, places of worship and works of art, which constitute the cultural and spiritual heritage of peoples . . . must not be used in support of any military effort."³²¹

303. Canada's LOAC Manual states that it is prohibited to use historic monuments, works of art of places of worship which constitute the cultural or spiritual heritage of peoples "in support of the military effort".³²² It further provides that "use of a privileged building for improper purposes" constitutes a war crime.³²³ The manual restates this prohibition with respect to non-international armed conflicts in particular.³²⁴

304. Canada's Code of Conduct states that "cultural and religious property should . . . not be used for military purposes".³²⁵

305. Croatia's Commanders' Manual states that:

13. Specifically protected objects may not become military objectives . . .
14. The immunity of a marked cultural object may be withdrawn in case of imperative military necessity.
- ...
62. [In defence] the immunity of a marked cultural object shall only be withdrawn when the fulfilment of the mission absolutely so requires. The withdrawal shall only take place to the extent necessary. Advance warning and removal of distinctive signs shall make the situation clear to the enemy.³²⁶

³¹⁹ Argentina, *Law of War Manual* (1989), § 4.44.

³²⁰ Argentina, *Law of War Manual* (1989), § 7.09.

³²¹ Australia, *Defence Force Manual* (1994), § 928.

³²² Canada, *LOAC Manual* (1999), p. 4-7, § 63(b).

³²³ Canada, *LOAC Manual* (1999), p. 16-4, § 21(c).

³²⁴ Canada, *LOAC Manual* (1999), p. 17-5, § 40.

³²⁵ Canada, *Code of Conduct* (2001), Rule 9, § 5.

³²⁶ Croatia, *Commanders' Manual* (1992), §§ 13-14 and 62.

306. Germany's Military Manual provides that:

903. Cultural property shall neither directly nor indirectly be used in support of military efforts.

...

905. . . . It is also prohibited to expose cultural property, its immediate surroundings and the appliances in use for its protection to the danger of destruction or damage by using them for other purposes than originally intended.

906. An exception to this rule shall be permissible only in cases of imperative military necessity. The decision is to be taken by the competent military commander

...

907. The parties to the conflict shall take sufficient precautions to prevent cultural property from being used for military purposes. Example: On 19 June 1944 all military installations were removed from Florence by order of the German authorities so as to prevent this abundant city of art from becoming a theatre of war. The broad avenues surrounding the city of Florence on its former fortifications were regarded as a boundary which was not to be crossed by military transport.³²⁷

307. Germany's IHL Manual states that "it is prohibited to use [movable or immovable property of great importance to the cultural heritage of every people] in support of the military effort".³²⁸

308. Israel's Manual on the Laws of War provides that:

On the other hand, the protection of cultural property is accompanied by an express prohibition to use such property for assisting warfare activities (stationing a sniper on a museum roof, and so on), and once such use has been made, the other side is allowed to do anything required to neutralize the danger, even at the expense of damaging the cultural property. This particular rule in the laws of war was violated by Iraq during the Gulf War, by concealing its warplanes inside the ancient ruins of Nineveh. The Americans refrained from attacking the archaeological ruins, although the laws of war permit this.³²⁹

309. Italy's LOAC Elementary Rules Manual states that:

13. Specifically protected objects may not become military objectives . . .

14. The immunity of a marked cultural object may be withdrawn in case of imperative military necessity.

...

62. [In defence] the immunity of a marked cultural object shall only be withdrawn when the fulfilment of the mission absolutely so requires. The withdrawal shall only take place to the extent necessary. Advance warning and removal of distinctive signs shall make the situation clear to the enemy.³³⁰

310. Italy's IHL Manual states that "cultural property and places of worship are entitled to protection in all circumstances provided they are not illicitly used for military purposes".³³¹

³²⁷ Germany, *Military Manual* (1992), §§ 903 and 905–907.

³²⁸ Germany, *IHL Manual* (1996), § 701. ³²⁹ Israel, *Manual on the Laws of War* (1998), p. 34.

³³⁰ Croatia, *Commanders' Manual* (1992), §§ 13–14 and 62.

³³¹ Italy, *IHL Manual* (1991), Vol. I, § 12.

311. Kenya's LOAC Manual states that "in defence, withdrawal of immunity of cultural objects marked with distinctive protective signs (in the exceptional case of unavoidable military necessity) shall, when the tactical situation permits, be limited in time and restricted to the less important parts of the object".³³²

312. The Military Manual of the Netherlands states that respect for cultural objects implies that "the objects may not be used in case of armed conflict" but that an exception can be made "in case military necessity requires such an exception. Hence, the protection is not at all absolute."³³³ With respect to non-international armed conflicts in particular, the manual states that historic monuments, works of art and places of worship "may not be used in support of the military effort" and recalls Article 19 of the 1954 Hague Convention.³³⁴

313. The Military Handbook of the Netherlands stresses that cultural property "may not be used for military purposes, except in case of imperative military necessity".³³⁵

314. New Zealand's Military Manual states that for parties to AP I it is prohibited to use historic monuments, works of art or places of worship which constitute the cultural or spiritual heritage of peoples "in support of the military effort".³³⁶ The manual further states that "use of a privileged building for improper purposes" is a war crime recognised by the customary law of armed conflict.³³⁷

315. Nigeria's Manual on the Laws of War qualifies "the improper use of a privileged building for military purposes" as a war crime.³³⁸

316. Nigeria's Military Manual emphasises that "marked cultural objects must be protected" in the conduct of defence.³³⁹

317. Russia's Military Manual states that using cultural property, historical monuments, places of worship, and other buildings which represent the cultural or spiritual heritage of a people "in order to gain a military advantage" is a prohibited method of warfare.³⁴⁰

318. South Africa's LOAC Manual protects buildings dedicated to religion and cultural objects such as historic monuments. It provides that "misuse of protected places [buildings dedicated to religion and cultural objects such as historic monuments] for military purposes may make them the subject of an armed attack".³⁴¹

³³² Kenya, *LOAC Manual* (1997), Précis No. 4, p. 9.

³³³ Netherlands, *Military Manual* (1993), p. V-6, § 5.

³³⁴ Netherlands, *Military Manual* (1993), p. XI-7.

³³⁵ Netherlands, *Military Handbook* (1995), p. 7-43.

³³⁶ New Zealand, *Military Manual* (1992), § 520(4), see also § 632(4).

³³⁷ New Zealand, *Military Manual* (1992), 1703(5).

³³⁸ Nigeria, *Manual on the Laws of War* (undated), § 6.

³³⁹ Nigeria, *Military Manual* (1994), p. 44, § 15.

³⁴⁰ Russia, *Military Manual* (1990), § 5(s).

³⁴¹ South Africa, *LOAC Manual* (1996), § 29(b)(i).

319. Spain's LOAC Manual states that combatants must remember that it is prohibited "to use property which constitutes the cultural or spiritual heritage of peoples, whether public or private, in support of the military effort".³⁴²

320. Sweden's IHL Manual points out that:

A condition [for their protection under the 1954 Hague Convention] is that none of these cultural values may be used for military purposes. If this should happen, the adversary is no longer obliged to extend protection to these objects . . . A question of great practical importance is whether the formulation of Additional Protocol admits any possibility of using the object named in Article 53 for military purposes. This does not need to involve such sensational steps as establishing headquarters or ammunitions dumps in museum or churches – it would more normally concern using the objects as observation posts. As Article 53 aims at giving these objects protection equivalent to that of hospitals, the intention has obviously been that no such object shall be used for military purpose of any kind. If such an object should be so used, there is no longer any requirement upon the adversary to respect the safeguard.³⁴³

321. Switzerland's Military Manual provides that marked cultural property "must not be used for military purposes. In certain well-defined circumstances, the protection may be lifted by a responsible commander."³⁴⁴

322. Switzerland's Basic Military Manual states that respect for cultural property implies that it is prohibited "to use this property, the appliances in use for its protection and its immediate surroundings for purposes which are likely to expose it to destruction or damage. The obligation to respect may only be derogated from in case military necessity imperatively so demands."³⁴⁵

323. The UK Military Manual states that "in addition to the 'grave breaches' of the 1949 [Geneva] Conventions . . . the following are examples of punishable violations of the laws of war, or war crimes: . . . (h) improper use of a privileged building for military purposes".³⁴⁶

324. The US Field Manual stresses that "in the practice of the United States, religious buildings, shrines, and consecrated places employed for worship are used only for aid stations, medical installations, or for the housing of wounded personnel awaiting evacuation, provided in each case that a situation of emergency requires such use".³⁴⁷ The manual further states that "in addition to the 'grave breaches' of the Geneva Conventions of 1949, the following acts are representative of violations of the law of war ('war crimes'): . . . h. Improper use of privileged buildings for military purposes."³⁴⁸

325. The US Air Force Pamphlet states that "in addition to the grave breaches of the Geneva Conventions of 1949, the following acts are representative of

³⁴² Spain, *LOAC Manual* (1996), Vol. I, § 7.3.b.(2).

³⁴³ Sweden, *IHL Manual* (1991), Section 3.2.1.5, p. 56–58.

³⁴⁴ Switzerland, *Military Manual* (1984), p. 19.

³⁴⁵ Switzerland, *Basic Military Manual* (1987), Article 53, commentary and Article 54.

³⁴⁶ UK, *Military Manual* (1958), § 626(h).

³⁴⁷ US, *Field Manual* (1956), § 405(c). ³⁴⁸ US, *Field Manual* (1956), § 504(h).

situations involving individual criminal responsibility: . . . (7) wilful and improper use of privileged buildings or localities for military purposes".³⁴⁹

326. The US Air Force Commander's Handbook states that "if possible, US forces should avoid using cultural property for military purposes, or to support the military effort".³⁵⁰

327. The US Instructor's Guide states that "in addition to the grave breaches of the Geneva Conventions, the following acts are further examples of war crimes: . . . improperly using privileged buildings for military purposes such as a church steeple as an observation post".³⁵¹

328. The US Rules of Engagement for Operation Desert Storm states that "churches, shrines, schools, museums, national monuments, and any other historical or cultural sites will not be engaged except in self-defence".³⁵²

329. The Annotated Supplement to the US Naval Handbook states that "while the United States is not a Party to the 1954 Hague Convention, it considers it to reflect customary law".³⁵³

330. The YPA Military Manual of the SFRY (FRY) provides that cultural property and its immediate vicinity must not be used directly or indirectly by armed forces for purposes which could provoke enemy attack.³⁵⁴

National Legislation

331. Ireland's Geneva Conventions Act as amended provides that any "minor breach" of AP I, including violations of Article 53 AP I, as well as any "contravention" of AP II, including violations of Article 16 AP II, are punishable offences.³⁵⁵

332. Under the International Crimes Act of the Netherlands, "using cultural property that is under enhanced protection as referred to in [Articles 10 and 11 of the 1999 Second Protocol to the 1954 Hague Convention] or the immediate vicinity of such property in support of military action" is a crime, when committed in an international armed conflict.³⁵⁶

333. Under Norway's Military Penal Code as amended, "anyone who contravenes or is accessory to the contravention of provisions relating to the protection of persons or property laid down in . . . the two additional protocols to [the Geneva] Conventions . . . is liable to imprisonment".³⁵⁷

National Case-law

334. No practice was found.

³⁴⁹ US, *Air Force Pamphlet* (1976), § 15-3(c)(7).

³⁵⁰ US, *Air Force Commander's Handbook* (1980), § 3-5(a).

³⁵¹ US, *Instructor's Guide* (1985), p. 13.

³⁵² US, *Rules of Engagement for Operation Desert Storm* (1991), § D.

³⁵³ US, *Annotated Supplement to the Naval Handbook* (1997), § 8.5.1.6, footnote 122.

³⁵⁴ SFRY (FRY), *YPA Military Manual* (1988), § 88.

³⁵⁵ Ireland, *Geneva Conventions Act as amended* (1962), Section 4(1) and (4).

³⁵⁶ Netherlands, *International Crimes Act* (2003), Article 5(4)(b).

³⁵⁷ Norway, *Military Penal Code as amended* (1902), § 108 (b).

Other National Practice

335. At the CDDH, Australia stated that had Article 47 *bis* of draft AP I (now Article 53) been put to a vote, it would have abstained “because the article contains a prohibition against reprisals” even though it agreed “with the prohibition against using these historic monuments in support of the military effort”.³⁵⁸

336. In its written comments on other written statements submitted to the ICJ in the *Nuclear Weapons case* in 1995, Egypt stated that “cultural and religious objects . . . should not be used in support of the military effort”.³⁵⁹

337. At the CDDH, the FRG stated that, with respect to Article 47 *bis* of draft AP I (now Article 53), that “*the illegal use of these objects for military purposes, however, will cause them to lose the protection provided for in Article 47 bis as a result of attacks which are to be directed against such military uses*”.³⁶⁰ (emphasis added)

338. According to the Report on the Practice of India, “the protection that is ordinarily available to religious objects is not available if such objects are used for terrorist activities”. The report adds that “in 1984, a number of religious places in Punjab including the famous Golden Temple at Amritsar were identified as terrorist bases and military action taken against them”.³⁶¹

339. According to the Report on the Practice of Israel, it is an IDF policy not to establish military bases or positions in the vicinity of cultural property”.³⁶²

340. At the CDDH, the Netherlands stated, with respect to Article 47 *bis* of draft AP I (now Article 53), that “*the illegitimate use of those historical objects for military purposes would deprive them of the protection afforded by Article 47 bis*”.³⁶³ (emphasis added)

341. According to the Report on the Practice of Russia, the use of cultural property, historic monuments or places of worship that constitute a part of the cultural or spiritual heritage of a people in support of the military effort is a prohibited method of warfare.³⁶⁴

342. On the basis of replies by army officers to a questionnaire, the Report on the Practice of Rwanda states that Rwanda’s armed forces avoid establishing military installations in proximity to cultural and religious objects and turning these objects into military bases.³⁶⁵

³⁵⁸ Australia, Statement at the CDDH, *Official Records*, Vol. VI, CDDH/SR.42, 27 May 1977, pp. 219–220.

³⁵⁹ Egypt, Written comments on other written statements submitted to the ICJ, *Nuclear Weapons case*, September 1995, p. 21, § 50.

³⁶⁰ FRG, Statement at the CDDH, *Official Records*, Vol. VI, CDDH/SR.42, 27 May 1977, pp. 225 and 226.

³⁶¹ Report on the Practice of India, 1997, Chapter 1.3

³⁶² Report on the Practice of Israel, 1997, Chapter 1.7.

³⁶³ Netherlands, Statement at the CDDH, *Official Records*, Vol. VI, CDDH/SR.42, 27 May 1977, pp. 207–208.

³⁶⁴ Report on the Practice of Russia, 1997, Chapter 1.6.

³⁶⁵ Report on the Practice of Rwanda, 1997, Replies by army officers to a questionnaire, Chapter 4.3.

343. At the CDDH, the UK declared, with respect to Article 47 *bis* of draft AP I (now Article 53), that “if these objects are *unlawfully used for military purposes*, they will thereby lose effective protection as a result of attacks directed against such unlawful military uses”.³⁶⁶ (emphasis added)

344. At the CDDH, the US stated, with respect to Article 47 *bis* of draft AP I (now Article 53), that “the use of these objects in support of the military effort is a violation of this article”.³⁶⁷

345. In 1992, in its final report to Congress on the conduct of hostilities in the Gulf War, the US Department of Defense stated that contrary to the 1954 Hague Convention and

certain principles of customary law codified in [AP I], the Government of Iraq placed military assets (personnel, weapons, and equipment) in civilian populated areas and next to protected objects (mosques, medical facilities, and cultural sites) in an effort to protect them from attack.³⁶⁸

The report further described how Iraq had used “cultural property to protect legitimate targets from attack”:

A classic example was the positioning of two fighter aircraft adjacent to the ancient temple of Ur... While the law of war permits the attack of the two fighter aircraft, with Iraq bearing responsibility for any damage to the temple, Commander-in-Chief, Central Command (CINCCENT) elected not to attack the aircraft on the basis of respect for cultural property and the belief that positioning of the aircraft adjacent to Ur (without servicing equipment or a runway nearby) effectively had placed each out of action, thereby limiting the value of their destruction by Coalition air forces when weighed against the risk of damage to the temple. Other cultural property similarly remained on the Coalition no-attack list, despite Iraqi placement of valuable military equipment in or near those sites.³⁶⁹

346. In 1993, in its report to Congress on the protection of natural and cultural resources during times of war, the US Department of Defense stated that:

The US and its Coalition partners in Desert Storm recognized that they were fighting in the “cradle of civilization” and took extraordinary measures to minimize damage to cultural property. Regrettably, these precautionary steps were met by Iraqi use of cultural property within its control to shield military objects from attack. A classical example is the positioning of two MiG-21 fighter aircraft at the entrance of the ancient temple of Ur. Although the law of war permitted their attack, and although each could have been destroyed utilizing precision-guided munitions, US commanders recognized that the aircraft for all intents and purposes

³⁶⁶ UK, Statement at the CDDH, *Official Records*, Vol. VI, CDDH/SR.42, 27 May 1977, p. 238.

³⁶⁷ US, Statement at the CDDH, *Official Records*, Vol. VI, CDDH/SR.42, 27 May 1977, pp. 240–241.

³⁶⁸ US, Department of Defense, Final Report to Congress on the Conduct of the Persian Gulf War, Appendix O, The Role of the Law of War, 10 April 1992, *ILM*, Vol. 31, 1992, p. 624.

³⁶⁹ US, Department of Defense, Final Report to Congress on the Conduct of the Persian Gulf War, Appendix O, The Role of the Law of War, 10 April 1992, *ILM*, Vol. 31, 1992, p. 626.

were incapable of military operations from their position, and elected against their attack for fear of collateral damage to the temple.³⁷⁰

III. Practice of International Organisations and Conferences

United Nations

347. In a resolution adopted in 1993, the UNESCO General Conference reaffirmed that "(a) the object and purpose of the 1954 Hague Convention are still valid and realistic" and "(b) the fundamental principles of protecting and preserving cultural property in the event of armed conflict could be considered part of customary international law".³⁷¹

348. In a joint declaration issued in 1991 on the situation in the former Yugoslavia, the Director-General of UNESCO and the UN Secretary-General launched a solemn appeal to all parties "to respect the principles enshrined in the Convention for the Protection of Cultural Property in the Event of Armed Conflict and in the Convention concerning the Protection of the World Cultural and Natural Heritage".³⁷²

Other International Organisations

349. In a press release issued in 2001 following allegations that the historic Arabati Baba Teke Dervish Monastery and the area next to the Painted Mosque in Tetovo were being used as a base for military operations by the ethnic Albanian armed groups operating in Macedonia, the OSCE Spillover Monitoring Mission to Skopje expressed its "great concern" about "the misuse of religious and cultural monuments for military reasons, which is not acceptable according to international law".³⁷³

International Conferences

350. No practice was found.

IV. Practice of International Judicial and Quasi-judicial Bodies

351. In the *Tadić* case in 1995, the ICTY Appeals Chamber held that "it cannot be denied that customary rules have developed to govern internal strife. These rules . . . cover such areas as . . . protection of civilian objects, in particular cultural property."³⁷⁴ The Appeals Chamber explicitly stated that Article 19 of the

³⁷⁰ US, Department of Defense, Report to Congress on International Policies and Procedures Regarding the Protection of Natural and Cultural Resources During Times of War, 19 January 1993, p. 204.

³⁷¹ UNESCO, General Conference, Res. 3.5, 13 November 1993, preamble.

³⁷² Director-General of UNESCO and UN Secretary-General, Joint declaration on the situation in the former Yugoslavia, 24 October 1991, *UNESCO Courier*, January 1992, p. 50.

³⁷³ OSCE Spillover Monitoring Mission to Skopje, Press Release, OSCE Skopje Mission concerned about misuse of religious and cultural sites, 7 August 2001.

³⁷⁴ ICTY, *Tadić* case, Interlocutory Appeal, 2 October 1995, § 127.

1954 Hague Convention, which provides for the application of the provisions of the Convention relating to respect for cultural property “as a minimum” in non-international armed conflicts, constituted a treaty rule which had “gradually become part of customary law”.³⁷⁵

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

352. To fulfil its task of disseminating IHL, the ICRC has delegates around the world teaching armed and security forces that they must distinguish between “historic monuments, works of art and places of worship which constitute the cultural or spiritual heritage of peoples” on the one hand, which enjoy full protection and whose immunity from use for military purposes may not be withdrawn, and “objects of great importance to the cultural heritage of every people” on the other hand, which may not be used for military purposes in principle but whose immunity from such use may be withdrawn in case of imperative military necessity.³⁷⁶

353. In a joint statement issued in 1991, the Yugoslav Red Cross and the Hungarian Red Cross expressed their deep concern about “the protracting internal conflict in Yugoslavia” and urged the parties to the conflict “not to use [cultural objects] for military purposes”.³⁷⁷

VI. Other Practice

354. No practice was found.

C. Respect for Cultural Property

Note: For practice concerning the destruction of cultural property in general, see section A of this chapter.

I. Treaties and Other Instruments

Treaties

355. Article 56 of the 1899 HR provides that:

The property of the communes, that of religious, charitable, and educational institutions, and those of arts and science, even when State property, shall be treated as private property.

All seizure of, and destruction, or intentional damage done to such institutions, to historical monuments, works of art or science, is prohibited, and should be made the subject of proceedings.

³⁷⁵ ICTY, *Tadić case*, Interlocutory Appeal, 2 October 1995, § 98.

³⁷⁶ Frédéric de Mulinen, *Handbook on the Law of War for Armed Forces*, ICRC, Geneva, 1987, §§ 97, 219 and 225.

³⁷⁷ Yugoslav Red Cross and Hungarian Red Cross, Joint Statement, Subotica, 25 October 1991.

356. Article 56 of the 1907 HR provides that:

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

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

357. Article 4(3) of the 1954 Hague Convention provides that:

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

358. Article 19(1) of the 1954 Hague Convention provides that:

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

359. Article 15 of the 1999 Second Protocol to the 1954 Hague Convention provides that:

1. Any person commits an offence within the meaning of this Protocol if that person intentionally and in violation of the Convention or this Protocol commits any of the following acts:
 - ...
 - (e) theft, pillage or misappropriation of, or acts of vandalism directed against cultural property protected under the Convention.
2. Each Party shall adopt such measures as may be necessary to establish as criminal offences under its domestic law the offences set forth in this Article and to make such offences punishable by appropriate penalties.

Other Instruments

360. Article 34 of the 1863 Lieber Code provides that:

As a general rule, the property belonging to churches, to hospitals, or other establishments of an exclusively charitable character, to establishments of education, or foundations for the promotion of knowledge, whether public schools, universities, academies of learning or observatories, museums of the fine arts, or of a scientific character – such property is not to be considered public property in the sense of paragraph 31; but it may be taxed or used when the public service may require it.

361. Article 36 of the 1863 Lieber Code provides that:

If such works of art, libraries, collections, or instruments belonging to a hostile nation or government, can be removed without injury, the ruler of the conquering

state or nation may order them to be seized or removed for the benefit of the said nation. The ultimate ownership is to be settled by the ensuing treaty of peace.

In no case shall they be sold or given away, if captured by the armies of the United States, nor shall they ever be privately appropriated or wantonly destroyed or injured.

362. Article 8 of the 1874 Brussels Declaration provides that:

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

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

363. Article 53 of the 1880 Oxford Manual provides that:

The property of municipalities, and that of institutions devoted to religion, charity, education, art and science, cannot be seized.

All destruction or wilful damage to institutions of this character, historic monuments, archives, works of art, or science, is formally forbidden, save when urgently demanded by military necessity.

364. Based on several documents supplying evidence of outrages committed during the First World War, the 1919 Report of the Commission on Responsibility lists violations of the laws and customs of war which should be subject to criminal prosecution, including "wanton destruction of religious, charitable, educational and historic buildings and monuments".

365. In the 1943 London Declaration, the Allied governments expressed their intention:

to do their utmost to defeat the methods of dispossession practised by the Governments with which they are at war against the countries and peoples who have been so wantonly assaulted and despoiled. Accordingly, the governments making this Declaration and the French National Committee reserve all their rights to declare invalid any transfers of, or dealing with, property, rights and interests of any description whatsoever which are, or have been, situated in the territories which have come under the occupation or control, direct or indirect, of the Governments with which they are at war, or which belong, or have belonged, to persons (including juridical persons) resident in such territories. This warning applies whether such transfers or dealings have taken the form of open looting or plunder, or of transactions apparently legal in form, even when they purport to be voluntarily effected.

366. Article 3(d) of the 1993 ICTY Statute includes among the violations of the laws or customs of war in respect to which the Tribunal has jurisdiction "seizure of, destruction or wilful damage done to institutions dedicated to religion, charity and education, the arts and sciences, historic monuments and works of art and science".

367. Pursuant to Article 20(e)(iv) of the 1996 ILC Draft Code of Crimes against the Peace and Security of Mankind, “seizure of, destruction of or wilful damage done to institutions dedicated to religion, charity and education, the arts and sciences, historic monuments and works of art and sciences” is a war crime.

368. Article 1(3) of the 1997 Revised Lauswolt Document states that “any form of theft, pillage or misappropriation of, any act of vandalism directed against, any illicit transaction in, or any other breach of integrity of cultural property is prohibited”.

369. Article 12(1) of the 1997 Revised Lauswolt Document provides that:

All the provisions of this instrument, the provisions of the Convention and its 1954 Protocol which relate to safeguarding of, and respect for, cultural property shall apply in the event of an armed conflict not of an international character, occurring within the territory of one of the States Parties.

370. Section 6.6 of the 1999 UN Secretary-General’s Bulletin states that “theft, pillage, misappropriation and any act of vandalism directed against cultural property is strictly prohibited”.

II. National Practice

Military Manuals

371. Argentina’s Law of War Manual provides that:

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

All seizure of, destruction or wilful damage done to institutions of this character, historic monuments, works of art and science, is forbidden, and should be made the subject of legal proceedings.³⁷⁸

372. Australia’s Defence Force Manual states that:

The property of municipalities, that of institutions dedicated to religion, charity and education, the arts and sciences, is treated as private property and any seizure or destruction of that property is prohibited. If that property is located in any area which is subject to seizure or bombardment, then it must be secured against all avoidable damage and injury.³⁷⁹

373. Canada’s LOAC Manual provides, with respect to occupied territory, that:

The property of municipalities, that of institutions dedicated to religion, charity and education, the arts and sciences, shall be treated as private property even when owned by the state. All seizure or destruction of, or wilful damage to, institutions of this character, historic monuments, works of art and science, is forbidden, and should be made the subject of legal proceedings.³⁸⁰

³⁷⁸ Argentina, *Law of War Manual* (1969), § 5.016.

³⁷⁹ Australia, *Defence Force Manual* (1994), § 741.

³⁸⁰ Canada, *LOAC Manual* (1999), p. 12-9, § 82.

374. Canada's Code of Conduct provides that soldiers must do their best to ensure that buildings and property dedicated to cultural or religious purposes "are not stolen, damaged or destroyed . . . Thus, every attempt should be made to avoid unnecessary desecration or destruction of cultural objects and places of worship."³⁸¹

375. Germany's Military Manual states that:

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

...

561. It is prohibited to requisition, destroy or damage cultural property.

...

908. Any acts of theft, pillage, misappropriation, confiscation or vandalism directed against cultural property are prohibited.

...

919. The protection of cultural property also extends to a period of occupation. This implies that a party which keeps a territory occupied shall be bound to prohibit, prevent and, if necessary, put a stop to any theft, pillage, confiscation or other misappropriation of, and any acts of vandalism directed against cultural property.

920. It is prohibited to seize, or wilfully destroy or damage institutions dedicated to religion, charity and education, the arts and sciences; the same shall apply to historic monuments and other works of art and science.³⁸²

The manual further provides that grave breaches of IHL are in particular "extensive destruction of cultural property and places of worship".³⁸³

376. Germany's IHL Manual states that "it is prohibited to confiscate, requisition or misappropriate [movable or immovable property of great importance to the cultural heritage of every people]".³⁸⁴

377. Israel's Manual on the Laws of War states that "the Geneva Conventions contain provisions banning the looting of . . . cultural property. Looting is regarded as a despicable act that tarnishes both the soldier and the IDF, leaving a serious moral blot."³⁸⁵

378. Italy's IHL Manual states that:

The property of provinces and municipalities, that of institutions dedicated to religion, charity and education, the arts and sciences, even when property of the State or of other public entities in the occupied territory, shall be treated as private property.

The occupying military authority shall take all necessary measures to prohibit and punish any seizure of, destruction or wilful damage done to such property.³⁸⁶

The manual further states that an occupying power has the duty "to abstain from pillaging the cultural property" in the occupied territory.³⁸⁷

³⁸¹ Canada, *Code of Conduct* (2001), Rule 9, §§ 1 and 2.

³⁸² Germany, *Military Manual* (1992), §§ 559, 561, 908 and 919–920.

³⁸³ Germany, *Military Manual* (1992), § 1209. ³⁸⁴ Germany, *IHL Manual* (1996), § 701.

³⁸⁵ Israel, *Manual on the Laws of War* (1998), p. 62, see also p. 35.

³⁸⁶ Italy, *IHL Manual* (1991), Vol. I, § 46.

³⁸⁷ Italy, *IHL Manual* (1991), Vol. I, § 48(5).

379. The Military Manual of the Netherlands provides that “theft, pillage and destruction of cultural property are also prohibited”.³⁸⁸ It recalls that, according to Article 19 of the 1954 Hague Convention, the provisions of that Convention on respect for cultural property apply, as a minimum, in non-international armed conflicts.³⁸⁹

380. The Military Handbook of the Netherlands states that “cultural property may not be stolen, plundered or exposed to vandalism. It may not be requisitioned either.”³⁹⁰

381. New Zealand’s Military Manual provides, with reference to occupied areas, that:

The property of municipalities, that of institutions dedicated to religion, charity and education, the arts and sciences, even when State property, shall be treated as private property. All seizure or destruction of, or wilful damage to, property of this character, historic monuments, works of art and science, is forbidden, and should be made the subject of legal proceedings.³⁹¹

382. Nigeria’s Operational Code of Conduct states that during military operations, all officers and men of the armed forces shall observe the rules whereby “no property, building, etc. will be destroyed maliciously” and “churches and mosques must not be desecrated”.³⁹²

383. Nigeria’s Manual on the Laws of War states that “real property belonging to local government such as hospitals and buildings dedicated to public worship, charity, education, religion, science and art should be treated as private property . . . Destruction or damage of such buildings is forbidden.”³⁹³

384. Sweden’s Military Manual states that it is forbidden to pillage or seize cultural property such as museum collections, churches, historic monuments and other cultural sites.³⁹⁴

385. Switzerland’s Basic Military Manual states that respect for cultural property implies that it is prohibited “to use, steal, pillage or misappropriate cultural property”. The manual further states that “the property of municipalities, institutions dedicated to religion, charity and education, the arts and sciences, even when State property, must be treated as private property”.³⁹⁵

386. The UK Military Manual provides that:

611. Property belonging to local, that is, provincial, county, municipal and parochial, authorities, . . . as well as the property of institutions dedicated to public worship, charity, education, science and art – such as churches, chapels, synagogues, mosques, almshouses, hospitals, schools, museums, libraries, and the like – even

³⁸⁸ Netherlands, *Military Manual* (1993), p. V-6, § 5.

³⁸⁹ Netherlands, *Military Manual* (1993), p. XI-1, § 1.

³⁹⁰ Netherlands, *Military Handbook* (1995), p. 7-43.

³⁹¹ New Zealand, *Military Manual* (1992), § 1343.

³⁹² Nigeria, *Operational Code of Conduct* (1967), § 4(f)–(g).

³⁹³ Nigeria, *Manual on the Laws of War* (undated), § 27.

³⁹⁴ Sweden, *Military Manual* (1976), p. 30.

³⁹⁵ Switzerland, *Basic Military Manual* (1987), Articles 53, commentary, and 169.

when state property, must be treated as private property. Troops, sick and wounded, horses, and stores may therefore be housed in buildings of that nature, but such use is justified only by military necessity. Any seizure or destruction of, or wilful damage to, the property of such institutions, or to historic monuments or works of science and art, is forbidden, as is, generally, any destruction of property which is not required by imperative military necessity. Thus, it would not be improper to place sick and wounded in a church if no accommodation could immediately be found elsewhere, but a consecrated building should not be used for the purpose of barracks, stables, or stores, unless it is absolutely necessary... In 1870, the German occupation authorities housed 9,000 French prisoners of war in the Cathedral of Orleans.

...

613. Other movable public property, not susceptible of use for military operations, as well as that belonging to the institutions mentioned above, which is to be treated as private property must be respected and cannot be appropriated, for instance, crown jewels, pictures, collections of works of art, and archives. However, papers connected with the war may be seized, even when forming part of archives.³⁹⁶

387. The US Field Manual reproduces Article 56 of the 1907 HR and states that the property included in this rule "may be requisitioned in case of necessity for quartering the troops and the sick and wounded, storage of supplies and material, housing of vehicles and equipment, and generally as prescribed for private property".³⁹⁷

388. The Annotated Supplement to the US Naval Handbook states that "while the United States is not a Party to the 1954 Hague Convention, it considers it to reflect customary law".³⁹⁸

National Legislation

389. Bulgaria's Penal Code as amended, in a part dealing with "crimes against the laws and customs of waging war", provides for the punishment of "any person who steals, unlawfully appropriates or conceals [cultural or historical monuments and objects, works of art, buildings and equipment intended for cultural, scientific or other humanitarian purposes], or imposes contribution or confiscation with respect to such objects".³⁹⁹

390. China's Law Governing the Trial of War Criminals provides that "plundering of historical, artistic or other cultural treasures" constitutes a war crime.⁴⁰⁰

391. The Draft Amendments to the Penal Code of El Salvador punishes anyone who, during an international or a non-international armed conflict, seizes, loots or vandalises "clearly recognised cultural property or places of worship; works of art which constitute the cultural and spiritual heritage of peoples; and/or which have been granted protection pursuant to special agreements".

³⁹⁶ UK, *Military Manual* (1956), §§ 611, and footnote 4, and 613.

³⁹⁷ US, *Field Manual* (1956), § 405.

³⁹⁸ US, *Annotated Supplement to the Naval Handbook* (1997), § 8.5.1.6, footnote 122.

³⁹⁹ Bulgaria, *Penal Code as amended* (1968), Article 414(2).

⁴⁰⁰ China, *Law Governing the Trial of War Criminals* (1946), Article 3(37).

It defines cultural property in accordance with Article 1 of the 1954 Hague Convention.⁴⁰¹

392. Under Estonia's Penal Code, "damaging or illegal appropriation of cultural monuments, churches, or other structures or objects of religious significance, works of art or science, archives of cultural value, libraries, museums or scientific collections, which are not being used for military purposes" is a war crime.⁴⁰²

393. Italy's Law of War Decree as amended provides that:

The property of provinces and municipalities, that of institutions dedicated to religion, charity and education, the arts and sciences, even when property of the State or of other public entities in the occupied territory, shall be treated as private property.

The occupying military authority shall take all necessary measures to prohibit and punish any seizure of, destruction or wilful damage done to such property.⁴⁰³

394. Under Lithuania's Criminal Code as amended, the "plundering of national treasures in occupied or annexed territory" constitutes a war crime.⁴⁰⁴

395. Luxembourg's Law on the Repression of War Crimes provides for the punishment of "the taking . . . by any means, from the territory of Luxembourg, of objects of whatever nature".⁴⁰⁵

396. Under the International Crimes Act of the Netherlands, "destroying or appropriating on a large scale cultural property that is under the protection of [the 1954 Hague Convention and the 1999 Second Protocol thereto]", as well as "theft, pillaging or appropriation of – or acts of vandalism directed against – cultural property under the protection of the [1954 Hague Convention]", are crimes, when committed in an international armed conflict.⁴⁰⁶

397. Nicaragua's Military Penal Code punishes a soldier who commits "any act of pillage or appropriation of . . . cultural property, as well as any act of vandalism against such property and the requisitioning of those located in territory under military occupation".⁴⁰⁷

398. Nicaragua's Draft Penal Code punishes anyone who, during an international or a non-international armed conflict, "seizes, loots or vandalises clearly recognised cultural property or places of worship; works of art which constitute the cultural and spiritual heritage of peoples; and/or which have been granted protection pursuant to special agreements". It defines cultural property in accordance with Article 1 of the 1954 Hague Convention.⁴⁰⁸

⁴⁰¹ El Salvador, *Draft Amendments to the Penal Code* (1998), Article entitled "Destrucción de bienes culturales".

⁴⁰² Estonia, *Penal Code* (2001), § 107.

⁴⁰³ Italy, *Law of War Decree as amended* (1938), Article 61.

⁴⁰⁴ Lithuania, *Criminal Code as amended* (1961), Article 339.

⁴⁰⁵ Luxembourg, *Law on the Repression of War Crimes* (1947), Article 2(6).

⁴⁰⁶ Netherlands, *International Crimes Act* (2003), Article 5(4)(c) and (e).

⁴⁰⁷ Nicaragua, *Military Penal Code* (1996), Article 61.

⁴⁰⁸ Nicaragua, *Draft Penal Code* (1999), Article 469.

399. Poland's Penal Code provides for the punishment of "any person who, in violation of international law, . . . damages or pillages cultural property in occupied or controlled territory or in the combat area" and provides for a harsher punishment "if the offence is directed against cultural property of particular importance".⁴⁰⁹

400. Portugal's Penal Code provides for the punishment of whoever

in times of war, armed conflict or occupation and violating the norms or principles of general or common international law, destroys or damages, without military necessity, cultural or historical monuments or establishments affected to science, arts, culture [and] religion.⁴¹⁰

401. Romania's Penal Code provides for the punishment of "robbery or appropriation of any kind of . . . cultural heritage from territories under military occupation".⁴¹¹

402. Spain's Military Criminal Code punishes a soldier who commits "any act of pillage or appropriation of . . . cultural property, as well as any act of vandalism against such property and the requisitioning of those located in territory under military occupation".⁴¹²

403. Switzerland's Law on the Protection of Cultural Property states that protection includes respect for cultural property, which means, *inter alia*, "to prohibit, prevent and put a stop to any form of theft, pillage or misappropriation, and any acts of vandalism; [and] to refrain from the requisitioning of movable cultural property".⁴¹³

404. Under Ukraine's Criminal Code, "pillage of national treasures in occupied territories" is a punishable "crime against peace, security of mankind and international legal order".⁴¹⁴

National Case-law

405. In the *Lingenfelder case* in 1947, the accused was charged with destruction of public monuments. It was shown that in May 1941 the accused, acting upon orders of a German official, used four horses to pull down the monument erected by the inhabitants of Arry, Moselle to fellow citizens who died during the First World War, destroyed the marble slabs bearing the names of the dead, and broke the statue of Joan of Arc. In its judgement, the French Permanent Military Tribunal at Metz held that these acts constituted violations of the laws and customs of war and were punishable war crimes. The accused was convicted under the terms of Article 257 of the French Penal Code which covers in French municipal law the acts prohibited under Article 56 of the 1907 HR.⁴¹⁵

⁴⁰⁹ Poland, *Penal Code* (1997), Article 125.

⁴¹⁰ Portugal, *Penal Code* (1996), Article 242. ⁴¹¹ Romania, *Penal Code* (1968), Article 360.

⁴¹² Spain, *Military Criminal Code* (1985), Article 77(7).

⁴¹³ Switzerland, *Law on the Protection of Cultural Property* (1966), Article 2(3).

⁴¹⁴ Ukraine, *Criminal Code* (2001), Article 438.

⁴¹⁵ France, Permanent Military Tribunal at Metz, *Lingenfelder case*, Judgement, 11 March 1947.

406. In the *Von Leeb (The High Command Trial)* case before the US Military Tribunal at Nuremberg in 1948, the accused, former high-ranking officers in the German army and navy, were charged, *inter alia*, with war crimes and crimes against humanity against civilians in that they participated in atrocities such as plunder of public and private property. The Tribunal found that, on 17 September 1940, Keitel issued an order to the military commander in occupied France providing for the illegal seizure of property and its transfer to Germany. The order provided that the Reichsminister "is entitled to transport to Germany cultural goods which appear valuable to him and to safeguard them there. The Führer has reserved for himself the decision as to their use."⁴¹⁶

407. In its judgement in the *Weizsaecker* case in 1949, the US Military Tribunal at Nuremberg referred to Article 56 of the 1907 HR and ruled that all seizure of, destruction or wilful damage done to institutions of religious or charitable character, historic monuments, works of art and science was forbidden and should be the subject of legal proceedings.⁴¹⁷

Other National Practice

408. In 1992, in a letter to the President of the UN Security Council and to the UN Secretary-General, Azerbaijan referred to data provided to the UN fact-finding mission in the region concerning illegal actions by Armenia and included the damage caused to and destruction of places of worship.⁴¹⁸

409. The Report on the Practice of Bosnia and Herzegovina notes that members of the forces of the Republic of Bosnia and Herzegovina "did not commit any criminal acts of endangering cultural and religious facilities" during the conflict in the former Yugoslavia. It gives as an example the order issued by the Commander-in-chief on 17 December 1993 allowing Catholic priests unimpeded passage to visit the Franciscan monastery in Fojnica. The report further recalls another order issued by the same commander on 30 June 1994 that the facility in Guca Gora be emptied, secured and prepared to be handed over to Catholic priests.⁴¹⁹

410. In 1973, in a statement on the return of plundered works of art, China stated that:

The precious cultural heritage of the Chinese people also suffered from plunder and destruction by imperialists and colonialists. In the past 100 years, starting from 1840, troops of the imperialist powers invaded China many times, and each time the cultural heritage of the Chinese people suffered tremendously. They took away what they could, smashed those items which they could not take as a whole and then took away the pieces, destroyed and burned what they eventually could not take away. Apart from the large scale plunder and destruction by the invading

⁴¹⁶ US, Military Tribunal at Nuremberg, *Von Leeb (The High Command Trial)* case, Judgement, 28 October 1948.

⁴¹⁷ US, Military Tribunal at Nuremberg, *Weizsaecker* case, Judgement, 14 April 1949.

⁴¹⁸ Azerbaijan, Letters dated 11 June 1992 to the UN Secretary-General and the President of the UN Security Council, UN Doc. S/24103, 16 June 1992, p. 1.

⁴¹⁹ Report on the Practice of Bosnia and Herzegovina, 2000, Chapter 4.3.

troops, China's historical relics and art treasures were also stolen by adventurers of different kinds by fair or foul means.⁴²⁰

411. In 1977, in a statement on human rights in the Israeli-occupied territories, China stated that the Israeli Authority had "rudely interfered with the religious beliefs of the Arab people, had of lot of old buildings in Jerusalem pulled down and the occupants moved elsewhere, and damaged the precious Arab and Muslim historical relics".⁴²¹

412. In 1991, in a letter to the UN Secretary-General, Iran expressed alarm at the "reported desecration of holy shrines".⁴²²

413. According to the Report on the Practice of Rwanda, cultural property is protected by Rwanda's armed forces and the pillage of cultural and religious goods is prohibited.⁴²³

414. In 1992, in its final report to Congress on the conduct of the Gulf War, the US Department of Defense stated that "cultural . . . property was confiscated [and] pillage was widespread" in violation of the 1954 Hague Convention.⁴²⁴ The report further stated that "Iraqi war crimes were widespread and premeditated. They include . . . looting of cultural property."⁴²⁵

415. According to the Report on the Practice of Zimbabwe, the protection afforded to private property by Section 16 of the Constitution would extend to cultural property within national territory.⁴²⁶

416. During an internal conflict, acts of pillage were carried out by the armed forces of a State against churches in the run-up to elections.⁴²⁷

III. Practice of International Organisations and Conferences

United Nations

417. In a resolution adopted in 1992, the UN General Assembly expressed alarm that:

although the conflict in Bosnia and Herzegovina is not a religious conflict, it has been characterized by the systematic destruction and profanation of mosques,

⁴²⁰ China, Statement on the Issue of Return of Plundered Works of Art to its Country, by Comrade Wang Runsheng, 18 December 1973, *Selected Documents of the Chinese Delegation to the United Nations*, The People's Press, Beijing, 1973, pp. 56–57.

⁴²¹ China, Statement on the Issue of Human Rights in Israeli Occupied Territories, by Zhou Nan, Chinese Representative, 18 November 1977, *Selected Documents of the Chinese Delegation to the United Nations*, The People's Press, Beijing, 1977, pp. 92–93.

⁴²² Iran, Letter dated 22 March 1991 to the UN Secretary-General, UN Doc. S/22379, 22 March 1991, p. 1.

⁴²³ Report on the Practice of Rwanda, 1997, Replies by army officers to a questionnaire, 1997, Chapter 4.3.

⁴²⁴ US, Department of Defense, Final Report to Congress on the Conduct of the Persian Gulf War, Appendix O, The Role of the Law of War, 10 April 1992, *ILM*, Vol. 31, 1992, p. 620.

⁴²⁵ US, Department of Defense, Final Report to Congress on the Conduct of the Persian Gulf War, Appendix O, The Role of the Law of War, 10 April 1992, *ILM*, Vol. 31, 1992, p. 632.

⁴²⁶ Report on the Practice of Zimbabwe, 1998, Chapter 4.3.

⁴²⁷ ICRC archive document.

churches and other places of worship, as well as other sites of cultural heritage, in particular areas currently or previously under Serbian control.⁴²⁸

Similar concerns were expressed in 1994 and 1995.⁴²⁹

418. In a resolution adopted in 1998, the UN Commission on Human Rights expressed its deep concern over reports of the destruction and looting of the cultural and historical heritage of Afghanistan and urged the parties to protect and safeguard such heritage.⁴³⁰

419. In a resolution adopted in 1993, the UNESCO General Conference reaffirmed that "(a) the object and purpose of the 1954 Hague Convention are still valid and realistic" and "(b) the fundamental principles of protecting and preserving cultural property in the event of armed conflict could be considered part of customary international law".⁴³¹

420. In a joint declaration issued in 1991 on the situation in the former Yugoslavia, the Director-General of UNESCO and the UN Secretary-General launched a solemn appeal to all parties "to respect the principles enshrined in the Convention for the Protection of Cultural Property in the Event of Armed Conflict and in the Convention concerning the Protection of the World Cultural and Natural Heritage".⁴³²

421. In a press release issued in February 2001 following press reports of the deliberate destruction by the Taliban of more than a dozen ancient statues in the Afghan National Museum in Kabul and of an order by the supreme Taliban leader to destroy all statues in Afghanistan which, as human representations, were viewed as unIslamic, UNESCO strongly appealed to those directly concerned to stop the destruction of the cultural heritage of the peoples of Afghanistan.⁴³³

422. In a press release issued in March 2001, the Director-General of UNESCO condemned the Taliban's destruction of the Buddhas of Bamiyan and described it as a "crime against culture". He stated that "it is abominable to witness the cold and calculated destruction of cultural properties which were the heritage of the Afghan people, and, indeed, of the whole of humanity".⁴³⁴

423. In 1993, in a report on the situation of human rights in the territory of the former Yugoslavia, the Special Rapporteur of the UN Commission on Human Rights stated that "massive violations of human rights and international humanitarian law" were committed "deliberately to achieve ethnically homogenous areas" through a "variety of methods used in ethnic cleansing", including

⁴²⁸ UN General Assembly, Res. 47/147, 18 December 1992, preamble.

⁴²⁹ UN General Assembly, Res. 49/196, 23 December 1994, preamble; Res. 50/193, 22 December 1995, preamble.

⁴³⁰ UN Commission on Human Rights, Res. 1998/70, 21 April 1998, §§ 2(g) and 5(h).

⁴³¹ UNESCO, General Conference, Res. 3.5, 13 November 1993, preamble.

⁴³² Director-General of UNESCO and the UN Secretary-General, Joint declaration on the situation in the former Yugoslavia, 24 October 1991, *UNESCO Courier*, January 1992, p. 50.

⁴³³ UNESCO, Press Release No. 2001-27, 26 February 2001.

⁴³⁴ UNESCO, Press Release No. 2001-38, 12 March 2001.

the "destruction of mosques".⁴³⁵ The Special Rapporteur deplored the fact that "Ukrainians in the Banja Luka region were reportedly subjected to psychological pressure which included the blowing up of the Ukrainian church in Prnjavor, the destruction of the old church in Dubrava and of a village church near Omarska".⁴³⁶ He added that "although the conflict... is not regarded as a religious one, it has been characterised by the systematic destruction and profanation of mosques, Catholic churches and other places of worship".⁴³⁷ In another report the same year, under the heading "Other violations of human rights and humanitarian law", the Special Rapporteur noted deliberate damage to or destruction of church buildings.⁴³⁸

424. In 1997, in a report on the situation of human rights in Afghanistan, the Special Rapporteur of the UN Commission on Human Rights stated that "acts of looting of the Afghan cultural heritage constitute a clear violation of the laws of war". Reference was not made to the 1954 Hague Convention, but "the trafficking of such artifacts" was qualified as "a legal violation of the UNESCO Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property" and of the "domestic laws of the countries concerned". The report further declared that "the tacit approval by Governments and museums of such practices [looting and illegal trafficking] may amount to 'cultural genocide' or to 'genocide of the cultural rights' of the Afghan people".⁴³⁹

Other International Organisations

425. In 1993, in a report on the destruction by war of the cultural heritage in Croatia and Bosnia and Herzegovina, the Committee on Culture and Education of the Parliamentary Assembly of the Council of Europe stated that the conflicts in Croatia and Bosnia and Herzegovina "have led to a major cultural catastrophe for all the communities of the war zone... and also for our European heritage", basing this statement in part on the fact that "churches and mosques are annihilated".⁴⁴⁰

426. In a resolution adopted in 1983, the Council of the League of Arab States condemned Israel for its "robbing of archaeological and cultural properties" and "violating the sanctity of places of worship".⁴⁴¹

⁴³⁵ UN Commission on Human Rights, Special Rapporteur on the Situation of Human Rights in the Former Yugoslavia, Report, UN Doc. E/CN.4/1993/50, 10 February 1993, §§ 16–17.

⁴³⁶ UN Commission on Human Rights, Special Rapporteur on the Situation of Human Rights in the Former Yugoslavia, Report, UN Doc. E/CN.4/1993/50, 10 February 1993, § 23.

⁴³⁷ UN Commission on Human Rights, Special Rapporteur on the Situation of Human Rights in the Former Yugoslavia, Report, UN Doc. E/CN.4/1993/50, 10 February 1993, § 106.

⁴³⁸ UN Commission on Human Rights, Special Rapporteur on the Situation of Human Rights in the Former Yugoslavia, Fifth periodic report, UN Doc. E/CN.4/1994/47, 17 November 1993, §§ 46 and 69.

⁴³⁹ UN Commission on Human Rights, Special Rapporteur on the Situation of Human Rights in Afghanistan, Final report, UN Doc. E/CN.4/1997/59, 20 February 1997, §§ 117 and 131.

⁴⁴⁰ Council of Europe, Parliamentary Assembly, Committee on Culture and Education, Information report on the destruction of the cultural heritage of Croatia and Bosnia and Herzegovina, Doc. 6756, 2 February 1993, §§ 1, 3 and 5.

⁴⁴¹ League of Arab States, Council, Res. 4237, 31 March 1983, § 1(b).

International Conferences

427. In a resolution adopted in 2000 on the destruction and desecration of the Islamic historical and cultural relics and shrines in the occupied Azeri territories resulting from the Republic of Armenia's aggression against the Republic of Azerbaijan, the Islamic Summit Conference, referring to the 1954 Hague Convention, condemned "the mass and barbaric demolition of mosques and other Islamic shrines in Azerbaijan by Armenia" and stated that "governments are bound to ban theft and looting of whatever type, acts of illegal violations of cultural values . . . as well as savage prejudice to the above values. They are committed to prevent such acts or reverse their effects where necessary."⁴⁴²

IV. Practice of International Judicial and Quasi-judicial Bodies

428. In the *Tadić case* in 1995, the ICTY Appeals Chamber held that "it cannot be denied that customary rules have developed to govern internal strife. These rules . . . cover such areas as . . . protection of civilian objects, in particular cultural property."⁴⁴³ The Appeals Chamber explicitly stated that Article 19 of the 1954 Hague Convention, which provides for the application of the provisions of the Convention relating to respect for cultural property "as a minimum" in non-international armed conflicts, constituted a treaty rule which had "gradually become part of customary law".⁴⁴⁴

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

429. No practice was found.

VI. Other Practice

430. No practice was found.

D. Export and Return of Cultural Property in Occupied Territory**Export of cultural property from occupied territory***I. Treaties and Other Instruments**Treaties*

431. Paragraph 1 of the 1954 Hague Protocol provides that:

Each High Contracting Party undertakes to prevent the exportation, from a territory occupied by it during an armed conflict, of cultural property as defined in Article

⁴⁴² Islamic Summit Conference, Ninth Session, Doha, 12–13 November 2000, Res. 25/8-C (IS), preamble and §§ 1 and 3.

⁴⁴³ ICTY, *Tadić case*, Interlocutory Appeal, 2 October 1995, § 127.

⁴⁴⁴ ICTY, *Tadić case*, Interlocutory Appeal, 2 October 1995, § 98.

1 of the Convention for the Protection of Cultural Property in the Event of Armed Conflict, signed at The Hague on 14 May 1954.

432. Paragraph 2 of the 1954 Hague Protocol provides that:

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

433. Article 11 of the 1970 Convention on the Illicit Trade in Cultural Property provides that “the export and transfer of ownership of cultural property under compulsion arising directly or indirectly from the occupation of a country by a foreign power shall be regarded as illicit”.

434. Article 9(1) of the 1999 Second Protocol to the 1954 Hague Convention, which refers to the protection of cultural property in occupied territory, stipulates that:

Without prejudice to the provisions of Articles 4 and 5 of the Convention, a Party in occupation of the whole or part of the territory of another Party shall prohibit and prevent in relation to the occupied territory:

- (a) any illicit export, other removal or transfer of ownership of cultural property.

435. Article 21 of the 1999 Second Protocol to the 1954 Hague Convention provides that:

Each Party shall adopt such legislative, administrative or disciplinary measures as may be necessary to suppress the following acts when committed intentionally:

...

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

Other Instruments

436. Article 36 of the 1863 Lieber Code provides that:

If such works of art, libraries, collections, or instruments belonging to a hostile nation or government, can be removed without injury, the ruler of the conquering state or nation may order them to be seized or removed for the benefit of the said nation. The ultimate ownership is to be settled by the ensuing treaty of peace.

In no case shall they be sold or given away, if captured by the armies of the United States, nor shall they ever be privately appropriated or wantonly destroyed or injured.

437. In the 1943 London Declaration, the Allied governments expressed their intention:

to do their utmost to defeat the methods of dispossession practised by the Governments with which they are at war against the countries and peoples who have been so wantonly assaulted and despoiled. Accordingly, the governments making this Declaration and the French National Committee reserve all their rights to declare invalid any transfers of, or dealing with, property, rights and interests of any

description whatsoever which are, or have been, situated in the territories which have come under the occupation or control, direct or indirect, of the Governments with which they are at war, or which belong, or have belonged, to persons (including juridical persons) resident in such territories. This warning applies whether such transfers or dealings have taken the form of open looting or plunder, or of transactions apparently legal in form, even when they purport to be voluntarily effected.

438. Article 1(4) of the 1997 Revised Lauswolt Document provides that “without limiting the provisions of the 1954 Protocol, it is prohibited to export or otherwise illicitly remove cultural property from occupied territory or from a part of the territory of a State Party”.

439. Article 12(1) of the 1997 Revised Lauswolt Document provides that:

All the provisions of this instrument, the provisions of the Convention and its 1954 Protocol which relate to safeguarding of, and respect for, cultural property shall apply in the event of an armed conflict not of an international character, occurring within the territory of one of the States Parties.

II. National Practice

Military Manuals

440. Germany’s Military Manual states that “each party to the conflict shall be bound to prevent the exportation of cultural property from a territory occupied by it during an international armed conflict”.⁴⁴⁵

National Legislation

441. Luxembourg’s Law on the Repression of War Crimes provides for the punishment of “the exportation, by any means, from the territory of Luxembourg, of objects of whatever nature”.⁴⁴⁶

National Case-law

442. In 1970, two antiquity dealers in East Jerusalem were charged in the Military Court of Hebron under Jordanian law with exporting antiquities into “foreign territory” (i.e., from Hebron, in Judaea, to East Jerusalem) without obtaining an export licence.⁴⁴⁷

Other National Practice

443. It has been reported that, during the Gulf War, large amounts of cultural property, including almost the entire contents of the Kuwait National Museum, were removed to Baghdad. After the Gulf War, Iraq stated that thousands of objects had been stolen from its provincial museums during the period of the

⁴⁴⁵ Germany, *Military Manual* (1992), § 922.

⁴⁴⁶ Luxembourg, *Law on the Repression of War Crimes* (1947), Article 2(6).

⁴⁴⁷ Case referred to in Shoshana Berman, “Antiquities in Israel in a Maze of Controversy”, *Case Western Reserve Journal of International Law*, Vol. 19, 1987, pp. 356–360.

military intervention and its immediate aftermath. Four volumes listing this catalogued material have been drawn up by the Iraqi authorities and deposited with UNESCO.⁴⁴⁸

III. Practice of International Organisations and Conferences

United Nations

444. In a resolution adopted in 1993, the UNESCO General Conference reaffirmed that "the fundamental principles of protecting and preserving cultural property in the event of armed conflict could be considered part of customary international law".⁴⁴⁹

Other International Organisations

445. No practice was found.

International Conferences

446. In a resolution adopted in 2000 on the destruction and desecration of the Islamic historical and cultural relics and shrines in the occupied Azeri territories resulting from the Republic of Armenia's aggression against the Republic of Azerbaijan, the Islamic Summit Conference, referring to the 1954 Hague Convention, noted that "where an armed conflict erupts, the states undertake to prevent the smuggling of valuable cultural items from the territories under occupation".⁴⁵⁰

IV. Practice of International Judicial and Quasi-judicial Bodies

447. No practice was found.

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

448. No practice was found.

VI. Other Practice

449. No practice was found.

⁴⁴⁸ Lyndel V. Prott, "The Protocol to the Convention for the Protection of Cultural Property in the Event of Armed Conflict (The Hague Convention) 1954", *Humanitäres Völkerrecht – Informationsschriften*, No. 4/1993, pp. 192–193.

⁴⁴⁹ UNESCO, General Conference, Res. 3.5, 13 November 1993, preamble.

⁴⁵⁰ Islamic Summit Conference, Ninth Session, Doha, 12–13 November 2000, Res. 25/8-C (IS), § 3.

Return of cultural property exported or taken from occupied territory

I. Treaties and Other Instruments

Treaties

450. Article 12 of the 1947 Treaty of Peace between the Allied and Associated Powers and Italy provides that:

Italy shall restore to Yugoslavia all objects of artistic, historical, scientific, educational or religious character . . . which, as the result of the Italian occupation, were removed between 4 November 1918 and 2 March 1924 from the territories ceded to Yugoslavia under the treaties signed in Rapallo on 12 November 1920 and in Rome on 27 January 1924.

451. Under Article 37 of the 1947 Treaty of Peace between the Allied and Associated Powers and Italy, Italy was obliged to “restore all works of art, religious objects, archives and objects of historical value belonging to Ethiopia or its nationals and removed from Ethiopia to Italy since 3 October 1935”.

452. Article 1, paragraph 1, of Chapter Five (“External Restitution”) of the 1952 Convention on the Settlement of Matters Arising out of the War and the Occupation provides that:

Upon the entry into force of the present Convention, the Federal Republic [of Germany] shall establish, staff and equip an administrative agency which shall . . . search for, recover, and restitute jewellery, silverware and antique furniture . . . and cultural property, if such articles or cultural property were, during the occupation of any territory, removed therefrom by the forces or authorities of Germany or its Allies or their individual members (whether or not pursuant to orders) after acquisition by duress (with or without violence), by larceny, by requisitioning or by other forms of dispossession by force.

453. The 1954 Hague Protocol provides that:

3. Each High Contracting Party undertakes to return, at the close of hostilities, to the competent authorities of the territory previously occupied, cultural property which is in its territory, if such property has been exported in contravention of the principle laid down in the first paragraph. Such property shall never be retained as war reparations.
4. The High Contracting Party whose obligation was to prevent the exportation of cultural property from the territory occupied by it, shall pay an indemnity to the holders in good faith of any cultural property which has to be returned in accordance with the preceding paragraph.

454. Upon ratification of the 1954 Hague Protocol, Norway entered a reservation whereby “restitution of cultural property in accordance with the provisions of Sections I and II of the Protocol could not be required more than twenty years

from the date on which the property in question had come into the possession of a holder acting in good faith". In 1979, Norway withdrew this reservation.⁴⁵¹
455. Article 2(2) of the 1970 Convention on the Illicit Trade in Cultural Property provides that:

The States Parties undertake to oppose [the illicit import, export and transfer of ownership of cultural property] with the means at their disposal, and particularly by removing their causes, putting a stop to current practices, and by helping to make the necessary reparations.

Other Instruments

456. No practice was found.

II. National Practice

Military Manuals

457. Germany's Military Manual states that:

Each party to the conflict shall be bound to prevent the exportation of cultural property from a territory occupied by it during an international armed conflict. If, in spite of this prohibition, cultural property should nevertheless be transferred from the occupied territory into the territory of another party, the latter shall be bound to place such property under its protection. This shall be effected either immediately upon the importation of the property or, failing this, at a later date, at the request of the authorities of the occupied territory concerned.⁴⁵²

National Legislation

458. Russia's Law on Removed Cultural Property declares federal property of the Russian Federation:

all cultural values located in the territory of the Russian Federation that were brought [as a result of the Second World War] into the USSR by way of exercise of its right to compensatory restitution . . . pursuant to orders of the Soviet Army Military Command, the Soviet Military Administration in Germany or instructions of other competent bodies in the USSR.⁴⁵³

By the term "cultural values" is meant "any property of a religious or secular nature which has historic, artistic, scientific or any other cultural importance", either owned by the State or privately.⁴⁵⁴ However, the following types of properties may be claimed under the law: a) the cultural values plundered by Germany or its allies that were the national property of the former Soviet republics; b) the property of religious organisations or private charities which,

⁴⁵¹ Jiri Toman, *The Protection of Cultural Property in the Event of Armed Conflict*, Dartmouth and UNESCO Publishing, Hants and Paris, 1996, p. 345.

⁴⁵² Germany, *Military Manual* (1992), § 922.

⁴⁵³ Russia, *Law on Removed Cultural Property* (1997), Article 6.

⁴⁵⁴ Russia, *Law on Removed Cultural Property* (1997), Article 4.

being used exclusively for religious or charitable aims, did not serve the interest of militarism and/or Fascism; c) the cultural values previously owned by victims of Nazi/Fascist persecutions; d) all other removed cultural values located in Russia and originating from territories of States, other than the former Soviet republics, that were occupied during the war by Germany or its allies; and e) family relics.⁴⁵⁵

National Case-law

459. In its decision in 1999 concerning verification of the constitutionality of the Law on Removed Cultural Property, Russia's Constitutional Court ruled that cultural property legally transferred from the territory of former enemy States had become the property of the Russian Federation. The Court upheld the constitutionality of the Law insofar as it dealt with "the rights of Russia to cultural property imported into Russia from former enemy states [Germany and its allies] by way of compensatory restitution". In the Court's opinion:

The obligation of former enemy states to compensate their victims in the form of common restitution and compensatory restitution is based on the well-established principle of international law recognised well before World War II, concerning international legal responsibility of an aggressor state.⁴⁵⁶

Other National Practice

460. In 1991, the German government declared that it "fully accepts the fact that cultural property has to be returned after the end of hostilities". Germany has returned cultural property in all cases in which the cultural goods were found and could be identified. In other cases, Germany has paid compensation to the original owner countries.⁴⁵⁷

461. In 1997, the German government reiterated the principles contained in a general declaration made in 1984, whereby "thefts and destruction of cultural property by the Nazi regime as well as the removal of cultural property by the Soviet Union during and after the Second World War were breaches of international law". Furthermore, it pointed out that the basic principles of the protection of cultural property are not only binding upon the vanquished but also upon the victor.⁴⁵⁸

462. In 1998, during a parliamentary debate concerning a dispute between Germany and Russia over a Russian parliamentary draft law to nationalise formerly German cultural property confiscated by the Soviet Union during the

⁴⁵⁵ Russia, *Law on Removed Cultural Property* (1997), Articles 7–12.

⁴⁵⁶ Russia, Constitutional Court, *Law on Removed Cultural Property case*, 20 July 1999.

⁴⁵⁷ Germany, Lower House of Parliament, Statement by a Member of Parliament, Dr. Werner Schuster, 21 June 1991, *Plenarprotokoll* 12/35, p. 2966.

⁴⁵⁸ Germany, Lower House of Parliament, Answer by the government to a question in Parliament, *BT-Drucksache* 13/8111, 27 June 1997, p. 7.

occupation of Germany after the Second World War, a representative of the German government stated that:

The theft of cultural property committed by the German Nationalist-Socialist regime during the Second World War, as well as the transporting of cultural objects from Germany to Russia by the Soviet Union after the Second World War, represent violations of international law.⁴⁵⁹

463. It was reported that during the Gulf War, large amounts of cultural property, including almost the entire contents of the Kuwait National Museum, were removed to Baghdad but later returned.⁴⁶⁰

464. In 1991, in identical letters to the UN Secretary-General and the President of the UN Security Council, the Minister of Foreign Affairs of Iraq stated that "the Iraqi Government has decided to return the following property seized by the Iraqi authorities after 2 August 1990: . . . 3. Museum objects."⁴⁶¹

465. In a letter to a number of the Ministers of Foreign Affairs of the member States of the UN Security Council in 1991, the Minister of Foreign Affairs of Iraq stated that:

Mr. J. Richard Foran, Assistant Secretary-General and official responsible for coordinating the return of [Kuwaiti] property, visited Iraq twice during the month of May 1991. The competent Iraqi authorities expressed their readiness to hand over the Kuwaiti property of which Iraq had already notified the Secretariat of the United Nations . . . Mr. Foran also undertook a wide-ranging field visit and saw for himself the . . . museum antiquities and books that will be returned to Kuwait immediately [after] an agreement is reached establishing a location for the handing over, it being understood that it is this property whose handing over Mr. Foran has determined should have priority at the present stage. The same procedures will doubtless be applied to other Kuwaiti property.⁴⁶²

466. In a letter to the UN Secretary-General in September 1994, Iraq claimed that it had returned all the Kuwaiti property in its possession, "having nothing else whatsoever to return".⁴⁶³

467. In 1995, in a letter to the President of the UN Security Council, Kuwait stated that it attached "the utmost importance to the return by Iraq of all the

⁴⁵⁹ Germany, Lower House of Parliament, Statement by the Government, *Plenarprotokoll* 13/221, 4 March 1998.

⁴⁶⁰ Lyndel V. Prott, "The Protocol to the Convention for the Protection of Cultural Property in the Event of Armed Conflict (The Hague Convention) 1954", *Humanitäres Völkerrecht – Informationsschriften*, No. 4/1993, pp. 192–193.

⁴⁶¹ Iraq, Identical letters dated 5 March 1991 from the Minister of Foreign Affairs to the UN Secretary-General and the President of the UN Security Council, annexed to Identical letters dated 5 March 1991 to the UN Secretary-General and the President of the UN Security Council, UN Doc. S/22330, 5 March 1991, p. 2.

⁴⁶² Iraq, Letter dated 8 June 1991 from the Minister of Foreign Affairs to a number of Ministers of Foreign Affairs of the States members of the UN Security Council, annexed to Letter dated 16 August 1991 addressed to the President of the UN Security Council, UN Doc. S/22957, 16 August 1991, Annex II, § 4.

⁴⁶³ Iraq, Letter dated 26 September 1994 to the UN Secretary-General, UN Doc. S/1994/1099, 27 September 1994, p. 1.

official documents looted by Iraqi forces from the Office of the Amir, the Office of the Crown Prince, the Cabinet Office and the Ministry of Foreign Affairs. No price can compensate for such documents."⁴⁶⁴

468. In 1997, during a debate in the UN General Assembly, Kuwait reiterated the allegation that Iraqi soldiers had robbed and looted Kuwaiti cultural property during the Gulf War, including manuscripts and historical documents, adding that many treasures which had been returned had been damaged. He then appealed to the international community to urge the return of Kuwait's cultural property.⁴⁶⁵ In response, Iraq declared that all the cultural property taken out of Kuwait by Iraq had either been returned or would be in the future.⁴⁶⁶

469. During the diplomatic conference which led to the adoption of the 1954 Hague Convention, Norway proposed that "restitution cannot, however, be required later than twenty years after the object has got into the hands of the present holder, this holder having acted in good faith in acquiring it". The proposal was not adopted by the conference.⁴⁶⁷

470. In March 2001, Russia and Belgium reached an agreement on the return to Belgium of the military archives stolen by the Nazis during the Second World War and then taken to Moscow by Soviet forces. The Russian authorities accepted to return the archives to Belgium, provided that they be compensated for the cost of having maintained them.⁴⁶⁸

471. In 1999, during a debate in the UN General Assembly, the UAE called on Iraq to return Kuwaiti cultural property.⁴⁶⁹

III. Practice of International Organisations and Conferences

United Nations

472. In 1991, the UN Security Council adopted Resolution 686, in which, acting under Chapter VII of the UN Charter, it demanded that Iraq "immediately begin to return all Kuwaiti property seized by Iraq, the return to be completed in the shortest possible period".⁴⁷⁰ The same demand was implicitly reiterated

⁴⁶⁴ Kuwait, Letter dated 6 March 1995 to the President of the UN Security Council, UN Doc. S/1995/184, 7 March 1995, p. 2; see also UN Secretary-General, Report on the return of Kuwaiti property seized by Iraq, UN Doc. S/1996/1042, 16 December 1996, p. 1 and Second report pursuant to paragraph 14 of resolution 1284 (1999), UN Doc. S/2000/575, 14 June 2000, §§ 17(a).

⁴⁶⁵ Kuwait, Statement before the UN General Assembly, UN Doc. A/52/PV.55, 25 November 1997, p. 15.

⁴⁶⁶ Iraq, Statement before the UN General Assembly, UN Doc. A/52/PV.55, 25 November 1997, p. 20.

⁴⁶⁷ Jiri Toman, *The Protection of Cultural Property in the Event of Armed Conflict*, Dartmouth and UNESCO Publishing, Hants and Paris, 1996, p. 345.

⁴⁶⁸ Ch. Laporte, "Les archives belges quittent Moscou", *Le Soir*, 24 March 2001.

⁴⁶⁹ UAE, Statement before the UN General Assembly, UN Doc. A/54/PV.7, 21 September 1999, p. 36.

⁴⁷⁰ UN Security Council, Res. 686, 2 March 1991, § 2(d).

the same year in Resolution 687, in which the Security Council requested that the UN Secretary-General report on the steps taken to facilitate the return of all Kuwaiti property seized by Iraq.⁴⁷¹

473. In a resolution adopted in 1999, the UN Security Council, recalling Resolutions 686 and 687 of 1991, noted “with regret” that Iraq had still not complied fully with its obligation to return in the shortest possible time all Kuwaiti property it had seized, and requested that the UN Secretary-General “report every six months on the return of all Kuwaiti property, including archives, seized by Iraq”.⁴⁷²

474. In a resolution adopted in 1991, the UN General Assembly strongly condemned Israel’s pillaging of archaeological and cultural property in the occupied territories. It also condemned Israel’s attack against the Sharia Islamic Court in occupied Jerusalem on 18 November 1991, during which Israeli forces had taken away important documents and papers, and demanded that “Israel, the occupying power, return immediately all documents and papers that were taken away from the Sharia Islamic Court in occupied Jerusalem, to the officials of the said Court”.⁴⁷³

475. In a resolution adopted in 1993, the UNESCO General Conference reaffirmed that “the fundamental principles of protecting and preserving cultural property in the event of armed conflict could be considered part of customary international law”.⁴⁷⁴

476. In 1992, in a report on compliance by Iraq with obligations placed upon it under certain UN Security Council resolutions, the UN Secretary-General noted that:

The return of the property has commenced and, to date, properties of the Central Bank of Kuwait, the Central Library of Kuwait, the National Museum of Kuwait, the Kuwait News Agency . . . have been returned. A number of additional items are ready for return and the process is continuing. In addition, Kuwait has submitted lists of properties from other ministries, corporations and individuals that are being pursued. The Iraqi and Kuwaiti officials involved with the return of property have extended maximum cooperation to the United Nations to facilitate the return.⁴⁷⁵

477. In 2000, in a report on the return of Kuwaiti property from Iraq, the UN Secretary-General confirmed that, although Iraq had returned a substantial quantity of property since the end of the Gulf War, there remained “many items which Iraq is under obligation to return to Kuwait”. In this respect, he

⁴⁷¹ UN Security Council, Res. 687, 3 April 1991, § 15.

⁴⁷² UN Security Council, Res. 1284, 17 December 1999, preamble and § 14.

⁴⁷³ UN General Assembly, Res. 46/47, 9 December 1991, Part A, §§ 8(h) and 25–26.

⁴⁷⁴ UNESCO, General Conference, Res. 3.5, 13 November 1993, preamble.

⁴⁷⁵ UN Secretary-General, Further report on the status of compliance by Iraq with the obligations placed upon it under certain of the Security-Council resolutions relating to the situation between Iraq and Kuwait, UN Doc. S/23687, 7 March 1992; see also “Kuwait’s Art Comes Home”, *The Washington Post*, 17 February 1992.

stressed that “priority should be given to the return by Iraq of the Kuwaiti archives . . . and museum items”.⁴⁷⁶

Other International Organisations

478. No practice was found.

International Conferences

479. In a resolution adopted in 2000 on the destruction and desecration of the Islamic historical and cultural relics and shrines in the occupied Azeri territories resulting from the Republic of Armenia’s aggression against the Republic of Azerbaijan, the Islamic Summit Conference recalled that the 1954 Hague Convention “prohibits the confiscation of cultural assets moved to the territories of other countries”.⁴⁷⁷

IV. Practice of International Judicial and Quasi-judicial Bodies

480. No practice was found.

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

481. To fulfil its task of disseminating IHL, the ICRC has delegates around the world teaching armed and security forces that “cultural objects transferred during the war shall be returned to the belligerent Party in whose territory they were previously situated”.⁴⁷⁸

VI. Other Practice

482. No practice was found.

⁴⁷⁶ UN Secretary-General, Second report pursuant to paragraph 14 of resolution 1284 (1999), UN Doc. S/2000/575, 14 June 2000, §§ 17(a) and 20.

⁴⁷⁷ Islamic Summit Conference, Ninth Session, Doha, 12–13 November 2000, Res. 25/8-C (IS), § 3.

⁴⁷⁸ Frédéric de Mulinen, *Handbook on the Law of War for Armed Forces*, ICRC, Geneva, 1987, § 259.

WORKS AND INSTALLATIONS CONTAINING DANGEROUS FORCES

Works and Installations Containing Dangerous Forces (practice relating to Rule 42)	§§ 1–153
Attacks against works and installations containing dangerous forces and against military objectives located in their vicinity	§§ 1–128
Placement of military objectives near works and installations containing dangerous forces	§§ 129–153

Works and Installations Containing Dangerous Forces

Attacks against works and installations containing dangerous forces and against military objectives located in their vicinity

Note: For practice concerning attacks against economic installations such as oil installations and chemical plants, see Chapter 2, section B.

I. Treaties and Other Instruments

Treaties

1. Article 56 AP I provides that:

1. Works and installations containing dangerous forces, namely dams, dykes and nuclear electrical generating stations, shall not be made the object of attack, even where these objects are military objectives, if such attack may cause the release of dangerous forces and consequent severe losses among the civilian population. Other military objectives located at or in the vicinity of these works or installations shall not be made the object of attack if such attack may cause the release of dangerous forces from the works or installations and consequent severe losses among the civilian population.
2. The special protection against attack provided for in paragraph 1 shall cease:
 - (a) for a dam or a dyke only if it is used for other than its normal function and in regular, significant and direct support of military operations and if such attack is the only feasible way to terminate such support;
 - (b) for a nuclear electrical generating station only if it provides electric power in regular, significant and direct support of military operations and if such attack is the only feasible way to terminate such support;
 - (c) for other military objectives located at or in the vicinity of these works or installations only if they are used in regular, significant and direct support of military operations and if such attack is the only feasible way to terminate such support.

3. In all cases, the civilian population and individual civilians shall remain entitled to all the protection accorded them by international law, including the protection of the precautionary measures provided for in Article 57. If the protection ceases and any of the works, installations or military objectives mentioned in paragraph 1 is attacked, all practical precautions shall be taken to avoid the release of the dangerous forces.

...

4. The High Contracting Parties and the Parties to the conflict are urged to conclude further agreements among themselves to provide additional protection for objects containing dangerous forces.

Article 56 AP I was adopted by consensus.¹

2. Article 85(3)(c) AP I provides that "launching an attack against works or installations containing dangerous forces in the knowledge that such attack will cause excessive loss of life, injury to civilians or damage to civilian objects" is a grave breach of the Protocol. Article 85 AP I was adopted by consensus.²

3. Upon ratification of AP I, the UK stated with respect to Articles 56 and 85(3)(c) AP I that:

The United Kingdom cannot undertake to grant absolute protection to installations which may contribute to the opposing Party's war effort, or to the defenders of such installations, but will take all due precautions in military operations at or near the installations referred to in paragraph 1 of Article 56 in the light of the known facts, including any special marking which the installation may carry, to avoid severe collateral losses among the civilian population; direct attacks on such installations will be launched only on authorisation at a high level of command.³

4. Upon ratification of AP I, France declared that:

The Government of the French Republic cannot guarantee absolute protection to works and installations containing dangerous forces, which may contribute to the opposing Party's war effort, or to the defenders of such installations, but will take all necessary precautions, pursuant to Articles 56, 57(2)(a)(iii) and 85(3)(c) [AP I], to avoid severe collateral losses among the civilian population, including during possible direct attacks against such works and installations.⁴

5. Article 15 AP II provides that:

Works or installations containing dangerous forces, namely dams, dykes and nuclear electrical generating stations, shall not be made the object of attack, even where these objects are military objectives, if such attack may cause the release of dangerous forces and consequent severe losses among the civilian population.

Article 15 AP II was adopted by consensus.⁵

¹ CDDH, *Official Records*, Vol. VI, CDDH/SR.42, 25 May 1977, p. 209.

² CDDH, *Official Records*, Vol. VI, CDDH/SR.44, 30 May 1977, p. 291.

³ UK, Reservations and declarations made upon ratification of AP I, 28 January 1998, § n.

⁴ France, Reservations and declarations made upon ratification of AP I, 11 April 2001, § 15.

⁵ CDDH, *Officials Records*, Vol. VII, CDDH/SR.52, 6 June 1977, p. 138.

Other Instruments

6. Article 17 of the 1956 New Delhi Draft Rules provides that:

In order to safeguard the civilian population from the dangers that might result from the destruction of engineering works or installations – such as hydro-electric dams, nuclear power stations or dikes – through the releasing of natural or artificial forces, the States or Parties concerned are invited:

- (a) to agree, in time of peace, on a special procedure to ensure in all circumstances the general immunity of such works where intended essentially for peaceful purposes:
- (b) to agree, in time of war, to confer special immunity, possibly on the basis of the stipulations of Article 16, on works and installations which have not, or no longer have, any connexion with the conduct of military operations.

The preceding stipulations shall not, in any way, release the Parties to the conflict from the obligation to take the precautions required by the general provisions of the present rules, under Articles 8 to 11 in particular.

7. Paragraph 6 of the 1991 Memorandum of Understanding on the Application of IHL between Croatia and the SFRY states that hostilities shall be conducted in compliance with Article 56 AP I.

8. Paragraph 2.5 of the 1992 Agreement on the Application of IHL between the Parties to the Conflict in Bosnia and Herzegovina states that hostilities shall be conducted in compliance with Article 56 AP I.

9. According to Article 20(b)(iii) of the 1996 ILC Draft Code of Crimes against the Peace and Security of Mankind, “launching an attack against works or installations containing dangerous forces in the knowledge that such attack will cause excessive loss of life, injury to civilians or damage to civilian objects” is a war crime.

10. Section 6.8 of the 1999 UN Secretary-General’s Bulletin states that:

The United Nations force shall not make installations containing dangerous forces, namely dams, dykes and nuclear electrical generating stations, the object of military operations if such operations may cause the release of dangerous forces and consequent severe losses among the civilian population.

*II. National Practice**Military Manuals*

11. Argentina’s Law of War Manual states that:

Works and installations containing dangerous forces (dams, dykes, nuclear stations or nuclear power plants) must not be attacked, even if they are military objectives, if such attack may cause the release of those forces and cause severe losses among the civilian population. Other military objectives located at or in the vicinity of these works must not be attacked either if such an attack may cause the release of those dangerous forces. This protection will only cease if these objects are being

used as a regular, significant and direct support to military operations, and if such attack is the only feasible way to terminate such support.⁶

The manual qualifies “attacks against works and installations containing dangerous forces in the knowledge that such attacks will cause loss of life, injury to civilians or damage to civilian objects which are excessive in relation to the concrete and direct military advantage anticipated” as grave breaches of IHL.⁷ With respect to non-international armed conflicts, the manual restates the absolute prohibition of attacks against works and installations containing dangerous forces as found in Article 15 AP II.⁸

12. Australia’s Defence Force Manual provides that:

933. The works and installations containing dangerous forces are specifically limited to dams, dykes and nuclear electrical generating stations. Even where these objects are military objectives, they shall not be attacked if such attack may cause the release of dangerous forces and consequently severe losses amongst the civilian population. The purpose of this rule against such attacks is to avoid excess damage or loss to the civilian population.

934. Military objectives at or in the vicinity of an installation mentioned in paragraph 933 are also immune from attack if the attack might directly cause the release of dangerous forces from that installation in question and subsequent severe losses upon the civilian population.

935. The release of the dangerous forces must have a consequent severe loss among the civilian population. This is an absolute standard rather than the relative one set by the rule of proportionality. If massive civilian losses are foreseeable, the attack would be prohibited regardless of the anticipated military advantage.

936. Loss of Protection. In the case of a dyke or dam, the protection afforded ceases if three special conditions are evident. These are that:

- a. it is used for other than its normal function;
- b. it is used in regular, significant and direct support of military operations; and
- c. an attack is the only feasible way to terminate such support.

937. In relation to nuclear electrical generating stations and other military objectives located in the vicinity, only the conditions in paragraph 936.b and c. apply.⁹

The manual further provides that “launching unlawful attacks against installations containing dangerous forces” constitutes a grave breach or a serious war crime likely to warrant institution of criminal proceedings.¹⁰

13. Belgium’s Teaching Manual for Soldiers states that “certain objects and buildings must not be attacked. Unless an order to the contrary has been given, they must be avoided. This concerns . . . certain installations which contain particularly dangerous forces (dams, dykes and nuclear power stations).”¹¹

⁶ Argentina, *Law of War Manual* (1989), § 4.04.

⁷ Argentina, *Law of War Manual* (1989), § 8.03.

⁸ Argentina, *Law of War Manual* (1989), § 7.09.

⁹ Australia, *Defence Force Manual* (1994), §§ 933–937, see also § 544 (“any such attack would be approved at the highest command level”) and *Commanders’ Guide* (1994) §§ 408, 631 and 962.

¹⁰ Australia, *Defence Force Manual* (1994), § 1315(j); see also *Commanders’ Guide* (1994), § 1305(j).

¹¹ Belgium, *Teaching Manual for Soldiers* (undated), p. 8, see also p. 22 and slide 6b/2.

14. Belgium's Law of War Manual prohibits the use of "means and methods of warfare . . . that may cause the release of forces which may cause severe losses among the civilian population". The manual specifically prohibits "attacks against dams, dykes and nuclear power stations whose destruction may release dangerous forces, unless these works and installations are used for other than their normal function and provide an important and direct support to military operations".¹²

15. Benin's Military Manual states that it is prohibited:

to attack dykes, nuclear power plants and dams, if such attack would release dangerous forces which may cause severe losses among the civilian population, unless these works have been used in direct support of military operations or for military purposes and an attack on these objectives is the only way to terminate such use.¹³

16. Cameroon's Instructors' Manual defines installations containing dangerous forces as "dams, dykes and nuclear power stations whose destruction may lead to severe losses among the civilian population" and states that they lose their protection against attack "when they are used as tactical support by the belligerents".¹⁴

17. Canada's LOAC Manual states that:

72. Dams, dykes and nuclear electrical generating stations shall not be attacked, even when they are legitimate targets, if such an attack might cause the release of dangerous forces and consequent severe losses among the civilian population.
73. Other legitimate targets located at or in the vicinity of dams, dykes and nuclear electrical generating stations shall not be attacked if such an attack may cause the release of dangerous forces from those works or installations and consequent severe losses among the civilian population.
74. The protection that the LOAC provides to dams, dykes, nuclear electrical generating stations, and other legitimate targets in the vicinity of those installations is not absolute. The protection ceases in the following circumstances:
 - a. for a dam or dyke, only if it is used for other than its normal function and in regular, significant and direct support of military operations and if such attack is the only feasible way to terminate such support;
 - b. for a nuclear electrical generating station, only if it provides electric power in regular, significant and direct support of military operations and only if such attack is the only feasible way to terminate such support; and
 - c. for other legitimate targets located at or in the vicinity of these works or installations, only if they are used in regular, significant and direct support of military operations and if such attack is the only feasible way to terminate such support.¹⁵

It also states that "launching an attack against works or installations containing dangerous forces in the knowledge that such attack will cause excessive

¹² Belgium, *Law of War Manual* (1983), pp. 27–28.

¹³ Benin, *Military Manual* (1995), Fascicule III, p. 13.

¹⁴ Cameroon, *Instructors' Manual* (1992), p. 20, § 226.

¹⁵ Canada, *LOAC Manual* (1999), p. 4-8, §§ 72–74.

collateral civilian damage" constitutes a grave breach of AP I.¹⁶ With respect to non-international armed conflicts, the manual restates the absolute prohibition of attacks against works and installations containing dangerous forces as found in Article 15 AP II.¹⁷

18. Colombia's Basic Military Manual considers that "abstaining from attacks against works and installations... containing dangerous forces" is a way to protect the civilian population.¹⁸

19. Croatia's Commanders' Manual states that "specifically protected objects may not become military objectives and may not be attacked", including works and installations containing dangerous forces such as dams, dykes and nuclear power plants.¹⁹

20. Ecuador's Naval Manual provides that "dams, dikes, levees, and other installations, which if breached or destroyed would release flood waters or other forces dangerous to the civilian, should not be bombarded if the potential for harm to noncombatants would be excessive in relation to the military advantage to be gained by bombardment".²⁰

21. France's LOAC Summary Note provides that "the specific immunity granted to certain persons and objects by the law of war [including works and installations containing dangerous forces] must be strictly observed... They may not be attacked."²¹ It specifies that "the immunity of specifically protected objects may only be lifted under certain conditions and under the personal responsibility of the commander. Military necessity justifies only those measures which are indispensable for the accomplishment of the mission."²² "Attacks against works and installations containing forces which are dangerous for the civilian population" are qualified as a war crime.²³

22. France's LOAC Teaching Note states that "the law of armed conflict grants specific protection to certain specially marked installations and zones", including certain works and installations containing dangerous forces.²⁴ It further states that "dams, dykes and nuclear electrical generating stations are considered to be installations containing dangerous forces and must not be attacked in any circumstances".²⁵

23. France's LOAC Manual, with reference to Articles 56 AP I and 15 AP II, includes works and installations containing dangerous forces among objects which are specifically protected by the law of armed conflict.²⁶ The manual further restates the prohibition on attacking dams, dykes and nuclear power

¹⁶ Canada, *LOAC Manual* (1999), p. 16-3, § 16(c).

¹⁷ Canada, *LOAC Manual* (1999), p. 17-5, § 39.

¹⁸ Colombia, *Basic Military Manual* (1995), p. 22, § 2, see also p. 29, § 2(a).

¹⁹ Croatia, *Commanders' Manual* (1992), §§ 7 and 13, see also § 31 (search for information).

²⁰ Ecuador, *Naval Manual* (1989), § 8.5.1.7.

²¹ France, *LOAC Summary Note* (1992), §§ 2.2-2.3.

²² France, *LOAC Summary Note* (1992), § 2.4.

²⁴ France, *LOAC Teaching Note* (2000), p. 5.

²⁶ France, *LOAC Manual* (2001), p. 31.

²³ France, *LOAC Summary Note* (1992), § 3.4.
²⁵ France, *LOAC Teaching Note* (2000), p. 6.

plants, and the exceptions thereto, as found in Article 56 AP I and stresses that "a decision to attack such works and installations belongs to the commander whose criminal responsibility is engaged in case the action undertaken is illegal".²⁷

24. Germany's Military Manual states that:

464. Works and installations containing dangerous forces, namely dams, dykes, and nuclear electrical generating stations, shall not be made the object of attack, even where these objects are military objectives, if such attack may cause the release of dangerous forces and consequent severe losses among the civilian population.

465. This protection shall cease if these works are used in regular, significant and direct support of military operations and such attack shall be the only feasible way to terminate such use. This shall also apply to other military objectives located at or in the vicinity of these works and installations.

466. Regular, significant and direct support of military operations comprises, for instance, the manufacture of weapons, ammunition and defence materiel. The mere possibility of use by armed forces is not subject to these provisions.

467. The decision to launch an attack shall be taken on the basis of all information available at the time of action.

...

469. The parties to the conflict shall remain obliged to take all precautions to protect dangerous works from the effects of attack (e.g. shutting down nuclear electrical generating stations).²⁸

The manual further provides that grave breaches of IHL are in particular "launching an attack against works or installations containing dangerous forces (dams, dykes and nuclear electrical generating stations), expecting that such attack will cause excessive loss of life, injury to civilians or damage to civilian objects".²⁹

25. Hungary's Military Manual states that the destruction of works and installations containing dangerous forces "may release forces that could cause severe losses among the civilian population".³⁰

26. Israel's Manual on the Laws of War states that:

One of the additions in the Additional Protocols to the Geneva Conventions (which, as already stated, is not binding on the State of Israel but nevertheless widely accepted as a binding provision) is the prohibition of striking installations which hold back dangerous forces. This refers to installations that might indeed afford the enemy military or strategic benefit, but if damaged would incur such severe environmental damage to the civilian population that it was decided to prohibit their destruction. The section mentions dams, embankments (for protection against floods) and nuclear power stations for generating electricity. It is clear in each of these examples that destruction will indeed reduce the infrastructure of the enemy state (for example, damage to its power supply), however, it will lead to the unleashing of destructive forces, such as the huge flooding of a river or nuclear fallout resulting

²⁷ France, *LOAC Manual* (2001), p. 69.

²⁸ Germany, *Military Manual* (1992), §§ 464–467 and 469.

²⁹ Germany, *Military Manual* (1992), § 1209. ³⁰ Hungary, *Military Manual* (1992), p. 22.

in tens of thousands of civilian victims, and therefore it is forbidden. In addition, it is imperative to refrain from attacking military targets within such installations or in close proximity to them, if such an attack results in the unleashing of such forces.³¹

27. Italy's LOAC Elementary Rules Manual provides that "specifically protected objects may not become military objectives and may not be attacked", include works and installations containing dangerous forces such as dams, dykes and nuclear power plants.³²

28. Italy's IHL Manual qualifies "attacks . . . against installations containing dangerous forces" as war crimes.³³

29. Kenya's LOAC Manual defines a work or installation containing dangerous forces as "a dam, a dyke or nuclear power plant whose attack and consequent destruction may cause the release of dangerous forces and thereby severe losses among the civilian population".³⁴ The manual states that "certain property and buildings must also not be attacked except where an order to the contrary has been given. This comprises . . . certain installations which contain particularly dangerous forces (dams, dykes and nuclear power plants)."³⁵

30. South Korea's Operational Law Manual states that attacks against dams, dykes and nuclear power plants are prohibited.³⁶

31. Madagascar's Military Manual states that "specifically protected objects may not become military objectives and may not be attacked", including works and installations containing dangerous forces such as dams, dykes and nuclear power plants.³⁷

32. The Military Manual of the Netherlands restates the content of Article 56 AP I and specifies that:

The normal function of a dyke is to hold back water or to be prepared for that function. When a dyke is used only to this effect it cannot lose its function, even if it carries a road and has a traffic function and even if that road is occasionally used for military traffic. Protection only ceases if the last two conditions are also fulfilled: significant support for military operations and no other means to terminate such support [than attack].³⁸

The manual further states that "attacking . . . dams, dykes and nuclear power plants" in violation of IHL constitutes a grave breach.³⁹ With respect to

³¹ Israel, *Manual on the Laws of War* (1998), pp. 35–36.

³² Italy, *LOAC Elementary Rules Manual* (1991), §§ 7 and 13, see also § 31 (search for information).

³³ Italy, *IHL Manual* (1991), Vol. I, § 85.

³⁴ Kenya, *LOAC Manual* (1997), Précis No. 2, p. 12.

³⁵ Kenya, *LOAC Manual* (1997), Précis No. 2, p. 15.

³⁶ South Korea, *Operational Law Manual* (1996), p. 42.

³⁷ Madagascar, *Military Manual* (1994), Fiche No. 2-O, § 7 and Fiche No. 3-O, § 13, see also Fiche No. 3-SO, § H, Fiche No. 2-T, § 27 and Fiche No. 4-T, § 24.

³⁸ Netherlands, *Military Manual* (1993), p. V-9/V-10, § 8.

³⁹ Netherlands, *Military Manual* (1993), p. IX-5.

non-international armed conflicts in particular, the manual restates the content of Article 15 AP II.⁴⁰

33. The Military Handbook of the Netherlands states that “in principle, dams, dykes and nuclear power plants (works and installations containing dangerous forces) must not be made the object of attack”.⁴¹

34. New Zealand’s Military Manual provides that:

1. Even though they may be military objectives, works or installations containing dangerous forces, namely dams, dykes and nuclear electrical generating stations, are not to be attacked if the result of such an attack would be the release of dangerous forces and consequent severe losses among the civilian population. Any other military objective at or in the vicinity of such an installation is also immune from attack if the attack might cause the release of dangerous forces from the works or installations in question and consequent severe losses among the civilian population.
2. The protection afforded to such installations ceases in the case of dykes, dams and all such installations and nearby military objectives “only if they are used in regular, significant and direct support of military operations and if such attack is the only feasible way to terminate such support” and, in the case of dykes and dams, only if they are also being used for other than their normal function.
...
- 5 Although parties not accepting AP I are free to disregard this particular protective requirement, AP I, confirming customary law, authorizes Parties to agree between themselves on the provision of any additional protection that they might wish to afford such works and installations.⁴²

The manual qualifies “launching an attack against works or installations containing dangerous forces in the knowledge that such attack will cause injury to civilians or damage to civilian objects” as a grave breach of AP I.⁴³ With respect to non-international armed conflicts, the manual states that:

Reflecting the new approach to technological advances and the dangers that may be inherent in them, it is forbidden to attack certain works or installations containing dangerous forces, namely dams, dykes and nuclear electrical generating stations, even if they may be regarded as military objectives, if such an attack might cause the release of dangerous forces and consequent severe losses among the civilian population.⁴⁴

35. Russia’s Military Manual states that is prohibited “to launch an attack against works or installations containing dangerous forces in the knowledge that such attack will cause excessive loss of life, injury to civilians or damage to civilian objects”.⁴⁵

⁴⁰ Netherlands, *Military Manual* (1993), p. XI-7, § 6.

⁴¹ Netherlands, *Military Handbook* (1995), p. 7-44.

⁴² New Zealand, *Military Manual* (1992), § 521, see also § 633 (air to land operations).

⁴³ New Zealand, *Military Manual* (1992), § 1703(3)(c).

⁴⁴ New Zealand, *Military Manual* (1992), § 1821. ⁴⁵ Russia, *Military Manual* (1990), § 8(h).

36. South Africa's LOAC Manual provides that "the LOAC grants particular protection to the following categories of persons and targets which are termed 'protected targets' . . . Protected places include the following: . . . installations containing dangerous forces (e.g. dams and nuclear electrical power stations)."⁴⁶

37. Spain's LOAC Manual states that:

Dams, dykes and nuclear electrical generating stations must not be the object of attack, even when they are military objectives, if such attack may cause severe losses to the civilian population. Nevertheless, this protection ceases if they are being used in regular, significant and direct support to military operations.⁴⁷

The manual further states that "launching an attack against works or installations containing dangerous forces in the knowledge that such attack will cause excessive loss of life, injury to civilians or damage to civilian objects" constitutes a war crime.⁴⁸

38. Switzerland's Military Manual states that "works and installations containing dangerous forces, such as dams, dykes and nuclear power stations, must not be attacked if such attack may release dangerous forces and cause severe losses among the civilian population"⁴⁹

39. Switzerland's Basic Military Manual states that "installations whose destruction could cause severe losses among the civilian population, because such destruction could release dangerous forces, such as dykes, dams and nuclear power stations, must not be attacked".⁵⁰ It further provides that "an attack against works or installations containing dangerous forces in the knowledge that such attack will cause excessive loss of life, injury to civilians or damage to civilian objects" constitutes a grave breach of AP I.⁵¹

40. Togo's Military Manual states that it is prohibited:

to attack dykes, nuclear power plants and dams, if such attack would release dangerous forces which may cause severe losses among the civilian population, unless these works have been used in direct support of military operations or for military purposes and an attack on these objectives is the only way to terminate such use.⁵²

41. The UK LOAC Manual states that it is prohibited "to attack dykes, nuclear power stations or dams if to do so would cause the release of dangerous forces and consequent severe losses among the civilian population, unless they are used in direct support of military operations or for military purposes".⁵³

⁴⁶ South Africa, *LOAC Manual* (1996), § 29(b)(ii), see also § 22.

⁴⁷ Spain, *LOAC Manual* (1996), Vol. I, § 2.3.b.(2), see also §§ 1.3.d.(2), 4.5.b.(2)(b) and 7.3.b.(4).

⁴⁸ Spain, *LOAC Manual* (1996), Vol. I, § 11.8.b.(1).

⁴⁹ Switzerland, *Military Manual* (1984), p. 21.

⁵⁰ Switzerland, *Basic Military Manual* (1987), Article 31(1).

⁵¹ Switzerland, *Basic Military Manual* (1987), Article 193(1)(c).

⁵² Togo, *Military Manual* (1996), Fascicule III, p. 13.

⁵³ UK, *LOAC Manual* (1981), Section 4, p. 15, § 5(i).

42. The US Air Force Pamphlet states that:

In view of the general immunity of the civilian population and civilian objects and the requirement of precautions to minimize injury or damage to them, many states have urged a rule absolutely prohibiting attacks upon works and installations containing "dangerous forces", such as water held by a dam or radioactive material from a nuclear generating station, if the attack would release such dangerous forces. The United States has not accepted that such a rule, prohibiting attacks on works and installations containing dangerous forces, exists absolutely if, under the circumstances at the time, they are lawful military objectives. Of course their destruction must not cause excessive injury to civilians or civilian objects. Under some circumstances attacks on objects such as dams, dykes and nuclear electrical generating stations may result in distinct and substantial military advantage depending upon the military uses of such objects. Injury to civilians may be nonexistent or at least not excessive in relation to the military advantage anticipated. However, there are clearly special concerns that destruction of such objects may unleash forces causing widespread havoc and injury far beyond any military advantage secured or anticipated. Target selection of such objects is accordingly a matter of national decision at appropriate high policy levels.⁵⁴

43. The US Air Force Commander's Handbook states that:

Protocol I to the 1949 Geneva Conventions restricts attack against dams, dikes, and nuclear power stations, if "severe" civilian losses might result from flooding or radioactivity. While the United States is not yet a party to this protocol, such attacks may be politically sensitive. Consult the Staff Judge Advocate for the exact status and provisions of Protocol I and the exceptions to its rules (see also paragraph 3-8 [collateral damage]...).⁵⁵

44. The US Naval Handbook states that:

Dams, dikes, levees, and other installations, which if breached or destroyed would release flood waters or other forces dangerous to the civilian population, should not be bombarded if the potential for harm to noncombatants would be excessive in relation to the military advantage to be gained by bombardment. Conversely, installations containing such dangerous forces that are used by belligerents to shield or support military activities are not so protected.⁵⁶

45. The Annotated Supplement to the US Naval Handbook specifies that:

Attacks on [works and installations containing dangerous forces] are, of course, subject to the rule of proportionality. . . . The practice of nations has previously indicated great restraint in the attacks of dams and dikes, the breach of which would cause such severe civilian losses. . . . See, however, the U.K. destruction of the Ruhr dams during WW II. . . . For an example of U.S. application of this principle in the Vietnam conflict, see President Nixon's news conference of 27 July 1972.⁵⁷

⁵⁴ US, *Air Force Pamphlet* (1976), § 5-3(d).

⁵⁵ US, *Air Force Commander's Handbook* (1980), § 2-3(c).

⁵⁶ US, *Naval Handbook* (1995), § 8.5.1.7, see also § 8.1.2.

⁵⁷ US, *Annotated Supplement to the Naval Handbook* (1997), § 8.5.1.7, footnote 125.

46. The YPA Military Manual of the SFRY (FRY) restates the content of Article 56 AP I.⁵⁸

National Legislation

47. Argentina's Draft Code of Military Justice punishes any soldier who:

attacks . . . or carries out acts of hostility against works and installations containing dangerous forces when such attacks may cause the release of dangerous forces and consequent severe losses among the civilian population, unless such works and installations are being used in significant and direct support of military operations and if such attacks are the only feasible way to terminate such support.⁵⁹

48. Under Armenia's Penal Code, launching, during an armed conflict, an "attack against works or installations containing dangerous forces in the knowledge that such attack will cause loss of life to civilians or damage to civilian objects excessive in relation to the concrete and direct military advantage anticipated" constitutes a crime against the peace and security of mankind.⁶⁰

49. Australia's ICC (Consequential Amendments) Act incorporates in the list of war crimes in the Criminal Code grave breaches of AP I, including "attacks against works and installations containing dangerous forces resulting in excessive loss of life or injury to civilians".⁶¹

50. Australia's Geneva Conventions Act as amended provides that "a person who, in Australia or elsewhere, commits a grave breach . . . of [AP I] is guilty of an indictable offence".⁶²

51. Azerbaijan's Criminal Code provides that "directing attacks against installations which may cause severe damage to civilian objects or severe losses among the civilian population" constitutes a war crime in international and non-international armed conflicts.⁶³

52. The Criminal Code of Belarus provides that it is a war crime to "launch an attack against works and installations containing dangerous forces, in the knowledge that such attack will cause excessive loss of life, injury to civilians or damage to civilians".⁶⁴

53. Belgium's Law concerning the Repression of Grave Breaches of the Geneva Conventions and their Additional Protocols as amended provides that it is a crime under international law to launch:

an attack against works or installations containing dangerous forces, in the knowledge that such attack will cause loss of human life, injury to civilians or damage to civilian objects, which would be excessive in relation to the concrete and direct

⁵⁸ SFRY (FRY), *YPA Military Manual* (1988), § 76.

⁵⁹ Argentina, *Draft Code of Military Justice* (1998), Article 293, introducing a new Article 877(4) in the *Code of Military Justice as amended* (1951).

⁶⁰ Armenia, *Penal Code* (2003), Article 390.3(3).

⁶¹ Australia, *ICC (Consequential Amendments) Act* (2002), Schedule 1, § 268.97.

⁶² Australia, *Geneva Conventions Act as amended* (1957), Section 7(1).

⁶³ Azerbaijan, *Criminal Code* (1999), Article 116(12).

⁶⁴ Belarus, *Criminal Code* (1999), Article 136(12).

military advantage anticipated, without prejudice to the criminal nature of an attack whose harmful effects, even where proportionate to the military advantage anticipated, would be inconsistent with the principles of international law derived from established custom, from the principles of humanity and from the dictates of public conscience.⁶⁵

54. Under the Criminal Code of the Federation of Bosnia and Herzegovina, it is a war crime to order that “an attack be launched against . . . objects and facilities with dangerous power, such as dams, embankments and nuclear power stations” or to carry out such an attack.⁶⁶ The Criminal Code of the Republika Srpska contains the same provision.⁶⁷

55. Canada’s Geneva Conventions Act as amended provides that “every person who, whether within or outside Canada, commits a grave breach [of AP I] . . . is guilty of an indictable offence”.⁶⁸

56. Colombia’s Penal Code, under the heading “Attacks against works and installations containing dangerous forces”, provides for the punishment of anyone “who, at the occasion and during armed conflict, without any justification based on imperative military necessity, attacks dams, dykes, electrical or nuclear power stations or other installations containing dangerous forces, which are clearly marked with the conventional signs”. The Code provides for even harsher punishment in case such attack should lead to important losses or damage.⁶⁹

57. The Geneva Conventions and Additional Protocols Act of the Cook Islands punishes “any person who in the Cook Islands or elsewhere commits, or aids or abets or procures the commission by another person of, a grave breach . . . of [AP I]”.⁷⁰

58. Under Croatia’s Criminal Code, “the launching of an attack . . . against works and installations containing dangerous forces, such as dams, dykes and nuclear electrical generating stations” is a war crime.⁷¹

59. Cyprus’s AP I Act punishes “any person who, whatever his nationality, commits in the Republic or outside the Republic any grave breach of the provisions of the Protocol, or takes part or assists or incites another person in the commission of such a breach”.⁷²

60. The Czech Republic’s Criminal Code as amended provides for the punishment of “a commander who, contrary to the provisions of international law on means and methods of warfare, intentionally: . . . (c) destroys or damages a

⁶⁵ Belgium, *Law concerning the Repression of Grave Breaches of the Geneva Conventions and their Additional Protocols as amended* (1993), Article 1(3)(13).

⁶⁶ Bosnia and Herzegovina, Federation, *Criminal Code* (1998), Article 154(2).

⁶⁷ Bosnia and Herzegovina, Republika Srpska, *Criminal Code* (2000), Article 433(2).

⁶⁸ Canada, *Geneva Conventions Act as amended* (1985), Section 3(1).

⁶⁹ Colombia, *Penal Code* (2000), Article 157.

⁷⁰ Cook Islands, *Geneva Conventions and Additional Protocols Act* (2002), Section 5(1).

⁷¹ Croatia, *Criminal Code* (1997), Article 158(2). ⁷² Cyprus, *AP I Act* (1979), Section 4(1).

water dam, a nuclear power plant or a similar facility containing dangerous forces".⁷³

61. The Draft Amendments to the Penal Code of El Salvador provide for a prison sentence for "anyone who, in the context of an international or a non-international armed conflict, attacks works or installations containing dangerous forces, knowing that such attack will cause death or injury among the civilian population or damage to civilian objects". Works and installations containing dangerous forces are defined as "works and installations which, upon the release of their forces, cause severe losses among the civilian population, such as dams, dikes and nuclear electrical generating stations, among others".⁷⁴

62. Under Estonia's Penal Code, "attacking structures or installations containing dangerous forces" is a war crime.⁷⁵

63. Georgia's Criminal Code provides that "wilful breaches of norms of humanitarian law committed in an international or internal armed conflict, *i.e.* . . . (c) launching an attack against works and installations containing dangerous forces, in the knowledge that it will cause loss among civilians and damage of civilian objects" are punishable crimes against IHL.⁷⁶

64. Germany's Law Introducing the International Crimes Code provides for the punishment of anyone who, "in connection with an international armed conflict or with an armed conflict not of an international character, . . . directs an attack by military means against . . . works and installations containing dangerous forces".⁷⁷

65. Under Hungary's Criminal Code as amended, "a military commander who, in violation of the rules of international law concerning warfare, carries out military operations which result in heavy damage to . . . facilities containing dangerous forces" commits a war crime.⁷⁸

66. Ireland's Geneva Conventions Act as amended provides that grave breaches of AP I are punishable offences.⁷⁹ It adds that any "minor breach" of AP I, including violations of Article 56 AP I, as well as any "contravention" of AP II, including violations of Article 15 AP II, are also punishable offences.⁸⁰

67. Under Jordan's Draft Military Criminal Code, "attacks against works and installations containing dangerous forces in the knowledge that such attacks will cause widespread loss of life or injury among the civilian population and damage to civilian property" are considered war crimes.⁸¹

⁷³ Czech Republic, *Criminal Code as amended* (1961), Article 262(2)(c).

⁷⁴ El Salvador, *Draft Amendments to the Penal Code* (1998), Article entitled "Ataque a instalaciones que contengan fuerzas peligrosas".

⁷⁵ Estonia, *Penal Code* (2001), § 95. ⁷⁶ Georgia, *Criminal Code* (1999), Article 411(1)(c).

⁷⁷ Germany, *Law Introducing the International Crimes Code* (2002), Article 1, § 11(1)(2).

⁷⁸ Hungary, *Criminal Code as amended* (1978), Section 160(a).

⁷⁹ Ireland, *Geneva Conventions Act as amended* (1962), Section 3(1).

⁸⁰ Ireland, *Geneva Conventions Act as amended* (1962), Section 4(1) and (4).

⁸¹ Jordan, *Draft Military Criminal Code* (2000), Article 41(A)(11).

68. Under the Draft Amendments to the Code of Military Justice of Lebanon, “attacks against works or installations containing dangerous forces, committed with the knowledge that such attacks will cause excessive loss of lives or injuries to civilians or damage to civilian objects” are considered war crimes, provided that they are committed intentionally and cause death or serious injury to body or health.⁸²

69. Under Lithuania’s Criminal Code as amended, “a military attack against an object posing a great threat to the environment and people – a nuclear plant, a dam, a storage facility of hazardous substances or other similar object – knowing that it might have extremely grave consequences” constitutes a war crime.⁸³

70. Under the International Crimes Act of the Netherlands, it is a crime, during an international armed conflict, to commit

the following acts, when they are committed intentionally and in violation of the relevant provisions of Additional Protocol (I) and cause death or serious injury to body or health: . . . launching an attack against works or installations containing dangerous forces, in the knowledge that such an attack will cause excessive loss of life, injury to civilians or damage to civilian objects.⁸⁴

71. New Zealand’s Geneva Conventions Act as amended provides that “any person who in New Zealand or elsewhere commits, or aids or abets or procures the commission by another person of, a grave breach . . . of [AP I] is guilty of an indictable offence”.⁸⁵

72. Nicaragua’s Draft Penal Code punishes “anyone who, in the context of an international or a non-international armed conflict, attacks works or installations containing dangerous forces, knowing that such attack will cause death or injury among the civilian population or damage to civilian objects”. Works and installations containing dangerous forces are defined as “works and installations which, upon the release of their forces, cause severe losses among the civilian population, such as dams, dykes and nuclear electrical generating stations, among others”.⁸⁶

73. Niger’s Penal Code as amended contains a list of war crimes committed against persons and objects protected under the 1949 Geneva Conventions or their Additional Protocols of 1977, including “attacks against works and installations containing dangerous forces knowing that this attack will cause loss of human lives, injuries to civilians or damages to civilian objects which would be excessive with regard to the concrete or direct military advantage expected”.⁸⁷

74. Under Norway’s Military Penal Code as amended, “anyone who contravenes or is accessory to the contravention of provisions relating to the

⁸² Lebanon, *Draft Amendments to the Code of Military Justice* (1997), Article 146(11).

⁸³ Lithuania, *Criminal Code as amended* (1961), Article 337.

⁸⁴ Netherlands, *International Crimes Act* (2003), Article 5(2)(c)(iii).

⁸⁵ New Zealand, *Geneva Conventions Act as amended* (1958), Section 3(1).

⁸⁶ Nicaragua, *Draft Penal Code* (1999), Article 465.

⁸⁷ Niger, *Penal Code as amended* (1961), Article 208.3(13).

protection of persons or property laid down in . . . the two additional protocols to [the Geneva] Conventions . . . is liable to imprisonment".⁸⁸

75. Slovakia's Criminal Code as amended provides for the punishment of "a commander who, contrary to the provisions of international law on means and methods of warfare, intentionally: . . . (c) destroys or damages a dam, a nuclear power plant or a similar facility containing dangerous forces".⁸⁹

76. Under Slovenia's Penal Code, "an attack . . . on buildings and facilities, an attack on which would be particularly dangerous, such as dams, levees and nuclear power plants" is a war crime.⁹⁰

77. Spain's Penal Code provides for the punishment of:

anyone who, in the event of armed conflict, should . . . attack . . . those installations that contain dangerous forces when such actions may produce the liberation of these forces and cause, as a result, considerable losses among the civilian population, except in the case that such installations are regularly used in direct support of military operations and that such attacks are the only feasible means of ending such support.⁹¹

78. Sweden's Penal Code as amended provides that:

A person guilty of a serious violation of a treaty or agreement with a foreign power or an infraction of a generally recognised principle or tenet relating to international humanitarian law concerning armed conflicts shall be sentenced for crime against international law to imprisonment for at most four years. Serious violations shall be understood to include:

...

(5) initiating an attack against establishments or installations which enjoy special protection under international law.⁹²

79. Tajikistan's Criminal Code, in the section on "Serious violations of international humanitarian law", provides for the punishment of "wilful breaches of norms of international humanitarian law committed in an international or non-international armed conflict, i.e. . . . launching an attack against works and installations containing dangerous forces".⁹³

80. The UK Geneva Conventions Act as amended punishes "any person, whatever his nationality, who, whether in or outside the United Kingdom, commits, or aids, abets or procures the commission by any other person of, a grave breach of . . . [AP I]".⁹⁴

81. According to the Penal Code as amended of the SFRY (FRY), "the launching of an attack on . . . facilities and installations containing dangerous forces

⁸⁸ Norway, *Military Penal Code as amended* (1902), § 108(b).

⁸⁹ Slovakia, *Criminal Code as amended* (1961), Article 262(2)(c).

⁹⁰ Slovenia, *Penal Code* (1994), Article 374(2).

⁹¹ Spain, *Penal Code* (1995), Article 613(1)(d).

⁹² Sweden, *Penal Code as amended* (1962), Chapter 22, § 6.

⁹³ Tajikistan, *Criminal Code* (1998), Article 403(1).

⁹⁴ UK, *Geneva Conventions Act as amended* (1957), Section 1(1).

including dams, dykes and nuclear electrical generating stations" is a war crime.⁹⁵

82. Zimbabwe's Geneva Conventions Act as amended punishes "any person, whatever his nationality, who, whether in or outside Zimbabwe, commits any such grave breach of . . . [AP I]".⁹⁶

National Case-law

83. No practice was found.

Other National Practice

84. According to the Report on the Practice of Angola, during the civil war in Angola both governmental forces and UNITA have violated Article 15 AP II by treating dams as military targets.⁹⁷

85. According to the Report on the Practice of Botswana, Botswana will comply with Article 56 AP I in the event of an armed conflict.⁹⁸ The report further recalls that Botswana has ratified AP II and states, on the basis of an interview with a retired army general, that the armed forces of Botswana would comply with the obligations under Article 15 AP II if the situation arose.⁹⁹

86. The Report on the Practice of Brazil states that Brazil has ratified AP I and AP II and, therefore, "the protection afforded by the Protocols to certain works and installations is binding for Brazil".¹⁰⁰

87. According to the Report on the Practice of China, any attack intended to destroy the banks or dams of a river with the aim of using the dangerous forces contained therein to gain a military advantage should be condemned. The report recounts how, in 1938, the Nationalist government decided to bomb a dam on the Yellow River to use the water to halt Japanese offensives. Although the Japanese troops were forced to retreat, the floods caused many casualties and severe damage among civilians. The Communist government subsequently condemned this method of warfare.¹⁰¹

88. In reaction to an article in the press, the Office of the Human Rights Adviser of the Presidency of the Colombian Republic stated that:

In the example of the dam cited by the author of the article in *La Prensa*, it is very clear that government troops may attack it in order to dislodge the guerrillas. However, the crux of the matter is how this should be done to ensure that the attack, which is otherwise lawful, does not cause superfluous injury or unnecessary suffering. Obviously, it would not occur to any sensible military officer to bomb

⁹⁵ SFRY (FRY), *Penal Code as amended* (1976), Article 142(2).

⁹⁶ Zimbabwe, *Geneva Conventions Act as amended* (1981), Section 3(1).

⁹⁷ Report on the Practice of Angola, 1998, Chapter 1.9.

⁹⁸ Report on the Practice of Botswana, 1998, Chapter 1.9.

⁹⁹ Report on the Practice of Botswana, 1998, Interview with a retired army general, Answers to additional questions on Chapter 1.9.

¹⁰⁰ Report on the Practice of Brazil, 1997, Chapter 1.9.

¹⁰¹ Report on the Practice of China, 1997, Chapter 1.9.

the position with high-power explosives which would destroy the dam wall and cause a deluge that would sweep away the inhabitants of the basin of the tributary feeding the dam.¹⁰²

89. According to the Report on the Practice of Egypt, Egypt believes that works and installations containing dangerous forces, such as dams, dykes and power stations, are protected as long as they are used for peaceful purposes.¹⁰³

90. According to the Report on the Practice of El Salvador, El Salvador deems itself bound by AP II, and specifically by the prohibition on attacks targeting dams, dykes and nuclear electrical generating stations, even when these structures are military objectives. In the case of non-international armed conflicts, the report, on the basis of Article 15 AP II, mentions the two main requirements for the prohibition of attacks on works or installations containing dangerous forces, namely the release of dangerous forces and the consequent severe losses among the civilian population.¹⁰⁴

91. In 1977, during a debate in the Sixth Committee of the UN General Assembly, Finland noted that Article 56 AP I contained important and timely principles that should be respected under all circumstances. However, it found the text tangled with ambiguities owing to concessions made to military requirements.¹⁰⁵

92. In 1981, in reply to a question in parliament on the legal status of nuclear power plants, the German government stated that these plants were only used for peaceful purposes in Germany and therefore enjoyed the status of civilian objects and were protected as such. The government stated that this protection was underlined in Article 56 AP I.¹⁰⁶

93. The Report on the Practice of Germany states that:

Official correspondence among the responsible ministries reveals that nuclear power plants are seen to be protected under customary international law, insofar as:

- nuclear power plants are civilian objects
- no party to an armed conflict has an unlimited right in its choice of means of warfare
- every attack has to be seen in the light of the proportionality principle and this principle also has to be applied in cases where the nuclear power plant is used for military purposes.¹⁰⁷

¹⁰² Colombia, Presidency, Office of the Human Rights Adviser, Comments on the article published in *La Prensa* by Pablo E. Victoria on AP II, undated, § 5, reprinted in Congressional record concerning the enactment of Law 171 of 16 December 1994.

¹⁰³ Report on the Practice of Egypt, 1997, Chapter 1.9.

¹⁰⁴ Report on the Practice of El Salvador, 1997, Chapter 1.9.

¹⁰⁵ Finland, Statement before the Sixth Committee of the UN General Assembly, UN Doc. A/C.6/SR.17, 13 October 1977, § 19.

¹⁰⁶ Germany, Lower House of Parliament, Answer by the government to a written question, *BT-Drucksache* 9/327, 10 April 1981, p. 3.

¹⁰⁷ Report on the Practice of Germany, 1997, Chapter 1.9 (source not quoted).

94. According to the Report on the Practice of Indonesia, Indonesia considers that installations containing dangerous forces cannot be attacked as long as they are not used for military purposes.¹⁰⁸

95. The Report on the Practice of Iran refers to a military communiqué according to which the Iranian Air Force had bombarded the power station of Ducan dam in reprisal for Iraqi attacks on Iranian economic installations.¹⁰⁹

The report notes that, in response to Iraqi and foreign press reports, Iran denied that it had attacked a nuclear plant in Iraq during the Iran–Iraq War. Instead, Iran objected to Iraqi attacks on the Bushehr nuclear plant. According to the report, Iran considers the protection of nuclear plants to be part of customary international law and attacks on buildings containing nuclear energy to be war crimes.¹¹⁰

96. In 1996, in a letter to the UN Secretary-General, Iraq reported that “a number of United States warplanes dropped 10 heat flares in the Saddam Dam area of Ninawa Governorate in northern Iraq” and requested the Secretary-General “to intervene with the Government of the United States with a view to halting these acts of aggression against Iraqi civilian installations committed in violation of the Charter of the United Nations and international law”.¹¹¹

97. According to the Report on the Practice of Iraq, “the duty to refrain from striking installations containing dangerous forces is considered an important principle, as great dangers may result as a consequence of striking them”.¹¹²

The report refers to a letter from the President of Iraq to the World Association for Peace and Life against Nuclear War in 1983 which stated that “Iraq believes that an attack directed against peaceful nuclear installations by conventional weapons is tantamount to an attack by nuclear weapons, as the consequences of such an attack lead to the danger of exposure to radiation”.¹¹³

98. According to the Report on the Practice of Israel, decisions concerning attacks on installations containing dangerous forces are mainly based on whether the installations serve a direct or indirect military advantage and on the principle of proportionality. The report points out that Israel has not concluded any bilateral or multilateral agreements with neighbouring States concerning works and installations containing dangerous forces, although one possible exception could be paragraph 3 of the “Grapes of Wrath Understanding” of 26 June 1996, which prohibits attacks against “civilian populated areas, industrial and electrical installations”. The report further notes that the potential result of an attack on such works or installations on a civilian population or object

¹⁰⁸ Report on the Practice of Indonesia, 1997, Chapter 1.9.

¹⁰⁹ Report on the Practice of Iran, 1997, Chapter 1.9, referring to Military Communiqué No. 2234; see also Military Communiqué No. 3268.

¹¹⁰ Report on the Practice of Iran, 1997, Chapters 1.9 and 6.5.

¹¹¹ Iraq, Letter dated 14 August 1996 to the UN Secretary-General, UN Doc. S/1996/657, 14 August 1996.

¹¹² Report on the Practice of Iraq, 1998, Chapter 1.9.

¹¹³ Report on the Practice of Iraq, 1998, Chapter 1.9, referring to Letter dated 26 June 1983 from the President of the Republic of Iraq to the World Association for Peace and Life against Nuclear War.

will be factored in from the pre-attack planning phase. The attack will not be launched if the damage, loss or injury to civilians is expected to be excessive in relation to the possible military advantage.¹¹⁴

99. The Report on the Practice of Japan notes that “there are no laws and regulations, judicial precedent nor explanation at the Diet” with respect to the protection of works and installations containing dangerous forces.¹¹⁵

100. The Report on the Practice of Jordan finds no evidence of attacks by Jordan on works and installations containing dangerous forces and concludes that a prohibition on doing so exists.¹¹⁶

101. The Report on the Practice of Pakistan notes that Pakistan condemned the Israeli attack on a nuclear reactor near Baghdad. The report further points out that, in response to rumours that India was planning an attack on Pakistan’s nuclear facilities, the Pakistani government took “a very stern position” on this subject. It also notes that, during the wars of 1965 and 1971, the Pakistani armed forces “refrained from striking against installations containing dangerous forces”. The report concludes, therefore, that Pakistan’s *opinio juris* favours “the protection of installations containing dangerous forces during conflict”.¹¹⁷

102. In 1986, in reply to a question in the House of Lords, the UK Minister of State for Defence Procurement declared that “existing laws of war already impose restrictions on attacks on [nuclear] installations which would pose a particular threat to civilian populations and require a balance to be struck between the military advantage and the danger of collateral damage to the civilian population”.¹¹⁸

103. In 1991, in reply to a question in the House of Lords concerning “the position in international law relating to the use of ‘conventional’ weapons against (a) nuclear facilities, (b) chemical weapons plants and dumps, and (c) petrochemical enterprises situated in towns or cities, when such use may release radioactivity, toxic chemicals, or firestorms, on a scale comparable to the use of nuclear, chemical, and other weapons deemed to be weapons of mass destruction,” the UK Minister of State, FCO, stated that:

International law requires that, in planning an attack on any military objective, account is taken of certain principles. These include the principles that civilian losses, whether of life or property, should be avoided or minimised so far as practicable, and that an attack should not be launched if it can be expected to cause civilian losses which would be disproportionate to the military advantage expected from the attack as a whole.¹¹⁹

¹¹⁴ Report on the Practice of Israel, 1997, Chapter 1.9.

¹¹⁵ Report on the Practice of Japan, 1998, Chapter 1.9.

¹¹⁶ Report on the Practice of Jordan, 1997, Chapter 1.9.

¹¹⁷ Report on the Practice of Pakistan, 1998, Chapter 1.9.

¹¹⁸ UK, House of Lords, Statement by the Minister of State for Defence Procurement, *Hansard*, 10 June 1986, Vol. 476, col. 112.

¹¹⁹ UK, House of Lords, Statement of the Minister of State, FCO, *Hansard*, 4 February 1991, Vol. 525, Written Answers, col. 37.

104. In 1993, in reply to a question in the House of Lords as to whether the bombing of nuclear facilities in Iraq was concordant with international law, the UK Minister of State, FCO, wrote that “the then Prime Minister condemned the Israeli bombing of Iraqi nuclear facilities as a grave breach of international law”.¹²⁰

105. In 1991, the UK Secretary of State for Defence, responding to questions in the Defence Committee concerning the UK’s participation in bombing nuclear reactors during the Gulf War, declared that the attack was undertaken “with the very greatest care and after the most detailed planning to minimise the risk of any contamination or the risk of any radiation spreading outside the site”. He went on to say that he was “not aware of any evidence that there was a risk of any contamination outside the site which would tend to suggest that those were very precise and very carefully planned attacks”.¹²¹

106. It is reported that during the Korean War, the US air force regularly targeted dams in order to flood transport routes and other communications lines.¹²²

107. It is reported that during the Vietnam War in 1972, the US planned to attack a hydroelectric plant at Lang Chi, which was estimated to supply up to 75 per cent of Hanoi’s industrial and defence needs. If the dam at the site were breached, as many as 23,000 civilians could have died in the resultant flooding. The US President’s military advisers estimated that if laser-guided bombs were used, there was a 90 per cent chance of the mission being accomplished without breaching the dam. On that basis, the US President authorised the attack, which destroyed the electricity generating plant without breaching the dam.¹²³

108. In 1987, the Deputy Legal Adviser of the US Department of State stated that “we do not support the provisions of Article 56 of AP I, concerning dams, dykes, and nuclear power stations . . . nor do we consider them to be customary law”.¹²⁴ With respect to the apparent inconsistency between the US rejection of the provisions in Article 56 of AP I and the simultaneous acceptance of Article 15 of AP II, he stated that:

The United States military based its objections on a pragmatic, real-world estimation of the difference between the two situations. The military perceives that in international conflicts, many situations may arise where it is important to attack

¹²⁰ UK, House of Lords, Reply of the Minister of State, FCO, *Hansard*, 31 March 1993, Vol. 544, Written Answers, col. 53.

¹²¹ UK, Statement by Secretary of Defence before the Defence Committee, Minutes of evidence, 6 March 1991, Report on UK Practice, 1997, Chapter 1.9.

¹²² Robert F. Futrell, *The United States Air Force in Korea 1950–1953*, Office of Air Force History, United States Air Force, Washington, D.C., Revised edition, 1983, pp. 668–669.

¹²³ W. Hays Parks, “Air War and the Law of War”, *The Air Force Law Review*, Vol. 32, 1990, pp. 168–169.

¹²⁴ US, Remarks of Michael J. Matheson, Deputy Legal Adviser, US Department of State, The Sixth Annual American Red Cross–Washington College of Law Conference on International Humanitarian Law: A Workshop on Customary International Law and the 1977 Protocols Additional to the 1949 Geneva Conventions, *American University Journal of International Law and Policy*, Vol. 2, 1987, p. 427.

and destroy parts of an electric power grid, such as a nuclear or hydroelectric generating station. In internal conflicts, on the other hand, such a significant real-world need will not exist. Preserving the military option in international conflicts where such facilities are more likely to become an object of military attack, therefore, is very important.¹²⁵

Lastly, the Deputy Legal Adviser stressed that:

All other rules of war designed for the protection of civilian populations, such as the rule of proportionality and the rule of reasonable precautions and advanced warning, govern these attacks [against works and installations containing dangerous forces]. The United States maintains the position that it cannot accept the almost total prohibition on such attacks contained in article 56. In any case, in situations where the United States military targets a part of the power grid connected to a hydroelectric or nuclear facility, the United States would have to consider the possible effects on the civilian population and strive to obtain its military objective in ways that would not inflict drastic effects on that population.¹²⁶

109. In 1987, the Legal Adviser of the US Department of State stated that:

Article 56 of Protocol I is designed to protect dams, dikes, and nuclear power plants against attacks that could result in "severe" civilian losses. As its negotiating history indicates, this article would protect objects that would be considered legitimate military objectives under customary international law. Attacks on such military objectives would be prohibited if "severe" civilian casualties might result from flooding or release of radiation. The negotiating history throws little light on what level of civilian losses would be "severe". It is clear, however, that under this article, civilian losses are not to be balanced against the military value of the target. If severe losses would result, then the attack is forbidden, no matter how important the target. It also appears that article 56 forbids any attack that raises the possibility of severe civilian losses, even though considerable care is taken to avoid them.

Paragraph 2 of article 56 provides for the termination of protection, but only in limited circumstances. If it is once conceded that a particular dam, dike, or nuclear power station is entitled to protection under article 56, that protection can only end if it is used "in regular, significant, and direct support of military operations". In the case of nuclear power plants, this support must be in the form of "electric power". The negotiating history refers to electric power for "production of arms, ammunition, and military equipment" as removing a power plant's protection, but not "production of civilian goods which may also be used by the armed forces". The Diplomatic Conference thus neglected the nature of modern integrated power grids, where it is impossible to say that electricity from a particular plant goes to

¹²⁵ US, Remarks of Michael J. Matheson, Deputy Legal Adviser, US Department of State, The Sixth Annual American Red Cross-Washington College of Law Conference on International Humanitarian Law: A Workshop on Customary International Law and the 1977 Protocols Additional to the 1949 Geneva Conventions, *American University Journal of International Law and Policy*, Vol. 2, 1987, p. 434.

¹²⁶ US, Remarks of Michael J. Matheson, Deputy Legal Adviser, US Department of State, The Sixth Annual American Red Cross-Washington College of Law Conference on International Humanitarian Law: A Workshop on Customary International Law and the 1977 Protocols Additional to the 1949 Geneva Conventions, *American University Journal of International Law and Policy*, Vol. 2, 1987, p. 434.

a particular customer. It is also unreasonable for article 56 to terminate the protection of nuclear power plants only on the basis of the use of their electric power. Under this provision, a nuclear power plant that is being used to produce plutonium for nuclear weapons purposes would not lose its protection.¹²⁷

110. In 1991, in response to an ICRC memorandum on the applicability of IHL in the Gulf region, the US Department of the Army stated that:

While the U.S. shares the concern expressed in Article 56 of Protocol I regarding carrying out an attack against a target that may result in release of 'dangerous forces', targeting decisions regarding the attack of such facilities are policy decisions that must be made based upon all relevant factors. . . . The U.S. does not recognize a protected status for enemy air and ground defenses placed in proximity to structures containing such 'dangerous forces'.¹²⁸

111. In 1991, in a report submitted to the UN Security Council on operations in the Gulf War, the US stated that nuclear storage facilities were considered to be a legitimate military target.¹²⁹

112. During the Gulf War, the US air force struck research reactors that were under IAEA safeguards. US officials declared that the US was not bound by any obligation prohibiting attacks on nuclear research facilities.¹³⁰ A press release referred to official statements recalling that the US had signed but not ratified AP I and, as a result, had made no commitments not to attack nuclear facilities.¹³¹

113. According to the Report on US Practice, the US does not apply special restrictions on attacks against works or installations containing dangerous forces. The report states that "it is the *opinio juris* of the United States that attacks are governed by the same legal criteria as attacks against any other military targets. In non-international armed conflicts, the United States regards Article 15 of Additional Protocol II as establishing an appropriate standard."¹³²

114. The Report on the Practice of the SFRY (FRY) states that:

It does not appear that the question of violations of norms relevant to protection of works and installations containing dangerous forces had been raised during armed conflicts in Slovenia and Croatia involving YPA. There was no information on such incidents, nor was the issue a matter of dispute between the parties concerned.

¹²⁷ US, Remarks of Judge Abraham D. Sofaer, Legal Adviser, US Department of State, The Sixth Annual American Red Cross-Washington College of Law Conference on International Humanitarian Law: A Workshop on Customary Law and the 1977 Protocols Additional to the 1949 Geneva Conventions, *American University Journal of International Law and Policy*, Vol. 2, 1987, pp. 468-469.

¹²⁸ US, Letter from the Department of the Army to the legal adviser of the US Army forces deployed in the Gulf region, 11 January 1991, § 8(Q), Report on US Practice, 1997, Chapter 1.9.

¹²⁹ US, Letter dated 8 February 1991 to the President of the UN Security Council, UN Doc. S/22216, 13 February 1991, p. 1.

¹³⁰ Report on US Practice, 1997, Chapter 1.9.

¹³¹ Report on US Practice, 1997, Chapter 1.9.

¹³² Report on US Practice, 1997, Chapter 1.9.

The report concludes that the existence of an *opinio juris* in favour of protection from attacks of works or installations containing dangerous forces is "obvious".¹³³

115. The Report on the Practice of Zimbabwe considers the prohibition on attacks against works and installations containing dangerous forces to be part of customary international law.¹³⁴

III. Practice of International Organisations and Conferences

United Nations

116. In a resolution adopted in 1983 on armed Israeli aggression against Iraqi nuclear installations, the UN General Assembly noted that "serious radiological effects would result from an armed attack with conventional weapons on a nuclear installation, which could also lead to the initiation of radiological warfare". The General Assembly considered that "any threat to attack and destroy nuclear facilities in Iraq and in other countries constitutes a violation of the Charter of the United Nations" and reiterated its demand that "Israel withdraw forthwith its threat to attack and destroy nuclear facilities in Iraq and other countries". The General Assembly also reaffirmed "its call for the continuation of the consideration, at the international level, of legal measures to prohibit armed attacks against nuclear facilities, and threats thereof, as a contribution to promoting and ensuring the safe development of nuclear energy for peaceful purposes".¹³⁵

117. In a resolution on Israeli nuclear armament adopted in 1983, the UN General Assembly reiterated "its condemnation of the Israeli threat, in violation of the Charter of the United Nations, to repeat its armed attack on peaceful nuclear facilities in Iraq and in other countries".¹³⁶

118. In several resolutions between 1987 and 1990, the IAEA stated that it considered an attack against nuclear installations used for pacific ends to be contrary to international law.¹³⁷

Other International Organisations

119. No practice was found.

International Conferences

120. In his report to Committee III of the CDDH, the rapporteur of the working group which elaborated Article 49 of draft AP I (now Article 56) stated that:

¹³³ Report on the Practice of the SFRY (FRY), 1997, Chapter 1.9.

¹³⁴ Report on the Practice of Zimbabwe, 1998, Chapter 1.8.

¹³⁵ UN General Assembly, Res. 38/9, 10 November 1983, preamble and §§ 3, 4 and 6.

¹³⁶ UN General Assembly, Res. 38/69, 15 December 1983, § 4.

¹³⁷ IAEA, Res. GC(XXXI)/RES/475, 25 September 1987, preamble; Res. GC(XXIX)/RES/444, 27 September 1985, § 2; Res. GC(XXXIV)/RES/533, 21 September 1990, § 3.

The rapporteur wishes to emphasize that article 49 provides a special protection to these objects and objectives which, although important, is only one of a number of layers of protection. First, if a dam, dyke, or nuclear power station does not qualify as a legitimate military objective under article 47, it is a civilian object and cannot be attacked. Second, if it does qualify as a military objective or if it has military objectives in its vicinity, it receives special protection under this article. Third, if, pursuant to the terms of this article, it may be attacked or a military objective in its vicinity may be attacked, such attack is still subject to all the other relevant rules of this Protocol and general international law; in particular, the dam, dyke, or nuclear power plant or other military objective could not be attacked if such attack would be likely to cause civilian losses excessive in relation to the anticipated military advantage, as provided in article 50. In the case of a dam or dyke, for example, where a great many people would be killed and much damage done by its destruction, immunity would exist unless the military reasons for destruction in a particular case were of an extraordinarily vital sort.

...

Additionally, it must always be recognized that an attack is not justified unless the military reasons for the destruction in a particular case are of such extraordinary and vital interest as to outweigh the severe losses which may be anticipated. Nevertheless, it should be noted that some representatives remain concerned about the problems that may arise from the use of dykes for roadways.

...

In the view of the Rapporteur, the second sentence of paragraph 3 is one of the most important contributions of this article. Even when attack on one of these objects is justified under all the applicable rules, this provision requires the combatants to take "all practical precautions" to avoid releasing the dangerous forces. Given the array of arms available to modern armies, this requirement should provide real protection against the catastrophic release of these forces. Finally, it should be noted that some representatives requested the inclusion in this article of special protection for oil rigs, petroleum storage facilities, and oil refineries. It was agreed that these were not objects containing dangerous forces within the meaning of this article and that, if these objects are to be given any special protection by the Protocol, it should be done by another article, perhaps by a special article for that purpose.¹³⁸

121. Article 56 AP I is limited to three specific types of works and installations containing dangerous forces, namely dams, dykes and nuclear electrical generating stations. At the CDDH, 14 Arab States submitted an amendment to replace the word "namely" in Article 49(1) of draft AP I (now Article 56(1)) by the words "such as".¹³⁹ This amendment was not accepted by the working group which elaborated Article 49 of draft AP I (now Article 56) because, as the rapporteur of the working group stated, "it was only when a decision was taken to limit the special protection of the article to dams, dykes, nuclear

¹³⁸ CDDH, Report to the Third Committee on the work of the working group submitted by the Rapporteur, *Official Records*, Vol. XV, CDDH/III/264, 13 March 1975, pp. 350–352.

¹³⁹ CDDH, Proposed amendment to Article 49 of Draft Protocol I submitted by Egypt, Iraq, Jordan, Kuwait, Lebanon, Libya, Mauritania, Morocco, Qatar, Sudan, Syria, UAE, Democratic Yemen and Yemen, *Official Records*, Vol. III, CDDH/III/76 and Add. 1, 21 March 1974, p. 224.

power stations, and other military objectives in the vicinity of these objects that it was possible to produce a generally acceptable text".¹⁴⁰

IV. Practice of International Judicial and Quasi-judicial Bodies

122. No practice was found.

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

123. To fulfil its task of disseminating IHL, the ICRC has delegates around the world teaching armed and security forces the rule that works and installations containing dangerous forces are specifically protected objects which may not be attacked except "a) if it provides regular, significant and direct support of military operations; b) if that support is other than its normal function; c) and if an attack against that work or installation is the only way to terminate such support".¹⁴¹ Furthermore, "attacks of works or installations containing dangerous forces in the knowledge that such attack will cause excessive civilian damage" constitutes a grave breach of the law of war.¹⁴²

124. In a Memorandum on the Applicability of International Humanitarian Law sent in 1990 to all States party to the Geneva Conventions in the context of the Gulf War, the ICRC invited:

States which are not party to [the] 1977 [Additional] Protocol I to respect, in the event of armed conflict, the following articles of the Protocol, which stem from the basic principle of civilian immunity from attack: . . . Article 56: protection of works and installations containing dangerous forces.¹⁴³

125. In 1994, in a Memorandum on Respect for International Humanitarian Law in Angola, the ICRC reminded the parties that "installations containing dangerous forces, such as dams and dykes, shall not be made the object of attack, if such attack may cause the release of dangerous forces and consequent severe losses among the civilian population".¹⁴⁴

126. In a working paper on war crimes submitted in 1997 to the Preparatory Committee for the Establishment of an International Criminal Court, the ICRC, emphasising the customary law nature of most grave breaches of AP I,

¹⁴⁰ CDDH, Report to the Third Committee on the work of the working group submitted by the Rapporteur, *Official Records*, Vol. XV, CDDH/III/264, 13 March 1975, p. 350.

¹⁴¹ Frédéric de Mulinen, *Handbook on the Law of War for Armed Forces*, ICRC, Geneva, 1987, §§ 107, 219 and 227.

¹⁴² Frédéric de Mulinen, *Handbook on the Law of War for Armed Forces*, ICRC, Geneva, 1987, § 778(f).

¹⁴³ ICRC, Memorandum on the Applicability of International Humanitarian Law, 14 December 1990, § II, *IRRC*, No. 280, 1991, p. 25.

¹⁴⁴ ICRC, Memorandum on Respect for International Humanitarian Law in Angola, 8 June 1994, § II, *IRRC*, No. 320, 1997, p. 504.

listed, *inter alia*, the following as a war crime to be subject to the jurisdiction of the Court:

Launching an attack against works and installations containing dangerous forces in the knowledge that such attack will cause excessive loss of life, injury to civilians or damage to civilian objects, which is excessive in relation to the concrete and direct military advantage anticipated, when committed wilfully, and causing death or serious injury to body or health.¹⁴⁵

127. In 1997, in a statement before the Preparatory Committee for the Establishment of an International Criminal Court, the ICRC noted that certain war crimes committed in international armed conflict were not included in the list of war crimes in the draft ICC Statute and reiterated that most of the provisions of AP I on grave breaches reflected customary law.¹⁴⁶

VI. Other Practice

128. In 1991, a senior military officer of an armed opposition group confirmed to the ICRC that he had ordered the placing of loads of explosives on a dam.¹⁴⁷ In subsequent contacts with the ICRC, the armed opposition group threatened to destroy the dam.¹⁴⁸

Placement of military objectives near works and installations containing dangerous forces

I. Treaties and Other Instruments

Treaties

129. Article 56(5) AP I states that:

The Parties to the conflict shall endeavour to avoid locating military objectives in the vicinity of [works or installations containing dangerous forces]. Nevertheless, installations erected for the sole purpose of defending the protected works or installations from attack are permissible and shall not themselves be made the object of attack, provided that they are not used in hostilities except for defensive actions necessary to respond to attacks against the protected works or installations and that their armament is limited to weapons capable only of repelling hostile action against the protected works or installations.

Article 56 AP I was adopted by consensus.¹⁴⁹

¹⁴⁵ ICRC, Working paper on war crimes submitted to the Preparatory Committee for the Establishment of an International Criminal Court, 14 February 1997, § 1(b)(iii).

¹⁴⁶ ICRC, Statement before the Preparatory Committee for the Establishment of an International Criminal Court, 8 December 1997.

¹⁴⁷ ICRC archive document. ¹⁴⁸ ICRC archive document.

¹⁴⁹ CDDH, *Official Records*, Vol. VI, CDDH/SR.42, 27 May 1977, p. 209.

Other Instruments

130. Paragraph 6 of the 1991 Memorandum of Understanding on the Application of IHL between Croatia and the SFRY states that hostilities shall be conducted in compliance with Article 56 AP I.

131. Paragraph 2.5 of the 1992 Agreement on the Application of IHL between the Parties to the Conflict in Bosnia and Herzegovina states that hostilities shall be conducted in compliance with Article 56 AP I.

*II. National Practice**Military Manuals*

132. Australia's Commanders' Guide provides that:

While parties to a conflict are required to avoid locating military objectives in the vicinity of such protected works and installations, they are nevertheless permitted to erect such emplacements as may be necessary for the defence of the protected installations. These emplacements shall be immune from attack provided they are not used in hostilities except in defence of the protected works and installations. Armament must be limited to weapons capable only of repelling hostile attacks against the protected works or installations in question.¹⁵⁰

133. Australia's Defence Force Manual provides that:

Defensive weapons systems may be erected to protect works or installations from attack. These systems may only be used for the limited purpose for which they are intended. The erection of such defence facilities is not without danger and could lead to the work or installation losing its protection.¹⁵¹

134. Cameroon's Instructors' Manual states that installations containing dangerous forces "may be protected by weapons destined to ensure their defence in case of attack".¹⁵²

135. Canada's LOAC Manual provides that "the parties to a conflict should avoid locating legitimate targets in the vicinity of dams, dykes and nuclear electrical generation stations. Weapons co-located for the sole purpose of defending such installations are permissible."¹⁵³

136. Germany's Military Manual states that "military objectives shall not be located in the vicinity of works and installations containing dangerous forces unless it is necessary for the defence of these works".¹⁵⁴

137. Kenya's LOAC Manual provides that "the defensive armament of a work or installation containing dangerous forces must be limited to weapons capable of repelling hostile action against that work or installation".¹⁵⁵

¹⁵⁰ Australia, *Commanders' Guide* (1994), § 963.

¹⁵¹ Australia, *Defence Force Manual* (1994), § 938.

¹⁵² Cameroon, *Instructors' Manual* (1992), p. 20, § 226.

¹⁵³ Canada, *LOAC Manual* (1999), p. 4-8, § 75.

¹⁵⁴ Germany, *Military Manual* (1992), § 468.

¹⁵⁵ Kenya, *LOAC Manual* (1997), Précis No. 2, p. 13.

138. Madagascar's Military Manual states that "defences erected for the sole purpose of defending works or installations containing dangerous forces against attack are permissible".¹⁵⁶

139. The Military Manual of the Netherlands restates the content of Article 56(5) AP I.¹⁵⁷

140. New Zealand's Military Manual provides that:

While parties to a conflict are required to avoid locating military objectives in the vicinity of such protected works or installations [containing dangerous forces], they are nevertheless permitted to erect such emplacements as may be necessary for the defence of the protected installations. These emplacements shall be immune from attack, provided they are not used in hostilities except in defence of the protected work or installations. Their armament must be limited to weapons capable only of repelling hostile attacks against the protected works or installations in question.¹⁵⁸

141. Spain's LOAC Manual provides that "installations and armaments that are necessary to defend [works or installations containing dangerous forces] are permissible, provided they are not used in the hostilities".¹⁵⁹

142. The YPA Military Manual of the SFRY (FRY) restates the content of Article 56(5) AP I.¹⁶⁰

National Legislation

143. Under Ireland's Geneva Conventions Act as amended, any "minor breach" of AP I, including violations of Article 56(5) AP I, is a punishable offence.¹⁶¹

144. Under Norway's Military Penal Code as amended, "anyone who contravenes or is accessory to the contravention of provisions relating to the protection of persons or property laid down in . . . the two additional protocols to [the Geneva] Conventions . . . is liable to imprisonment".¹⁶²

National Case-law

145. No practice was found.

Other National Practice

146. In 1983, questions were raised in the German parliament concerning the planned construction of an ammunition depot 7 kilometres from a nuclear power plant. The government responded that these plants were granted the status of civilian objects under international law and were to be protected as

¹⁵⁶ Madagascar, *Military Manual* (1994), Fiche No. 3-SO, § H.

¹⁵⁷ Netherlands, *Military Manual* (1993), p. V-10, § 8.

¹⁵⁸ New Zealand, *Military Manual* (1992), §§ 521.4 and 633.4.

¹⁵⁹ Spain, *LOAC Manual* (1996), Vol. I, § 4.5.b.(2)(b).

¹⁶⁰ SFRY (FRY), *YPA Military Manual* (1988), § 76.

¹⁶¹ Ireland, *Geneva Conventions Act as amended* (1962), Section 4(1) and (4).

¹⁶² Norway, *Military Penal Code as amended* (1902), § 108(b).

such. The distance between the depot and the plant was construed as being in compliance with international law.¹⁶³

147. According to the Report on the Practice of Israel, the IDF, as a policy, does not establish military bases or positions in the vicinity of works or installations containing dangerous forces. The report considers that structures necessary for the protection of a facility constitute an exception to the prohibition on locating military bases or positions in the vicinity of works or installations containing dangerous forces.¹⁶⁴

148. The Report on the Practice of the Netherlands notes that no internal legislation has been adopted to implement the required separation between military structures and protected works and installations.¹⁶⁵

149. In 1991, in response to an ICRC memorandum on the applicability of IHL in the Gulf region, the US Department of the Army stated that “military objectives may not be placed in proximity to structures containing ‘dangerous forces’ in order to shield those military objectives from attack”.¹⁶⁶

III. Practice of International Organisations and Conferences

150. No practice was found.

IV. Practice of International Judicial and Quasi-judicial Bodies

151. No practice was found.

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

152. To fulfil its task of disseminating IHL, the ICRC has delegates around the world teaching armed and security forces that:

Defences erected for the sole purpose of defending a work or installation containing dangerous forces from attack are permitted. The defensive armament of a work or installation containing dangerous forces must be limited to weapons only capable of repelling hostile action against that work or installation.¹⁶⁷

VI. Other Practice

153. No practice was found.

¹⁶³ Germany, Lower House of Parliament, Answer by the government to a written question, *BT-Drucksache* 10/101, 27 May 1983, p. 14.

¹⁶⁴ Report on the Practice of Israel, 1997, Chapter 1.7.

¹⁶⁵ Report on the Practice of the Netherlands, 1997, Chapter 1.9.

¹⁶⁶ US, Letter from the Department of the Army to the legal adviser of the US Army forces deployed in the Gulf region, 11 January 1991, § 8(Q), Report on US Practice, 1997, Chapter 1.9.

¹⁶⁷ Frédéric de Mulinen, *Handbook on the Law of War for Armed Forces*, ICRC, Geneva, 1987, §§ 110 and 111.

THE NATURAL ENVIRONMENT

A.	Application of the General Rules on the Conduct of Hostilities to the Natural Environment (practice relating to Rule 43)	§§ 1–70
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A. Application of the General Rules on the Conduct of Hostilities to the Natural Environment

Note: For practice concerning the general rules on the conduct of hostilities, see Part I. For practice concerning the destruction of property, see Chapter 16. For practice concerning attacks of forests or other kinds of plant cover by incendiary weapons, see Chapter 30, section A.

I. Treaties and Other Instruments

Treaties

1. Pursuant to Article 8(2)(b)(iv) of the 1998 ICC Statute, “intentionally launching an attack in the knowledge that such attack will cause . . . widespread, long-term and severe damage to the natural environment which would be clearly excessive in relation to the concrete and direct overall military advantage anticipated” constitutes a war crime in international armed conflicts.

2. Upon ratification of the 1998 ICC Statute, France declared that “the risk of damage to the natural environment as a result of methods and means of warfare, as envisaged in article 8, paragraph 2 (b) (iv), must be weighed objectively on the basis of the information available at the time of its assessment”.¹

¹ France, Interpretative declarations made upon ratification of the ICC Statute, 9 June 2000, § 7.

Other Instruments

3. Paragraph 39.6 of the 1992 Agenda 21 provides that:

Measures in accordance with international law should be considered to address, in times of armed conflict, large-scale destruction of the environment that cannot be justified under international law. The General Assembly and its Sixth Committee are the appropriate forums to deal with this subject. The specific competence and role of the International Committee of the Red Cross should be taken into account.

4. Paragraph 44 of the 1994 San Remo Manual provides that:

Methods and means of warfare should be employed with due regard for the natural environment taking into account the relevant rules of international law. Damage to or destruction of the natural environment not justified by military necessity and carried out wantonly is prohibited.

5. The 1994 Guidelines on the Protection of the Environment in Times of Armed Conflict provides that:

(4) In addition to the specific rules set out below, the general principles of international law applicable in armed conflict – such as the principle of distinction and the principle of proportionality – provide protection to the environment. In particular, only military objectives may be attacked and no methods or means of warfare which cause excessive damage shall be employed. Precautions shall be taken in military operations as required by international law.

...

(6) Parties to a non-international armed conflict are encouraged to apply the same rules that provide protection to the environment in international armed conflict and, accordingly, States are urged to incorporate such rules in their military manuals and instructions on the laws of war in a way that does not discriminate on the basis of how the conflict is characterized.

...

(8) Destruction of the environment not justified by military necessity violates international humanitarian law. Under certain circumstances, such destruction is punishable as a grave breach of international humanitarian law.

(9) The general prohibition on destroying civilian objects, unless such destruction is justified by military necessity, also protects the environment.

6. Paragraph 13(c) of the 1994 San Remo Manual defines as “collateral casualties” or “collateral damage”, *inter alia*, “damage to or the destruction of the natural environment”.

7. The 2000 UNTAET Regulation No. 2000/15 establishes panels with exclusive jurisdiction over serious criminal offences, including war crimes. According to Section 6(1)(b)(iv), “intentionally launching an attack in the knowledge that such attack will cause...widespread, long-term and severe damage to the natural environment which would be clearly excessive in relation to the

concrete and direct overall military advantage anticipated" constitutes a war crime in international armed conflicts.

II. National Practice

Military Manuals

8. Australia's Defence Force Manual states that:

The natural environment is not a legitimate object of attack. Destruction of the environment, not justified by military necessity, is punishable as a violation of international law . . . The general prohibition on destroying civilian objects, unless justified by military necessity, also protects the environment.²

9. According to Belgium's Regulations on the Tactical Use of Large Units, restrictions on the use of weapons can result from "the obligation to respect the rules of the laws of war relative to the conduct of hostilities. These rules concern, *inter alia*, the choice of means and methods of warfare, the protection of the civilian population, civilian objects and the environment."³

10. Italy's IHL Manual defines "attacks against the natural environment" as war crimes.⁴

11. The US Naval Handbook provides that, "the commander has an affirmative obligation to avoid unnecessary damage to the environment".⁵

National Legislation

12. Australia's ICC (Consequential Amendments) Act incorporates in the Criminal Code the war crimes defined in the 1998 ICC Statute, including launching an attack in the knowledge that such attack will cause "widespread, long-term and severe damage to the natural environment . . . of such an extent as to be excessive in relation to the concrete and direct military advantage anticipated" in international armed conflicts.⁶

13. Under Burundi's Draft Law on Genocide, Crimes against Humanity and War Crimes, "intentionally launching an attack in the knowledge that such attack will cause . . . widespread, long-term and severe damage to the natural environment which would be clearly excessive in relation to the concrete and direct overall military advantage anticipated" is a war crime in international armed conflicts.⁷

14. Canada's Crimes against Humanity and War Crimes Act provides that the war crimes defined in Article 8(2) of the 1998 ICC Statute are "crimes according

² Australia, *Defence Force Manual* (1994), § 545(a) and (c).

³ Belgium, *Regulations on the Tactical Use of Large Units* (1994), Article 208(c)(2).

⁴ Italy, *IHL Manual* (1991), Vol. I, § 85. ⁵ US, *Naval Handbook* (1995), § 8.1.3.

⁶ Australia, *ICC (Consequential Amendments) Act* (2002), Schedule 1, § 268.38(2).

⁷ Burundi, *Draft Law on Genocide, Crimes against Humanity and War Crimes* (2001), Article 4(B)(d).

to customary international law" and, as such, indictable offences under the Act.⁸

15. Congo's Genocide, War Crimes and Crimes against Humanity Act defines war crimes with reference to the categories of crimes set out in Article 8 of the 1998 ICC Statute.⁹

16. The Czech Republic's Criminal Code as amended, in a part entitled "Crimes against humanity", provides for the punishment of "a commander who, contrary to the provisions of international law on means and methods of warfare, intentionally: ... (d) destroys or damages ... a place internationally-recognized with regard to the protection of nature".¹⁰

17. Under Georgia's Criminal Code, any war crime provided for by the 1998 ICC Statute which is not explicitly mentioned in the Code, such as "intentionally launching an attack in the knowledge that such attack will cause ... widespread, long-term and severe damage to the natural environment which would be clearly excessive in relation to the concrete and direct overall military advantage anticipated" in international armed conflict, is a crime.¹¹

18. Germany's Law Introducing the International Crimes Code provides that:

Anyone who, in connection with an international armed conflict, carries out an attack with military means which may be expected to cause widespread, long-term and severe damage to the natural environment which could be excessive in relation to the overall concrete and direct military advantage anticipated, shall be liable to imprisonment for not less than three years.¹²

19. Under Ireland's Geneva Conventions Act as amended, any "minor breach" of AP I, including violations of Articles 35(3) and 55(1) AP I, is a punishable offence.¹³

20. Under the International Crimes Act of the Netherlands, "intentionally launching an attack in the knowledge that such an attack will cause ... widespread, long-term and severe damage to the natural environment which would be clearly excessive in relation to the concrete and direct overall military advantage anticipated" is a crime, when committed in an international armed conflict.¹⁴

21. Under New Zealand's International Crimes and ICC Act, war crimes include the crimes defined in Article 8(2)(b)(iv) of the 1998 ICC Statute.¹⁵

22. Nicaragua's Military Penal Code punishes a soldier who "destroys or damages, without military necessity, ... places of historical or environmental

⁸ Canada, *Crimes against Humanity and War Crimes Act* (2000), Section 4(1) and (4).

⁹ Congo, *Genocide, War Crimes and Crimes against Humanity Act* (1998), Article 4.

¹⁰ Czech Republic, *Criminal Code as amended* (1961), Article 262(2)(d).

¹¹ Georgia, *Criminal Code* (1999), Article 413(d).

¹² Germany, *Law Introducing the International Crimes Code* (2002), Article 1, § 12(3).

¹³ Ireland, *Geneva Conventions Act as amended* (1962), Section 4(1) and (4).

¹⁴ Netherlands, *International Crimes Act* (2003), Article 5(5)(b).

¹⁵ New Zealand, *International Crimes and ICC Act* (2000), Section 11(2).

importance . . . and natural sites, gardens and parks of historical-artistic or anthropological value and, in general, all those which are part of the historical heritage".¹⁶

23. Under Norway's Military Penal Code as amended, "anyone who contravenes or is accessory to the contravention of provisions relating to the protection of persons or property laid down in . . . the two additional protocols to [the Geneva] Conventions . . . is liable to imprisonment".¹⁷

24. Slovakia's Criminal Code as amended provides for the punishment of "a commander who, contrary to the provisions of international law on means and methods of warfare, intentionally: . . . (d) destroys or damages . . . an internationally recognized . . . natural site".¹⁸

25. Spain's Military Criminal Code punishes a soldier who:

destroys or damages, without military necessity, . . . places of historical or environmental importance . . . and natural sites, gardens and parks of historical-artistic or anthropological value and, in general, all those which are part of the historical heritage.¹⁹

26. Under Trinidad and Tobago's Draft ICC Act, it is a punishable offence to commit a war crime as defined in Article 8(2)(b)(iv) of the 1998 ICC Statute.²⁰

27. Under the UK ICC Act, it is a punishable offence to commit a war crime as defined in Article 8(2)(b)(iv) of the 1998 ICC Statute.²¹

National Case-law

28. No practice was found.

Other National Practice

29. In 1992, during a debate in the Sixth Committee of the UN General Assembly on protection of the environment in times of armed conflict, Argentina recommended that:

Belligerents engaged in an armed conflict, whether international or non-international, should always bear in mind that the protection of the environment affects the well-being of humanity as a whole. They should therefore use those means which are least apt to cause damage to the environment, damage for which they would be responsible.²²

30. In 1991, during a debate in the UN General Assembly on the environmental impact of the Gulf War, Australia insisted that "what had been done in Kuwait

¹⁶ Nicaragua, *Military Penal Code* (1996), Article 61.

¹⁷ Norway, *Military Penal Code as amended* (1902), § 108(b).

¹⁸ Slovakia, *Criminal Code as amended* (1961), Article 262(2)(d).

¹⁹ Spain, *Military Criminal Code* (1985), Article 77(7).

²⁰ Trinidad and Tobago, *Draft ICC Act* (1999), Section 5(1)(a).

²¹ UK, *ICC Act* (2001), Sections 50(1) and 51(1) (England and Wales) and Section 58(1) (Northern Ireland).

²² Argentina, Statement before the Sixth Committee of the UN General Assembly, UN Doc. A/C.6/47/SR.8, 1 October 1992, § 23.

was clearly illegal under the customary rules of warfare and the traditional concepts of proportionality and military necessity".²³

31. In a briefing note in 1992, the Australian Department of Foreign Affairs and Trade stated that the Gulf War had underlined "the continuing need for the extension of principles of humanitarian law in cases of armed conflict", and referred to "the environmental devastation caused by the deliberate creation of oil slicks by Iraqi forces".²⁴

32. In its oral pleadings before the ICJ in the *Nuclear Weapons case* in 1995, Australia stated that "in recent times the issue of the protection of the environment in armed conflict has been a particular international concern" and referred to a number of international treaties, including the relevant provisions of the 1976 ENMOD Convention, API and the 1993 CWC. It stated that these instruments provided "cumulative evidence that weapons having . . . potentially disastrous effects on the environment, and on civilians and civilian targets, are no longer compatible with the dictates of public conscience" reflected in the general principles of humanity. Australia added that "consideration of lethal effects of radiation over time provides a link between the principle which provides for the protection of civilian populations and the principle which provides for protection of the environment".²⁵

33. In 1991, during a debate in the Sixth Committee of the UN General Assembly on the protection of the environment in armed conflict, Austria stated, with respect to the damage caused by Iraq to the environment, that:

There could be no doubt whatsoever that those deliberate acts of environmental destruction flagrantly violated existing international law and could not, even in the most remote sense, be justified by military necessity . . . There could be no doubt as to the illegality of the acts committed by Iraq, entailing international responsibility of that State as well as personal criminal liability of those responsible for those acts.²⁶

34. In 1992, during a debate in the UN General Assembly on the environmental impact of the Gulf War, Austria stated that it was a "shortcoming" of the present legal regime that "the principle of proportionality between the military necessity of an action and its possible detrimental effects on the environment was usually applied in favour of military necessity".²⁷

35. In 1992, during a debate in the Sixth Committee of the UN General Assembly on protection of the environment in times of armed conflict, Brazil stated

²³ Australia, Statement before the Sixth Committee of the UN General Assembly, UN Doc. A/C.6/46/SR.20, 22 October 1991, § 7.

²⁴ Australia, Department of Foreign Affairs and Trade, DFAT-92/013031 Pt 8, 13 February 1991, p. 2, § 5.

²⁵ Australia, Oral pleadings before the ICJ, *Nuclear Weapons case*, 30 October 1995, Verbatim Record CR 95/22, p. 47, § 31.

²⁶ Austria, Statement before the Sixth Committee of the UN General Assembly, UN Doc. A/C.6/46/SR.19, 22 October 1991, § 5.

²⁷ Austria, Statement before the Sixth Committee of the UN General Assembly, UN Doc. A/C.6/47/SR.8, 1 October 1992, § 37.

that "a principle of customary international law which, in general terms, protected the environment in times of armed conflict had been recognised implicitly in paragraph 39.6 of Agenda 21 of UNEP".²⁸

36. In 1991, during a debate in the Sixth Committee of the UN General Assembly on the protection of the environment in armed conflict, Canada stated:

An important conclusion reached at the international conference of experts held at Ottawa [from 9–12 July 1991] was that the customary laws of war, in reflecting the dictates of public conscience, now included a requirement to avoid unnecessary damage to the environment... In effect, the practice of States, generally accepted environmental principles and public consciousness about the environment had combined with the traditional armed conflict rules on the protection of civilians and their property to produce a customary rule of armed conflict prohibiting the infliction of unnecessary damage on the environment in wartime.²⁹

37. In 1992, during a debate in the Sixth Committee of the UN General Assembly on protection of the environment in times of armed conflict, Canada reiterated the conclusions of the Ottawa conference and referred to the rule of proportionality as "the need to strike a balance between the protection of the environment and the needs of war" and further concluded that, under the principle of distinction, "the environment as such should not form the object of direct attack".³⁰

38. At the Conference on Environmental Protection and the Law of War held in London in 1992, Canada, with reference to the Martens Clause, identified a "requirement to avoid unjustifiable damage to the environment".³¹

39. In 1996, a study of Colombia's Presidential Council for Human Rights, conducted in cooperation with the Colombian Red Cross and the Jorge Tadeo Lozano University, asserted that "the principle of proportionality... [is] also directly applicable to the ecological heritage of the human race".³²

40. In 1992, in a letter to the President of the UN Security Council, Croatia stated that "unprovoked, indiscriminate and savage attacks may result in an economic and ecological catastrophe which could happen if oil facilities on both sides of the river are destroyed".³³

41. In 1991, during a debate in the Sixth Committee of the UN General Assembly on protection of the environment in armed conflict, Iran stated that:

²⁸ Brazil, Statement before the Sixth Committee of the UN General Assembly, UN Doc. A/C.6/47/SR.9, 6 October 1992, § 12.

²⁹ Canada, Statement before the Sixth Committee of the UN General Assembly, UN Doc. A/C.6/46/SR.18, 22 October 1991, §§ 13–14.

³⁰ Canada, Statement before the Sixth Committee of the UN General Assembly, UN Doc. A/C.6/47/SR.8, 1 October 1992, § 20.

³¹ Canada, Statement at the Conference on Environmental Protection and the Law of War, London, 3 June 1992.

³² Colombia, Presidential Council for Human Rights in cooperation with the Colombian Red Cross and the Jorge Tadeo Lozano University, *Academic Study on National Measures of Application of International Humanitarian Law*, Bogotá, September 1996, p. 67.

³³ Croatia, Letter dated 24 August 1992 to the President of the UN Security Council, UN Doc. S/24481, 24 August 1992, p. 2.

Referring to the law of armed conflict, . . . both customary law and treaty law prohibited belligerent parties from inflicting either direct or indirect damage on the environment.

The principle of proportionality, which was enshrined in customary law, set important limits on warfare whereby damage not necessary to the achievement of a definite military advantage was prohibited. Another principle of customary law, whereby military operations not directed against military targets were prohibited, had been incorporated in the preamble of the 1868 Declaration of St. Petersburg to the effect of prohibiting the use of certain practices in wartime and in article 35.1 of [AP I]. Lastly, the [1907 HR] prohibited the destruction of non-military enemy property unless imperatively demanded by the necessities of war . . . The Fourth Geneva Convention contained two provisions intended to ensure indirect protection of the environment in the context of protecting property rights in occupied territories. Thus, for example, an occupying Power which destroyed industrial installations in an occupied territory, causing damage to the environment, would be in violation of the Fourth Geneva Convention unless such destruction was justified by military necessity. If such destruction was extensive, it constituted a grave breach of the Convention and even a war crime.³⁴

42. In its oral pleadings before the ICJ in the *Nuclear Weapons case* in 1995, Iran argued that:

As far as the law of armed conflict is concerned, both the customary rules and the provisions of treaty law prohibit belligerent parties, directly or indirectly, from inflicting unnecessary damage on the environment. Parties to the armed conflict are obliged, in accordance with well-established rules of customary law pertaining to armed conflict, to protect the environment in time of armed conflict.³⁵

43. In its oral pleadings before the ICJ in the *Nuclear Weapons case* in 1995, Japan expressed the view that, "in terms of international law concerning warfare, . . . the destruction of [the] natural environment [is] prohibited".³⁶

44. Prior to the adoption of UN General Assembly Resolution 47/37 in 1992 on the protection of the environment in times of armed conflict, Jordan and the US submitted a memorandum to the Sixth Committee of the UN General Assembly entitled "International Law Providing Protection to the Environment in Times of Armed Conflict". In it, they stated that "the customary rule that prohibits attacks which reasonably may be expected at the time to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated, are prohibited" provides protection for the environment in times of armed conflict.³⁷

³⁴ Iran, Statement before the Sixth Committee of the UN General Assembly, UN Doc. A/C.6/46/SR.18, 22 October 1991, §§ 27–28.

³⁵ Iran, Oral pleadings before the ICJ, *Nuclear Weapons case*, 6 November 1995, Verbatim Record CR 95/26, p. 34, § 59.

³⁶ Japan, Oral pleadings before the ICJ, *Nuclear Weapons case*, 7 November 1995, Verbatim Record CR 95/27, p. 37.

³⁷ Jordan and US, International Law Providing Protection to the Environment in Times of Armed Conflict, annexed to Letter dated 28 September 1992 to the Chairman of the Sixth Committee of the UN General Assembly, UN Doc. A/C.6/47/3, 28 September 1992, § 1(h).

45. In its oral pleadings before the ICJ in the *Nuclear Weapons case* in 1995, the Marshall Islands referred to the environmental damage caused by the use of nuclear weapons, remarking that such damage “should not be regarded as necessary to the achievement of military objectives”.³⁸

46. In 1994, Romania’s Ministry of Defence pointed out that “the education and instruction process was intended especially for the study and implementation of the types of military decisions that would provide a balance between the desired military advantage and its potentially negative impact on the environment”.³⁹

47. In 1992, during a debate in the Sixth Committee of the UN General Assembly on protection of the environment in times of armed conflict, Russia insisted that “premeditated and indiscriminate destruction of the environment in times of armed conflict constituted not merely an evil but a crime”, adding that “such acts were clearly violations of the norms of international law and could not be justified even as reprisals”.⁴⁰

48. In 1991, during a debate in the Sixth Committee of the UN General Assembly on the environmental impact of the Gulf War, Sweden expressed the view that the destruction of the environment caused by Iraqi forces was taking place “on an unprecedented scale” and considered that it constituted “unacceptable forms of warfare in the future”.⁴¹

49. In a briefing note in 1991, the UK Foreign and Commonwealth Office declared that Iraq’s attacks on Kuwaiti oil fields were “a deliberate crime against the planet”.⁴²

50. In 1991, during a debate in the Sixth Committee of the UN General Assembly on the protection of the environment in armed conflict, the US stated that:

The deliberate release of oil into the Gulf and the burning of Kuwaiti oil wells had constituted a serious violation of the prohibition of the destruction of property unless required by military necessity contained in [GC IV and the 1907 HR]. Those acts had also been a violation of the prohibitions under customary international law against any military operation which was not directed against a legitimate military target or which could be expected to cause incidental death, injury or damage to civilians that was clearly excessive in relation to the direct military advantage of the operation. In the situation under consideration, the oil well destruction had taken

³⁸ Marshall Islands, Oral pleadings before the ICJ, *Nuclear Weapons case*, 14 November 1995, Verbatim Record CR 95/32, p. 22.

³⁹ UN Secretary-General, Report on the United Nations Decade of International Law, UN Doc. A/49/323, 19 August 1994, § 32.

⁴⁰ Russia, Statement before the Sixth Committee of the UN General Assembly, UN Doc. A/C.6/47/SR.9, 6 October 1992, p. 4, § 16.

⁴¹ Sweden, Statement before the Sixth Committee of the UN General Assembly, UN Doc. A/C.6/46/SR.20, 22 October 1991, § 21.

⁴² UK, Foreign and Commonwealth Office, Briefing Note: Oil Pollution in the Gulf, June 1991, reprinted in Marc Weller (ed.), *Iraq and Kuwait: The Hostilities and Their Aftermath*, Grotius Publications, Cambridge, 1993, p. 338.

place at a time when it had been clear to Iraq that the war had ended . . . Those violations of international law had definite legal consequences, as [GC IV] acknowledged in stipulating that the destruction of property not justified by military necessity was a grave breach and that persons committing such breaches incurred criminal liability . . . Iraq's actions did not demonstrate that existing international law was inadequate, but, rather, that the problem involved compliance with existing law, and no new rule or conventions were needed.⁴³

51. In 1992, during the debate in the Sixth Committee of the UN General Assembly on protection of the environment in time of armed conflict, the US said that "in time of war some collateral damage to the environment . . . is inevitable".⁴⁴

52. In 1992, in its final report to Congress on the conduct of hostilities in the Gulf War, the US Department of Defence considered that the destruction of oil well heads and the release of crude oil into the Gulf by Iraq violated Article 23(g) of the 1907 HR and Article 147 GC IV. It further stated that:

As the first Kuwaiti oil wells were ignited by Iraqi forces, there was public speculation the fires and smoke were intended to impair Coalition forces' ability to conduct both air and ground operations, primarily by obscuring visual and electro-optical sensing devices. Review of Iraqi actions makes it clear the oil well destruction had no military purpose, but was simply punitive destruction at its worst. For example, oil well fires to create obscurants could have been accomplished simply through the opening of valves; instead, Iraqi forces set explosive charges on many wells to ensure the greatest possible destruction and maximum difficulty in stopping each fire. Likewise, the Ar-Rumaylah oil field spreads across the Iraq–Kuwait border. Had the purpose of the fires been to create an obscurant, oil wells in that field on each side of the border undoubtedly would have been set ablaze; Iraqi destruction was limited to oil wells on the Kuwaiti side only. As with the release of oil into the Persian Gulf, this aspect of Iraq's wanton destruction of Kuwaiti property had little effect on Coalition offensive combat operations. In fact, the oil well fires had a greater adverse effect on Iraqi military forces.⁴⁵

53. In 1993, in a report to Congress on international policies and procedures regarding the protection of natural and cultural resources during times of war, the US Department of Defence stated that:

The United States considers the obligations to protect natural, civilian, and cultural property to customary international law . . . Natural resources are protected from intentional attack so long as they are not utilized for military purposes . . . The United States recognizes that protection of natural resources, as well as protection of the environment, is important even in times of armed conflict. Natural resources are finite, and reasonable measures must be taken to protect against their unnecessary

⁴³ US, Statement before the Sixth Committee of the UN General Assembly, UN Doc. A/C.6/46/SR.18, 22 October 1991, §§ 37–40.

⁴⁴ US, Statement before the Sixth Committee of the UN General Assembly, UN Doc. A/C.6/47/SR.9, 6 October 1992, § 55.

⁴⁵ US, Department of Defence, Final Report to Congress on the Conduct of the Persian Gulf War, Appendix O, The Role of the Law of War, 10 April 1992, *ILM*, Vol. 31, pp. 636–637.

destruction . . . What is prohibited is unnecessary destruction, that is destruction of natural resources that has no or limited military value.⁴⁶

54. According to the Report on US Practice, it is the *opinio juris* of the US that "collateral environmental damage caused by otherwise lawful military operations should be assessed for its proportionality to the expected military value of such operations".⁴⁷

III. Practice of International Organisations and Conferences

United Nations

55. In a resolution adopted in 1992 on the protection of the environment in times of armed conflict, the UN General Assembly expressed "deep concern about environmental damage and depletion of natural resources, including the destruction of hundreds of oil-well heads and the release and waste of crude oil into the sea, during recent conflicts" and noted that "existing provisions of international law prohibit such acts". The General Assembly stressed that "destruction of the environment, not justified by military necessity and carried out wantonly, is clearly contrary to existing international law" and urged States "to take all measures to ensure compliance with the existing international law applicable to the protection of the environment in times of armed conflict".⁴⁸

56. In a resolution adopted in 1994 on the United Nations Decade on International Law, the UN General Assembly referred to the 1994 Guidelines on the Protection of the Environment in Times of Armed Conflict. The General Assembly invited:

all States to disseminate widely the revised guidelines for military manuals and instructions on the protection of the environment in times of armed conflict received from the International Committee of the Red Cross and to give due consideration to the possibility of incorporating them into their military manuals and other instructions addressed to their military personnel.⁴⁹

57. The programme of activities for the final term (1997–1999) of the UN Decade of International Law, adopted by the UN General Assembly in 1996, states that:

In connection with training of military personnel, States are encouraged to foster the teaching and dissemination of the principles governing the protection of the environment in times of armed conflict and should consider the possibility of

⁴⁶ US, Department of Defense, Report to Congress on International Policies and Procedures Regarding the Protection of Natural and Cultural Resources During Times of War, 19 January 1993, pp. 202–204.

⁴⁷ Report on US Practice, 1997, Chapter 4.5.

⁴⁸ UN General Assembly, Res. 47/37, 25 November 1992, preamble and § 1.

⁴⁹ UN General Assembly, Res. 49/50, 9 December 1994, § 11.

making use of the guidelines for military manuals and instructions prepared by the International Committee of the Red Cross.⁵⁰

Other International Organisations

58. In the context of NATO's campaign against the FRY, following NATO's air strikes on the industrial complex in Pancevo on 18 April 1999, which resulted in the emission of chemical substances into the air and water, a NATO spokesperson argued that the industrial site was to be considered as a "strategic target", as it was "a key installation" that provided petrol and other resources to support the Yugoslav army. The official said that the environmental damage caused by the attack was taken into consideration, explaining that "when targeting is done we take into account all possible collateral damage, be it environmental, human or to the civilian infrastructure".⁵¹

59. At a press conference held at NATO Headquarters in Brussels on 20 April 1999 during NATO's military operations against the FRY, a General, asked to comment on NATO's bombing of a chemical factory in Baric, which caused threats to the environment, declared that "every single target is chosen having great consideration for possible collateral damage". He then argued that "the fact that a chemical factory has been hit does not mean that this process has been disregarded in this instance".⁵²

International Conferences

60. In 1992, in a report submitted to the UN Secretary-General on the protection of the environment in time of armed conflict, the ICRC described the outcome of an expert meeting it organised on this subject in Geneva from 27 to 29 April 1992, stating that:

The participants stressed the need to take environmental protection into account when assessing the military advantages to be expected from an operation. They reaffirmed the importance and relevance with regard to environmental protection of the accepted principles concerning the conduct of hostilities. These include:

- (a) The prohibition of actions causing damage that is not warranted by military necessity;
- (b) The obligation, when possible, to choose the least harmful means of reaching a military objective;
- (c) The obligation to respect proportionality between the military advantage expected and the incidental damage to the environment.⁵³

⁵⁰ UN General Assembly, Res. 51/157, 16 December 1996, Annex, § 19.

⁵¹ Chris Hedges, "Serbian Town Bombed by NATO Fears Effects of Toxic Chemicals", *New York Times*, 14 July 1999.

⁵² NATO, Press Conference by Jamie Shea and Brigadier General Giuseppe Marani, NATO Headquarters, Brussels, 20 April 1999.

⁵³ ICRC, Report on the Protection of the Environment in Time of Armed Conflict submitted to the UN General Assembly, reprinted in Report of the UN Secretary-General on the protection of the environment in times of armed conflict, UN Doc. A/47/328, 31 July 1992, § 54.

61. The Final Declaration adopted by the International Conference for the Protection of War Victims in 1993 urged all States to make every effort to:

Reaffirm and ensure respect for the rules of international humanitarian law applicable during armed conflicts protecting... the natural environment, either against attacks on the environment as such or against wanton destruction causing serious environmental damage; and continue to examine the opportunity of strengthening them.⁵⁴

IV. Practice of International Judicial and Quasi-judicial Bodies

62. In its advisory opinion in the *Nuclear Weapons case* in 1996, the ICJ did not directly deal with the issue of the precise extent to which environmental treaties applied during armed conflict, but stated in general terms that:

The Court does not consider that the treaties in question could have intended to deprive a State of the exercise of its right of self-defence under international law because of its obligations to protect the environment. Nonetheless, States must take environmental considerations into account when assessing what is necessary and proportionate in the pursuit of legitimate military objectives. Respect for the environment is one of the elements that go to assessing whether an action is in conformity with the principle of necessity.⁵⁵

The ICJ noted that this approach was supported by Principle 24 of the 1992 Rio Declaration, and also cited with approval UN General Assembly Resolution 47/37, which stated that “destruction of the environment, not justified by military necessity and carried out wantonly, is clearly contrary to existing law”.⁵⁶ More generally, the Court found that international environmental law “indicates important factors that are properly to be taken into account in the context of the implementation of the principles and rules of the law applicable in armed conflict”.⁵⁷

63. In its Final Report to the ICTY Prosecutor in 2000, the Committee Established to Review the NATO Bombing Campaign Against the Federal Republic of Yugoslavia remarked that Articles 35(3) and 55 AP I had “a very high threshold of application” which made it very difficult to assess whether environmental damage had exceeded the threshold of AP I. For this reason, in the Committee’s view, the environmental impact of the NATO bombing campaign was “best considered from the underlying principles of the law of armed conflicts such as necessity and proportionality”. As to the application of the principle of proportionality, the Committee stressed that:

⁵⁴ International Conference for the Protection of War Victims, Geneva, 30 August–1 September 1993, Final Declaration, § II(10), *ILM*, Vol. 33, 1994, p. 301.

⁵⁵ ICJ, *Nuclear Weapons case*, Advisory Opinion, 8 July 1996, § 30.

⁵⁶ ICJ, *Nuclear Weapons case*, Advisory Opinion, 8 July 1996, § 32.

⁵⁷ ICJ, *Nuclear Weapons case*, Advisory Opinion, 8 July 1996, § 33.

- 18 ... Even when targeting admittedly legitimate military objectives, there is a need to avoid excessive long-term damage to... natural environment with a consequential adverse effect on the civilian population. Indeed, military objectives should not be targeted if the attack is likely to cause collateral environmental damage which would be excessive in relation to the direct military advantage which the attack is expected to produce.
- ...
- 22 ... In order to satisfy the requirement of proportionality, attacks against military targets which are known or can reasonably be assumed to cause grave environmental harm may need to confer a very substantial military advantage in order to be considered legitimate. At a minimum, actions resulting in massive environmental destruction, especially where they do not serve a clear and important military purpose, would be questionable. The targeting by NATO of Serbian petro-chemical industries may well have served a clear and important military purpose.
- 23 The above considerations also suggest that the requisite *mens rea* on the part of a commander would be actual or constructive knowledge as to the grave environmental effects of a military attack; a standard which would be difficult to establish for the purposes of prosecution and which may provide an insufficient basis to prosecute military commanders inflicting environmental harm in the (mistaken) belief that such conduct was warranted by military necessity... In addition, the notion of "excessive" environmental destruction is imprecise and the actual environmental impact, both present and long term, of the NATO bombing campaign is at present unknown and difficult to measure.
- 24 In order to fully evaluate such matters, it would be necessary to know the extent of the knowledge possessed by NATO as to the nature of Serbian military-industrial targets (and thus, the likelihood of environmental damage flowing from their destruction), the extent to which NATO could reasonably have anticipated such environmental damage (for instance, could NATO have reasonably expected that toxic chemicals of the sort allegedly released into the environment by the bombing campaign would be stored alongside that military target?) and whether NATO could reasonably have resorted to other (and less environmentally damaging) methods for achieving its military objective of disabling the Serbian military-industrial infrastructure.⁵⁸

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

64. To fulfil its task of disseminating IHL, the ICRC has delegates around the world teaching armed and security forces that "to fulfil his mission, the commander needs appropriate information about the enemy and the environment. To comply with the law of war, information must include: ... e) natural environment."⁵⁹

⁵⁸ ICTY, Final Report to the Prosecutor by the Committee Established to Review the NATO Bombing Campaign Against the Federal Republic of Yugoslavia, 14 June 2000, §§ 15, 18 and 22–24.

⁵⁹ Frédéric de Mulinen, *Handbook on the Law of War for Armed Forces*, ICRC, Geneva, 1987, § 391.

65. In an appeal issued in 1991 in the context of the Gulf War, the ICRC reminded the belligerents that “weapons having indiscriminate effects and those likely to cause disproportionate suffering and damage to the environment are prohibited”.⁶⁰

66. In 1992, in a report submitted to the UN Secretary-General on the protection of the environment in time of armed conflict, the ICRC stated that:

5. Since its inception, international humanitarian law has set limits on the right of belligerents to cause suffering and injury to people and to wreak destruction on objects, including objects belonging to the natural environment, and has traditionally been concerned with limiting the use of certain kinds of weapons or means of warfare which continue to damage even after the war is over, or which may injure people or property of States which are completely uninvolved in the conflict.
6. [reference to the 1868 St. Petersburg Declaration]
7. [reference to Article 35(1) AP I]
8. The concept of proportionality also sets important limits on warfare: the only acts of war permitted are those that are proportional to the lawful objective of a military operation and actually necessary to achieve that objective.
9. These fundamental rules are now part of customary international law, which is binding on the whole community of nations. They are also applicable to the protection of the environment against acts of warfare.⁶¹

67. In 1993, in a report submitted to the UN General Assembly on the protection of the environment in times of armed conflict, the ICRC stated that “because [AP I], as at present, interpreted, does not necessarily cover all cases of damage to the environment and because not all States are party to it, the earlier conventional and customary rules, especially those of The Hague (1907) and Geneva (1949), continue to be very important”.⁶² With respect to the issue of the protection of the environment in non-international armed conflict, the report further states that:

Although neither article 3 common to the 1949 Geneva Conventions nor [AP II] established a specific protection for the environment in times of non-international armed conflict, the environment is none the less protected by general rules of international humanitarian law [indiscriminate means and methods of warfare, proportionality, wanton destruction of property]. Among them, it is worth mentioning articles 14 and 15 of Protocol II of 1977, and provisions of the World Heritage Convention of 1972. The latter, applicable in all armed conflicts, could play an

⁶⁰ ICRC, Press Release No. 1659, Middle East Conflict: ICRC appeals to belligerents, 1 February 1991, *IRRC*, No. 280, 1991, p. 27.

⁶¹ ICRC, Report on the Protection of the Environment in Time of Armed Conflict submitted to the UN General Assembly, reprinted in Report of the UN Secretary-General on the protection of the environment in times of armed conflict, UN Doc. A/47/328, 31 July 1992, §§ 5–9.

⁶² ICRC, Report on the protection of the environment in time of armed conflict submitted to the UN General Assembly, reprinted in Report of the UN Secretary-General on the protection of the environment in times of armed conflict, UN Doc. A/48/269, 29 July 1993, § 34.

important role; greater efforts should therefore be made to ensure its full implementation.⁶³

VI. Other Practice

68. Rogers stated that:

Environmental concerns certainly affected allied military planning [during the Gulf War]. It is reported that the allies decided not to attack four Iraqi super-tankers inside the Gulf which were contravening UN Security Council Resolution 665 because of the environmental consequences of so doing.⁶⁴

69. During a meeting of the IIHL held in 1993 as part of the process which resulted in the drafting of the 1994 San Remo Manual, a special rapporteur on the protection of the environment in armed conflict stated that the new wording of paragraph 44.5 of the manual stating that "damage to or destruction of the natural environment not justified by military necessity and carried out wantonly is prohibited" was a

response to the concern expressed by a number of participants . . . that, within the limits of the principle of military necessity, the draft should outlaw the use of the marine environment as an instrument of warfare or as a direct target or object of attack during an armed conflict at sea.⁶⁵

70. In 1995, the IUCN Commission on Environmental Law, in cooperation with the International Council of Environmental Law, issued the Draft International Covenant on Environment and Development, which was intended to stimulate consideration of a global instrument on environmental conservation and sustainable development. Article 32(2) provides that "Parties shall co-operate to further develop and implement rules and measures to protect the environment during international armed conflict and establish rules and measures to protect the environment during non-international armed conflict". The commentary on this draft provision notes that "paragraph 2 aims at the further development of the law on this subject, both to deal with international armed conflict and non-international armed conflict. In the latter case, there is a particularly glaring dearth of law which must be remedied."⁶⁶

⁶³ ICRC, Report on the protection of the environment in time of armed conflict submitted to the UN General Assembly, reprinted in Report of the UN Secretary-General on the protection of the environment in times of armed conflict, UN Doc. A/48/269, 29 July 1993, § 95.

⁶⁴ A. P. V. Rogers, *Law on the Battlefield*, Manchester University Press, Manchester, 1996, p. 120.

⁶⁵ Louise Doswald-Beck (ed.), *San Remo Manual on International Law Applicable to Armed Conflicts at Sea*, Cambridge University Press, Cambridge, 1995, p. 119, Explanation, § 44.5.

⁶⁶ IUCN, Commission on Environmental Law, Draft International Covenant on Environment and Development, Bonn, March 1995, Article 32(2) and commentary.

B. Due Regard for the Natural Environment in Military Operations

General

I. Treaties and Other Instruments

Treaties

71. Principle 3 of the 1992 Convention on Biodiversity states that:

States have, in accordance with the Charter of the United Nations and the principles of international law, . . . the responsibility to ensure that activities within their jurisdiction or control do not cause damage to the environment of other States or of areas beyond the limits of national jurisdiction.

Other Instruments

72. Principle 21 of the 1972 Stockholm Declaration on the Human Environment provides that:

States have, in accordance with the Charter of the United Nations and the principles of international law, . . . the responsibility to ensure that activities within their jurisdiction or control do not cause damage to the environment of other States or of areas beyond the limits of national jurisdiction.

73. Principle 5 of the 1982 World Charter for Nature provides that "nature shall be secured against degradation caused by warfare or other hostile activities".

74. Principle 20 of the 1982 World Charter for Nature provides that "military activities damaging to nature shall be avoided".

75. Principle 2 of the 1992 Rio Declaration provides that:

States have, in accordance with the Charter of the United Nations and the principles of international law, the sovereign right to exploit their own resources pursuant to their own environmental and developmental policies, and the responsibility to ensure that activities within their jurisdiction or control do not cause damage to the environment of other States or of areas beyond the limits of national jurisdiction.

76. Principle 24 of the 1992 Rio Declaration provides that "warfare is inherently destructive of sustainable development. States shall therefore respect international law providing protection for the environment in times of armed conflict and co-operate in its further development, as necessary."

77. The 1994 Guidelines on the Protection of the Environment in Times of Armed Conflict provides that:

- (5) International environmental agreements and relevant rules of customary law may continue to be applicable in times of armed conflict to the extent that they are not inconsistent with the applicable law of armed conflict. Obligations concerning the protection of the environment that are binding on

States not party to an armed conflict (e.g. neighbouring States) and that relate to areas beyond the limits of national jurisdiction (e.g. the high seas) are not affected by the existence of the armed conflict to the extent that those obligations are not inconsistent with the applicable law of armed conflict.

...

- (11) Care shall be taken in warfare to protect and preserve the natural environment.

78. The 1994 San Remo Manual provides that:

35. ...Due regard shall also be given to the protection and preservation of the marine environment [of the exclusive economic zone and the continental shelf].

...

44. Methods and means of warfare should be employed with due regard for the natural environment taking into account the relevant rules of international law.

II. National Practice

Military Manuals

79. Australia's Defence Force Manual states that "those responsible for planning and conducting military operations have a duty to ensure that the natural environment is protected".⁶⁷

80. South Korea's Operational Law Manual prohibits the use of weapons damaging the natural environment.⁶⁸

81. The US Naval Handbook provides that "methods and means of warfare should be employed with due regard to the protection and preservation of the natural environment".⁶⁹

National Legislation

82. No practice was found.

National Case-law

83. No practice was found.

Other National Practice

84. At the Meeting on Human Environment in 1972, China condemned the US for causing "unprecedented damage to the human environment" in South Vietnam through the use of "chemical toxic and poisonous gas". It also accused the US of destroying "large areas of rich farming land with craters", poisoning

⁶⁷ Australia, *Defence Force Manual* (1994), § 545.

⁶⁸ South Korea, *Operational Law Manual* (1996), p. 129.

⁶⁹ US, *Naval Handbook* (1995), § 8.1.3.

“rivers and other water resources”, destroying forests and crops and threatening “some of the species with extinction”.⁷⁰

85. In 1997, Colombia’s Defensoría del Pueblo (Ombudsman’s Office) denounced guerrilla attacks on oil pipelines as a violation of IHL insofar as oil spills inflicted damage on the environment, which affected both natural water sources and the productivity of the land.⁷¹

86. The Report on the Practice of Colombia states that it is Colombia’s *opinio juris* that “the parties to the conflict must protect the environment, endeavouring to prevent the damage to the natural environment caused by war operations”.⁷²

87. In its written statement submitted to the ICJ in the *Nuclear Weapons (WHO) case* in 1995, Costa Rica stated that:

Due to the length of the State practice and continued State expression of maintenance and protection of the environment, the Human Right to Environment may be considered a part of customary international law. Whether it is recognized as a full legal right, it is clear that the Human Right to the Environment would be violate[d] by the threat or use of nuclear weapons.⁷³

88. In its written statement submitted to the ICJ in the *Nuclear Weapons case* in 1995, Egypt stated that it considered the principle whereby every State must ensure that activities within its jurisdiction or under its control do not cause damage to the environment to be a “general rule”. Referring to the 1972 Stockholm Declaration on the Human Environment and the 1992 Rio Declaration, in which this rule was stated, Egypt argued that they “must be seen as declaratory of evolving normative regulation for the protection of the environment”.⁷⁴

89. In its written statement submitted to the ICJ in the *Nuclear Weapons case* in 1995, France denied the existence in contemporary international law, either as *lex lata* or as *lex ferenda*, of a customary principle concerning the protection of the environment in time of armed conflict. It also indicated its view that in general none of the multilateral environmental agreements were applicable in times of armed conflict.⁷⁵

90. In December 1991, during a parliamentary debate on the consequences of the Gulf War, a member of the German parliament stated that:

⁷⁰ China, Address to the Meeting on Human Environment, 10 June 1972, *Selected Documents of the Chinese Delegation to the United Nations*, 1972, World Knowledge Press, Beijing, pp. 257–258.

⁷¹ Colombia, Defensoría del Pueblo, *En defensa del pueblo acusado: Impactos de la violencia de oleoductos en Colombia*, 1997, p. 33, §§ 2–4.

⁷² Report on the Practice of Colombia, 1998, Chapter 4.4.

⁷³ Costa Rica, Written statement submitted to the ICJ, *Nuclear Weapons (WHO) case*, July 1995, pp. 8–9.

⁷⁴ Egypt, Written statement submitted to the ICJ, *Nuclear Weapons case*, September 1995, § 70.

⁷⁵ France, Written statement submitted to the ICJ, *Nuclear Weapons case*, 20 June 1995, § 27; see also Oral pleadings before the ICJ, *Nuclear Weapons case*, 2 November 1995, Verbatim Record CR 95/24, § 45.

The immediate improvement of international law providing protection from environment-destructive warfare is necessary. This implies... the ratification of the 1977 Additional Protocols to the Geneva Conventions without reservations by all NATO partners, including the Federal Republic of Germany [and] a general priority to be given to the fight against ecological damage over military secrecy in the case of armed conflict... In addition, a review is required of the existing priority of military necessity for specific acts of warfare to be legitimate over ecological needs – a very central point; furthermore, the general prohibition of the use of environmental destruction as a weapon is necessary.⁷⁶

This view was supported by another parliamentary group; the other parliamentary groups neither supported nor rejected it.⁷⁷ During the same debate, a member of the parliamentary group which had supported the first speaker stated that in the view of her group, “it is inevitable to take steps in order to give more effectiveness and respect to international law in force and to enable also the UN to prevent and punish warfare against the environment as well as violations of international conventions for the protection of the environment”.⁷⁸

91. In 1991, the German President, commenting on the effect on the environment of Iraqi means and methods of warfare, stated that “we are witnesses to an unprecedented disregard for the natural environment”.⁷⁹ The German Chancellor considered this particular type of warfare as falling within possible “crimes against the environment”.⁸⁰

92. In 1991, during a debate in the Sixth Committee of the UN General Assembly on protection of the environment in armed conflict, Iran stated that:

Turning to the law on the protection of the environment, ... the general principles of customary international law clearly contained specific rules on the protection of the environment. One such rule was the obligation of States not to damage or endanger the environment beyond their jurisdiction, a rule which had been enshrined in numerous international and regional agreements.

With regard to the application of environmental law in time of war, ... the relationship between a party to the conflict and a neutral State was essentially governed by the law in time of peace and, consequently, belligerent parties had an obligation to respect environmental law vis-à-vis non-belligerent States. There was no universally accepted rule concerning the application of international law on the protection of the environment to belligerent parties, and some argued that the relationship was governed by the law of armed conflict, which meant that with the outbreak of war, the application of rules on the protection of the environment

⁷⁶ Germany, Lower House of Parliament, Statement by a Member of Parliament, Dr. Klaus Kübler, 5 December 1991, *Plenarprotokoll* 12/64, p. 5509.

⁷⁷ Germany, Lower House of Parliament, Proposal by the Alliance 90/The Greens, Nationale und internationale Konsequenzen der ökologischen Auswirkungen des Golf-krieges, *BT-Drucksache* 12/779, 17 June 1991, p. 5528.

⁷⁸ Germany, Lower House of Parliament, Statement by a Member of Parliament, Birgit Homburger, 5 December 1991, *Plenarprotokoll* 12/64, p. 5528.

⁷⁹ Germany, Statement by the President, Richard von Weizsäcker, 29 January 1991, *Bulletin*, No. 7, Presse- und Informationsamt der Bundesregierung, Bonn, 30 January 1991, p. 57.

⁸⁰ Germany, Statement by the Chancellor, Helmut Kohl, 9 April 1991, *Bulletin*, No. 35, Presse- und Informationsamt der Bundesregierung, Bonn, 12 April 1991, p. 255.

was suspended. However, others argued that in such cases, under treaty law and customary law, international legal rules protecting the environment were neither suspended [n]or terminated, since the law of armed conflict itself tended to protect the environment in time of war.⁸¹

93. In its written statement submitted to the ICJ in the *Nuclear Weapons case* in 1995, Iran stated that:

[The] prohibition of the use of nuclear weapons, due to their huge destructive and modifying effects, could also be understood from the rules of international law relating to the environment. First of all, reference can be made to Principle 21 of [the] 1972 Stockholm Declaration on Human Environment which, as a customary rule, stipulated that States are responsible for any acts in their territory having adverse effects on the environment of other States. The same idea is also reflected in Principle [2] of [the] Rio Declaration of 1992. It can be argued that, while States are prevented from such conducts in their own territory, they are duly bound to refrain from any such acts against other States.

...

The progressive development of international environmental law in recent years has resulted in the adoption of a series of treaties, such as:

- Vienna Convention for the Protection of the Ozone Layer (1985)
- United Nations Framework Convention on Climate Change (1992)
- Convention on Biological Diversity (1992)

which is indicative of the awareness of [the] international community and the emergence of an *opinio juris* concerning the preservation of the environment. Therefore, the use of nuclear weapons, having the most destructive effects on the environment, is a great concern of [the] international society.⁸²

94. The Report on the Practice of Iran states that the Iranian government holds Iraq responsible for attacking oil tankers in the Gulf and polluting the sea during the Iran–Iraq War. Iran also denounced Iraq for using chemical weapons, which resulted in the pollution of the air, water, soil and consequent effects on the ecosystem. The report adds that it is Iran's *opinio juris* that "the environment must be protected against pollution during armed conflict".⁸³

95. The Report on the Practice of Kuwait states that it is Kuwait's *opinio juris* that States shall not resort to military operations that entail consequences for the environment. When such consequences occur, the report considers that Chapter VII of the UN Charter should be applied.⁸⁴

96. A training document for the Lebanese army regards "offences against the environment" as "a 'conventional' war crime" and includes them in the list of acts considered to amount to war crimes.⁸⁵

⁸¹ Iran, Statement before the Sixth Committee of the UN General Assembly, UN Doc. A/C.6/46/SR.18, 22 October 1991, §§ 30–31.

⁸² Iran, Written statement submitted to the ICJ *Nuclear Weapons case*, 19 June 1995, pp. 4–5, § c.

⁸³ Report on the Practice of Iran, 1997, Chapter 4.4.

⁸⁴ Report on the Practice of Kuwait, 1997, Chapter 4.4.

⁸⁵ Lebanon, Training document, *L'Etat de droit et les opérations disciplinées*, 1996, p. 8–4 and p. 12–11.

97. In its written statement submitted to the ICJ in the *Nuclear Weapons case* in 1995, Malaysia expressed the view that “the principle of environmental safety is now recognised as part of international humanitarian law”.⁸⁶

98. In its written statement submitted to the ICJ in the *Nuclear Weapons (WHO) case* in 1994, Mexico stated that “the threat or use of nuclear arms in an armed conflict would constitute a breach of principles of international environmental law generally accepted”.⁸⁷

99. In 1991, in a letter to the President of the Dutch parliament concerning the environmental aspects of the Gulf War, the Ministers of Foreign Affairs, of Development Cooperation and of Defence of the Netherlands stated that they considered the intentional draining of oil and setting alight of hundreds of oil wells by Iraq in Kuwait to be “serious crimes against the environment”.⁸⁸

100. At the First Review Conference of States Parties to the CCW in 1995, Peru stressed the need to establish rules determining the liability of States for damage caused to the environment by the use of certain conventional weapons that may be deemed to be excessively injurious or to have indiscriminate effects.⁸⁹

101. The Report on the Practice of the Philippines states that “there are no specific rules which categorically state that the environment should be spared and protected during armed conflicts”. It refers to some information provided by NGOs, according to which, in most cases, the forest serves as a shield for civilians fleeing bombing, shelling and gun battles between combatants, resulting in damage to the area and the resources contained therein.⁹⁰

102. In its oral pleadings before the ICJ in the *Nuclear Weapons case* in 1995, Qatar referred to the emergence within the international community “of an *opinio juris* concerning the preservation of the environment”.⁹¹

103. In its written statement submitted to the ICJ in the *Nuclear Weapons case* in 1995, the Solomon Islands argued that “the use of nuclear weapons violates international law for the protection of human health, the environment and fundamental human rights”.⁹² In its oral pleadings, the Solomon Islands reiterated the argument whereby multilateral environmental agreements applied also in times of war, unless expressly provided otherwise.⁹³

⁸⁶ Malaysia, Written statement submitted to the ICJ, *Nuclear Weapons case*, undated, p. 10.

⁸⁷ Mexico, Written statement submitted to the ICJ, *Nuclear Weapons (WHO) case*, 9 June 1994, pp. 10–11, §§ 35–41.

⁸⁸ Netherlands, Lower House of Parliament, Letter from the Ministers of Foreign Affairs, of Development Cooperation and of Defence concerning the environmental aspects of the Gulf War, 1990–1991 Session, Doc. 21664, No. 68.

⁸⁹ Peru, Statement at the First Review Conference of States Parties to the CCW (First Session), Vienna, 25 September–13 October 1995, UN Doc. CCW/CONF.I/SR 5, 3 October 1995, §§ 67–69.

⁹⁰ Report on the Practice of the Philippines, 1997, Chapter 4.4.

⁹¹ Qatar, Oral pleadings before the ICJ, *Nuclear Weapons case*, 10 November 1995, Verbatim Record CR 95/29, §§ 28–29.

⁹² Solomon Islands, Written statement submitted to the ICJ, *Nuclear Weapons case*, 19 June 1995, Section B.

⁹³ Solomon Islands, Oral pleadings before the ICJ, *Nuclear Weapons case*, 14 November 1995, Verbatim Record CR 95/32, § 22.

104. In its written statement submitted to the ICJ in the *Nuclear Weapons (WHO) case*, Sri Lanka stated that “the protection of the environment in times of armed conflict has . . . emerged as an established principle of international law”.⁹⁴

105. In 1991, in a report submitted to the UN Security Council on operations in the Gulf War, the UK condemned Iraq for inflicting environmental damage by causing oil spills and oil fires in Kuwait, and underlined the substantial contribution made by his government to the international effort in response to this damage.⁹⁵

106. According to the Report on UK Practice, during the Rio Summit on Environment and Development in 1992, the UK Minister of State for the Armed Forces supported the principle that “States should respect international law providing protection for the environment in times of armed conflict”.⁹⁶

107. In its oral pleadings before the ICJ in the *Nuclear Weapons case* in 1995, the UK stated that the argument “that the general provisions in environmental treaties have the effect of outlawing the use of nuclear weapons” cannot be sustained because:

These treaties . . . make no reference to nuclear weapons. Their principal purpose is the protection of the environment in times of peace. Warfare in general, and nuclear warfare in particular, are not mentioned in their texts and were scarcely alluded to in the negotiations which led to their adoption.⁹⁷

108. In its written statement submitted to the ICJ in the *Nuclear Weapons case* in 1995, the US refuted the possibility of inferring a principle of “environmental security” from existing international environmental treaties, which would form part of the law of war, being that none of these treaties refers to such a principle, nor was any of them negotiated “with any idea that it [the treaty] was to be applicable in armed conflict”.⁹⁸ The US went on to state that “even if these treaties were meant to apply in armed conflict . . . the language of none of them prohibits or limits the actions of States in any manner that would reasonably apply to the use of weapons”. With reference to the 1972 Stockholm Declaration on the Human Environment, the US maintained that “nothing in the Declaration purports to ban the use of nuclear weapons in armed conflict”.⁹⁹ Lastly,

⁹⁴ Sri Lanka, Written statement submitted to the ICJ, *Nuclear Weapons (WHO) case*, undated, p. 3.

⁹⁵ UK, Letter dated 13 February 1991 to the President of the UN Security Council, UN Doc. S/22218, 13 February 1991; see also Letter dated 23 April 1991 to the President of the UN Security Council, UN Doc. S/22522, 23 April 1991.

⁹⁶ Report on UK Practice, 1997, Chapter 4.4.

⁹⁷ UK, Oral pleadings before the ICJ, *Nuclear Weapons case*, 15 November 1995, Verbatim Record CR 95/34, p. 42.

⁹⁸ US, Written statement submitted to the ICJ, *Nuclear Weapons case*, 20 June 1995, pp. 34–35; see also Written comments on the submissions of other States submitted to the ICJ, *Nuclear Weapons (WHO) case*, 20 June 1995, pp. 10–19 and Oral pleadings before the ICJ, *Nuclear Weapons case*, 15 November 1995, Verbatim Record CR 95/34, pp. 64–66.

⁹⁹ US, Written statement submitted to the ICJ, *Nuclear Weapons case*, 20 June 1995, p. 39.

the US stated that, although Principles 1, 2 and 25 of the 1992 Rio Declaration had been relied upon to maintain that “the threat or use of nuclear weapons in an armed conflict would constitute a breach of generally accepted principles of international environmental law, . . . none of these principles addresses armed conflict or the use of nuclear weapons”.¹⁰⁰

109. In 1991, during a debate in Sixth Committee of the UN General Assembly on the environmental impact of the Gulf War, Yemen stated that “the damage caused to the environment as a result of the war had emphasised the importance of adherence to the legal norms on the prohibition on causing damage to the environment in times of armed conflict, norms which had been incorporated in a number of international conventions in the field of humanitarian law”, referring in particular to AP I and the 1976 ENMOD Convention.¹⁰¹

110. The Report on the Practice of Zimbabwe recalls Zimbabwe’s adoption of the 1992 Rio Principles as evidence that environmental protection during armed conflict forms an important component of Zimbabwe’s view of IHL. It also refers to “various pieces of legislation” dealing with environmental protection and setting up standards to be observed at all times, “whether or not there is armed conflict”, as evidence of Zimbabwe’s view that the environment should be protected even in times of armed conflict.¹⁰²

III. Practice of International Organisations and Conferences

United Nations

111. In a resolution adopted in 1991, the UN Security Council reaffirmed Iraq’s responsibility “under international law for any direct loss, damage including environmental damage and the depletion of natural resources or injury to foreign Governments, nationals and corporations as a result of its unlawful invasion and occupation of Kuwait”.¹⁰³

112. In a resolution adopted in 1992, the UN General Assembly stated that it was “aware of the disastrous situation caused in Kuwait and neighbouring areas by the torching and destruction of hundreds of its oil wells and of the other environmental consequences on the atmosphere, land and marine life”. It recalled Security Council Resolution 687, section E, in which Iraq’s international responsibility for environmental damage caused during Kuwait’s occupation had been asserted. The General Assembly further stated that it was:

profoundly concerned at the deterioration in the environment as a consequence of the damage, especially the threat posed to the health and well-being of the people of Kuwait and the people of the region, and the adverse impact on the economic

¹⁰⁰ US, Written statement submitted to the ICJ, *Nuclear Weapons case*, 20 June 1995, p. 41.

¹⁰¹ Yemen, Statement before the Sixth Committee of the UN General Assembly, UN Doc. A/C.6/46/SR.20, 22 October 1991, § 30.

¹⁰² Report on the Practice of Zimbabwe, 1998, Chapter 4.4.

¹⁰³ UN Security Council, Res. 687, 3 April 1991, § 16.

activities of Kuwait and other countries of the region, including the effects on livestock, agriculture and fishing, as well as on wildlife.¹⁰⁴

113. In a resolution adopted in 1994 on the United Nations Decade on International Law, the UN General Assembly referred to the 1994 Guidelines on the Protection of the Environment in Times of Armed Conflict. The General Assembly invited:

all States to disseminate widely the revised guidelines for military manuals and instructions on the protection of the environment in times of armed conflict received from the International Committee of the Red Cross and to give due consideration to the possibility of incorporating them into their military manuals and other instructions addressed to their military personnel.¹⁰⁵

114. The programme of activities for the final term (1997–1999) of the UN Decade of International Law, adopted by the UN General Assembly in 1996, states that:

In connection with training of military personnel, States are encouraged to foster the teaching and dissemination of the principles governing the protection of the environment in times of armed conflict and should consider the possibility of making use of the guidelines for military manuals and instructions prepared by the International Committee of the Red Cross.¹⁰⁶

115. In a resolution adopted in 2001, the UN General Assembly considered that “damage to the environment in times of armed conflict impairs ecosystems and natural resources long beyond the period of conflict, and often extends beyond the limits of national territories and the present generation”. It therefore declared “6 November each year as the International Day for Preventing the Exploitation of the Environment in War and Armed Conflict”.¹⁰⁷

116. In 1991, with regard to the environmental consequences of the Gulf War, the Governing Council of the UNCC expressed “its concern about the environmental damage that occurred during the armed conflict in the Gulf area, which resulted in the pollution of the waters of the area by oil, air pollution from burning oil wells and other environmental damage to the surrounding areas”.¹⁰⁸

Other International Organisations

117. In 2001, in a report on the environmental impact of the war in the FRY on south-east Europe, the Committee on the Environment, Regional Planning and Local Authorities of the Parliamentary Assembly of the Council of Europe

¹⁰⁴ UN General Assembly, Res. 46/216, 20 December 1991, preamble; see also Res. 47/151, 18 December 1992, preamble.

¹⁰⁵ UN General Assembly, Res. 49/50, 9 December 1994, § 11.

¹⁰⁶ UN General Assembly, Res. 51/157, 16 December 1996, Annex, § 19.

¹⁰⁷ UN General Assembly, Res. 56/4, 5 November 2001, preamble and § 1.

¹⁰⁸ UNCC, Governing Council, Decision 16/11, 31 May 1991, § A.

noted that the military operations conducted by NATO against the FRY during the 1999 Kosovo crisis had caused serious damage to the country's natural environment and that the damage had extended to several other countries of south-east Europe. The report stated that "the military operations violated the rights of Yugoslav citizens and people in neighbouring countries, first and foremost the right to a healthy environment".¹⁰⁹

International Conferences

118. No practice was found.

IV. Practice of International Judicial and Quasi-judicial Bodies

119. In its advisory opinion in the *Nuclear Weapons case* in 1996, the ICJ made reference to the *Nuclear Tests case (Request for an Examination of the Situation)*, in which it held that its order in that case was "without prejudice to the obligations of States to respect and protect the natural environment". The Court stated that "although that statement was made in the context of nuclear testing, it naturally also applies to the actual use of nuclear weapons in armed conflict".¹¹⁰

120. In its advisory opinion in the *Nuclear Weapons case* in 1996, the ICJ stated that:

The Court recognizes that the environment is under daily threat and . . . also recognizes that the environment is not an abstraction but represents the living space, the quality of life and the very health of human beings, including generations unborn. The existence of the general obligation of States to ensure that activities within their jurisdiction and control respect the environment of other States or of areas beyond national control is now part of the corpus of international law relating to the environment.¹¹¹

121. In its judgement in the *Gabcikovo-Nagymaros Project case* in 1997, the ICJ considered whether protection of the environment amounted to an "essential interest" of a State that could be invoked in order to justify, by way of "necessity", actions that were not in conformity with that State's international obligations. The Court, stressing that a state of necessity could only be invoked in exceptional circumstances, answered in the affirmative. It quoted the ILC in this regard, which stated that a state of necessity could include "a grave danger to . . . the ecological preservation of all or some of [the] territory [of a State]" and that "it is primarily in the last two decades that safeguarding the ecological balance has come to be considered an 'essential interest' of all States". The

¹⁰⁹ Council of Europe, Parliamentary Assembly, Committee on the Environment, Regional Planning and Local Authorities, Report on the Environmental Impact of the War in Yugoslavia on South-East Europe, Doc. 8925, 10 January 2001, § 59.

¹¹⁰ ICJ, *Nuclear Weapons case*, Advisory Opinion, 8 July 1996, § 32.

¹¹¹ ICJ, *Nuclear Weapons case*, Advisory Opinion, 8 July 1996, § 29.

Court then quoted paragraph 29 of its advisory opinion in the *Nuclear Weapons case* in order to show that it had recently stressed “the great significance that it attaches to respect for the environment, not only for States but also for the whole of mankind”.¹¹²

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

122. In 1992, in a report submitted to the UN Secretary-General on the protection of the environment in time of armed conflict, the ICRC stated that “in addition to the rules of law pertaining to warfare, general (peacetime) provisions on the protection of the environment may continue to be applicable. This holds true in particular for the relations between a belligerent State and third States.”¹¹³

VI. Other Practice

123. The Restatement (Third) of the Foreign Relations Law of the United States, adopted and promulgated by the American Law Institute in 1986, provides that:

- (1) A state is obligated to take such measures as may be necessary, to the extent practicable under the circumstances, to ensure that activities within its jurisdiction or control
 - (a) conform to generally accepted international rules and standards for the prevention, reduction, and control of injury to the environment of another state or of areas beyond the limits of national jurisdiction; and
 - (b) are conducted so as not to cause significant injury to the environment of another state or of areas beyond the limits of national jurisdiction.
- (2) A state is responsible to all other states
 - (a) for any violation of its obligations under Subsection 1(a), and
 - (b) for any significant injury, resulting from such violation, to the environment of areas beyond the limits of national jurisdiction.
- (3) A state is responsible for any significant injury, resulting from a violation of its obligations under Subsection (1), to the environment of another state or to its property, or to persons or property within that state’s territory or under its jurisdiction or control.¹¹⁴

124. In a resolution adopted in 1991, the Politico-Military High Command of the SPLM/A stated that “the SPLM/SPLA shall do everything to halt the

¹¹² ICJ, *Gabcikovo-Nagymaros Project case*, Judgement, 25 September 1997, §§ 50–53.

¹¹³ ICRC, Report on the Protection of the Environment in Time of Armed Conflict submitted to the UN General Assembly, reprinted in Report of the UN Secretary-General on the protection of the environment in times of armed conflict, UN Doc. A/47/328, 31 July 1992, § 11.

¹¹⁴ The American Law Institute, *Restatement Third. Restatement of the Foreign Relations Law of the United States*, American Law Institute Publishers, St. Paul, 1987, § 601.

destruction of our wildlife resources and to protect and develop them for us and for posterity".¹¹⁵

125. In 1995, the IUCN Commission on Environmental Law, in cooperation with the International Council of Environmental Law, issued the Draft International Covenant on Environment and Development, which was intended to stimulate consideration of a global instrument on environmental conservation and sustainable development. Article 32(1) provides that:

Parties shall protect the environment during periods of armed conflict. In particular, Parties shall:

- (a) observe, outside areas of armed conflict, all international environmental rules by which they are bound in times of peace;
- (b) take care to protect the environment against avoidable harm in areas of armed conflict.¹¹⁶

The precautionary principle

I. Treaties and Other Instruments

Treaties

126. Paragraph 9 of the preamble to the 1992 Convention on Biodiversity states that "where there is a threat of significant reduction or loss of biological diversity, lack of full scientific certainty should not be used as a reason for postponing measures to avoid or minimize such a threat".

Other Instruments

127. Principle 15 of the 1992 Rio Declaration states that:

In order to protect the environment, the precautionary approach shall be widely applied by States according to their capabilities. Where there are threats of serious or irreversible damage, lack of full scientific certainty shall not be used as a reason for postponing cost-effective measures to prevent environmental degradation.

II. National Practice

Military Manuals

128. No practice was found.

National Legislation

129. No practice was found.

¹¹⁵ SPLM/A, PMHC Resolution No. 17: Wild Life and the Environment, 11 September 1991, § 17.1, Report on SPLM/A Practice, 1998, Chapter 4.3.

¹¹⁶ IUCN, Commission on Environmental Law, Draft International Covenant on Environment and Development, Bonn, March 1995, Article 32(1).

National Case-law

130. No practice was found.

Other National Practice

131. In its written statement submitted to the ICJ in the *Nuclear Tests case (Request for an Examination of the Situation)* in 1995, France argued that it was uncertain whether the precautionary principle had become a binding rule of international law. It went on to state that France does carry out an analysis of the impact of its activities on the environment, and described all the measures it took to ensure that the tests would not have a negative effect. It described these measures as being precautions that were in keeping with its obligations under international environmental law and therefore France did exercise sufficient diligence. However, it denied that the precautionary principle could have the effect of shifting the burden of proof as New Zealand asserted.¹¹⁷

132. In its written statement submitted to the ICJ in the *Nuclear Tests case (Request for an Examination of the Situation)*, New Zealand argued, in its request for an examination of the situation, that, under customary international law, a State is under an obligation to carry out an environmental impact assessment "in relation to any activity which is likely to cause significant damage to the environment, particularly where such effects are likely to be transboundary in nature".¹¹⁸ New Zealand also referred to the "precautionary principle" as a "very widely accepted and operative principle of international law" and which has the effect that "in situations that may possibly be significantly environmentally threatening, the burden is placed upon the party seeking to carry out the conduct that could give rise to environmental damage to prove that that conduct will not lead to such a result".¹¹⁹ New Zealand indicated that France had accepted this rule because it was contained in French law No. 95-101 of 1995 in the following terms:

The precautionary principle, according to which the absence of certainty, having regard to scientific and technical knowledge at the time, should not hold up the adoption of effective and proportionate measures with a view to avoiding a risk of serious and irreversible damage to the environment at an economically acceptable cost.¹²⁰

¹¹⁷ France, Written statement submitted to the ICJ, *Nuclear Tests case (Request for an Examination of the Situation)*, 12 September 1995, Verbatim Record CR 95/20, pp. 56–62.

¹¹⁸ New Zealand, Written statement submitted to the ICJ, *Nuclear Tests case (Request for an Examination of the Situation)*, undated, § 89.

¹¹⁹ New Zealand, Written statement submitted to the ICJ, *Nuclear Tests case (Request for an Examination of the Situation)*, undated, § 105.

¹²⁰ New Zealand, Written statement submitted to the ICJ, *Nuclear Tests case (Request for an Examination of the Situation)*, undated, § 107.

III. Practice of International Organisations and Conferences

United Nations

133. The meeting of the UN Economic Commission for Europe (ECE) in 1990 issued the Bergen ECE Ministerial Declaration on Sustainable Development. Article 7 of this Declaration formulated the precautionary principle in these terms:

In order to achieve sustainable development, policies must be based on the precautionary principle. Environmental measures must anticipate, prevent and attack the causes of environmental degradation. Where there are threats of serious or irreversible damage, lack of full scientific certainty should not be used as a reason for postponing measures to prevent environmental degradation.¹²¹

134. On 14 August 2000, KFOR troops assisted UNMIK and UNMIK-Police in taking control of a lead-smelting plant in Zvecan, part of the Trepca mining complex in northern Kosovo. As a justification for the military action, the Special Representative of the UN Secretary-General for Kosovo explained that the Zvecan plant had been producing unacceptable levels of air pollution and therefore presented a serious threat to public health.¹²² In a press conference at the UN Headquarters, the chargé d'affaires a.i. of the Permanent Mission of the FRY to the UN said that the government of the FRY rejected the Special Representative's claim that KFOR was acting to prevent lead pollution. He maintained that daily air measurements corresponded to Yugoslav government regulations, adding that, even if high air pollution had been the problem, "it was not sufficient to justify such a crude use of military force".¹²³

135. In its report in 1996, the Working Group of Experts on Liability and Compensation for Environmental Damage Arising from Military Activities, which was established by UNEP in 1994 within the purview of the Montevideo Programme II, provided a practical contribution to the work of the UNCC, *inter alia*, by recommending the criteria for evaluating "environmental damage". The Working Group examined four kinds of damages in respect of which claims for compensation were allowed:

- a) Abatement and prevention of environmental damage (including expenses directly relating to fighting oil fires and stemming the flow of oil in coastal and international waters);

¹²¹ UN Economic Commission for Europe, Bergen ECE Ministerial Declaration on Sustainable Development, 15 May 1990, Article 7.

¹²² KFOR, Acting KFOR Spokesman, News Update, COMKFOR's Zvecan Smelter Plant Closure Statement, Pristina, 14 August 2000, see website www.kforonline.com/news/updates/nu_14aug00.htm.

¹²³ FRY, Press Conference by the Permanent Mission of FRY to the UN, New York, 22 August 2000.

- b) Reasonable measures already taken to clean and restore the environment or future measures which can be documented as reasonably necessary to clean and restore the environment;
- c) Reasonable monitoring and assessment of the environmental damage for the purpose of evaluating and abating harm and restoring the environment; and
- d) Reasonable monitoring of public health and performing medical screening for the purposes of investigation and combating increased health risks as a result of the environmental damage.¹²⁴

As to the first type of damages, the Working Group concluded that “the methodology for determining the amount of compensation would be the costs actually incurred in taking such measures [to abate or prevent environmental damage]”. It added that, although not expressly mentioned, “it would . . . be appropriate to infer a limitation on compensation to measures which themselves are reasonable, and to costs that are reasonable in amount”, while “in the light of the precautionary principle some latitude would be warranted in relation to costs incurred in an emergency situation requiring a prompt response in the face of limited information”.¹²⁵ As to the other type of damages, reference was also made by the Working Group to the precautionary principle as an element to be taken into due account for determining the “reasonableness” of the activities in question.¹²⁶

136. In June 2001, within the framework of the activities of the UNCC, the “F4” Panel of Commissioners submitted its first report to the Governing Council dealing with claims for losses resulting from environmental damage and the depletion of natural resources. The report addressed only the first instalment of “F4” claims, which included claims submitted by the governments of Iran, Kuwait, Saudi Arabia, Syria and Turkey for compensation for expenses resulting from monitoring and assessment activities undertaken or to be undertaken by the claimants to identify and evaluate environmental damage suffered as a result of Iraq’s invasion and occupation of Kuwait (“monitoring and assessment claims”). In particular, these activities related to damage from air pollution and oil pollution caused by the ignition of hundreds of oil wells and by the release of millions of barrels of oil into the sea by Iraqi forces in Kuwait.¹²⁷ In deciding whether expenses incurred for monitoring and assessment activities were compensable, the Panel declared that it had considered “whether there was evidence that the activity proposed or undertaken could produce information

¹²⁴ UNEP, Report of the Working Group of Experts on Liability and Compensation for Environmental Damage Arising from Military Activities, adopted at the Third Meeting of the Working Group, London, 17 May 1996.

¹²⁵ UNEP, Report of the Working Group of Experts on Liability and Compensation for Environmental Damage Arising from Military Activities, adopted at the Third Meeting of the Working Group, London, 17 May 1996, §§ 61 and 62.

¹²⁶ UNEP, Report of the Working Group of Experts on Liability and Compensation for Environmental Damage Arising from Military Activities, adopted at the Third Meeting of the Working Group, London, 17 May 1996, §§ 65 and 73.

¹²⁷ UNCC, Governing Council, Report and Recommendations made by the Panel of Commissioners concerning the first instalment of F4 claims, UN Doc. S/AC.26/2001/16, 22 June 2001, p. 9, §§ 13–14.

that might be helpful in identifying environmental damage and depletion of natural resources, or that could offer a useful basis for taking preventive or remedial measures".¹²⁸

Other International Organisations

137. No practice was found.

International Conferences

138. The 26th International Conference of the Red Cross and Red Crescent in 1995 adopted a resolution on protection of the civilian population in period of armed conflict in which it called upon parties to conflict "to take all feasible precautions to avoid, in their military operations, all acts liable to destroy or damage water sources".¹²⁹

IV. Practice of International Judicial and Quasi-judicial Bodies

139. The ICJ's order in the *Nuclear Tests case (Request for an Examination of the Situation)* in 1995 turned on procedural aspects and did not consider the merits of the arguments relating to the need for a prior assessment and the application of the precautionary principle. The order only made a reference in the most general terms to "obligations of States to respect and protect the natural environment, obligations to which both New Zealand and France have in the present instance reaffirmed their commitment".¹³⁰

140. In his dissenting opinion in the *Nuclear Tests case (Request for an Examination of the Situation)* in 1995, Judge Weeramantry referred to the precautionary principle as one "which is gaining increasing support as part of the international law of the environment" and the principle requiring an environmental impact assessment as "gathering strength and international acceptance".¹³¹

141. In his dissenting opinion in the *Nuclear Tests case (Request for an Examination of the Situation)* in 1995, Judge Palmer stated that "as the law now stands it is a matter of legal duty to first establish before undertaking an activity that the activity does not involve any unacceptable risk to the environment". He added that "the norm involved in the precautionary principle has developed rapidly and may now be a principle of customary international law relating to the environment".¹³²

¹²⁸ UNCC, Governing Council, UN Doc. S/AC.26/2001/16, Report and Recommendations made by the Panel of Commissioners concerning the first instalment of F4 claims, 22 June 2001, p. 15, § 35.s

¹²⁹ 26th International Conference of the Red Cross and Red Crescent, Geneva, 3–7 December 1995, Res. II, § F(b).

¹³⁰ ICJ, *Nuclear Tests case (Request for an Examination of the Situation)*, Order, 22 September 1995, § 64.

¹³¹ ICJ, *Nuclear Tests case (Request for an Examination of the Situation)*, Dissenting Opinion of Judge Weeramantry, 22 September 1995, pp. 342 and 344.

¹³² ICJ, *Nuclear Tests case (Request for an Examination of the Situation)*, Dissenting Opinion of Judge Palmer, 22 September 1995, §§ 87 and 91.

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

142. To fulfil its task of disseminating IHL, the ICRC has delegates around the world teaching armed and security forces that “targets for particular weapons and fire units shall be determined and assigned with the same precautions as to military objectives, specially taking into account the tactical result desired . . . and the destructive power of the ammunition used (. . . possible effects on the environment)”.¹³³

143. In 1993, in a report submitted to the UN General Assembly on the protection of the environment in times of armed conflict, the ICRC stated that, with respect to the applicability of the precautionary principle to the protection of the environment in times of armed conflict:

This principle is an emerging, but generally recognized principle of international law. The object of the precautionary principle is to anticipate and prevent damage to the environment and to ensure that, where there are threats of serious or irreversible damage, lack of full scientific certainty shall not be used as a reason to postpone any measures to prevent such damage.¹³⁴

VI. Other Practice

144. No practice was found.

C. Causing Serious Damage to the Natural Environment

Widespread, long-term and severe damage

I. Treaties and Other Instruments

Treaties

145. Article 35(3) AP I provides that “it is prohibited to employ methods or means of warfare which are intended, or may be expected, to cause widespread, long-term and severe damage to the natural environment”. Article 35 AP I was adopted by consensus.¹³⁵

146. Article 55(1) AP I provides that:

Care shall be taken in warfare to protect the natural environment against widespread, long-term and severe damage. This protection includes a prohibition of the use of methods or means of warfare which are intended or may be expected to cause such damage to the natural environment and thereby to prejudice the health or survival of the population.

¹³³ Frédéric de Mulinen, *Handbook on the Law of War for Armed Forces*, ICRC, Geneva, 1987, § 433.

¹³⁴ ICRC, Report on the protection of the environment in time of armed conflict submitted to the UN General Assembly, reprinted in Report of the UN Secretary-General on the protection of the environment in times of armed conflict, UN Doc. A/48/269, 29 July 1993, § 91.

¹³⁵ CDDH, *Official Records*, Vol. VI, CDDH/SR.39, 25 May 1977, p. 101.

Article 55 AP I was adopted by consensus.¹³⁶

147. Upon ratification of AP I, France stated that:

The Government of the French Republic considers that the risk of damaging the natural environment which results from the use of certain means or methods of warfare, as derives from the provisions of paragraphs 2 and 3 of Article 35 as well as those of Article 55, shall be examined objectively on the basis of information available at the time of its assessment.¹³⁷

148. Upon ratification of AP I, Ireland stated that:

In ensuring that care shall be taken in warfare to protect the natural environment against widespread, long-term and severe damage and taking account of the prohibition of the use of methods or means of warfare which are intended or may be expected to cause such damage to the natural environment thereby prejudicing the health or survival of the population, Ireland declares that nuclear weapons, even if not directly governed by Additional Protocol I, remain subject to existing rules of international law as confirmed in 1996 by the International Court of Justice in its Advisory Opinion on the Legality of the Threat or Use of Nuclear Weapons. Ireland will interpret and apply this Article in a way which leads to the best possible protection for the civilian population.¹³⁸

149. Upon ratification of AP I, the UK declared with respect to Articles 35(3) and 55 AP I that:

The United Kingdom understands both of these provisions to cover the employment of methods and means of warfare and that the risk of environmental damage falling within the scope of these provisions arising from such methods and means of warfare is to be assessed objectively on the basis of the information available at the time.¹³⁹

150. During the negotiations on AP II at the CDDH, environmental aspects were first addressed at the initiative of Australia, which proposed the addition of an Article 28 *bis* concerning the protection of the natural environment, stressing that “destruction of the environment should be prohibited not only in international but also in non-international conflicts”.¹⁴⁰ This draft provision read as follows: “It is forbidden to employ methods and means of combat which are intended or may be expected to cause widespread, long-term, and severe damage to the natural environment.”¹⁴¹ Committee III adopted the proposal by

¹³⁶ CDDH, *Official Records*, Vol. VI, CDDH/SR.42, 27 May 1977, p. 209.

¹³⁷ France, Reservations and declaration made upon ratification of AP I, 11 March 2001, § 6.

¹³⁸ Ireland, Declarations and reservations made upon ratification of AP I, 19 May 1999, § 11.

¹³⁹ UK, Reservations and declarations made upon ratification of AP I, 28 January 1998, § e.

¹⁴⁰ Australia, Statement at the CDDH, *Official Records*, Vol. XIV, CDDH/III/SR.20, 14 February 1975, p. 176, § 37.

¹⁴¹ CDDH, *Official Records*, Vol. XV, CDDH/215/Rev.1, Report of Committee III, Geneva, 3 February–18 April 1975, p. 324.

49 votes in favour, 4 against and 7 abstentions.¹⁴² The provision was rejected in the plenary by 25 votes in favour, 19 against and 33 abstentions.¹⁴³

151. The preamble to the 1980 CCW recalls that “it is prohibited to employ methods and means of warfare which are intended, or may be expected, to cause widespread, long-term and severe damage to the natural environment”.

152. Upon ratification of the 1980 CCW, France stated that:

The fourth paragraph of the preamble to the Convention on Prohibitions or Restrictions on The Use of Certain Conventional Weapons Which May Be Deemed to Be Excessively Injurious or to Have Indiscriminate Effects, which reproduces the provisions of Article 35, paragraph 3, of Additional Protocol I, applies only to States parties to that Protocol.¹⁴⁴

153. Upon ratification of the 1980 CCW, the US stated that:

The United States considers that the fourth paragraph of the preamble to the Convention, which refers to the substance of provisions of article 35(3) and article 55(1) of additional Protocol I to the Geneva Convention for the Protection of War Victims of August 12, 1949, applies only to States which have accepted those provisions.¹⁴⁵

154. Pursuant to Article 8(2)(b)(iv) of the 1998 ICC Statute, “intentionally launching an attack in the knowledge that such attack will cause . . . widespread, long-term and severe damage to the natural environment which would be clearly excessive in relation to the concrete and direct overall military advantage anticipated” constitutes a war crime in international armed conflicts.

155. Upon ratification of the 1998 ICC Statute, France declared that “the risk of damage to the natural environment as a result of the use of methods and means of warfare, as envisaged in article 8, paragraph 2(b)(iv), must be weighed objectively on the basis of the information available at the time of its assessment”.¹⁴⁶

Other Instruments

156. Pursuant to Article 22(d) of the 1991 ILC Draft Code of Crimes against the Peace and Security of Mankind, “employing methods or means of warfare which are intended or may be expected to cause widespread, long-term and severe damage to the natural environment” is an exceptionally serious war crime.

¹⁴² CDDH, *Official Records*, Vol. XV, CDDH/215/Rev.1, Report of Committee III, Geneva, 3 February–18 April 1975, p. 294, § 146.

¹⁴³ CDDH, *Official Records*, Vol. VII, CDDH/SR.51, 3 June 1977, p. 114.

¹⁴⁴ France, Reservations made upon ratification of the CCW, 4 March 1988.

¹⁴⁵ US, Statements of understanding made upon ratification of the CCW, 24 March 1995.

¹⁴⁶ France, Interpretative declarations made upon ratification of the ICC Statute, 9 June 2000, § 7.

157. Paragraph 6 of the 1991 Memorandum of Understanding on the Application of IHL between Croatia and the SFRY requires that hostilities be conducted in accordance with Articles 35(3) and 55 AP I.

158. Paragraph 2.5 of the 1992 Agreement on the Application of IHL between the Parties to the Conflict in Bosnia and Herzegovina requires that hostilities be conducted in accordance with Articles 35(3) and 55 AP I.

159. Paragraph 11 of the 1994 Guidelines on the Protection of the Environment in Times of Armed Conflict provides that "it is prohibited to employ methods or means of warfare which are intended, or may be expected, to cause widespread, long-term and severe damage to the natural environment and thereby prejudice the health or survival of the population".

160. Pursuant to Article 20(g) of the 1996 ILC Draft Code of Crimes against the Peace and Security of Mankind the following constitutes a war crime:

in the case of armed conflict, using methods or means of warfare not justified by military necessity with the intent to cause widespread, long-term and severe damage to the natural environment and thereby gravely prejudice the health or survival of the population and such damage occurs.

161. Section 6.3 of the 1999 UN Secretary-General's Bulletin provides that "the United Nations force is prohibited from employing methods of warfare . . . which are intended, or may be expected to cause, widespread, long-term and severe damage to the natural environment".

162. The 2000 UNTAET Regulation No. 2000/15 establishes panels with exclusive jurisdiction over serious criminal offences, including war crimes. According to Section 6(1)(b)(iv), "intentionally launching an attack in the knowledge that such attack will cause . . . widespread, long-term and severe damage to the natural environment which would be clearly excessive in relation to the concrete and direct overall military advantage anticipated" constitutes a war crime in international armed conflicts.

II. National Practice

Military Manuals

163. Argentina's Law of War Manual provides that "the natural environment must be protected against widespread, long-term and severe damage".¹⁴⁷ The manual also restates Article 35 AP I.¹⁴⁸

164. Australia's Commanders' Guide states that "it is prohibited to use methods or means of warfare which are intended or may be expected to cause widespread, long-term and severe damage to the natural environment and

¹⁴⁷ Argentina, *Law of War Manual* (1989), § 4.03.

¹⁴⁸ Argentina, *Law of War Manual* (1989), § 1.04(3).

thereby jeopardise the survival or seriously prejudice the health or survival of the population".¹⁴⁹

165. Australia's Defence Force Manual states that:

Any method or means of warfare which is planned, or expected, to cause widespread, long-term and severe damage to the natural environment and thereby jeopardise the survival or seriously prejudice the health of the population is prohibited. In this context, "long-term" means continuing for decades. Means or methods which are not expected to cause such damage are permitted even if damage results.¹⁵⁰

166. Belgium's Law of War Manual prohibits the use of "methods or means of warfare . . . which cause such damage to the natural environment that they prejudice the health or survival of the population". The manual specifically prohibits "methods or means of warfare that are intended or may be expected to cause widespread, long-term and severe damage to the natural environment".¹⁵¹ With respect to weapons, the manual states that the basic principle whereby the only legitimate goal in war is to weaken the enemy's military forces would be violated if weapons or other means of warfare were used which "would cause widespread, long-term and severe damage to the natural environment".¹⁵²

167. Benin's Military Manual states that it is prohibited "to use means and methods of warfare which are likely to cause widespread, long-term and severe damage to the natural environment".¹⁵³

168. Canada's LOAC Manual states that:

83. Care shall be taken in an armed conflict to protect the natural environment against widespread, long-term and severe damage.

84. Attacks which are intended or may be expected to cause damage to the natural environment that prejudices the health or survival of the population are prohibited.¹⁵⁴

169. Colombia's Basic Military Manual states that "the use of weapons which cause unnecessary and indiscriminate, widespread, long-term and severe damage to persons and the environment" is prohibited.¹⁵⁵

170. France's LOAC Manual restates the prohibition on employing methods or means of warfare which are intended, or may be expected, to cause widespread, long-term and severe damage to the natural environment set out in Article 35 AP I.¹⁵⁶

¹⁴⁹ Australia, *Commanders' Guide* (1994), § 909.

¹⁵⁰ Australia, *Defence Force Manual* (1994), § 713.

¹⁵¹ Belgium, *Law of War Manual* (1983), pp. 27–28.

¹⁵² Belgium, *Law of War Manual* (1983), p. 37.

¹⁵³ Benin, *Military Manual* (1995), Fascicule III, p. 12.

¹⁵⁴ Canada, *LOAC Manual* (1999), pp. 4-8/4-9, §§ 83–84, see also p. 6-5, § 44.

¹⁵⁵ Colombia, *Basic Military Manual* (1995), pp. 49–50.

¹⁵⁶ France, *LOAC Manual* (2001), p. 63.

171. Germany's Soldiers' Manual provides that "it is prohibited to use means or methods of warfare which are intended or of a nature . . . to cause widespread, long-term and severe damage to the natural environment".¹⁵⁷

172. Germany's Military Manual states that:

401. It is particularly prohibited to employ means or methods which are intended or of a nature . . . to cause widespread, long-term and severe damage to the natural environment.

...

403. "Widespread", "long-term" and "severe" damage to the natural environment is a major interference with human life or natural resources which considerably exceeds the battlefield damage to be regularly expected in a war. Damage to the natural environment by means of warfare (Art. 35 para 3, 55 para 1 AP I) and severe manipulation of the environment as a weapon (ENMOD) are likewise prohibited.¹⁵⁸

173. Germany's IHL Manual states that "it is prohibited to use means or methods of warfare which are intended or of a nature . . . to cause widespread, long-term and severe damage to the natural environment".¹⁵⁹

174. Italy's IHL Manual states that "it is prohibited to use means and methods of warfare, which may cause . . . widespread, long-term and severe damage to the natural environment".¹⁶⁰

175. Kenya's LOAC Manual provides that it is forbidden "to use methods of warfare which are specifically intended or may be expected to cause widespread, long-term and severe damage to the natural environment".¹⁶¹

176. The Military Manual of the Netherlands states that "it is prohibited to employ methods or means of warfare which are intended, or may be expected, to cause widespread, long-term and severe damage to the natural environment".¹⁶²

The manual explains that the part of AP I concerning the general protection of the civilian population against the effects of hostilities repeats this prohibition (in Article 55) with the proviso that "the damage to the natural environment has to be such that the health or the survival of the civilian population is endangered".¹⁶³

177. The Military Handbook of the Netherlands states that "attention must be paid to the protection of the natural environment against widespread, long-term and severe damage".¹⁶⁴

178. New Zealand's Military Manual states that:

Care shall be taken in warfare to protect the natural environment against widespread, long-term *and* severe damage. This protection includes a prohibition

¹⁵⁷ Germany, *Soldiers' Manual* (1991), p. 5.

¹⁵⁸ Germany, *Military Manual* (1992), §§ 401 and 403, see also § 1020 (naval warfare).

¹⁵⁹ Germany, *IHL Manual* (1996), § 302.

¹⁶⁰ Italy, *IHL Manual* (1991), Vol. I, § 7.

¹⁶¹ Kenya, *LOAC Manual* (1997), Précis No. 4, p. 3, see also Précis No. 2, p. 2.

¹⁶² Netherlands, *Military Manual* (1993), p. IV-1, § 1.

¹⁶³ Netherlands, *Military Manual* (1993), p. V-9, § 7.

¹⁶⁴ Netherlands, *Military Handbook* (1995), p. 7-44.

of the use of methods or means of warfare which are intended or may be expected to cause such damage to the natural environment and thereby to prejudice the health or survival of the population.¹⁶⁵ [emphasis in original]

179. Russia's Military Manual states that "substances which have widespread, long-term and severe consequences on the environment" are prohibited means of warfare.¹⁶⁶

180. Spain's LOAC Manual states that:

There is a serious concern today about the protection of the natural environment which is translated in the law of war in the form of three specific prohibitions to use means and methods of warfare which would cause widespread, long-term and severe damage to the environment (Articles 35 and 55 AP I and the 1976 ENMOD Convention).¹⁶⁷

181. Sweden's IHL Manual refers to Article 55 AP I as providing that "the parties shall exercise caution so that widespread, long-term and severe damage [to the natural environment] can be avoided".¹⁶⁸

182. Switzerland's Basic Military Manual prohibits the employment of means of warfare likely to cause "serious and long-term damage to the natural environment".¹⁶⁹ It further states that "during military operations, care must be taken to protect the environment against widespread, long-term and severe damage".¹⁷⁰

183. Togo's Military Manual states that it is prohibited "to use means and methods of warfare which are likely to cause widespread, long-term and severe damage to the natural environment".¹⁷¹

184. The UK LOAC Manual states that it is forbidden "to use methods of warfare which are specifically intended to cause widespread, long-term and severe damage to the natural environment. This rule does not prohibit the use of nuclear weapons against military objectives."¹⁷² In a subsequent section, the manual states that "the following are prohibited in *international* armed conflict: . . . g. weapons (other than nuclear weapons) intended or which may be expected to cause widespread, long-term and severe damage to the natural environment".¹⁷³ (emphasis in original)

185. The US Air Force Commander's Handbook states that:

Weapons that may be expected to cause widespread, long-term, and severe damage to the natural environment are prohibited. This is a new principle, established by

¹⁶⁵ New Zealand, *Military Manual* (1992), §§ 505(1) and 614(1).

¹⁶⁶ Russia, *Military Manual* (1990), § 6(g).

¹⁶⁷ Spain, *LOAC Manual* (1996), Vol. I, §§ 1.3.d.(4) and 4.5.b.(4).

¹⁶⁸ Sweden, *IHL Manual* (1991), Section 3.2.1.5, p. 62.

¹⁶⁹ Switzerland, *Basic Military Manual* (1987), Article 17.

¹⁷⁰ Switzerland, *Basic Military Manual* (1987), Article 25(3).

¹⁷¹ Togo, *Military Manual* (1996), Fascicule III, p. 12.

¹⁷² UK, *LOAC Manual* (1981), Section 4, p. 14, § 5(h).

¹⁷³ UK, *LOAC Manual* (1981), Section 5, p. 20, § 1(g).

[AP I]. Its exact scope is not yet clear, though the United States does not regard it as applying to nuclear weapons. It is not believed that any presently employed conventional weapon would violate this rule.¹⁷⁴

186. The US Operational Law Handbook states that “the following measures are expressly prohibited by the law of war and are not excusable on the basis of military necessity: . . . (i) using weapons which cause . . . prolonged damage to the natural environment”.¹⁷⁵

187. The YPA Military Manual of the SFRY (FRY) provides that “it is prohibited to use means and methods of warfare which are designed to or likely to cause massive, long-term and serious damage to the environment”.¹⁷⁶

National Legislation

188. Argentina’s Draft Code of Military Justice punishes any soldier who uses or orders, in time of armed conflict, the use of methods or means of warfare “which are intended, or may be expected, to cause widespread, long-term and severe damage to the natural environment and thereby prejudice the health or survival of the population”.¹⁷⁷

189. Under Armenia’s Penal Code, “ecocide”, namely “mass destruction of flora and fauna, pollution of the atmosphere, soils and water resources, as well as other acts having caused an ecological disaster”, constitutes a crime against the peace and security of mankind.¹⁷⁸

190. Australia’s ICC (Consequential Amendments) Act incorporates in the Criminal Code the war crimes defined in the 1998 ICC Statute, including launching an attack in the knowledge that such attack will cause “widespread, long-term and severe damage to the natural environment . . . of such an extent as to be excessive in relation to the concrete and direct military advantage anticipated” in international armed conflicts.¹⁷⁹

191. Azerbaijan’s Criminal Code provides that the use of methods and means of warfare which cause “widespread, long-term and severe damage to the natural environment” constitutes a war crime in international and non-international armed conflicts.¹⁸⁰

192. The Criminal Code of Belarus, in a part dealing with “crimes against the peace and the security of mankind and war crimes”, provides for the punishment of “ecocide”, namely “mass destruction of the fauna and flora, pollution of the atmosphere and water resources as well as any other act liable to cause an

¹⁷⁴ US, *Air Force Commander’s Handbook* (1980), § 6-2(c).

¹⁷⁵ US, *Operational Law Handbook* (1993), p. Q-182, § (i).

¹⁷⁶ SFRY (FRY), *YPA Military Manual* (1988), § 97.

¹⁷⁷ Argentina, *Draft Code of Military Justice* (1998), Article 290, introducing a new Article 874 in the *Code of Military Justice as amended* (1951).

¹⁷⁸ Armenia, *Penal Code* (2003), Article 394.

¹⁷⁹ Australia, *ICC (Consequential Amendments) Act* (2002), Schedule 1, § 268.38(2).

¹⁸⁰ Azerbaijan, *Criminal Code* (1999), Article 116.0.2.

ecological disaster".¹⁸¹ It also provides for the punishment of "wilfully causing widespread, long-term and serious damage to the natural environment".¹⁸²

193. Under the Criminal Code of the Federation of Bosnia and Herzegovina, it is a war crime to order or commit "long-lasting and large-scale environmental devastation which may be detrimental to the health or survival of the population".¹⁸³ The Criminal Code of the Republika Srpska contains the same provision.¹⁸⁴

194. Under Burundi's Draft Law on Genocide, Crimes against Humanity and War Crimes, "intentionally launching an attack in the knowledge that such attack will cause... widespread, long-term and severe damage to the natural environment which would be clearly excessive in relation to the concrete and direct overall military advantage anticipated" is a war crime in international armed conflicts.¹⁸⁵

195. Canada's Crimes against Humanity and War Crimes Act provides that the war crimes defined in Article 8(2) of the 1998 ICC Statute are "crimes according to customary international law" and, as such, indictable offences under the Act.¹⁸⁶

196. Colombia's Penal Code imposes a criminal sanction on "anyone who, during an armed conflict, uses methods or means of warfare which are intended to cause widespread, long-term and severe damage to the natural environment".¹⁸⁷

197. Congo's Genocide, War Crimes and Crimes against Humanity Act defines war crimes with reference to the categories of crimes set out in Article 8 of the 1998 ICC Statute.¹⁸⁸

198. Croatia's Criminal Code, in a part dealing with "war crimes against the civilian population", provides for the punishment of:

whoever, in violation of the rules of international law in times of war, armed conflict or occupation, orders... long-term and widespread damage to the natural environment which can prejudice the health or survival of the population. Such punishment shall also be imposed on whoever commits [such] acts.¹⁸⁹

199. Under the Draft Amendments to the Penal Code of El Salvador, "anyone who, in the context of an international or a non-international armed conflict, causes widespread, long-term and severe damage to natural resources and the natural environment" is punishable.¹⁹⁰

¹⁸¹ Belarus, *Criminal Code* (1999), Article 131.

¹⁸² Belarus, *Criminal Code* (1999), Article 136(2).

¹⁸³ Bosnia and Herzegovina, Federation, *Criminal Code* (1998), Article 154(2).

¹⁸⁴ Bosnia and Herzegovina, Republika Srpska, *Criminal Code* (2000), Article 433(2).

¹⁸⁵ Burundi, *Draft Law on Genocide, Crimes against Humanity and War Crimes* (2001), Article 4(B)(d).

¹⁸⁶ Canada, *Crimes against Humanity and War Crimes Act* (2000), Section 4(1) and (4).

¹⁸⁷ Colombia, *Penal Code* (2000), Article 164.

¹⁸⁸ Congo, *Genocide, War Crimes and Crimes against Humanity Act* (1998), Article 4.

¹⁸⁹ Croatia, *Criminal Code* (1997), Article 158(2).

¹⁹⁰ El Salvador, *Draft Amendments to the Penal Code* (1998), Article entitled "Destrucción del Medio Ambiente".

200. Under Estonia's Penal Code, "a person who knowingly affects the environment as a method of warfare, if major damage is thereby caused to the environment", commits a war crime.¹⁹¹

201. Under Georgia's Criminal Code, any war crime provided for by the 1998 ICC Statute which is not explicitly mentioned in the Code, such as "intentionally launching an attack in the knowledge that such attack will cause... widespread, long-term and severe damage to the natural environment which would be clearly excessive in relation to the concrete and direct overall military advantage anticipated" in international armed conflict, is a crime.¹⁹²

202. Germany's Law Introducing the International Crimes Code provides that:

Anyone who, in connection with an international armed conflict, carries out an attack with military means which may be expected to cause widespread, long-term and severe damage to the natural environment which could be excessive in relation to the overall concrete and direct military advantage anticipated, shall be liable to imprisonment for not less than three years.¹⁹³

203. Under Ireland's Geneva Conventions Act as amended, any "minor breach" of AP I, including violations of Articles 35(3) and 55(1) AP I, is a punishable offence.¹⁹⁴

204. Under Kazakhstan's Criminal Code, "ecocide", namely "mass destruction of the fauna or flora, pollution of the atmosphere, agricultural or water resources, as well as other acts which have caused or are capable of causing an ecological catastrophe", constitutes a crime against the peace and security of mankind.¹⁹⁵

205. Under Kyrgyzstan's Criminal Code, "ecocide", namely "mass destruction of the flora and fauna, poisoning of the atmosphere or water resources, as well as other acts capable of causing an ecological catastrophe", is punishable by deprivation of liberty.¹⁹⁶

206. Mali's Penal Code punishes as a war crime the "the launching of a deliberate attack knowing that it will cause widespread, long-term and severe damage to the natural environment".¹⁹⁷

207. Under Moldova's Penal Code, "ecocide", namely "the deliberate and massive destruction of the fauna and flora, the pollution of the atmosphere or poisoning of water resources, as well as other acts capable of causing an ecological catastrophe", is punishable by deprivation of liberty.¹⁹⁸

208. Under the International Crimes Act of the Netherlands, "intentionally launching an attack in the knowledge that such an attack will cause... widespread, long-term and severe damage to the natural environment which

¹⁹¹ Estonia, *Penal Code* (2001), § 104.

¹⁹² Georgia, *Criminal Code* (1999), Article 413(d).

¹⁹³ Germany, *Law Introducing the International Crimes Code* (2002), Article 1, § 12(3).

¹⁹⁴ Ireland, *Geneva Conventions Act as amended* (1962), Section 4(1) and (4).

¹⁹⁵ Kazakhstan, *Penal Code* (1997), Article 161.

¹⁹⁶ Kyrgyzstan, *Criminal Code* (1997), Article 374.

¹⁹⁷ Mali, *Penal Code* (2001), Article 31(4).

¹⁹⁸ Moldova, *Penal Code* (2002), Article 136.

would be clearly excessive in relation to the concrete and direct overall military advantage anticipated" is a crime, when committed in an international armed conflict.¹⁹⁹

209. Under New Zealand's International Crimes and ICC Act, war crimes include the crimes defined in Article 8(2)(b)(iv) of the 1998 ICC Statute.²⁰⁰

210. Nicaragua's Draft Penal Code punishes "anyone who, in the context of an international or a non-international armed conflict, causes widespread, long-term and severe damage to natural resources and the natural environment".²⁰¹

211. Under Norway's Military Penal Code as amended, "anyone who contravenes or is accessory to the contravention of provisions relating to the protection of persons or property laid down in . . . the two additional protocols to [the Geneva] Conventions . . . is liable to imprisonment".²⁰²

212. Under Russia's Criminal Code, "ecocide", namely "massive destruction of the fauna and flora, contamination of the atmosphere or water resources, as well as other acts capable of causing an ecological catastrophe", constitutes a crime against the peace and security of mankind.²⁰³

213. Under Slovenia's Penal Code, "infliction of long-term and large-scale damage to the environment, which may endanger the health or survival of the population" is a war crime.²⁰⁴

214. Spain's Penal Code provides for the punishment of:

anyone who, during armed conflict, uses methods or means of combat, or orders them to be used, which are . . . conceived to cause, or with good reason are expected to cause, extensive, permanent and severe damage to the natural environment, endangering the health or the survival of the population.²⁰⁵

215. Under Tajikistan's Criminal Code, "ecocide", namely "mass extermination of flora or fauna, poisoning the atmosphere or water resources, as well as other acts capable of causing an ecological catastrophe", constitutes a crime against the peace and security of mankind.²⁰⁶

216. Under Trinidad and Tobago's Draft ICC Act, it is a punishable offence to commit a war crime as defined in Article 8(2)(b)(iv) of the 1998 ICC Statute.²⁰⁷

217. Under Ukraine's Criminal Code, "ecocide", namely "mass destruction of flora and fauna, poisoning of air or water resources, and any other acts that may cause an ecological disaster", constitutes a criminal offence.²⁰⁸

¹⁹⁹ Netherlands, *International Crimes Act* (2003), Article 5(5)(b).

²⁰⁰ New Zealand, *International Crimes and ICC Act* (2000), Section 11(2).

²⁰¹ Nicaragua, *Draft Penal Code* (1999), Article 470.

²⁰² Norway, *Military Penal Code as amended* (1902), § 108(b).

²⁰³ Russia, *Criminal Code* (1996), Article 358.

²⁰⁴ Slovenia, *Penal Code* (1994), Article 374(2).

²⁰⁵ Spain, *Penal Code* (1995), Article 610.

²⁰⁶ Tajikistan, *Criminal Code* (1998), Article 400.

²⁰⁷ Trinidad and Tobago, *Draft ICC Act* (1999), Section 5(1)(a).

²⁰⁸ Ukraine, *Criminal Code* (2001), Article 441.

218. Under the UK ICC Act, it is a punishable offence to commit a war crime as defined in Article 8(2)(b)(iv) of the 1998 ICC Statute.²⁰⁹

219. Under Vietnam's Penal Code, "ecocide, destroying the natural environment", whether committed in time of peace or war, constitutes a crime against humanity.²¹⁰

220. The Penal Code as amended of the SFRY (FRY), in a part dealing with "war crimes against civilians", provides for the punishment of:

any person who may order the following in violation of the rules of international law during armed conflict or occupation: . . . long-term and widespread damage to the natural environment which may harm the health or survival of the population, or any person who may commit [such] acts.²¹¹

National Case-law

221. No practice was found.

Other National Practice

222. At the CDDH, Australia stated that the adoption of Article 48 *bis* of draft AP I (now Article 55) "might well fill a gap in humanitarian law applicable in armed conflicts".²¹²

223. In its oral pleadings before the ICJ in the *Nuclear Weapons case* in 1995, Australia stated that "in recent times the issue of the protection of the environment in armed conflict has been a particular international concern" and referred to a number of international treaties including the relevant provisions of the 1976 ENMOD Convention, AP I and the 1993 CWC. It stated that these instruments provided "cumulative evidence that weapons having . . . potentially disastrous effects on the environment, and on civilians and civilian targets, are no longer compatible with the dictates of public conscience reflected in general principles of humanity".²¹³

224. In 1992, in identical letters to the UN Secretary-General and the President of the UN Security Council, Bosnia and Herzegovina stated that "in Tuzla, the aggressor has attacked a major chemical facility, which could cause a massive ecological catastrophe encompassing much of southern Europe. Stocks of chlorine there are 128 times larger than they were in Bhopal, India, before the disaster."²¹⁴

²⁰⁹ UK, *ICC Act* (2001), Sections 50(1) and 51(1) (England and Wales) and Section 58(1) (Northern Ireland).

²¹⁰ Vietnam, *Penal Code* (1990), Article 278.

²¹¹ SFRY (FRY), *Penal Code* (1995), Article 142(2).

²¹² Australia, Statement at the CDDH, *Official Records*, Vol. XIV, CDDH/SR.20, 14 February 1975, p. 171, § 2.

²¹³ Australia, Oral pleadings before the ICJ, *Nuclear Weapons case*, Verbatim Record CR 95/22, 30 October 1995, § 31.

²¹⁴ Bosnia and Herzegovina, Identical letters dated 6 June 1992 to the UN Secretary-General and the President of the UN Security Council, UN Doc. S/24081, 10 June 1992, p. 2.

225. In 1993, in a letter to the President of the UN Security Council, Bosnia and Herzegovina stated that:

On 1 December, at 2115, from the direction of Korenita Strana near the town of Koraj, Serbian forces fired two "Volkov" rockets in the direction of the chemical plant complex [in Tuzla]. One rocket landed within the fenced-in area of the complex. Fortunately, this rocket did not hit the storage tanks holding the chlorine and other chemicals, and a major humanitarian and ecological disaster did not occur... As per the request of the Mayor of Tuzla, we ask that the Security Council send a team of international experts to Tuzla to assess the potential humanitarian and ecological consequences if the chemical plant is hit by artillery.²¹⁵

226. In its written statement submitted to the ICJ in the *Nuclear Weapons case* in 1995, Ecuador stated that:

The effects of the use of nuclear weapons will, in all cases, have devastating effects on the environment. Consequently, it is contrary to the humanitarian conditions that prohibit the destruction of the environment, which is the only guarantee of the survival of the human species, and of the whole chain of life of the planet.²¹⁶

227. At the CDDH, Egypt held the position that "any substantial deterioration of the environment in wartime must be forbidden".²¹⁷

228. At the CDDH, the FRG declared that it joined in the consensus on Article 33 of draft Protocol I (now Article 35 AP I) "with the understanding that... paragraph 3 of this article is an important new contribution to the protection of the natural environment in times of international armed conflict".²¹⁸

229. In 1988, a member of the German parliament pointed out that the rules in the Additional Protocols referring to the protection of the environment were indeed new norms. He suggested that this opinion was shared by all parliamentary groups and no protest was raised.²¹⁹

230. The memorandum annexed to Germany's declaration of ratification of the Additional Protocols referred to the rules on the protection of the environment as "new norms".²²⁰

231. In 1991, the German Minister for Family and Education accused Saddam Hussein of "fighting not according to the methods of international humanitarian law, but... of terrorism", referring, *inter alia*, to the "massive destruction of

²¹⁵ Bosnia and Herzegovina, Letter dated 3 December 1993 to the President of the UN Security Council, UN Doc. S/26870, 13 December 1993, p. 2.

²¹⁶ Ecuador, Written statement submitted to the ICJ, *Nuclear Weapons case*, 20 June 1995, p. 3.

²¹⁷ Egypt, Statement at the CDDH, *Official Records*, Vol. III, CDDH/III/SR.22, 24 February 1975, p. 156.

²¹⁸ FRG, Statement at the CDDH, *Official Records*, Vol. VI, CDDH/SR.39, 25 May 1977, p. 115.

²¹⁹ Germany, Lower House of Parliament, Statement by Member of Parliament, Günter Verheugen, 10 November 1988, *Plenarprotokoll* 11/106, p. 7344, § (C).

²²⁰ Germany, Lower House of Parliament, Memorandum annexed to the declaration of ratification of AP I, 14 February 1991, *BT-Drucksache* 11/6770, p. 112.

the environment by Iraqi forces".²²¹ The German Minister for the Environment accused Saddam Hussein of "brutal terrorism . . . against the environment".²²²

232. In its counter memorial submitted to the ICJ in the *Nuclear Weapons (WHO) case*, India stated that "the customary as well as conventional law of war prohibits the use of methods and means of warfare that may cause widespread, long-term and severe damage to the environment".²²³

233. According to the Report on the Practice of India, although Indian military and police regulations do not explicitly refer to the protection of the natural environment in times of internal conflict, the obligation to maintain public order can be interpreted as including the prevention of a serious threat to the natural environment. Furthermore, the report maintains that such an approach would be in line with an extensive interpretation of the right to life and personal freedom under Article 21 of the Indian Constitution and the relevant jurisprudence of the Indian Supreme Court.²²⁴

234. In 1991, during a debate in the Sixth Committee of the UN General Assembly on the exploitation of the environment as a weapon in times of armed conflict, Iran cited "various provisions of Additional Protocol I (1977) to the Geneva Conventions which related to the protection of the environment and led to the conclusion that that instrument clearly prohibited attacks on the environment and the use of the environment as a tool of warfare".²²⁵

235. In its written statement submitted to the ICJ in the *Nuclear Weapons case* in 1995, Iran stated, with respect to Article 35 AP I, that "no doubt, this prohibition applies to nuclear weapons for their enormous destructive and long term effect on the environment".²²⁶

236. According to the Report on the Practice of Iran, following the bombardment of Iranian oil wells in the Gulf during the Iran–Iraq War, Iran's ambassador to Kuwait announced that "Iraq had violated Articles 35 and 37 [AP I]".²²⁷

237. In 1991, in a letter to the UN Secretary-General, Iraq affirmed that it was willing "to do everything to protect the environment and natural resources and not to exploit them as a weapon in times of armed conflict" and drew attention to the "appalling environmental damage caused by coalition forces in Kuwait

²²¹ Germany, Statement by the Federal Minister for Family Affairs and Senior Citizens, Hannelore Rönch, 5 February 1991, *Bulletin*, No. 18, Presse- und Informationsamt der Bundesregierung, Bonn, 19 February 1991, p. 124.

²²² Germany, Lower House of Parliament, Statement by the Federal Minister for the Environment, Protection of Nature and Nuclear Safety, Dr. Klaus Töpfer, 31 January 1991, *Plenarprotokoll* 12/6, p. 191.

²²³ India, Counter memorial submitted to the ICJ, *Nuclear Weapons (WHO) case*, undated, p. 12, § d (vi).

²²⁴ Report on the Practice of India, 1997, Chapter 4.4.

²²⁵ Iran, Statement before the Sixth Committee of the UN General Assembly, UN Doc. A/C.6/46/SR.18, 22 October 1991, § 29.

²²⁶ Iran, Written statement submitted to the ICJ, *Nuclear Weapons case*, 19 June 1995, p. 4, § c. On the applicability of AP I to nuclear weapons, see also Written statement submitted to the ICJ, *Nuclear Weapons (WHO) case*, undated, p. 2.

²²⁷ Report on the Practice of Iran, 1997, Chapter 4.4.

and Iraq".²²⁸ A similar statement was made in 1991 during a debate in the Sixth Committee of the UN General Assembly on the environmental impact of the Gulf War.²²⁹

238. According to the Report on the Practice of Iraq, "it is not permissible to violate the existing environmental system" and "to use it as a means of oppression". The report concludes that "the violation of this principle is considered a war crime".²³⁰

239. At the CDDH, Ireland referred to the adoption of Article 48 *bis* of draft AP I (now Article 55) as an "event in the history of international humanitarian law".²³¹

240. At the CDDH, Ireland, which was one of the countries that voted in favour of Article 20 of draft AP II, explained that it was "particularly concerned" to retain paragraph 3 of this article "because of the development of methods of warfare capable of causing widespread, long-term and severe damage to the natural environment and the danger that such methods may be used by one side even in a non-international armed conflict".²³²

241. The Report on the Practice of Israel states that the "Israel Defence Force does not utilise or condone the use of methods or means of warfare which are intended, or may be expected, to cause widespread, long-term and severe damage to the natural environment".²³³

242. At the CDDH, while expressing its readiness to join in a consensus on the adoption of Article 48 *bis* of draft AP I (now Article 55), Italy stated that this article "marked a big step forward in the protection of the natural environment in the event of international armed conflict".²³⁴

243. In 1991, in a note verbale to UN Secretary-General, Jordan requested the inclusion of the item "exploitation of the environment as a weapon in times of armed conflict and the taking of practical measures to prevent such exploitation" in the provisional agenda of the 46th Session of the UN General Assembly.²³⁵ In an explanatory memorandum supporting its request Jordan stated that:

In a world where all humanity is ecologically vulnerable, it has become evident that warfare is no longer a tenable policy option for civilized nations. It is common

²²⁸ Iraq, Letter dated 12 August 1991 to the UN Secretary-General, UN Doc. A/46/358-S/22931, 13 August 1991, p. 1.

²²⁹ Iraq, Statement before the Sixth Committee of UN General Assembly, UN Doc. A/C.6/46/SR.20, 22 October 1991, § 42.

²³⁰ Report on the Practice of Iraq, 1998, Chapter 4.4.

²³¹ Ireland, Statement at the CDDH, *Official Records*, Vol. XIV, CDDH/III/SR.38, 10 April 1975, p. 412, § 52.

²³² Ireland, Statement at the CDDH, *Official Records*, Vol. VII, CDDH/SR.51, 3 June 1977, p. 120.

²³³ Report on the Practice of Israel, 1997, Chapter 4.4.

²³⁴ Italy, Statement at the CDDH, *Official Records*, Vol. VI, CDDH/SR.42, 27 May 1977, p. 208, § 20.

²³⁵ Jordan, Note verbale dated 5 July 1991 to the UN Secretary-General, UN Doc. A/46/141, 8 July 1991.

knowledge that the recent military conflict in the Gulf had an impact of tragic proportions on both the people of the region and the environment. Scientists have calculated that it will take decades to recover from the environmental damage resultant from the confrontation. This emphasizes the urgent necessity to prevent any further exploitation of the environment as a means of indiscriminate destruction. The environment must be taken into consideration from the initial stages of conflict decision-making by both politicians and military decision makers. In our approach to the next millennium, it is evident that closer cooperation between all nations is essential if we are to avoid further environmental destruction and conflict. All should realize that environmental degradation is not limited to the confines of any one nation State.²³⁶

244. In 1992, in a memorandum annexed to a letter to the Chairman of the Sixth Committee of the UN General Assembly, Jordan and the US noted that for those States party to AP I, the following principles of international law provide additional protection for the environment in times of armed conflict: "a) Article 55 of AP I requires States parties to take care in warfare to protect the natural environment against widespread, long-term and severe damage".²³⁷

245. In 1991, in a letter to the UN Secretary-General in 1991, Kuwait expressed support for Jordan's request to include the item "exploitation of the environment as a weapon in times of armed conflict and the taking of practical measures to prevent such exploitation" in the provisional agenda of the 46th Session of the UN General Assembly because of its "substantial concern and interest in protecting the environment and natural resources, which are the property of the entire mankind, and preventing their use as a weapon of terrorism as we witnessed during the war of Kuwait's liberation".²³⁸

246. In 1998, during a lecture given at the Centre of Near and Middle East Studies of the London School of Oriental and African Studies, the Chairman of the Kuwaiti Public Authority on Environment accused Iraq of having caused "the greatest premeditated environmental catastrophe ever experienced in the history of mankind". He expressed concern about the adverse effects of "Iraqi crimes against the marine environment in Kuwait".²³⁹

247. In its written statement submitted to the ICJ in the *Nuclear Weapons case* in 1995, Lesotho stated that "any use of nuclear weapons, even in self-defence, would violate international humanitarian law, including the Hague and Geneva Conventions, which prohibit as practices of war, . . . causing long-term or severe damage to the environment".²⁴⁰

²³⁶ Jordan, Explanatory memorandum, annexed to Note verbale dated 5 July 1991 to the UN Secretary-General, UN Doc. A/46/141, 8 July 1991, p. 2, § 1.

²³⁷ Jordan and US, International Law Providing Protection to the Environment in Times of Armed Conflict, annexed to Letter dated 28 September 1992 to the Chairman of the Sixth Committee of the UN General Assembly, UN Doc. A/C.6/47/3, 28 September 1992, § 2(a).

²³⁸ Kuwait, Letter dated 12 July 1991 to the UN Secretary-General, UN Doc. A/45/1035-S/22787, 15 July 1991, p. 1.

²³⁹ "Kuwait Environmental Disaster Worst Ever Experienced", *Kuwait Times*, 21 October 1998.

²⁴⁰ Lesotho, Written statement submitted to the ICJ, *Nuclear Weapons case*, 20 June 1995, p. 2.

248. In its written statement submitted to the ICJ in the *Nuclear Weapons case* in 1995, the Marshall Islands was of the view that “any use of nuclear weapons violates laws of war including the Geneva and Hague Conventions and the United Nations Charter. Such laws prohibit . . . the causing of long-term damage to the environment.”²⁴¹

249. In its response to submissions of other States to the ICJ in the *Nuclear Weapons (WHO) case* in 1995, Nauru stated that “it is also a violation of customary international law . . . to use weapons that cause severe damage to the environment”.²⁴²

250. In its written statement submitted to the ICJ in the *Nuclear Weapons case* in 1995, New Zealand stated that:

Protection of the global environment is now a major concern of the international community, with widespread support for progressive development of international treaty law in this area. The condemnation of the large-scale environmental damage wreaked upon Kuwait by Iraqi forces during the “Gulf War” in 1991 was in part a reflection of this concern. It would be a matter for consideration by the Court whether the avoidance of widespread, long-term and severe damage to the environment during war could yet be regarded as itself a rule of customary law.²⁴³

251. In its oral pleadings before the ICJ in the *Nuclear Weapons case* in 1995, New Zealand invoked a principle of IHL whereby “parties to a conflict must not use methods or means of warfare which are intended or may be expected to cause widespread, long-term and severe damage to the natural environment”.²⁴⁴

252. At the CDDH, Portugal, which was one of the countries that voted in favour of Article 20 of draft AP II, explained that it regarded “the article as a fundamental humanitarian provision the adoption of which will not imperil the authority of the State”.²⁴⁵

253. In its written statement submitted to the ICJ in the *Nuclear Weapons (WHO) case* in 1993, Rwanda stated that a State which uses nuclear weapons endangers human health and the environment and violates its obligations under IHL.²⁴⁶

254. In its written statement submitted to the ICJ in the *Nuclear Weapons (WHO) case* in 1994, Samoa stated that it considered that “the use of nuclear

²⁴¹ Marshall Islands, Written statement submitted to the ICJ, *Nuclear Weapons case*, 22 June 1995, p. 4.

²⁴² Nauru, Written comments on other written statements submitted to the ICJ, *Nuclear Weapons (WHO) case*, 15 June 1995, Part 1, p. 11.

²⁴³ New Zealand, Written statement submitted to the ICJ, *Nuclear Weapons case*, 20 June 1995, § 73.

²⁴⁴ New Zealand, Oral pleadings before the ICJ, *Nuclear Weapons case*, 9 November 1995, Verbatim Record CR 95/28, p. 27.

²⁴⁵ Portugal, Statement at the CDDH, *Official Records*, Vol. VII, CDDH/SR.51, 3 June 1977, p. 123.

²⁴⁶ Rwanda, Written statement submitted to the ICJ, *Nuclear Weapons (WHO) case*, 8 December 1993, p. 2.

weapons by a State in war or other armed conflict would be a violation of international customary law and conventions, including the Hague Conventions and the Geneva Conventions", adding that "such law and conventions prohibit the use of weapons . . . which cause widespread, long-term and severe damage to the environment".²⁴⁷

255. In its written statement submitted to the ICJ in the *Nuclear Weapons case* in 1995, Samoa, while arguing that the question as to whether the threat or use of nuclear weapons was permitted under international law should be answered in the negative, referred to the nuclear tests in the Pacific and to their "significant and long term effects on the health of Pacific people and the environment", adding that it had "a large stake in safeguarding its environment, and the survival of the planet".²⁴⁸

256. At the CDDH, Saudi Arabia, which was one of the countries that voted against Article 20 of draft AP II, stated that "since the legitimate party to an internal conflict is the *de jure* State . . . we consider that the article was merely a repetition in contradiction with draft Protocol II". It also stated that in Islamic society war's sole aim is to repel aggressors without exposing . . . the environment to danger."²⁴⁹

257. In its written statement submitted to the ICJ in the *Nuclear Weapons case* in 1995, the Solomon Islands maintained that:

The extraordinary power of nuclear weapons and the enormity of their effects on human health and the environment necessarily means that their use violates, directly or indirectly, those rules of the international law of armed conflict which prohibit:

- the use of weapons that render death inevitable;
- the use of weapons which have indiscriminate effects;
- any behaviour which might violate this law.

...

Additionally, international law now also regulates the methods and means of warfare with the aim of ensuring appropriate protection for the environment. It establishes, in particular, an absolute prohibition on the use of weapons which will cause "widespread, long-term and severe damage to the environment". [Articles 35(3) and 55 AP I are quoted] There can be little doubt that any use of nuclear weapons would cause "widespread, long-term and severe damage" to the environment, engendering a violation of Articles 35(3) and 55 [AP I] and the customary obligation reflected therein.²⁵⁰

²⁴⁷ Samoa, Written statement submitted to the ICJ, *Nuclear Weapons (WHO) case*, 16 September 1994, p. 3.

²⁴⁸ Samoa, Written statement submitted to the ICJ, *Nuclear Weapons case*, 15 June 1995, p. 1.

²⁴⁹ Saudi Arabia, Statement at the CDDH, *Official Records*, Vol. VII, CDDH/SR.51, 3 June 1977, p. 123.

²⁵⁰ Solomon Islands, Written statement submitted to the ICJ, *Nuclear Weapons case*, 19 June 1995, §§ 3.63 and 3.78.

In its oral pleadings, the Solomon Islands further invoked "the existence of a customary norm prohibiting significant environmental damage in war".²⁵¹

258. At the CDDH, while expressing satisfaction at the adoption of the two Additional Protocols, Sweden pointed out that "there were now for the first time explicit rules against . . . environmental warfare".²⁵²

259. In its written statement submitted to the ICJ in the *Nuclear Weapons case* in 1995, Sweden stated that "in accordance with an established basic principle, expressed, for example, in the Declaration made by the 1972 UN Conference on the Human Environment, there are impediments to the use of weapons which cause extensive, long-term and serious damage to the environment".²⁵³

260. In 1981, Switzerland's Federal Council qualified Articles 35(3) and 55 AP I as stating a "new prohibition".²⁵⁴

261. In its written statement submitted to the ICJ in the *Nuclear Weapons (WHO) case* in 1994, Ukraine stated that it was "deeply convinced that, in view of the health and environmental effects, the use of nuclear weapons by a State in war or other armed conflict would be a breach of its obligation under international law".²⁵⁵

262. In its written statement submitted to the ICJ in the *Nuclear Weapons case* in 1995, the UK stated that:

Articles 35(3) and 55 of Additional Protocol I are broader in scope than the [1976 ENMOD] Convention, in that they are applicable to the incidental effects on the environment of the use of weapons. They were, however, innovative provisions when included in Additional Protocol I, as was made clear in a statement by the Federal Republic of Germany on the adoption of what became Article 35 of the Protocol [see *infra*]. As new rules, the provisions of Articles 35(3) and 55 are subject to the understanding . . . that the new provisions created by Additional Protocol I do not apply to the use of nuclear weapons. The view that the environmental provisions of Protocol I are new rules and thus inapplicable to the use of nuclear weapons is confirmed by a number of commentators.²⁵⁶

263. In 1987, the Deputy Legal Adviser of the US Department of State stated that:

²⁵¹ Solomon Islands, Oral pleadings before the ICJ, *Nuclear Weapons case*, 14 November 1995, Verbatim Record CR 95/32, § 19.

²⁵² Sweden, Statement at the CDDH, *Official Records*, Vol. VII, CDDH/SR.58, 9 June 1977, p. 307, § 133.

²⁵³ Sweden, Written statement submitted to the ICJ, *Nuclear Weapons case*, 20 June 1995, p. 5; see also Written statement submitted to the ICJ, *Nuclear Weapons (WHO) case*, undated, p. 5 (extracts from the Report of the Swedish Parliamentary Standing Committee on Foreign Affairs).

²⁵⁴ Switzerland, Federal Council, Message concernant les Protocoles Additionnels aux Conventions de Genève, 18 February 1981, p. 38, § 211.411.

²⁵⁵ Ukraine, Written statement submitted to the ICJ, *Nuclear Weapons (WHO) case*, 16 May 1994, p. 1.

²⁵⁶ UK, Written statement submitted to the ICJ, *Nuclear Weapons case*, 16 June 1995, § 3.77.

We, however, consider that another principle in article 35, which also appears later in the Protocol, namely that the prohibition of methods or means of warfare intended or expected to cause widespread, long-term and severe damage to the environment, is too broad and ambiguous and is not a part of customary law.

...

The United States, however, considers the rule on the protection of the environment contained in article 55 of Protocol I as too broad and too ambiguous for effective use in military operations . . . Means and methods of warfare that have such a severe effect on the natural environment so as to endanger the civilian population may be inconsistent with the other general principles, such as the rule of proportionality.²⁵⁷

264. In 1991, in response to an ICRC memorandum on the applicability of IHL in the Gulf region, the US Department of the Army stated that "U.S. practice does not involve methods of warfare that would constitute widespread, long-term and severe damage to the environment"²⁵⁸

265. In 1991, in a report submitted to the UN Security Council on operations in the Gulf War, the US stated that:

In a development with potential devastating consequences for the environment of the Gulf, we would like to report that a vast oil slick occurred in the northern Gulf this week. Iraqi occupation forces created this slick by opening the Sea Island terminal pipelines and an oiling buoy on approximately 19 January, allowing oil to flow directly into the northern Gulf. We have evidence that Iraqi forces simultaneously emptied five oil tankers moored at piers at the Mina al-Ahmadi oil field. As of 28 January the resulting oil slick was at least 35 miles long and 10 miles wide. This is the largest oil slick in history.

On 26 January after full consultation with oil and environmental experts and the Governments of Kuwait and Saudi Arabia, United States aircraft destroyed two manifold areas used for pumping oil along pipelines. We believe this action has halted the discharge of oil into the Gulf. At the request of the Government of Saudi Arabia, the United States dispatched expert personnel and specific equipment to help contain the slick and minimize its environmental impact. Several other countries have also sent teams to provide assistance.²⁵⁹

266. In 1991, in a report submitted to the UN Security Council on operations in the Gulf War, the US stated that "Iraqi authorities have deliberately caused serious damage to the natural environment of the region".²⁶⁰

²⁵⁷ US, Remarks of Michael J. Matheson, Deputy Legal Adviser, US Department of State, The Sixth Annual American Red Cross-Washington College of Law Conference on International Humanitarian Law: A Workshop on Customary International Law and the 1977 Protocols Additional to the 1949 Geneva Conventions, *American University Journal of International Law and Policy*, Vol. 2, 1987, pp. 424 and 436.

²⁵⁸ US, Letter from the Department of the Army to the legal adviser of the US Army forces deployed in the Gulf region, 11 January 1991, § 8(P), Report on US Practice, 1997, Chapter 4.4.

²⁵⁹ US, Letter dated 30 January 1991 to the President of the UN Security Council, UN Doc. S/22173, 30 January 1991, pp. 2-3.

²⁶⁰ US, Letter dated 13 February 1991 to the President of the UN Security Council, UN Doc. S/22216, 13 February 1991, p. 2.

267. In 1992, in its final report to Congress on the conduct of hostilities in the Gulf War, the US Department of Defence declared, with particular reference to the applicability of Articles 35 and 55 AP I, that:

Even had Protocol I been in force, there were questions as to whether the Iraqi actions would have violated its environmental provisions. During that treaty's negotiation, there was general agreement that one of its criteria for determining whether a violation had taken place ("long term") was measured in decades. It is not clear the damage Iraq caused, while severe in a layman's sense of the term, would meet the technical-legal use of that term in Protocol I. The prohibitions on damage to the environment contained in Protocol I were not intended to prohibit battlefield damage caused by conventional operations and, in all likelihood, would not apply to Iraq's actions in the Persian Gulf War.²⁶¹

268. In 1994, in a memorandum on a depleted uranium tank round, the US Department of the Army stated that Article 35(3) and 55 AP I "do not codify customary international law, but nonetheless are obligations the United States has respected in its conduct of military operations since promulgation of the 1977 Additional Protocol I".²⁶²

269. In its written statement submitted to the ICJ in the *Nuclear Weapons case* in 1995, the US stated, with respect to the prohibition on the use of "methods or means of warfare which are intended, or may be expected, to cause widespread, long-term and severe damage to the natural environment" as embodied in Articles 35(3) and 55 AP I, that "this is one of the new rules established by [AP I] that . . . do not apply to nuclear weapons".²⁶³

270. At the CDDH, the SFRY stated that "biological and ecological warfare, as developed more particularly in Vietnam, should be placed under the ban of the new body of international humanitarian law".²⁶⁴ This view was supported by Hungary and North Vietnam.²⁶⁵

271. In 1999, following the NATO bombing of the petrochemical complex in Pancevo in the FRY, the Yugoslav Federal Minister for Development, Science and Environment warned "the European and the world-wide public of the danger which will, with repeated attacks on such industrial complexes, affect lives and health of people and cause environment pollution".²⁶⁶ On the occasion of

²⁶¹ US, Department of Defence, Final Report to Congress on the Conduct of the Persian Gulf War, Appendix O, The Role of the Law of War, 10 April 1992, *ILM*, Vol. 31, pp. 636–637.

²⁶² US, Department of the Army, Memorandum on M829A2 Cartridge, 120mm, APFSDS-T, 27 December 1994, p. 5.

²⁶³ US, Written statement submitted to the ICJ, *Nuclear Weapons case*, 20 June 1995, pp. 29–30, § 8; see also Written statement submitted to the ICJ, *Nuclear Weapons (WHO) case*, 10 June 1994, pp. 30–31, § 8.

²⁶⁴ SFRY (FRY), Statement at the CDDH, *Official Records*, Vol. V, CDDH/SR.11, 5 March 1975, p. 105, § 22.

²⁶⁵ CDDH, *Official Records*, Vol. XIV, CDDH/III/SR.16, 10 February 1975, p. 139, § 55 (Hungary); *Official Records*, Vol. XIV, CDDH/III/SR.17, 11 February 1975, p. 143, § 10 (North Vietnam).

²⁶⁶ FRY, Appeal by the Federal Minister for Development, Science and Environment to Ministers for Environment Protection, 17 April 1999.

World Day of the Planet Earth, on 22 April 1999, the Yugoslav Federal Minister for Development, Science and Environment launched an appeal to stop NATO's bombing campaign against the FRY, which he stated had already provoked an "environmental catastrophe". In particular, the Minister referred to attacks by NATO forces on national parks and nature reserves harbouring protected species of flora and fauna, as well as on chemical, oil and pharmaceutical plants.²⁶⁷ Another appeal by the Ministry dated 30 April 1999 aimed at informing the international community of the effects on the environment of NATO's military operations against the FRY, accused NATO forces of bombing civilian industrial facilities, including the petrochemical complex in Pancevo and the refinery in Novi Sad, thereby causing the spillage of harmful chemical substances which posed a "serious threat to human health in general and to ecological systems locally and in the broader Balkan and European regions". According to the Ministry, "the nineteen countries of NATO are committing an 'ecocide' as it were against the population and environment of Yugoslavia".²⁶⁸ The accusations were reiterated in a subsequent appeal dated 25 May 1999, which provided information on the actual and potential environmental impacts of NATO's attacks on the FRY.²⁶⁹ In a further appeal to the international community issued on 3 June 1999, the Yugoslav Federal Minister for Development, Science and Environment denounced daily attacks on chemical and electrical power plants by NATO forces, which he said had resulted in the emission of large quantities of dangerous substances "with negative consequences for people, plants and animals". The Minister maintained that "the NATO aggression on Yugoslavia contains essential elements of ecocide", adding that "man's right to safe and healthy environment is endangered by the NATO aggression". He also referred to the violation by NATO of "humanitarian law provisions, especially the Geneva Conventions with the related Protocols", as well as of "international agreement provisions in the field of environment" and "the basic proclaimed principles of environmental protection".²⁷⁰ In a letter to the UNEP Executive Director, the Minister for Development, Science and Environment of the FRY stressed "the environmental consequences inflicted by the NATO aggression on the Federal Republic of Yugoslavia". After accusing NATO of targeting on a daily basis "national parks, nature reservations, monuments of cultural and natural heritage, rare and protected plants and animal species, among which are those of international importance", the Minister stated that "NATO by its aggression is causing ecocide in the environment of the Federal

²⁶⁷ FRY, Federal Ministry for Development, Science and the Environment, Appeal for stopping NATO aggression against the Federal Republic of Yugoslavia, 22 April 1999.

²⁶⁸ FRY, Appeal by the Federal Ministry for Development, Science and the Environment, Information about the Effects of the NATO Aggression on the Environment in the Federal Republic of Yugoslavia, 30 April 1999.

²⁶⁹ FRY, Appeal by the Federal Ministry for Development, Science and the Environment, Preliminary Information on Actual and Potential Environmental Impacts of the NATO Aggression in the Federal Republic of Yugoslavia, 25 May 1999.

²⁷⁰ FRY, Appeal by Minister of the Federal Government, 3 June 1999.

Republic of Yugoslavia and wider, in the whole Balkans and considerable part of Europe. The real ecological catastrophe is going on in the heart of Europe with unforeseeable time and space range."²⁷¹

272. In its oral pleadings before the ICJ in the *Nuclear Weapons case* in 1995, Zimbabwe stated that it fully shared the analysis by other States that "the threat or use of nuclear weapons violates the principles of humanitarian law prohibiting the use of weapons or methods of warfare that . . . cause long term and severe damage to the environment".²⁷²

III. Practice of International Organisations and Conferences

United Nations

273. In a resolution adopted in 1994 on the United Nations Decade on International Law, the UN General Assembly referred to the 1994 Guidelines on the Protection of the Environment in Times of Armed Conflict. The General Assembly invited:

all States to disseminate widely the revised guidelines for military manuals and instructions on the protection of the environment in times of armed conflict received from the International Committee of the Red Cross and to give due consideration to the possibility of incorporating them into their military manuals and other instructions addressed to their military personnel.²⁷³

274. The programme of activities for the final term (1997–1999) of the UN Decade of International Law, adopted by the UN General Assembly in 1996, states that:

In connection with training of military personnel, States are encouraged to foster the teaching and dissemination of the principles governing the protection of the environment in times of armed conflict and should consider the possibility of making use of the guidelines for military manuals and instructions prepared by the International Committee of the Red Cross.²⁷⁴

275. In a decision in 1991, UNEP's Governing Council stated that, with regard to the environmental effects of warfare, it was aware of the general prohibition on employing methods or means of warfare that were intended, or could be expected, to cause widespread, long-term or severe damage to the natural environment, laid down in AP I and the 1976 ENMOD Convention.²⁷⁵ It recommended that:

²⁷¹ FRY, Letter from the Federal Ministry for Development, Science and Environment to the UNEP Executive Director, undated.

²⁷² Zimbabwe, Oral pleadings before the ICJ, *Nuclear Weapons case*, 15 November 1995, Verbatim Record CR 95/35, p. 27.

²⁷³ UN General Assembly, Res. 49/50, 9 December 1994, § 11.

²⁷⁴ UN General Assembly, Res. 51/157, 16 December 1996, Annex, § 19.

²⁷⁵ UNEP, Governing Council, Decision 16/11, 31 May 1991, preamble.

Governments consider identifying weapons, hostile devices and ways of using such techniques that would cause particularly serious effects on the environment and consider efforts in appropriate forums to strengthen international law prohibiting such weapons, hostile devices and ways of using such techniques.²⁷⁶

Other International Organisations

276. In a resolution adopted in 1991, the Parliamentary Assembly of the Council of Europe condemned "the disgraceful attack on the environment represented by Iraq's fouling of the Gulf with oil, with catastrophic effects which can be considered a crime against humanity".²⁷⁷

277. In 2001, in a report on the environmental impact of the war in the FRY on south-east Europe, the Committee on the Environment, Regional Planning and Local Authorities of the Parliamentary Assembly of the Council of Europe noted that the military operations conducted by NATO against the FRY during the 1999 Kosovo crisis had caused serious damage to the country's natural environment and that the damage had extended to several other countries of south-east Europe. It argued that, since it was "highly predictable" that NATO's military action "would have grave environmental consequences", and such consequences had been "fairly evident right from the start of the air strikes", "the militarily inflicted environmental damage can be presumed to have been deliberate".²⁷⁸ It therefore concluded that "the military operations violated the environmental-protection rule laid down in the First Additional Protocol to the Geneva Convention. In particular, bombing environmentally hazardous installations is a flagrant breach of that protocol."²⁷⁹ Following this report, the Parliamentary Assembly of the Council of Europe adopted a recommendation, in which it noted with concern "the serious environmental impact of military operations over the Federal Republic of Yugoslavia between 25 March and 5 June 1999".²⁸⁰ It stated that:

As was the case for operations in Bosnia and Chechnya, states involved in these operations disregarded the international rules set out in Articles 55 and 56 of Protocol I (1977) to the Geneva Conventions of 1949 intended to limit environmental damage in armed conflict. In the Assembly's view, these rules should be strengthened and enforced in order to prevent or at least lessen such violations of fundamental human rights in any future conflict.²⁸¹

²⁷⁶ UNEP, Governing Council, Decision 16/11, 31 May 1991, § 2.

²⁷⁷ Council of Europe, Parliamentary Assembly, Res. 954, 29 January 1991, § 6.

²⁷⁸ Council of Europe, Parliamentary Assembly, Committee on the Environment, Regional Planning and Local Authorities, Report on the Environmental Impact of the War in Yugoslavia on South-East Europe, Doc. 8925, 10 January 2001, § 60.

²⁷⁹ Council of Europe, Parliamentary Assembly, Committee on the Environment, Regional Planning and Local Authorities, Report on the Environmental Impact of the War in Yugoslavia on South-East Europe, Doc. 8925, 10 January 2001, § 61.

²⁸⁰ Council of Europe, Parliamentary Assembly, Rec. 1495, 24 January 2001, § 1.

²⁸¹ Council of Europe, Parliamentary Assembly, Rec. 1495, 24 January 2001, § 2.

278. In a declaration adopted in 1991 on the environmental situation in the Gulf, the OECD Ministers of the Environment condemned Iraq's burning of oil fields and discharging of oil into the Gulf as a violation of international law and a crime against the environment, and urged Iraq to cease to resort to environmental destruction as a weapon.²⁸²

International Conferences

279. At the CDDH, the concluding report of the Working Group which drafted Articles 33(3) and 48 *bis* of draft AP I (now Articles 35(3) and 55 respectively) stated that it was "the first occasion on which an attempt has been made to provide in express terms for the protection of the environment in time of war". It stated that, therefore, "it is not surprising that the question should have given a great deal of difficulty to the Working Group".²⁸³

280. In a decision adopted in 1992, the CSCE Committee of Senior Officials drew attention to the human and environmental catastrophe which could result from continued shelling of the city of Tuzla, which is home to one of the largest chemical complexes in the Balkans. This plant contained large and potentially hazardous chemicals. Fire or explosion could result in a serious threat to the human health and to the environment.²⁸⁴

IV. Practice of International Judicial and Quasi-judicial Bodies

281. In his dissenting opinion in the *Nuclear Tests case (Request for an Examination of the Situation)* in 1995, Judge Koroma stated that "under contemporary international law, there is probably a duty not to cause gross or serious damage which can reasonably be avoided, together with a duty not to permit the escape of dangerous substances".²⁸⁵

282. In its advisory opinion in the *Nuclear Weapons case* in 1996, the ICJ held that Articles 35(3) and 55 AP I:

provide additional protection for the environment. Taken together these provisions embody a general obligation to protect the natural environment against widespread, long-term and severe environmental damage; the prohibition of methods and means of warfare which are intended, or may be expected, to cause such

²⁸² OECD, Communiqué SG/Press (91), Déclaration des Ministres de l'Environnement sur la situation écologique dans le Golfe, 30 January 1991, quoted in Paul Fautoux, "L'utilisation de l'environnement comme instrument de guerre au Koweït occupé", in Brigitte Stern (ed.), *Les aspects juridiques de la crise et de la guerre du Golfe*, Montchrestien, Paris, 1991, p. 234.

²⁸³ CDDH, *Official Records*, Vol. XV, CDDH/III/275, Report to Committee III on the work of the Working Group submitted by the Rapporteur, Geneva, 3 February–18 April 1975, p. 358.

²⁸⁴ CSCE, Committee of Senior Officials, 12th Session, Prague, 8–10 June 1992, Decision, annexed to Letter dated 11 June 1992 from Czechoslovakia to the UN Secretary-General, UN Doc. A/47/269-S/24093, 12 June 1992, § 6.

²⁸⁵ ICJ, *Nuclear Tests case (Request for an Examination of the Situation)*, Dissenting Opinion of Judge Koroma, 22 September 1995, p. 378.

damage... These are powerful constraints for all the States having subscribed to these provisions.²⁸⁶

283. In its Final Report to the ICTY Prosecutor in 2000, the Committee Established to Review the NATO Bombing Campaign Against the Federal Republic of Yugoslavia stated that:

14. The NATO bombing campaign did cause some damage to the environment. For instance, attacks on industrial facilities such as chemical plants and oil installations were reported to have caused the release of pollutants, although the exact extent of this is presently unknown. The basic legal provisions applicable to the protection of the environment in armed conflict are [Articles 35(3) and 55 AP I].
15. Neither the USA nor France has ratified Additional Protocol I. Article 55 may, nevertheless, reflect current customary law (see however the 1996 Advisory Opinion on the Legality of Nuclear Weapons, where the International Court of Justice appeared to suggest that it does not (ICJ Rep. (1996), 242, para. 31)). In any case, Articles 35(3) and 55 have a very high threshold of application. Their conditions for application are extremely stringent and their scope and contents imprecise. For instance, it is generally assumed that Articles 35(3) and 55 only cover very significant damage. The adjectives "widespread, long-term, and severe" used in [AP I] are joined by the word "and", meaning that it is a triple, cumulative standard that needs to be fulfilled. Consequently, it would appear extremely difficult to develop a *prima facie* case upon the basis of these provisions, even assuming they were applicable. For instance, it is thought that the notion of "long-term" damage in [AP I] would need to be measured in years rather than months, and that as such, ordinary battlefield damage of the kind caused to France in World War I would not be covered. The great difficulty of assessing whether environmental damage exceeded the threshold of [AP I] has also led to criticism by ecologists. This may partly explain the disagreement as to whether any of the damage caused by the oil spills and fires in the 1990/91 Gulf War technically crossed the threshold of [AP I].²⁸⁷

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

284. To fulfil its task of disseminating IHL, the ICRC has delegates around the world teaching armed and security forces that "it is prohibited to use weapons of a nature to cause... b) widespread, long-term and severe damage to the natural environment".²⁸⁸

285. In a Memorandum on the Applicability of International Humanitarian Law sent in 1990 to all States party to the Geneva Conventions in the context of the Gulf War, the ICRC invited States not party to AP I to respect, in the

²⁸⁶ ICJ, *Nuclear Weapons case*, Advisory Opinion, 8 July 1996, § 31.

²⁸⁷ ICTY, Final Report to the Prosecutor by the Committee Established to Review the NATO Bombing Campaign Against the Federal Republic of Yugoslavia, 14 June 2000, §§ 14–15.

²⁸⁸ Frédéric de Mulinen, *Handbook on the Law of War for Armed Forces*, ICRC, Geneva, 1987, § 394.

event of armed conflict, Article 55 AP I because its content stemmed “from the basic principle of civilian immunity from attack”.²⁸⁹

286. In 1993, in a report submitted to the UN Secretary-General on the protection of the environment in times of armed conflict, the ICRC stated, regarding the threshold set by Articles 35(3) and 55 AP I, that:

The question as to what constitutes “wide-spread, long-term and severe” damage and what is acceptable damage to the environment is open to interpretation. There are substantial grounds, including from the *travaux préparatoires* of [AP I], for interpreting “long-term” to refer to decades rather than months. On the other hand, it is not easy to know in advance exactly what the scope and duration of some environmentally damaging acts will be; and there is a need to limit as far as possible environmental damage even in cases where it is not certain to meet a strict interpretation of the criteria of “widespread, long-term and severe”.²⁹⁰

287. In a working paper on war crimes submitted in 1997 to the Preparatory Committee for the Establishment of an International Criminal Court, the ICRC, emphasising the customary law nature of the grave breaches of the Geneva Conventions, considered that “wilfully causing widespread, long-term and severe damage to the natural environment” in international or non-international armed conflicts was a war crime to be subject to the jurisdiction of the ICC.²⁹¹

VI. Other Practice

288. During a meeting of the IHL held in 1993 as part of the process which resulted in the drafting of the 1994 San Remo Manual, a special rapporteur on the protection of the environment in armed conflict emphasised that “the experience of the Gulf War (1991) showed very clearly that there was at least an emerging rule forbidding the use of the marine environment as an instrument of warfare”.²⁹²

289. In 1995, the IUCN Commission on Environmental Law, in cooperation with the International Council of Environmental Law, issued the Draft International Covenant on Environment and Development, which was intended to stimulate consideration of a global instrument on environmental conservation and sustainable development. Article 32(1) provides that:

²⁸⁹ ICRC, Memorandum on the Applicability of International Humanitarian Law, 14 December 1990, § II, *IRRC*, No. 280, 1991, p. 25.

²⁹⁰ ICRC, Report on the protection of the environment in time of armed conflict submitted to the UN General Assembly, reprinted in Report of the UN Secretary-General on the protection of the environment in times of armed conflict, UN Doc. A/48/269, 29 July 1993, § 34.

²⁹¹ ICRC, Working paper on war crimes submitted to the Preparatory Committee for the Establishment of an International Criminal Court, 14 February 1997, §§ 2(ii) and 3(viii).

²⁹² Louise Doswald-Beck (ed.), *San Remo Manual on International Law Applicable to Armed Conflicts at Sea*, Cambridge University Press, Cambridge, 1995, p. 119, Explanation, § 44.4.

Parties shall protect the environment during periods of armed conflict. In particular, Parties shall:

- ...
- (c) not employ or threaten to employ methods or means of warfare which are intended or may be expected to cause widespread, long-term, or severe harm to the environment and ensure that such means and methods of warfare are not developed, produced, tested, or transferred; and
 - (d) not use the destruction or modification of the environment as a means of warfare or reprisal.²⁹³

Environmental modification techniques

Note: *For practice concerning the prohibition of herbicides under the 1976 ENMOD Convention, see Chapter 24, section C.*

I. Treaties and Other Instruments

Treaties

290. Article I of the 1976 ENMOD Convention provides that:

1. Each State Party to this Convention undertakes not to engage in military or any other hostile use of environmental modification techniques having widespread, long-lasting or severe effects as the means of destruction, damage or injury to any other State Party.
2. Each State Party to this Convention undertakes not to assist, encourage or induce any State, group of States or international organization to engage in activities contrary to the provisions of paragraph 1 of this article.

291. The understanding relating to Article I of the 1976 ENMOD Convention submitted, together with the text of the draft convention, by the Conference of the Committee on Disarmament to the UN General Assembly states that:

It is the understanding of the Committee that, for the purpose of this Convention, the terms "widespread", "long-lasting" and "severe" shall be interpreted as follows:

- (a) "widespread": encompassing an area on the scale of several hundred square kilometres;
- (b) "long-lasting": lasting for a period of months, or approximately a season;
- (c) "severe": involving serious or significant disruption or harm to human life, natural and economic resources or other assets.²⁹⁴

292. Article II of the 1976 ENMOD Convention provides that:

As used in article I, the term "environmental modification techniques" refers to any technique for changing – through the deliberate manipulation of natural processes –

²⁹³ IUCN, Commission on Environmental Law, Draft International Covenant on Environment and Development, Bonn, March 1995, Article 32(1).

²⁹⁴ Conference of the Committee on Disarmament, Understanding relating to Article I of the 1976 ENMOD Convention, UN Doc. A/31/27, 1976, pp. 91–92.

the dynamics, composition or structure of the Earth, including its biota, lithosphere, hydrosphere and atmosphere, or of outer space.

293. The understanding relating to Article II of the 1976 ENMOD Convention submitted, together with the text of the draft convention, by the Conference of the Committee on Disarmament to the UN General Assembly states that:

It is the understanding of the Committee that the following examples are illustrative of phenomena that could be caused by the use of environmental modification techniques as defined in article II of the Convention: earthquakes; tsunamis; an upset in the ecological balance of a region; changes in weather patterns (clouds, precipitation, cyclones of various types and tornadic storms); changes in climate patterns; changes in ocean currents; changes in the state of the ozone layer; and changes in the state of the ionosphere.

It is further understood that all the phenomena listed above, when produced by military or any other hostile use of environmental modification techniques, would result, or could reasonably be expected to result, in widespread, long-lasting or severe destruction, damage or injury. Thus, military or any other hostile use of environmental modification techniques as defined in article II, so as to cause those phenomena as a means of destruction, damage or injury to another State Party, would be prohibited.

It is recognized, moreover, that the list of examples set out above is not exhaustive. Other phenomena which could result from the use of environmental modification techniques as defined in article II could also be appropriately included. The absence of such phenomena from the list does not in any way imply that the undertaking contained in article I would not be applicable to those phenomena, provided the criteria set out in that article were met.²⁹⁵

Other Instruments

294. Paragraph 12 of the 1994 Guidelines on the Protection of the Environment in Times of Armed Conflict provides that:

The military or any other hostile use of environmental modification techniques having widespread, long-lasting or severe effects as the means of destruction, damage or injury to any other State party is prohibited. The term "environmental modification techniques" refers to any technique for changing – through the deliberate manipulation of natural processes – the dynamics, composition or structure of the Earth, including its biota, lithosphere, hydrosphere and atmosphere, or of outer space.

II. National Practice

Military Manuals

295. Australia's Defence Force Manual prohibits environmental modification techniques.²⁹⁶ It adds that:

²⁹⁵ Conference of the Committee on Disarmament, Understanding relating to Article II of the 1976 ENMOD Convention, UN Doc. A/31/27, 1976, pp. 91–92.

²⁹⁶ Australia, *Defence Force Manual* (1994), § 409.

Australia, as a signatory to the [1976 ENMOD Convention], has undertaken not to engage in any military or hostile use of environmental modification techniques which would have widespread, long lasting or severe effects as the means of destruction, damage or injury to any other state which is a party to the Convention.²⁹⁷

296. Canada's LOAC Manual states that "environmental techniques having widespread, long-lasting or severe effects are prohibited".²⁹⁸ It further states that:

45. In addition, Canada as a party to the Convention on the Prohibition of Military or Any Other Hostile Use of Environmental Modification Techniques (ENMOD Convention) has undertaken not to engage in any military or hostile use of environmental modification techniques as the means of destruction, damage or injury to any other state which is party to the Convention.
46. An "environmental modification technique" is any technique for changing, through the deliberate manipulation of natural processes, the dynamics, composition or structure of the earth which would have widespread, long-term or severe effects.²⁹⁹

297. France's LOAC Manual states that:

The Stockholm Convention of 10 December 1976 (ENMOD), which has not been signed by France, prohibits the use of environmental techniques for military or any other hostile purposes. France has not adhered to this convention because it is of the opinion that it contains vague provisions which render its application uncertain, particularly with respect to nuclear dissuasion.³⁰⁰

298. Germany's Military Manual states that:

401. It is particularly prohibited to employ means or methods which are intended or of a nature . . . to cause widespread, long-term and severe damage to the natural environment.

...

403. "Widespread", "long-term" and "severe" damage to the natural environment is a major interference with human life or natural resources which considerably exceeds the battlefield damage to be regularly expected in a war. Damage to the natural environment by means of warfare (Art. 35 para 3, 55 para 1 AP I) and severe manipulation of the environment as a weapon (ENMOD) are likewise prohibited.³⁰¹

299. Indonesia's Military Manual states that "it is prohibited to use environment modification as a means of warfare."³⁰²

300. Israel's Manual on the Laws of War states that:

Besides conventional and non-conventional arms, there is another category of arms – those that have an impact on the natural environment. The 1970's saw a

²⁹⁷ Australia, *Defence Force Manual* (1994), §§ 714 and 545(e).

²⁹⁸ Canada, *LOAC Manual* (1999), p. 5-3, § 22.

²⁹⁹ Canada, *LOAC Manual* (1999), p. 6-5, §§ 45-46.

³⁰⁰ France, *LOAC Manual* (2001), p. 63.

³⁰¹ Germany, *Military Manual* (1992), §§ 401 and 403, see also § 1020 (naval warfare).

³⁰² Indonesia, *Military Manual* (1982), § 134.

growing deep awareness for environmental protection, rousing in its wake an aversion to the United States' conduct during the Vietnam War, in which it destroyed forests and crops by chemical means (more than 54% of the forests in South Vietnam were destroyed), and even tested means for altering the weather in Indochina (bringing down rain so as to create mud and flooding in North Vietnam). In 1977 a convention was signed banning the use of environment-modifying technologies for war purposes, if such use has "large-scale, long-term or severe effects on another country that is a party to the Convention". The Convention (which Israel has not signed) defines the modification of the natural environment as "any change – through the intervention of natural processes – to the dynamics, composition or structure of the Earth".

The Gulf War:

During the Gulf War, Iraq flagrantly violated the Convention on the prohibition against modifying the environment during the military occupation of Kuwait (both countries signed the convention). Immediately following the outbreak of hostilities in the Gulf War, the Iraqis opened Kuwait's marine oil pipes, flooding the Persian Gulf with oil slicks. In addition, the Iraqi army set ablaze more than 700 oil wells when retreating. The resulting damage to the natural environment and the death of thousands of cormorants in oil puddles (without giving Iraq any military advantage whatsoever) was irreparable.³⁰³

301. Referring to South Korea's Military Law Manual, the Report on the Practice of South Korea states that the 1976 ENMOD Convention applies only to contracting parties.³⁰⁴ With respect to the Operational Law Manual, the report states that "it is a principle not to use weapons injuring the natural environment".³⁰⁵

302. New Zealand's Military Manual states that:

Parties to the [ENMOD] Convention have undertaken not to engage in any military or hostile use of environmental modification techniques which would have widespread, long-lasting or severe effects as the means of destruction, damage or injury to any other States Party to the Convention.

"Environmental modification techniques" are defined by ENMOD as any technique for changing, through the deliberate manipulation of natural processes, the dynamics, composition or structure of the earth, including its biota, lithosphere, hydrosphere and atmosphere or outer space. Care shall be taken in warfare to protect the natural environment against widespread, long-term and severe damage. This protection includes a prohibition of the use of methods or means of warfare which are intended or may be expected to cause such damage to the natural environment and thereby to prejudice the health or survival of the population.³⁰⁶ [emphasis in original]

³⁰³ Israel, *Manual on the Laws of War* (1998), p. 17.

³⁰⁴ Report on the Practice of South Korea, 1997, Chapter 4.4, referring to *Military Law Manual* (1996).

³⁰⁵ Report on the Practice of South Korea, 1997, Chapter 4.4, referring to *Operational Law Manual* (1996), p. 129.

³⁰⁶ New Zealand, *Military Manual* (1992), §§ 505(2)–(3) and 614(2)–(3).

303. Russia's Military Manual states that "substances which have widespread, long-term and severe consequences on the environment" are prohibited means of warfare, referring in particular to the 1976 ENMOD Convention.³⁰⁷

304. Spain's LOAC Manual includes among prohibited methods of warfare all military or other hostile uses of environmental modification techniques having widespread, long-term or severe effects, which are adopted as a means of destruction, damage, or injury to any other State.³⁰⁸

National Legislation

305. No practice was found.

National Case-law

306. No practice was found.

Other National Practice

307. In 1992, in its opening statement, Australia, presiding the Second ENMOD Review Conference, questioned

whether the protection afforded by the Convention should be restricted to the States parties and whether activities such as deliberate "low-tech" environmental damage came within its purview. The absence so far of any accusations that the provisions of the Convention had been violated could be interpreted as meaning that its scope was so narrow that it had little practical application.³⁰⁹

308. In its memorandum annexed to the ratification instrument of the 1976 ENMOD Convention, the German government declared that the terms "widespread", "long-term" and "severe" were necessary to clarify the extent of the prohibition. It also underlined that only those significant cases of environmental damage or cases of deliberate attack on the environment should be covered by the relevant prohibitions.³¹⁰ As to the non-inclusion of a norm protecting the environment from the harmful effects caused by attacks against dams, dykes or nuclear power plants, the same memorandum stressed that the fact that such a norm was not included did not imply that these attacks were lawful under international law.³¹¹

309. In 1991, in a note verbale to UN Secretary-General, Jordan requested the inclusion of the item "exploitation of the environment as a weapon in times of

³⁰⁷ Russia, *Military Manual* (1990), § 6(g).

³⁰⁸ Spain, *LOAC Manual* (1996), Vol. I, § 3.3.(b).6.

³⁰⁹ Australia, Statement at the Second ENMOD Review Conference, Geneva, 14–21 September 1992, *United Nations Disarmament Yearbook*, Vol. 17, 1993, p. 229.

³¹⁰ Germany, Lower House of Parliament, Denkschrift zur ENMOD Konvention, 6 September 1982, *BT-Drucksache* 9/1952, p. 12.

³¹¹ Germany, Lower House of Parliament, Denkschrift zur ENMOD Konvention, 6 September 1982, *BT-Drucksache* 9/1952, p. 13.

armed conflict and the taking of practical measures to prevent such exploitation" in the provisional agenda of the 46th Session of the UN General Assembly.³¹² In an explanatory memorandum supporting its request Jordan stated that:

The existing 1977 [ENMOD Convention] was revealed as being painfully inadequate during the Gulf conflict. We find that the terms of the existing convention are so broad and vague as to be virtually impossible to enforce. We also find no provision for a mechanism capable of the investigation and settlement of any future disputes under the Convention. Furthermore, the Convention does not provide for advanced environmental scientific data to be made available to all States at the initial stages of crisis prevention.³¹³

310. In 1992, in a memorandum annexed to a letter to the Chairman of the Sixth Committee of the UN General Assembly, Jordan and the US noted that for those States party to the 1976 ENMOD Convention, the following principles of international law provide additional protection for the environment in times of armed conflict:

- e) The 1977 Convention (ENMOD) prohibits States parties from engaging in military or any other hostile use of environmental modification techniques (i.e., any techniques for changing – through the deliberate manipulation of natural processes – the dynamics, composition or structure of earth, its biota, lithosphere, hydrosphere and atmosphere, or of outer space) having widespread, long-lasting or severe effects as the means of destruction, damage or injury to any other State party.³¹⁴

311. In its written comments submitted to the ICJ in the *Nuclear Weapons (WHO) case* in 1995, responding to the UK and US submissions whereby the 1976 ENMOD Convention would not prohibit the use of nuclear weapons, being that such use is not intended to deliberately manipulate the natural environment, Malaysia stated that:

It is a general principle of law that the foreseeable consequences of an act are interpreted as an intention to bring them about. It is disingenuous, therefore, in view of what scientists have described as the enormously damaging environmental and climatic consequences of a nuclear exchange to assert that these would be mere "unintended side-effects".³¹⁵

312. In its response to submissions of other States to the ICJ in the *Nuclear Weapons (WHO) case* in 1995, Nauru stated that:

³¹² Jordan, Note verbale dated 5 July 1991 to the UN Secretary-General, UN Doc. A/46/141, 8 July 1991.

³¹³ Jordan, Explanatory memorandum, annexed to Note verbale dated 5 July 1991 to the UN Secretary-General, UN Doc. A/46/141, 8 July 1991, p. 2, § 2.

³¹⁴ Jordan and US, International Law Providing Protection to the Environment in Times of Armed Conflict, annexed to Letter dated 28 September 1992 to the Chairman of the Sixth Committee of the UN General Assembly, UN Doc. A/C.6/47/3, 28 September 1992, § 2(e).

³¹⁵ Malaysia, Written comments on other written statements submitted to the ICJ, *Nuclear Weapons (WHO) case*, 19 June 1995, p. 28.

It is a general principle of law that the foreseeable consequences of an act are interpreted as an intention to bring them about. It is disingenuous, therefore, in view of what scientists have described as the enormously damaging environmental and climatic consequences of a nuclear exchange to assert that these would be mere "unintended side effects".³¹⁶

313. In its written statement submitted to the ICJ in the *Nuclear Weapons case* in 1995, the Solomon Islands stated that:

The [1976 ENMOD] Convention signals widespread recognition of the need to limit the use of the environment as a weapon of war, without diminishing in any way the customary and treaty obligations establishing clear norms for the protection of the environment which must be followed in times of war and armed conflict. As supplemented by the more detailed and emphatic obligations of [AP I], it is submitted that [the 1976] ENMOD [Convention] now reflects the customary obligation not to cause "widespread, long-lasting or severe" harm to the environment.³¹⁷

314. In 1992, during a debate in the Sixth Committee of the UN General Assembly on the protection of the environment in times of armed conflict, Ukraine qualified the release of large quantities of oil into the sea and the setting alight of numerous well heads as a "clear illustration of the hostile use of environmental modification techniques in contravention of international law".³¹⁸

315. In its written statement submitted to the ICJ in the *Nuclear Weapons case* in 1995, the UK stated that:

The [1976 ENMOD] Convention was designed to deal with the deliberate manipulation of the environment as a method of war . . . While the use of a nuclear weapon may have considerable effects on the environment, it is unlikely that it would be used for the deliberate manipulation of natural processes. The effect on the environment would normally be a side-effect of the use of a nuclear weapon, just as it would in the case of use of other weapons.³¹⁹

316. In 1992, in a statement at the Second ENMOD Review Conference, the US expressed the view that:

The [1976 ENMOD] Convention is not an Environmental Protection Treaty; it is not a treaty to prohibit damage to the environment resulting from armed conflict. Rather, the [1976 ENMOD] Convention fills a special, but important niche

³¹⁶ Nauru, Written comments on other written statements submitted to the ICJ, *Nuclear Weapons (WHO) case*, 15 June 1995, Part 2, p. 28.

³¹⁷ Solomon Islands, Written statement submitted to the ICJ, *Nuclear Weapons case*, 19 June 1995, § 3.79; see also Written statement submitted to the ICJ, *Nuclear Weapons (WHO) case*, 9 June 1994, §§ 4.1–4.46.

³¹⁸ Ukraine, Statement before the Sixth Committee of the UN General Assembly, UN Doc. A/C.6/47/SR.9, 6 October 1992, p. 8, § 35.

³¹⁹ UK, Written statement submitted to the ICJ, *Nuclear Weapons case*, 16 June 1995, § 3.7513–3.116.

reflecting the international community's consensus that the environment itself should not be used as an instrument of war.³²⁰

III. Practice of International Organisations and Conferences

United Nations

317. In a resolution adopted in 1994 on the United Nations Decade on International Law, the UN General Assembly referred to the 1994 Guidelines on the Protection of the Environment in Times of Armed Conflict. The General Assembly invited:

all States to disseminate widely the revised guidelines for military manuals and instructions on the protection of the environment in times of armed conflict received from the International Committee of the Red Cross and to give due consideration to the possibility of incorporating them into their military manuals and other instructions addressed to their military personnel.³²¹

318. The programme of activities for the final term (1997–1999) of the UN Decade of International Law, adopted by the UN General Assembly in 1996, states that:

In connection with training of military personnel, States are encouraged to foster the teaching and dissemination of the principles governing the protection of the environment in times of armed conflict and should consider the possibility of making use of the guidelines for military manuals and instructions prepared by the International Committee of the Red Cross.³²²

319. In a decision in 1991, UNEP's Governing Council stated that, with regard to the environmental effects of warfare, it was aware of the general prohibition on employing methods or means of warfare that were intended, or could be expected, to cause widespread, long-term or severe damage to the natural environment, laid down in AP I and the 1976 ENMOD Convention.³²³ It recommended that:

Governments consider identifying weapons, hostile devices and ways of using such techniques that would cause particularly serious effects on the environment and consider efforts in appropriate forums to strengthen international law prohibiting such weapons, hostile devices and ways of using such techniques.³²⁴

Other International Organisations

320. No practice was found.

³²⁰ US, Statement of 15 September 1992 at the Second ENMOD Review Conference, Geneva, 14–21 September 1992.

³²¹ UN General Assembly, Res. 49/50, 9 December 1994, § 11.

³²² UN General Assembly, Res. 51/157, 16 December 1996, Annex, § 19.

³²³ UNEP, Governing Council, Decision 16/11, 31 May 1991, preamble.

³²⁴ UNEP, Governing Council, Decision 16/11, 31 May 1991, § 2.

International Conferences

321. A report on the discussion concerning laser weapons which took place at the Conference of Government Experts on Weapons which may Cause Unnecessary Suffering or have Indiscriminate Effects in Lucerne in 1974 states that:

Geophysical warfare 270. The expert who put forward the subject of geophysical warfare for consideration stated that it included such activities as the modification of weather or climate and the causing of earthquakes. He stated that man already possessed the ability to bring about on a limited scale certain geophysical changes for which military applications were conceivable. In his view these would inevitably be indiscriminate, and could give rise to unforeseeable environmental changes of prolonged duration.

271. Another expert made the observation that any attempt to divert or release forces of nature would require an input of energy equivalent to, or greater than, the amount of energy or force diverted or released.

Environmental warfare

272. The expert who put forward the subject of environmental warfare for consideration meant it to include the modification of the natural environment for the purpose of denying an enemy access to an area, or reducing the availability of natural cover for concealment, or of denying or preventing the growth of food or other crops. He observed that certain of the potential means of environmental warfare, such a chemical-warfare agent, did not fall within the category of conventional weapons. He also stated that environmental warfare, in his understanding of the term, was closely linked with geophysical warfare; other experts preferred to treat the two subjects as one.

273. The view was expressed by one expert that environmental warfare, like geophysical warfare, was by its nature indiscriminate. A distinction might be drawn between intentional and unintentional environmental warfare, the latter denoting the environmental impact of large-scale employment of conventional weapons.

274. One expert drew the attention of the Conference to the draft convention on environmental warfare recently submitted by his government to the General Assembly of the United Nations, the scope of the convention also including geophysical means of warfare. He expressed the opinion that the importance of the convention, which, if agreed internationally, would in his view greatly promote the cause of disarmament, lay in its attempt to prevent, at an early stage, the introduction of a novel and threatening warfare technique. Several experts supported this proposal and this opinion.

...

Evaluation

277. Some experts were of the opinion that, because the effects of potential future weapons could have important humanitarian implications, it was necessary to keep a close watch in order to develop any prohibitions or limitations that might seem necessary before the weapon in question had become widely accepted.³²⁵

³²⁵ Conference of Government Experts on the Use of Certain Conventional Weapons, Lucerne, 24 September–18 October 1974, Report, ICRC, Geneva, 1975, §§ 270–274 and 277.

IV. Practice of the International Judicial and Quasi-judicial Bodies

322. No practice was found.

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

323. No practice was found.

VI. Other Practice

324. In 1995, the IUCN Commission on Environmental Law, in cooperation with the International Council of Environmental Law, issued the Draft International Covenant on Environment and Development, which was intended to stimulate consideration of a global instrument on environmental conservation and sustainable development. Article 32(1) provides that:

Parties shall protect the environment during periods of armed conflict. In particular, Parties shall:

- ...
- (c) not employ or threaten to employ methods or means of warfare which are intended or may be expected to cause widespread, long-term, or severe harm to the environment and ensure that such means and methods of warfare are not developed, produced, tested, or transferred; and
 - (d) not use the destruction or modification of the environment as a means of warfare or reprisal.³²⁶

³²⁶ IUCN, Commission on Environmental Law, Draft International Covenant on Environment and Development, Bonn, March 1995, Article 32(1).

PART III

SPECIFIC METHODS OF WARFARE

DENIAL OF QUARTER

A. Orders or Threats that No Quarter Will Be Given (practice relating to Rule 46)	§§ 1–118
B. Attacks against Persons Hors de Combat (practice relating to Rule 47)	§§ 119–420
General	§§ 119–212
Specific categories of persons hors de combat	§§ 213–394
Quarter under unusual circumstances of combat	§§ 395–420
C. Attacks against Persons Parachuting from an Aircraft in Distress (practice relating to Rule 48)	§§ 421–490

Note: For practice concerning the treatment of persons hors de combat, see Part V. For specific practice concerning protection of the life of persons hors de combat, see Chapter 32, section C.

A. Orders or Threats that No Quarter Will Be Given
I. Treaties and Other Instruments
Treaties

1. Article 23(d) of the 1899 HR provides that “it is especially prohibited . . . to declare that no quarter will be given”.
2. Article 23(d) of the 1907 HR provides that “it is especially forbidden . . . to declare that no quarter will be given”.
3. Article 40 AP I provides that “it is prohibited to order that there shall be no survivors, to threaten an adversary therewith or to conduct hostilities on this basis”. Article 38 of draft AP I (now Article 40) submitted by the ICRC to the CDDH included the prohibition “to order that there shall be no survivors, to threaten an adversary therewith and to conduct hostilities on such basis” in the article concerning the safeguarding of the enemy *hors de combat*.¹ In view of its importance, the prohibition was the subject of a separate article on the basis of a proposal by Afghanistan, supported by Algeria, Belarus, Belgium, UK,

¹ CDDH, *Official Records*, Vol. I, Part Three, Draft Additional Protocols, June 1973, p. 13.

USSR, Venezuela and SFRY.² This separate article (now Article 40 AP I) was adopted by consensus.³

4. Article 4(1) AP II provides that “it is prohibited to order that there shall be no survivors”. Article 4 AP II was adopted by consensus.⁴

5. Article 22 of draft AP II submitted by the ICRC to the CDDH provided that “it is forbidden to order that there shall be no survivors, to threaten an adversary therewith and to conduct hostilities on such basis”.⁵ It was adopted by consensus in Committee III of the CDDH.⁶ Eventually, however, the prohibition to order that there shall be no survivors was placed, and adopted, in another article and the rest of draft Article 22 was deleted by consensus in the plenary.⁷

6. Pursuant to Article 8(2)(b)(xii) and (e)(x) of the 1998 ICC Statute, “declaring that no quarter will be given” is a war crime in both international and non-international armed conflicts.

Other Instruments

7. Article 60 of the 1863 Lieber Code provides that “it is against the usage of modern war to resolve, in hatred and revenge, to give no quarter. No body of troops has the right to declare that it will not give . . . quarter.”

8. Article 13(d) of the 1874 Brussels Declaration states that “the declaration that no quarter will be given” is especially forbidden.

9. Article 9(b) of the 1880 Oxford Manual provides that “it is forbidden . . . to declare in advance that quarter will not be given, even by those who do not ask it for themselves”.

10. Article 17(3) of the 1913 Oxford Manual of Naval War provides that “it is . . . forbidden . . . to declare that no quarter will be given”.

11. Based on several documents supplying evidence of outrages committed during the First World War, the 1919 Report of the Commission on Responsibility lists violations of the laws and customs of war which should be subject to criminal prosecution, including “directions to give no quarter”.

12. Paragraph 43 of the 1994 San Remo Manual provides that “it is prohibited to order that there shall be no survivors, to threaten an adversary therewith or to conduct hostilities on this basis”.

13. Paragraph 6.5 of the 1999 UN Secretary-General’s Bulletin provides that “it is forbidden to order that there shall be no survivors”.

² CDDH, *Official Records*, Vol. XIV, CDDH/III/SR.29, 7 March 1975, p. 277, § 38 (Afghanistan), p. 279, § 51 (Algeria), p. 280, § 54 (Belarus), p. 282, § 64 (Belgium), p. 284, § 73 (UK), p. 283, § 66 (USSR), p. 280, § 55 (Venezuela) and p. 284, § 71 (SFRY).

³ CDDH, *Official Records*, Vol. VI, CDDH/SR.39, 25 May 1977, p. 103.

⁴ CDDH, *Official Records*, Vol. VII, CDDH/SR.50, 3 June 1977, p. 90.

⁵ CDDH, *Official Records*, Vol. I, Part Three, Draft Additional Protocols, June 1973, p. 39.

⁶ CDDH, *Official Records*, Vol. XV, CDDH/III/SR.49, 4 June 1976, p. 108, § 6.

⁷ CDDH, *Official Records*, Vol. VII, CDDH/SR.52, 6 June 1977, p. 128.

14. The 2000 UNTAET Regulation No. 2000/15 establishes panels with exclusive jurisdiction over serious criminal offences, including war crimes. According to Section 6(1)(b)(xii) and (e)(x), “declaring that no quarter will be given” is a war crime in both international and non-international armed conflicts.

II. National Practice

Military Manuals

15. Argentina’s Law of War Manual (1969) provides that all declarations that no quarter shall be given are prohibited.⁸

16. Argentina’s Law of War Manual (1989) states that “it is prohibited... to order that there shall be no survivors, to threaten the adversary therewith or to conduct hostilities on this basis”.⁹

17. Australia’s Commanders’ Guide emphasises that “it is expressly forbidden to announce or implement a plan under which no prisoners are taken”.¹⁰ It further states that “it is prohibited to order that no prisoners will be taken, threaten an enemy that such an order will be given or conduct hostilities on the basis that no prisoners will be taken. Ambiguous orders, such as, ‘take that objective at any cost’ should be avoided.”¹¹

18. Australia’s Defence Force Manual provides that “it is prohibited to order that no prisoners will be taken, threaten an enemy that such an order will be given or conduct hostilities on the basis that no prisoners will be taken. Ambiguous orders, such as, ‘take that objective at any cost’ should be avoided.”¹²

19. Belgium’s Law of War Manual states that “declaring that no quarter will be given is forbidden”.¹³

20. Belgium’s Teaching Manual for Officers provides that it is forbidden “for military commanders to conduct hostilities on the basis that there shall be ‘no quarter’, *i.e.* no survivors at the end of combat. The threat to use this method of combat is also prohibited.”¹⁴

21. Benin’s Military Manual states that it is prohibited “to order that there shall be no survivors, to threaten the enemy therewith or to conduct operations on such a basis”.¹⁵

22. Burkina Faso’s Disciplinary Regulations provides that, under the laws and customs of war, it is prohibited “to declare that no quarter will be given”.¹⁶

⁸ Argentina, *Law of War Manual* (1969), § 1.005.

⁹ Argentina, *Law of War Manual* (1989), § 1.06(4).

¹⁰ Australia, *Commanders’ Guide* (1994), § 416.

¹¹ Australia, *Commanders’ Guide* (1994), § 905.

¹² Australia, *Defence Force Manual* (1994), § 706 (land warfare), see also § 835 (air warfare).

¹³ Belgium, *Law of War Manual* (1983), p. 33.

¹⁴ Belgium, *Teaching Manual for Officers* (1994), Part I, Title II, p. 34.

¹⁵ Benin, *Military Manual* (1995), Fascicule III, p. 12.

¹⁶ Burkina Faso, *Disciplinary Regulations* (1994), Article 35(2).

23. Cameroon's Disciplinary Regulations provides that, under the laws and customs of war, it is prohibited "to declare that no quarter will be given".¹⁷

24. Cameroon's Instructors' Manual provides that:

It is prohibited to order that there shall be no survivors, to threaten the adversary therewith or to conduct hostilities on such a basis. Such a prohibition has existed since the establishment . . . of Christian morality, through the doctrine of International Humanitarian Law, to the recent international diplomatic conferences.¹⁸

25. Under Canada's LOAC Manual, "it is prohibited to deny quarter. In other words, it is unlawful to order, imply or encourage that no prisoners will be taken; to threaten an adversary party that such an order will be given; or to conduct hostilities on the basis that no prisoners will be taken."¹⁹ The manual also considers that "declaring that no quarter will be given" is a war crime.²⁰ It further states that "Article 4(1) of AP II extends to non-international armed conflicts the principle of customary international law that it is prohibited to order that there shall be no survivors".²¹

26. Canada's Code of Conduct provides that "it is unlawful . . . to order that no PWs or detainees will be taken. It is also illegal as well as operationally unsound to make threats to opposing forces that no PWs or detainees will be taken."²²

27. Colombia's Basic Military Manual states that it is prohibited to order that there shall be no survivors.²³

28. Congo's Disciplinary Regulations provides that, under the laws and customs of war, it is prohibited "to declare that no quarter will be given".²⁴

29. France's Disciplinary Regulations as amended provides that, under international conventions, it is prohibited "to declare that no quarter will be given".²⁵

30. France's LOAC Summary Note states that "it is prohibited to order that there shall be no survivors or prisoners and to threaten the enemy therewith".²⁶

31. France's LOAC Teaching Note states that "it is prohibited to order that there shall be no survivors".²⁷

32. France's LOAC Manual provides that "it is prohibited to order that there shall be no survivors, to threaten an adversary therewith or to conduct hostilities on this basis".²⁸

33. Germany's Military Manual states that "it is prohibited to order that there shall be no survivors. It is also prohibited to threaten an adversary therewith or to conduct military operations on this basis."²⁹

¹⁷ Cameroon, *Disciplinary Regulations* (1975), Article 32.

¹⁸ Cameroon, *Instructors' Manual* (1992), p. 63, § 233, see also p. 30, § 132 and p. 149, § 531.

¹⁹ Canada, *LOAC Manual* (1999), p. 6-2, § 15 (land warfare), see also p. 7-3, § 20 (air warfare).

²⁰ Canada, *LOAC Manual* (1999), p. 16-3, § 20(d).

²¹ Canada, *LOAC Manual* (1999), p. 17-3, § 20.

²² Canada, *Code of Conduct* (2001), Rule 5, § 2.

²³ Colombia, *Basic Military Manual* (1995), p. 49.

²⁴ Congo, *Disciplinary Regulations* (1986), Article 32(2).

²⁵ France, *Disciplinary Regulations as amended* (1975), Article 9 bis (2).

²⁶ France, *LOAC Summary Note* (1992), § 4.5.

²⁷ France, *LOAC Teaching Note* (2000), p. 2.

²⁸ France, *LOAC Manual* (2001), p. 103. ²⁹ Germany, *Military Manual* (1992), § 450.

34. Italy's IHL Manual provides that it is prohibited "to declare that no quarter will be given".³⁰
35. Kenya's LOAC Manual states that "it is forbidden . . . to order that there will be no survivors, to threaten the enemy therewith or to conduct operations on this basis".³¹
36. Mali's Army Regulations provides that, under the laws and customs of war, it is prohibited "to declare that no quarter will be given".³²
37. Morocco's Disciplinary Regulations provides that, under the laws and customs of war, it is prohibited "to declare that no quarter will be given".³³
38. The Military Manual of the Netherlands states that "it is prohibited to order that there shall be no survivors, to threaten an adversary therewith or to conduct hostilities on this basis".³⁴ With respect to non-international armed conflicts, the manual also states that "it is prohibited to order that there shall be no survivors".³⁵
39. New Zealand's Military Manual states that "it is prohibited to order that no prisoners will be taken, to threaten an adverse party that such an order will be given, or to conduct hostilities on the basis that no prisoners will be taken".³⁶ The manual also provides that "declaring that no quarter will be given" is a war crime.³⁷ It further states that "Article 4(1) of AP II extends to non-international armed conflicts the principle of customary international law that it is prohibited to order that there shall be no survivors".³⁸
40. Nigeria's Military Manual provides that it is prohibited "to declare that no quarter will be given".³⁹
41. Nigeria's Manual on the Laws of War considers that "informing soldiers of the enemy that they will not be protected unless they surrender immediately" is an "illegitimate tactic".⁴⁰
42. Nigeria's Soldiers' Code of Conduct states that it is "prohibited . . . to declare that no mercy will be shown".⁴¹
43. Russia's Military Manual states that "ordering that there shall be no survivors, threatening the adversary therewith or conducting the hostilities according to this decision" is a prohibited method of warfare.⁴²
44. Senegal's Disciplinary Regulations provides that, under the laws and customs of war, it is prohibited "to declare that no quarter will be given".⁴³

³⁰ Italy, *IHL Manual* (1991), Vol. I, § 8. ³¹ Kenya, *LOAC Manual* (1997), Précis No. 4, p. 2.

³² Mali, *Army Regulations* (1979), Article 36.

³³ Morocco, *Disciplinary Regulations* (1974), Article 25(2).

³⁴ Netherlands, *Military Manual* (1993), p. IV-4.

³⁵ Netherlands, *Military Manual* (1993), p. XI-4.

³⁶ New Zealand, *Military Manual* (1992), § 503(1) (land warfare), see also § 612(1) (air warfare).

³⁷ New Zealand, *Military Manual* (1992), § 1704(2)(d).

³⁸ New Zealand, *Military Manual* (1992), § 1811.

³⁹ Nigeria, *Military Manual* (1994), p. 40, § 5(1)(vii).

⁴⁰ Nigeria, *Manual on the Laws of War* (undated), § 14(a)(4).

⁴¹ Nigeria, *Soldiers' Code of Conduct* (undated), § 12(g).

⁴² Russia, *Military Manual* (1990), § 5(p).

⁴³ Senegal, *Disciplinary Regulations* (1990), Article 34(2).

45. South Africa's LOAC Manual states that "it is a war crime to order troops to 'take no prisoners'".⁴⁴
46. Spain's LOAC Manual states that it is prohibited to order that there will be no survivors, to threaten the enemy therewith or to conduct operations on this basis.⁴⁵
47. Sweden's IHL Manual considers that the prohibition on ordering that no quarter shall be granted as contained in Article 40 AP I is part of customary international law.⁴⁶
48. Switzerland's Basic Military Manual provides that "it is prohibited to declare that no quarter will be given".⁴⁷
49. Togo's Military Manual states that it is prohibited "to order that there shall be no survivors, to threaten the enemy therewith or to conduct operations on such a basis".⁴⁸
50. The UK Military Manual stipulates that "it is forbidden to declare that no quarter will be given".⁴⁹
51. The UK LOAC Manual provides that "it is forbidden . . . to declare that no quarter will be given".⁵⁰
52. The US Field Manual provides that "it is especially forbidden . . . to declare that no quarter will be given".⁵¹
53. The YPA Military Manual of the SFRY (FRY) states that "it is prohibited to order that there shall be no survivors or detainees, to threaten an adversary therewith or to conduct hostilities on this basis".⁵²

National Legislation

54. Under Armenia's Penal Code, giving, during an armed conflict, the "order . . . not to spare anyone's life" constitutes a crime against the peace and security of mankind.⁵³
55. Australia's War Crimes Act considers "any war crime within the meaning of the instrument of appointment of the Board of Inquiry [set up to investigate war crimes committed by enemy subjects]" as a war crime, including directions to give no quarter.⁵⁴
56. Australia's ICC (Consequential Amendments) Act incorporates in the Criminal Code the war crimes defined in the 1998 ICC Statute, including declaring or ordering that there are to be no survivors with the intention of threatening an adversary or conducting hostilities on this basis, both in international and non-international armed conflicts.⁵⁵

⁴⁴ South Africa, *LOAC Manual* (1996), § 30, note 2.

⁴⁵ Spain, *LOAC Manual* (1996), Vol. I, § 2.3.b.(3), see also §§ 3.3.b.(5) and 7.3.a.(6).

⁴⁶ Sweden, *IHL Manual* (1991), Section 2.2.3, p. 19.

⁴⁷ Switzerland, *Basic Military Manual* (1987), Article 20.

⁴⁸ Togo, *Military Manual* (1996), Fascicule III, p. 12.

⁴⁹ UK, *Military Manual* (1958), § 117.

⁵⁰ UK, *LOAC Manual* (1981), Section 4, p. 12, § 2(c).

⁵¹ US, *Field Manual* (1956), § 28.

⁵² SFRY (FRY), *YPA Military Manual* (1988), § 103.

⁵³ Armenia, *Penal Code* (2003), Article 391(3).

⁵⁴ Australia, *War Crimes Act* (1945), Section 3.

⁵⁵ Australia, *ICC (Consequential Amendments) Act* (2002), Schedule 1, §§ 268.50 and 268.91.

57. Under the Criminal Code of the Federation of Bosnia and Herzegovina, whoever “orders that there be no surviving enemy soldiers in a fight, or whoever fights against the enemy on such basis” commits a war crime.⁵⁶ The Criminal Code of the Republika Srpska contains the same provision.⁵⁷
58. Under Burundi’s Draft Law on Genocide, Crimes against Humanity and War Crimes, “declaring that there shall be no quarter” constitutes a war crime in both international and non-international armed conflicts.⁵⁸
59. Canada’s Crimes against Humanity and War Crimes Act provides that the war crimes defined in Article 8(2) of the 1998 ICC Statute are “crimes according to customary international law” and, as such, indictable offences under the Act.⁵⁹
60. China’s Law Governing the Trial of War Criminals provides that “ordering wholesale slaughter” constitutes a war crime.⁶⁰
61. Congo’s Genocide, War Crimes and Crimes against Humanity Act defines war crimes with reference to the categories of crimes defined in Article 8 of the 1998 ICC Statute.⁶¹
62. Under Croatia’s Criminal Code, whoever “orders that in a battle there shall be no surviving members of the enemy or whoever engages in a battle against the enemy with the same objective” commits a war crime.⁶²
63. Under Ethiopia’s Penal Code, it is a punishable offence to order to kill or wound enemies who have surrendered or laid down their arms or, for any other reason, are incapable of defending or have ceased to defend themselves.⁶³
64. Under Georgia’s Criminal Code, any war crime provided for by the 1998 ICC Statute which is not explicitly mentioned in the Code, such as “declaring that no quarter will be given” in an international or non-international armed conflict, is a crime.⁶⁴
65. Germany’s Law Introducing the International Crimes Code punishes anyone who, in connection with an international or a non-international armed conflict, “orders or threatens, as a commander, that no quarter will be given”.⁶⁵
66. Ireland’s Geneva Conventions Act as amended provides that any “minor breach” of AP I, including violations of Article 40 AP I, as well as any “contravention” of AP II, including violations of Article 4(1) AP II, are punishable offences.⁶⁶

⁵⁶ Bosnia and Herzegovina, Federation, *Criminal Code* (1998), Article 158(3).

⁵⁷ Bosnia and Herzegovina, Republika Srpska, *Criminal Code* (2000), Article 438(3).

⁵⁸ Burundi, *Draft Law on Genocide, Crimes against Humanity and War Crimes* (2001), Article 4(B)(l) and (D)(j).

⁵⁹ Canada, *Crimes against Humanity and War Crimes Act* (2000), Section 4(1) and (4).

⁶⁰ China, *Law Governing the Trial of War Criminals* (1946), Article 3(14).

⁶¹ Congo, *Genocide, War Crimes and Crimes against Humanity Act* (1998), Article 4.

⁶² Croatia, *Criminal Code* (1997), Article 161(3).

⁶³ Ethiopia, *Penal Code* (1957), Article 287(a) and (d).

⁶⁴ Georgia, *Criminal Code* (1999), Article 413(d).

⁶⁵ Germany, *Law Introducing the International Crimes Code* (2002), Article 1, § 11(1)(6).

⁶⁶ Ireland, *Geneva Conventions Act as amended* (1962), Section 4(1) and (4).

67. Italy's Law of War Decree as amended provides that it is prohibited "to declare that no quarter will be given".⁶⁷

68. Under Lithuania's Criminal Code as amended, the "order to kill . . . persons who have surrendered by giving up their arms or having no means to put up resistance, the wounded, sick persons or the crew of a sinking ship" during an international armed conflict or occupation is a war crime.⁶⁸

69. Under Mali's Penal Code, "declaring that there shall be no quarter" is a war crime in international armed conflicts.⁶⁹

70. The Definition of War Crimes Decree of the Netherlands includes "directions to give no quarter" in its list of war crimes.⁷⁰

71. Under the International Crimes Act of the Netherlands, "declaring that no quarter will be given" constitutes a crime, whether in time of international or non-international armed conflict.⁷¹

72. Under New Zealand's International Crimes and ICC Act, war crimes include the crimes defined in Article 8(2)(b)(xii) and (e)(x) of the 1998 ICC Statute.⁷²

73. Under Norway's Military Penal Code as amended, "anyone who contravenes or is accessory to the contravention of provisions relating to the protection of persons or property laid down in . . . the two additional protocols to [the Geneva] Conventions . . . is liable to imprisonment".⁷³

74. Under Slovenia's Penal Code, "whoever orders . . . that there be no survivors among the aggressor's soldiers, or . . . whoever wages war against the aggressor on this basis" commits a war crime.⁷⁴

75. Spain's Royal Ordinance for the Armed Forces provides that it is prohibited to declare that a war will be waged without quarter.⁷⁵

76. Under Trinidad and Tobago's Draft ICC Act, it is a punishable offence to commit a war crime as defined in Article 8(2)(b)(xxi) and (e)(x) of the 1998 ICC Statute.⁷⁶

77. Under the UK ICC Act, it is a punishable offence to commit a war crime as defined in Article 8(2)(b)(xxi) and (e)(x) of the 1998 ICC Statute.⁷⁷

78. Under the US War Crimes Act as amended, violations of Article 23(d) of the 1907 HR are war crimes.⁷⁸

79. Under the Penal Code as amended of the SFRY (FRY), "a person who orders . . . that no enemy troops should survive combat or who fights the enemy

⁶⁷ Italy, *Law of War Decree as amended* (1938), Article 35.

⁶⁸ Lithuania, *Criminal Code as amended* (1961), Article 333.

⁶⁹ Mali, *Penal Code* (2001), Article 31(i)(12).

⁷⁰ Netherlands, *Definition of War Crimes Decree* (1946), Article 1.

⁷¹ Netherlands, *International Crimes Act* (2003), Articles 5(5)(s) and 6(3)(g).

⁷² New Zealand, *International Crimes and ICC Act* (2000), Section 11(2).

⁷³ Norway, *Military Penal Code as amended* (1902), § 108(b).

⁷⁴ Slovenia, *Penal Code* (1994), Article 377(2).

⁷⁵ Spain, *Royal Ordinance for the Armed Forces* (1978), Article 138.

⁷⁶ Trinidad and Tobago, *Draft ICC Act* (1999), Section 5(1)(a).

⁷⁷ UK, *ICC Act* (2001), Sections 50(1) and 51(1) (England and Wales) and Section 58(1) (Northern Ireland).

⁷⁸ US, *War Crimes Act as amended* (1996), Section 2441(c)(2).

for that purpose" commits a war crime.⁷⁹ The commentary on the Penal Code specifies that "in the case of an armed conflict, it is irrelevant for this act whether it is international in nature or whether it is a civil war".⁸⁰

National Case-law

80. The *Sergeant W. case* before Belgium's Court-Martial of Brussels in 1966 concerned the murder of an unarmed Congolese woman by a senior member of the Belgian staff who had been sent to provide assistance to the army in the Congo (DRC). In his defence, the accused argued that he had been ordered by his commanding officer (Major O.) to "shoot all suspect elements on sight" in the zone forbidden to civilians and that he had shot the woman on the basis that he had interpreted this order as meaning that he should "take no prisoners and to 'kill' everything we come across in here". The Court found that:

As interpreted by the accused in practice – viz. the right or even the obligation to kill an unarmed person in his power – the order was patently illegal. Executing or causing to be executed without prior due trial a suspect person or even a rebel fallen into the hands of the members of his battalion was obviously outside the competence of Major O., and such an execution was a manifest example of voluntary manslaughter. The illegal nature of the order thus interpreted was not in doubt and the accused had to refuse to carry it out... The act perpetrated by the accused constitutes not only murder within the meaning of Articles 43 and 44 of the Congolese Criminal Code and Articles 392 and 393 of the Belgian Criminal Code, but is also a flagrant violation of the laws and customs of war and the laws of humanity.⁸¹

81. In the *Abbaye Ardenne case* in 1945, the Canadian Military Court at Aurich convicted a German commander of having incited and counselled his troops to deny quarter to Allied troops.⁸²

82. In a case concerning conscientious objection in 1992, Colombia's Constitutional Court considered that a superior's order that would cause "death outside combat" would clearly lead to a violation of human rights and of the Constitution and as such could be disobeyed.⁸³

83. In 1995, in its examination of the constitutionality of AP II, Colombia's Constitutional Court considered that Article 4 AP II, including the prohibition on ordering that there shall be no survivors, perfectly met constitutional standards. The Constitution contained provisions on the protection of human life and dignity.⁸⁴

84. In 1995, in its examination of the constitutionality of a military regulation which provided that subordinates were obliged to obey a superior's order

⁷⁹ SFRY (FRY), *Penal Code as amended* (1976), Article 146(3).

⁸⁰ SFRY (FRY), *Penal Code as amended* (1976), commentary on Article 146.

⁸¹ Belgium, Court-Martial of Brussels, *Sergeant W. case*, Judgement, 18 May 1966.

⁸² Canada, Military Court at Aurich, *Abbaye Ardenne case*, Judgement, 28 December 1945.

⁸³ Colombia, Constitutional Court, *Constitutional Case No. T-409*, Judgement, 8 June 1992.

⁸⁴ Colombia, Constitutional Court, *Constitutional Case No. C-225/95*, Judgement, 18 May 1995.

that they considered unlawful if the order was confirmed in writing, Colombia's Constitutional Court stated that an order that would cause death outside combat would clearly be a violation of human rights and of the Constitution.⁸⁵

85. In the *Stenger and Cruisus case* before Germany's Leipzig Court after the First World War, one of the accused was charged with having issued an order that:

No prisoners are to be taken from to-day onwards; all prisoners, wounded or not, are to be killed

...

All the prisoners are to be massacred; the wounded, armed or not, are to be massacred; even men captured in large organised units are to be massacred. No enemy must remain alive behind us.

The other accused was charged with having passed on the order. The first accused was acquitted because it could not be proved that he had actually given the order in question. As to the second accused, the Court held that:

[He] acted in the mistaken idea that General Stenger, at the time of the discussion near the chapel, issued the order to shoot the wounded. He was not conscious of the illegality of such an order, and therefore considered that he might pass on the supposed order to his company, and indeed must do so.

So pronounced a misconception of the real facts seems only comprehensible in view of the mental condition of the accused... But this merely explains the error of the accused; it does not excuse it... Had he applied the attention which was to be expected from him, what was immediately clear to many of his men would not have escaped him, namely, that the indiscriminate killing of all wounded was a monstrous war measure, in no way to be justified.⁸⁶

86. In the *Peleus case* before the UK Military Court at Hamburg in 1945, the commander of a German submarine was charged with ordering the killing of survivors of a sunken Greek merchant vessel. He was found guilty and the Judge Advocate ruled that it must have been obvious to the most rudimentary intelligence that it was not a lawful command.⁸⁷

87. In the *Von Falkenhorst case* before the UK Military Court at Brunswick in 1946, the accused, Commander-in-Chief of the German armed forces in Norway, was found guilty of having incited, in two orders of October 1942 and June 1943, members of the forces under his command not to accept quarter or to give quarter to Allied soldiers, sailors and airmen taking part in commando operations. Furthermore he had ordered that, in the event of the capture of any Allied soldiers, sailors or airmen taking part in such operations, they should be killed after capture.⁸⁸

88. In the *Wickman case* before the UK Military Court at Hamburg in 1946, the accused was found guilty of "committing a war crime... in that he... in

⁸⁵ Colombia, Constitutional Court, *Constitutional Case No. C-578*, Judgement, 4 December 1995.

⁸⁶ Germany, Leipzig Court, *Stenger and Cruisus case*, Judgement, 1921.

⁸⁷ UK, Military Court at Hamburg, *Peleus case*, 20 October 1945.

⁸⁸ UK, Military Court at Brunswick, *Von Falkenhorst case*, Judgement, 2 August 1946.

violation of the laws and usages of war gave orders to [his] platoon that no prisoners were to be taken and that any prisoners taken were to be shot".⁸⁹

89. In the *Von Ruchteschell* case before the UK Military Court at Hamburg in 1947, the accused was charged, *inter alia*, of having ordered that survivors on life-rafts be fired at. He was found not guilty of this charge.⁹⁰

90. In the *Le Paradis* case before the UK Court at Hamburg-Altona in 1949, a German officer was convicted of the killing by his troops, on his orders, of members of a UK regiment which had surrendered.⁹¹

91. In the *Thiele* case before the US Military Commission at Augsburg in 1945, the accused, a German army lieutenant, was convicted of having ordered the killing of an American prisoner of war.⁹²

92. In the *Von Leeb (The High Command Trial)* case before the US Military Tribunal at Nuremberg in 1948, the accused, former high-ranking officers in the German army and navy, were charged, *inter alia*, with war crimes against enemy belligerents and prisoners of war for having unlawfully directed that certain enemy troops be refused quarter and that certain captured members of the military forces of nations at war with Germany be summarily executed. In its judgement, the Tribunal stated that "in the course of the war, many Allied soldiers who had surrendered to the Germans were shot immediately, often as a matter of deliberate, calculated policy". It added that "the murder of Commandos or captured airmen . . . were the result of direct orders circulated through the highest official channels". It also referred to Hitler's order of 18 October 1942 whereby no quarter should be granted to members of Allied commando units, stating that "this order was criminal on its face. It simply directed the slaughter of these 'sabotage' troops."⁹³

Other National Practice

93. In its oral pleadings before the ICJ in the *Nuclear Weapons* case in 1995, Australia stated that the "right to self-defence is not unlimited . . . Self-defence is not a justification . . . for ordering that there shall be no enemy survivors in combat."⁹⁴

94. At some point during the Chinese civil war, the PLA headquarters made an announcement stating that the PLA would not kill any officers or soldiers

⁸⁹ UK, Military Court at Hamburg, *Wickman* case, Judgement, 26 November 1946.

⁹⁰ UK, Military Court at Hamburg, *Von Ruchteschell* case, Judgement, 21 May 1947.

⁹¹ UK, Court No. 5 of the Curiohaus, Hamburg-Altona, *Le Paradis* case, 25 October 1948; see also cases cited in Lassa Oppenheim, *International Law. A Treatise*, Vol. II, *Disputes, War and Neutrality*, Longmans, Green and Co., London/New York/Toronto, Seventh edition, Hersch Lauterpacht (ed.), 1952, §§ 69 and 109; Eric David, *Principes de droit des conflits armés*, Bruylant, Brussels, Second edition, 1999, § 2.167; Christopher Greenwood, The Customary Law Status of the 1977 Geneva Protocols, in Astrid J. M. Delissen and Gerard J. Tanja (eds.), *Humanitarian Law of Armed Conflict: Challenges Ahead. Essays in Honour of Frits Kalshoven*, Martinus Nijhoff, Dordrecht, 1991, p. 106.

⁹² US, Military Commission at Augsburg, *Thiele* case, Judgement, 13 June 1945.

⁹³ US, Military Tribunal at Nuremberg, *Von Leeb (The High Command Trial)* case, Judgement, 28 October 1948.

⁹⁴ Australia, Oral pleadings before the ICJ, *Nuclear Weapons* case, 30 October 1995, Verbatim Record CR 95/22, p. 52.

of the Nationalist Army who laid down arms. According to the Report on the Practice of China, the policy was implemented in practice.⁹⁵

95. According to the Report on the Practice of Israel, the IDF does not conduct a policy of “no quarter”.⁹⁶

96. In 1990, in a letter addressed to the UN Secretary-General in the context of the Gulf War, Kuwait condemned the instructions given and measures taken by the Iraqi authorities, *inter alia*, “the execution of every Kuwaiti military man should he fail to surrender to Iraqi forces”. These were qualified as “savage practices”.⁹⁷

97. In 1995, during a debate in the House of Lords in 1995, the UK Minister of State, Home Office, criticised the Geneva Conventions (Amendment) Bill introduced by a private member for categorising as grave breaches certain acts not treated as such in AP I, including threatening an adversary that there shall be no survivors.⁹⁸

98. In 1987, the Deputy Legal Adviser of the US Department of State affirmed that “we support the principle that no order be given that there shall be no survivors nor an adversary be threatened with such an order or hostilities be conducted on that basis”.⁹⁹

99. In 1991, in response to an ICRC memorandum on the applicability of IHL in the Gulf region, the US commented that its practice was consistent with the prohibition on ordering that there shall be no survivors.¹⁰⁰

100. In 1992, in its final report to Congress on the conduct of the Gulf War, the US Department of Defense stated that Article 23(d) of the 1907 HR “prohibits the denial of quarter, that is the refusal to accept an enemy’s surrender”.¹⁰¹

101. In 1989, the military attaché of the embassy of State X commented that no order to kill prisoners was in force as such in State Y, but the practice seemed to be not to take prisoners, with the exception of important personalities.¹⁰²

102. In 1994, an ICRC delegate, summarising the military situation in a State, emphasised the position reiterated by an officer of the armed forces that there were no prisoners, and that there would not be any.¹⁰³

⁹⁵ China, Announcement of the People’s Liberation Army, 10 October 1947, *Selected Works of Mao Zedong*, Vol. 4, The People’s Press, p. 1238; Report on the Practice of China, 1997, Chapter 2.1.

⁹⁶ Report on the Practice of Israel, 1997, Chapter 2.1.

⁹⁷ Kuwait, Letter dated 24 September 1990 to the UN Secretary-General, UN Doc. S/21815, 24 September 1990.

⁹⁸ UK, House of Lords, Statement by the Minister of State, Home Office, *Hansard*, 25 May 1995, Vol. 564, cols. 1083–1084.

⁹⁹ US, Remarks of Michael J. Matheson, Deputy Legal Adviser, US Department of State, The Sixth Annual American Red Cross-Washington College of Law Conference on International Humanitarian Law: A Workshop on Customary International Law and the 1977 Protocols Additional to the 1949 Geneva Conventions, *American University Journal of International Law and Policy*, Vol. 2, 1987, p. 425.

¹⁰⁰ US, Letter from the Department of the Army to the legal adviser of the US Army forces deployed in the Gulf region, 11 January 1991, § 8(j), Report on US Practice, 1997, Chapter 2.8.

¹⁰¹ US, Department of Defense, Final Report to Congress on the Conduct of the Persian Gulf War, Appendix O, The Role of the Law of War, 10 April 1992, *ILM*, Vol. 31, 1992, p. 641.

¹⁰² ICRC archive document. ¹⁰³ ICRC archive document.

III. Practice of International Organisations and Conferences

United Nations

103. In 1993, the UN Commission on the Truth for El Salvador examined, *inter alia*, a case concerning the killing of two soldiers wounded after a US helicopter was shot down by an FMLN patrol. The survivors of the crash had been left on the scene, but shortly afterwards, a member of the patrol was sent back and killed the two wounded men. According to the Commission's report,

The Commission considers that there is sufficient proof that United States soldiers . . . who survived the shooting down of the helicopter . . . but were wounded and defenceless, were executed in violation of international humanitarian law . . .

The Commission has likewise found no evidence that the executions were ordered by higher levels of command, or that they were carried out in accordance with an ERP or FMLN policy of killing prisoners. FMLN acknowledged the criminal nature of the incident and detained and tried the accused.¹⁰⁴

Other International Organisations

104. No practice was found.

International Conferences

105. No practice was found.

IV. Practice of International Judicial and Quasi-judicial Bodies

106. No practice was found.

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

107. To fulfil its task of disseminating IHL, the ICRC has delegates around the world teaching armed and security forces the rule that "it is prohibited to order that there will be no survivors, to threaten the enemy therewith or to conduct operations on this basis".¹⁰⁵

108. In a report submitted to the 21st International Conference of the Red Cross in 1969, the ICRC considered that the rule prohibiting the declaration that no quarter will be given was implicit in the Geneva Conventions. It stated, however, that the Conventions focused on the protection of combatants once they had fallen into enemy hands, whereas the prohibition of denial of quarter applied from the time the intention to surrender had been declared.¹⁰⁶

¹⁰⁴ UN Commission on the Truth for El Salvador, Report, UN Doc. S/25500, 1 April 1993, pp. 167–169.

¹⁰⁵ Frédéric de Mulinen, *Handbook on the Law of War for Armed Forces*, ICRC, Geneva, 1987, § 399.

¹⁰⁶ ICRC, Report on the Reaffirmation and Development of Laws and Customs Applicable in Armed Conflicts, May 1969, submitted to the 21st International Conference of the Red Cross, Istanbul, 6–13 September 1969, p. 78.

109. The ICRC Commentary on Article 40 AP I states that “any order of ‘liquidation’ is prohibited, whether it concerns commandos, political or any other kind of commissars, irregular troops or so-called irregular troops, saboteurs, parachutists, mercenaries or persons to be considered as mercenaries, or other cases”.¹⁰⁷

110. In 1994, in a Memorandum on Respect for International Humanitarian Law in Angola, the ICRC stated that “no order shall ever be given that there should be no survivors”.¹⁰⁸

111. In 1994, in a Memorandum on Compliance with International Humanitarian Law by the Forces Participating in Opération Turquoise in the Great Lakes region, the ICRC stated that “it is prohibited to order that there shall be no survivors”.¹⁰⁹

112. In 1997, in a working paper on war crimes submitted to the Preparatory Committee for the Establishment of an International Criminal Court, the ICRC proposed that “to declare that there shall be no survivors” be listed as a war crime in both international and non-international armed conflicts, subject to the jurisdiction of the Court.¹¹⁰

113. In a communication to the press issued in 2001 in the context of the conflict in Afghanistan, the ICRC stated that “the rules governing armed conflict must be respected at all times and in all circumstances. The ICRC stresses that these rules . . . prohibit orders that there should be no survivors.”¹¹¹

VI. Other Practice

114. In 1977, in a meeting with the ICRC, an armed opposition group denounced the practice by troops of a State of systematically killing all combatants, even those wounded or who had laid down their arms.¹¹²

115. In 1985, in a report on violations of the laws of war in Nicaragua, Americas Watch stated that “the following . . . are prohibited by applicable international law rules: 1. Orders to combatants that there shall be no survivors, such threats to combatants or direction to conduct hostilities on this basis.”¹¹³

¹⁰⁷ Yves Sandoz *et al.* (eds.), *Commentary on the Additional Protocols*, ICRC, Geneva, 1987, § 1595.

¹⁰⁸ ICRC, Memorandum on Respect for International Humanitarian Law in Angola, 8 June 1994, § II, *IRRC*, No. 320, 1997, p. 504.

¹⁰⁹ ICRC, Memorandum on Compliance with International Humanitarian Law by the Forces Participating in Opération Turquoise, 23 June 1994, § II, reprinted in Marco Sassòli and Antoine A. Bouvier, *How Does Law Protect in War?*, ICRC, Geneva, 1999, p. 1309.

¹¹⁰ ICRC, Working paper on war crimes submitted to the Preparatory Committee for the Establishment of an International Criminal Court, New York, 14 February 1997, §§ 2(vii) and 3(xv).

¹¹¹ ICRC, Communication to the Press No. 01/58, Afghanistan: ICRC calls on all parties to comply with international humanitarian law, 23 November 2001.

¹¹² ICRC archive document.

¹¹³ Americas Watch, *Violations of the Laws of War by Both Sides in Nicaragua: 1981–1985*, New York, March 1985, p. 33.

116. In 1989, in a report on violations of the laws of war in Angola, Africa Watch stated that “applicable international law rules prohibit the following kinds of practices... A. Orders to combatants that there shall be no survivors, such threats to combatants or direction to conduct hostilities on this basis.”¹¹⁴

117. In 1995, in a meeting with the ICRC, the representative of an armed opposition group accused government troops of not taking prisoners and of killing all captured combatants.¹¹⁵

118. According to an ICRC mission report in 1995, the leader of an armed opposition group explained that if captured combatants were nationals of the same State they were obliged to join the opposition forces; if, however, they were foreigners, they were executed. Soldiers had allegedly been given instructions not to grant quarter.¹¹⁶

B. Attacks against Persons Hors de Combat

General

I. Treaties and Other Instruments

Treaties

119. Article 41(1) AP I provides that “a person who is recognized or who, in the circumstances, should be recognized to be *hors de combat* shall not be made the object of attack”. Article 41 was adopted by consensus.¹¹⁷

120. Under Article 85(3)(e) AP I, “making a person the object of attack in the knowledge that he is *hors de combat*” is a grave breach of AP I. Article 85 API was adopted by consensus.¹¹⁸

121. Article 7(1) of draft AP II submitted by the ICRC to the CDDH provided that “it is forbidden to kill, injure, ill-treat or torture an adversary *hors de combat*”.¹¹⁹ This proposal was amended and adopted by consensus in Committee III of the CDDH.¹²⁰ The text adopted provided that “a person who is recognized or should, under the circumstances, be recognized to be *hors de combat*, shall not be made the object of attack”.¹²¹ Eventually, however, it was rejected in the plenary by 22 votes in favour, 15 against and 42 abstentions.¹²²

¹¹⁴ Africa Watch, *Angola: Violations of the Laws of War by Both Sides*, New York, April 1989, p. 141.

¹¹⁵ ICRC archive document. ¹¹⁶ ICRC archive document.

¹¹⁷ CDDH, *Official Records*, Vol. VI, CDDH/SR.39, 25 May 1977, p. 104.

¹¹⁸ CDDH, *Official Records*, Vol. VI, CDDH/SR.44, 30 May 1977, p. 291.

¹¹⁹ CDDH, *Official Records*, Vol. I, Part Three, Draft Additional Protocols, June 1973, p. 35.

¹²⁰ CDDH, *Official Records*, Vol. XV, CDDH/III/SR.49, 4 June 1976, p. 108, § 7.

¹²¹ CDDH, *Official Records*, Vol. XV, CDDH/236/Rev.1, 21 April–11 June 1976, p. 420.

¹²² CDDH, *Official Records*, Vol. VII, CDDH/SR.52, 6 June 1977, p. 129.

Other Instruments

122. Article 60 of the 1863 Lieber Code stipulates that “it is against the usage of modern war to resolve, in hatred and revenge, to give no quarter”.

123. Paragraph 6 of the 1991 Memorandum of Understanding on the Application of IHL between Croatia and the SFRY requires that hostilities be conducted in accordance with Article 41 AP I.

124. Paragraph 2.5 of the 1992 Agreement on the Application of IHL between the Parties to the Conflict in Bosnia and Herzegovina requires that hostilities be conducted in accordance with Article 41 AP I.

125. Pursuant to Article 20(b)(iv) of the 1996 ILC Draft Code of Crimes against the Peace and Security of Mankind, “making a person the object of attack in the knowledge that he is hors de combat” is a war crime.

*II. National Practice**Military Manuals*

126. Argentina’s Law of War Manual forbids the refusal to give quarter.¹²³ It also states that “it is prohibited . . . to make an enemy *hors de combat* the object of attack”.¹²⁴ It further states that “attacks against persons recognised as *hors de combat*” are a grave breach of AP I and a war crime.¹²⁵

127. Australia’s Commanders’ Guide provides that “a person who is recognised or who, in the circumstances, should be recognised to be hors de combat shall not be made the object of attack”.¹²⁶ It also states that “the following examples constitute grave breaches or serious war crimes likely to warrant institution of criminal proceedings: . . . denying an enemy the right to surrender”.¹²⁷

128. Australia’s Defence Force Manual provides that “soldiers who are ‘out of combat’ and civilians are to be treated in the same manner and cannot be made the object of attack”.¹²⁸ It also stresses that the “LOAC forbids the killing or wounding of an enemy who . . . is . . . ‘hors de combat’”.¹²⁹ The manual further states that “the following examples constitute grave breaches or serious war crimes likely to warrant institution of criminal proceedings: . . . denying an enemy the right to surrender”.¹³⁰

129. Belgium’s Teaching Manual for Officers provides that “any adversary *hors de combat* may no longer be made the object of attack”.¹³¹

¹²³ Argentina, *Law of War Manual* (1989), § 1.06(4).

¹²⁴ Argentina, *Law of War Manual* (1989), § 1.06(5).

¹²⁵ Argentina, *Law of War Manual* (1989), § 8.03.

¹²⁶ Australia, *Commanders’ Guide* (1994), § 906.

¹²⁷ Australia, *Commanders’ Guide* (1994), § 1305(o).

¹²⁸ Australia, *Defence Force Manual* (1994), § 707.

¹²⁹ Australia, *Defence Force Manual* (1994), § 836.

¹³⁰ Australia, *Defence Force Manual* (1994), § 1315(o).

¹³¹ Belgium, *Teaching Manual for Officers* (1994), Part I, Title II, p. 34.

130. Belgium's Teaching Manual for Soldiers states that enemy combatants who are no longer taking part in combat "may be neutralised and captured. To kill them would not bring any additional advantage in combat."¹³²

131. Benin's Military Manual states that "it is prohibited to kill or injure an adversary . . . who is *hors de combat*".¹³³ It also states that "any person recognised or who should be recognised as being no longer able to participate in combat shall not be attacked".¹³⁴

132. Cameroon's Instructors' Manual provides that "the enemy *hors de combat* is defined as a combatant who, physically or morally, cannot continue to fight. The main rule to be observed at this moment is not to kill him but to preserve his life, provided he does not manifest any hostile intentions."¹³⁵

133. Canada's LOAC Manual states that "it is prohibited to deny quarter".¹³⁶ It also states that "a combatant who is recognized or who, in the circumstances, should be recognized to be *hors de combat* shall not be attacked".¹³⁷ It further states that "making a person the object of attack knowing he is *hors de combat*" is a grave breach of AP I and a war crime.¹³⁸

134. Canada's Code of Conduct provides that "the 'denial of quarter' is prohibited".¹³⁹

135. Colombia's Circular on the Fundamental Rules of IHL states that "it is prohibited to kill or injure an adversary who . . . is *hors de combat*".¹⁴⁰

136. Colombia's Directive on IHL considers an "attack against a person *hors de combat*" as a punishable offence.¹⁴¹

137. Croatia's LOAC Compendium states that the denial of quarter is a prohibited method of warfare.¹⁴² It further states that "attacks on persons 'hors de combat'" are a grave breach and a war crime.¹⁴³

138. Croatia's Commanders' Manual provides that "a combatant who is recognised (or should be recognised) as being out of combat may not be attacked".¹⁴⁴

139. Under Croatia's Instructions on Basic Rules of IHL, it is prohibited to kill or injure members of the enemy armed forces who are *hors de combat*.¹⁴⁵

¹³² Belgium, *Teaching Manual for Soldiers* (undated), p. 15.

¹³³ Benin, *Military Manual* (1995), Fascicule II, p. 4, see also p. 18.

¹³⁴ Benin, *Military Manual* (1995), Fascicule II, p. 9.

¹³⁵ Cameroon, *Instructors' Manual* (1992), p. 63, § 233.2.

¹³⁶ Canada, *LOAC Manual* (1999), p. 6-2, § 15 and p. 7-3, § 20.

¹³⁷ Canada, *LOAC Manual* (1999), p. 3-3, § 18, see also p. 4-5, § 42, p. 6-2, § 16 and p. 7-3, § 21.

¹³⁸ Canada, *LOAC Manual* (1999), p. 16-2, § 8(a) and p. 16-3, § 16(e).

¹³⁹ Canada, *Code of Conduct* (2001), Rule 5, § 2.

¹⁴⁰ Colombia, *Circular on the Fundamental Rules of IHL* (1992), § 2.

¹⁴¹ Colombia, *Directive on IHL* (1993), Section III(D).

¹⁴² Croatia, *LOAC Compendium* (1991), p. 40.

¹⁴³ Croatia, *LOAC Compendium* (1991), p. 56.

¹⁴⁴ Croatia, *Commanders' Manual* (1992), § 72.

¹⁴⁵ Croatia, *Instructions on Basic Rules of IHL* (1993), § 1.

140. Ecuador's Naval Manual states that "the following acts constitute war crimes: . . . denial of quarter (i.e., denial of the offer not to kill the defeated enemy)".¹⁴⁶

141. France's LOAC Summary Note states that "it is prohibited to kill or injure an adversary who . . . is *hors de combat*".¹⁴⁷

142. France's LOAC Teaching Note provides that "it is prohibited to attack . . . an adversary . . . who is *hors de combat*".¹⁴⁸

143. France's LOAC Manual states that "a person who is recognized or who, in the circumstances, should be recognized to be *hors de combat* shall not be made the object of attack".¹⁴⁹

144. Hungary's Military Manual states that the denial of quarter is a prohibited method of warfare.¹⁵⁰ It further states that "attacks on persons 'hors de combat'" are a grave breach of the law of war and a war crime.¹⁵¹

145. With reference to Israel's Law of War Booklet, the Report on the Practice of Israel states that "the protection of those persons who are *hors de combat* is a basic tenet in the IDF, and IDF soldiers are required not to make any such individual the subject of attack".¹⁵²

146. Israel's Manual on the Laws of War states that:

The laws of war do set clear bars to the possibility of harming combatants when the combatant is found "outside the frame of hostilities", as when he asks to surrender, or when he is wounded in a way that does not allow him to take an active part in the fighting. In such situations it is absolutely prohibited to harm the combatant.¹⁵³

147. Italy's IHL Manual provides that grave breaches of international conventions and protocols, including "attacks against persons *hors de combat*", are considered as war crimes.¹⁵⁴

148. Italy's LOAC Elementary Rules Manual provides that "a combatant who is recognised (or should be recognised) as being out of combat may not be attacked".¹⁵⁵

149. Under Kenya's LOAC Manual, "the enemy combatant who is no longer in a position to fight is no longer to be attacked, and is protected".¹⁵⁶ It further instructs: "Do not fight enemies who are *out of combat*."¹⁵⁷

150. Madagascar's Military Manual states that "a combatant who is recognised (or should be recognised) to be *hors de combat* shall not be attacked".¹⁵⁸

¹⁴⁶ Ecuador, *Naval Manual* (1989), § 6.2.5(4). ¹⁴⁷ France, *LOAC Summary Note* (1992), § 2.1.

¹⁴⁸ France, *LOAC Teaching Note* (2000), p. 2.

¹⁴⁹ France, *LOAC Manual* (2001), pp. 104 and 105.

¹⁵⁰ Hungary, *Military Manual* (1992), p. 64.

¹⁵¹ Hungary, *Military Manual* (1992), p. 90.

¹⁵² Report on the Practice of Israel, 1997, Chapter 2.1, referring to *Law of War Booklet* (1986), p. 13.

¹⁵³ Israel, *Manual on the Laws of War* (1998), p. 42.

¹⁵⁴ Italy, *IHL Manual* (1991), Vol. I, § 85.

¹⁵⁵ Italy, *LOAC Elementary Rules Manual* (1991), § 72.

¹⁵⁶ Kenya, *LOAC Manual* (1997), Précis No. 2, p. 15.

¹⁵⁷ Kenya, *LOAC Manual* (1997), Précis No. 3, p. 14.

¹⁵⁸ Madagascar, *Military Manual* (1994), Fiche No. 7-O. § 17, see also Fiche No. 9-SO, § A and Fiche No. 5-T, § 4.

151. The Military Manual of the Netherlands provides that any person placed *hors de combat* may not be attacked.¹⁵⁹ In addition, “attacks against . . . a person who is recognised to be *hors de combat*” are a grave breach of AP I.¹⁶⁰

152. Under New Zealand’s Military Manual, “a person who is recognised as, or who in the circumstances should be recognised as, *hors de combat* shall not be made the object of attack”.¹⁶¹ Furthermore, the manual states that “making a person the object of attack knowing he is *hors de combat*” is a grave breach of AP I and a war crime. The manual explains that “this has always been a war crime under customary law”.¹⁶²

153. The Soldier’s Rules of the Philippines instructs: “Do not fight enemies who are ‘out of combat’ . . . Disarm them and hand them over to your superior.”¹⁶³

154. Romania’s Soldiers’ Manual orders combatants not to attack, kill or injure an enemy *hors de combat*.¹⁶⁴

155. Russia’s Military Manual provides that “attacks against persons *hors de combat*” are a prohibited method of warfare.¹⁶⁵

156. South Africa’s LOAC Manual notes that “making a person who is ‘out of combat’ . . . the object of attack knowing that that person is out of combat” is a grave breach of AP I and a war crime.¹⁶⁶

157. Spain’s LOAC Manual prohibits attacks against persons *hors de combat*.¹⁶⁷ It also states that it is a grave breach of AP I and a war crime “to make a person the object of attack knowing that he is *hors de combat*”.¹⁶⁸

158. Sweden’s IHL Manual considers that the safeguard of an enemy *hors de combat* as contained in Article 41 API is part of customary international law.¹⁶⁹ It states that “Article 40 of Additional Protocol I treats quarter – an archaic concept which is equivalent to showing mercy to an enemy who has been placed *hors de combat*”.¹⁷⁰ The manual adds that:

Persons *hors de combat* may not be attacked, but shall enjoy the protection of international humanitarian law provided they abstain from any hostile act and do not attempt to escape.

In practice it can often be very hard to determine when this situation has arisen. If it is established that a person is *hors de combat*, he may not be subjected to attack, but he is not protected against the secondary effects of an attack on nearby

¹⁵⁹ Netherlands, *Military Manual* (1993), p. IV-3.

¹⁶⁰ Netherlands, *Military Manual* (1993), p. IX-5.

¹⁶¹ New Zealand, *Military Manual* (1992), § 503(2) (land warfare), see also § 612(2) (air warfare).

¹⁶² New Zealand, *Military Manual* (1992), §§ 1701(1) and 1703(3)(e), including footnote 17.

¹⁶³ Philippines, *Soldier’s Rules* (1989), § 4.

¹⁶⁴ Romania, *Soldiers’ Manual* (1991), pp. 4, 5 and 32.

¹⁶⁵ Russia, *Military Manual* (1990), § 5(i).

¹⁶⁶ South Africa, *LOAC Manual* (1996), §§ 37(c) and 41.

¹⁶⁷ Spain, *LOAC Manual* (1996), Vol. I, §§ 3.3.c.(3), 4.5.b.(1)b), 10.6.a and 10.8.f.(1).

¹⁶⁸ Spain, *LOAC Manual* (1996), Vol. I, § 11.8.b.(1).

¹⁶⁹ Sweden, *IHL Manual* (1991), Section 2.2.3, p. 19.

¹⁷⁰ Sweden, *IHL Manual* (1991), Section 3.2.1.2, p. 32.

objectives. It should also be noted that the mere presence of persons *hors de combat* does not imply that the place/object where they happen to be shall receive immunity.¹⁷¹

159. Under Switzerland's Basic Military Manual, "attacks directed against a person, in the knowledge that this person is *hors de combat*," are grave breaches of AP I.¹⁷²

160. Togo's Military Manual states that "it is prohibited to kill or injure an adversary . . . who is *hors de combat*".¹⁷³ It further states that "any person recognised or who should be recognised as being no longer able to participate in combat shall not be attacked".¹⁷⁴

161. The US Air Force Pamphlet states that "the law of armed conflicts clearly forbids the killing or wounding of an enemy who . . . is . . . *hors de combat*".¹⁷⁵ The Pamphlet goes on to say that "in addition to the grave breaches of the Geneva Conventions of 1949, the following acts are representative of situations involving individual criminal responsibility: . . . deliberate refusal of quarter".¹⁷⁶

162. The US Naval Handbook provides that "the following acts are representative war crimes: . . . denial of quarter (i.e., killing or wounding an enemy *hors de combat* . . .)".¹⁷⁷

National Legislation

163. Under Armenia's Penal Code, an "assault on a person who has clearly ceased to participate in military actions", during an armed conflict, constitutes a crime against the peace and security of mankind.¹⁷⁸

164. Australia's Geneva Conventions Act as amended provides that "a person who, in Australia or elsewhere, commits a grave breach . . . of [AP I] is guilty of an indictable offence".¹⁷⁹

165. Australia's ICC (Consequential Amendments) Act incorporates in the Criminal Code the war crimes defined in the 1998 ICC Statute, including "killing or injuring a person who is *hors de combat*" in international armed conflicts.¹⁸⁰

166. The Criminal Code of Belarus provides that it is a war crime to "attack a person in the knowledge that he is *hors de combat*".¹⁸¹

167. Belgium's Law concerning the Repression of Grave Breaches of the Geneva Conventions and their Additional Protocols as amended provides that "making

¹⁷¹ Sweden, *IHL Manual* (1991), Section 3.2.1.2, p. 33.

¹⁷² Switzerland, *Basic Military Manual* (1987), Article 193(1)(e).

¹⁷³ Togo, *Military Manual* (1996), Fascicule II, p. 4, see also p. 18.

¹⁷⁴ Togo, *Military Manual* (1996), Fascicule II, p. 9.

¹⁷⁵ US, *Air Force Pamphlet* (1976), § 4-2(d). ¹⁷⁶ US, *Air Force Pamphlet* (1976), § 15-3(c)(3).

¹⁷⁷ US, *Naval Handbook* (1995), § 6.2.5(4).

¹⁷⁸ Armenia, *Penal Code* (2003), Article 390.3(5).

¹⁷⁹ Australia, *Geneva Conventions Act as amended* (1957), Section 7(1).

¹⁸⁰ Australia, *ICC (Consequential Amendments) Act* (2002), Schedule 1, § 268.40.

¹⁸¹ Belarus, *Criminal Code* (1999), Article 136(13).

a person the object of attack in the knowledge that he/she is *hors de combat*" constitutes a crime under international law.¹⁸²

168. Under the Criminal Code of the Federation of Bosnia and Herzegovina, "an attack against . . . persons unable to fight" is a war crime.¹⁸³ The Criminal Code of the Republika Srpska contains the same provision.¹⁸⁴

169. Canada's Geneva Conventions Act as amended provides that "every person who, whether within or outside Canada, commits a grave breach [of AP I] . . . is guilty of an indictable offence".¹⁸⁵

170. Colombia's Penal Code imposes a criminal sanction on anyone who, during an armed conflict, refuses to give quarter or attacks persons *hors de combat*.¹⁸⁶

171. The Geneva Conventions and Additional Protocols Act of the Cook Islands punishes "any person who in the Cook Islands or elsewhere commits, or aids or abets or procures the commission by another person of, a grave breach . . . of [AP I]."¹⁸⁷

172. Under Croatia's Criminal Code, "an attack against . . . those *hors de combat*" is a war crime.¹⁸⁸

173. Cyprus's AP I Act punishes "any person who, whatever his nationality, commits in the Republic or outside the Republic, any grave breach of the provisions of the Protocol, or takes part or assists or incites another person in the commission of such a breach".¹⁸⁹

174. The Draft Amendments to the Penal Code of El Salvador provide for a prison sentence for "anyone who, during an international or non-international armed conflict, knowing of the existence of unequivocal acts of surrender from the adversary, continues to attack persons *hors de combat*, with the aim of leaving no survivors".¹⁹⁰

175. Under Georgia's Criminal Code, "making a person the object of attack in the knowledge that he is *hors de combat*", whether in an international or a non-international armed conflict, is a crime.¹⁹¹

176. Germany's Law Introducing the International Crimes Code punishes anyone who, in connection with an international or a non-international armed conflict, "wounds a member of the opposing armed forces or a combatant of the adverse party after the latter . . . is . . . placed *hors de combat*".¹⁹²

¹⁸² Belgium, *Law concerning the Repression of Grave Breaches of the Geneva Conventions and their Additional Protocols as amended* (1993), Article 1(3)(15).

¹⁸³ Bosnia and Herzegovina, Federation, *Criminal Code* (1998), Article 154(1).

¹⁸⁴ Bosnia and Herzegovina, Republika Srpska, *Criminal Code* (2000), Article 433(1).

¹⁸⁵ Canada, *Geneva Conventions Act as amended* (1985), Section 3(1).

¹⁸⁶ Colombia, *Penal Code* (2000), Article 145.

¹⁸⁷ Cook Islands, *Geneva Conventions and Additional Protocols Act* (2002), Section 5(1).

¹⁸⁸ Croatia, *Criminal Code* (1997), Article 158(1).

¹⁸⁹ Cyprus, *AP I Act* (1979), Section 4(1).

¹⁹⁰ El Salvador, *Draft Amendments to the Penal Code* (1998), Article entitled "Ataques contra actos inequívocos de rendición".

¹⁹¹ Georgia, *Criminal Code* (1999), Article 411(1)(e).

¹⁹² Germany, *Law Introducing the International Crimes Code* (2002), Article 1(8)(2).

177. Ireland's Geneva Conventions Act as amended provides that grave breaches of AP I are punishable offences.¹⁹³ It adds that "any minor breach" of AP I, including violations of Article 41(1) AP I, is also a punishable offence.¹⁹⁴

178. Under Jordan's Draft Military Criminal Code, "attacks against persons *hors de combat*" in time of armed conflict are war crimes.¹⁹⁵

179. Under the Draft Amendments to the Code of Military Justice of Lebanon, "an attack against a person *hors de combat*" constitutes a war crime.¹⁹⁶

180. Moldova's Penal Code punishes "grave breaches of international humanitarian law committed during international and non-international armed conflicts".¹⁹⁷

181. Under the International Crimes Act of the Netherlands, it is a crime, during an international armed conflict, to commit "the following acts, when they are committed intentionally and in violation of the relevant provisions of Additional Protocol (I) and cause death or serious injury to body or health: . . . making a person the object of attack in the knowledge that he is *hors de combat*".¹⁹⁸

182. New Zealand's Geneva Conventions Act as amended provides that "any person who in New Zealand or elsewhere commits, or aids or abets or procures the commission by another person of, a grave breach . . . of [AP I] is guilty of an indictable offence".¹⁹⁹

183. Nicaragua's Draft Penal Code punishes "anyone who, during an international or internal armed conflict, knowing of the existence of unequivocal acts of surrender from the adversary, continues to attack persons *hors de combat*, with the aim of leaving no survivors".²⁰⁰

184. According to Niger's Penal Code as amended, "making a person the object of an attack knowing that he/she is *hors de combat*" is a war crime, when such person is protected under the 1949 Geneva Conventions or their Additional Protocols of 1977.²⁰¹

185. Under Norway's Military Penal Code as amended, "anyone who contravenes or is accessory to the contravention of provisions relating to the protection of persons or property laid down in . . . the two additional protocols to [the Geneva] Conventions . . . is liable to imprisonment".²⁰²

186. Under Slovenia's Penal Code, "an attack . . . on persons unable to fight" is a war crime.²⁰³

¹⁹³ Ireland, *Geneva Conventions Act as amended* (1962), Section 3(1).

¹⁹⁴ Ireland, *Geneva Conventions Act as amended* (1962), Section 4(1) and (4).

¹⁹⁵ Jordan, *Draft Military Criminal Code* (2000), Article 41(A)(13).

¹⁹⁶ Lebanon, *Draft Amendments to the Code of Military Justice* (1997), Article 146(13).

¹⁹⁷ Moldova, *Penal Code* (2002), Article 391.

¹⁹⁸ Netherlands, *International Crimes Act* (2003), Article 5(2)(c)(v).

¹⁹⁹ New Zealand, *Geneva Conventions Act as amended* (1958), Section 3(1).

²⁰⁰ Nicaragua, *Draft Penal Code* (1999), Article 451.

²⁰¹ Niger, *Penal Code as amended* (1961), Article 208.3(15).

²⁰² Norway, *Military Penal Code as amended* (1902), § 108(b).

²⁰³ Slovenia, *Penal Code* (1994), Article 374(1).

187. Tajikistan's Criminal Code punishes the act of "making a person the object of attack in the knowledge that he is *hors de combat*" in an international or internal armed conflict.²⁰⁴

188. The UK Geneva Conventions Act as amended punishes "any person, whatever his nationality, who, whether in or outside the United Kingdom, commits, or aids, abets or procures the commission by any other person of, a grave breach of . . . [AP I]".²⁰⁵

189. Under Yemen's Military Criminal Code, "attacks against . . . persons *hors de combat*" are war crimes.²⁰⁶

190. Under the Penal Code as amended of the SFRY (FRY), "an attack on . . . persons placed *hors de combat*" is a war crime.²⁰⁷

191. Zimbabwe's Geneva Conventions Act as amended punishes "any person, whatever his nationality, who, whether in or outside Zimbabwe, commits any such grave breach of . . . [AP I]".²⁰⁸

National Case-law

192. In the *Von Leeb (The High Command Trial)* case before the US Military Tribunal at Nuremberg in 1948, the accused, former high-ranking officers in the German army and navy, were charged, *inter alia*, with war crimes against enemy belligerents and prisoners of war in that they refused to give quarter to prisoners of war and members of armed forces of nations then at war with the Third Reich. The Tribunal stated that "when Allied airmen were forced to land in Germany, they were sometimes killed at once by the civilian population. The police were instructed not to interfere with these killings, and the Ministry of Justice was informed that no one should be prosecuted for taking part in them."²⁰⁹

Other National Practice

193. According to the Report on the Practice of Algeria, the duty to give quarter has been a long-standing practice of Algeria.²¹⁰ During the Algerian war of independence, the ten rules of the ALN stipulated that Islamic teachings and international laws must be observed "in the destruction of enemy forces".²¹¹

194. At the CDDH, the Chilean delegation stated that it had abstained from the vote on draft Article 21 AP II (which was deleted in the final text) because it found the wording too vague. However, it agreed that the safeguarding of the

²⁰⁴ Tajikistan, *Criminal Code* (1998), Article 403(1).

²⁰⁵ UK, *Geneva Conventions Act as amended* (1957), Section 1(1).

²⁰⁶ Yemen, *Military Criminal Code* (1998), Article 21(6).

²⁰⁷ SFRY (FRY), *Penal Code as amended* (1976), Article 142(1).

²⁰⁸ Zimbabwe, *Geneva Conventions Act as amended* (1981), Section 3(1).

²⁰⁹ US, Military Tribunal at Nuremberg, *Von Leeb (The High Command Trial) case*, Judgement, 28 October 1948.

²¹⁰ Report on the Practice of Algeria, 1997, Chapter 2.1.

²¹¹ *El Moudjahid*, Les dix commandements de l'A.L.N., Vol. 1, p. 16, Report on the Practice of Algeria, 1997, Chapter 2.1.

enemy *hors de combat* as established in AP I should also be included in the Additional Protocol relative to non-international conflicts.²¹²

195. According to the Report on the Practice of Egypt, it has been a long-standing practice of Egypt to give quarter. The report notes that granting quarter has been practised by Egypt as far back as 1468 B.C.²¹³

196. According to the Report on the Practice of Egypt, during the Middle East conflict in 1973, Egypt issued military communiqués with instructions to respect the duty to give quarter.²¹⁴

197. According to the Report on the Practice of Germany, the right to be given quarter is for the benefit of every person.²¹⁵

198. According to the Report on the Practice of Indonesia, quarter must be granted to every person taking part in hostilities, whether they are saboteurs, spies, mercenaries or illegal combatants.²¹⁶

199. The Report on the Practice of Iraq notes that, during the Iran–Iraq War, several Iraqi military communiqués were issued with the aim of ensuring the safety of enemy combatants unwilling to fight and their evacuation to rear positions.²¹⁷

200. According to the Report on the Practice of Jordan, Islamic principles dictate that a combatant who is recognised as *hors de combat* may not be attacked. The report mentions an order of Caliph Abu Bakr, dating from the 7th century, which proscribed the killing of non-combatants.²¹⁸

201. During the debates at the CDDH, Syria emphasised that “a person *hors de combat* must in any case abstain from any hostile act and make no attempt to escape”.²¹⁹

III. Practice of International Organisations and Conferences

United Nations

202. In 1997, in a report on a mission to Zaire (DRC), the Special Rapporteur of the UN Commission on Human Rights pointed out that there had been reports indicating that rebel forces, the ADFL, members of the former FAR and *interahamwe* killed rather than took prisoners. Bodies of Zairean soldiers were

²¹² Chile, Statement at the CDDH, *Official Records*, Vol. XV, CDDH/III/SR.59, 17 May 1977, p. 217, § 47.

²¹³ Report on the Practice of Egypt, 1997, Chapter 2.1. (The report referred to the Battle of Magedou (1468 B.C.) and the Battle of Mansourah (1249 B.C.). It considered these battles to be part of international conflicts.)

²¹⁴ Report on the Practice of Egypt, 1997, Chapter 2.1, referring to Military Communiqué No. 34, 13 October 1973 and Military Communiqué No. 46, 18 October 1973.

²¹⁵ Report on the Practice of Germany, 1997, Answers to additional questions on Chapter 2.1.

²¹⁶ Report on the Practice of Indonesia, 1997, Answers to additional questions on Chapter 2.1.

²¹⁷ Report on the Practice of Iraq, 1998, Chapter 2.1, referring to Military Communiqué No. 973, 27 December 1982, Military Communiqué No. 975, 24 January 1983 and Military Communiqué No. 1902, 21 July 1985.

²¹⁸ Report on the Practice of Jordan, 1997, Chapter 2.1. (The order was sent to the leader of the Muslim army fighting against the Romans in Greater Syria.)

²¹⁹ Syria, Statement at the CDDH, *Official Records*, Vol. XV, CDDH/III/SR.47, 31 May 1976, p. 89, § 22.

also found showing no signs that they had died in battle.²²⁰ The rebel authorities justified the alleged incidents on the ground that a war was going on and claimed that the allegations were a smear campaign. The Special Rapporteur “pointed out that the arguments put forward [by rebel authorities] were unacceptable: many of the alleged incidents could not be justified even in time of war, since war too, is subject to regulations and there are limits to what is permissible in combat”.²²¹

Other International Organisations

203. No practice was found.

International Conferences

204. Committee III of the CDDH stated with regard to the wording of Article 41(1) AP I that it:

changed the prohibition contained in the ICRC draft (and, indeed, all the amendments) from “kill or injure” to “make the object of attack”. This change was designed to make clear that what was forbidden was the deliberate attack against persons *hors de combat*, not merely killing or injuring them as the incidental consequence of attacks not aimed at them *per se*.²²²

IV. Practice of International Judicial and Quasi-judicial Bodies

205. No practice was found.

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

206. The ICRC Commentary on the Additional Protocols states that:

A man who is in the power of his adversary may be tempted to resume combat if the occasion arises . . . Yet another, who has lost consciousness, may come to and show an intent to resume combat. It is self-evident that in these different situations, and in any other similar situations, the safeguard ceases. Any hostile act gives the adversary the right to take countermeasures until the perpetrator of the hostile act is recognized, or in the circumstances, should be recognized, to be “hors de combat” once again.

. . .

When troops, after surrendering, destroy installations in their possession or their own military equipment, this can be considered to be a hostile act. The same applies in principle if soldiers “hors de combat” attempt to communicate with the Party

²²⁰ UN Commission on Human Rights, Special Rapporteur on the Situation of Human Rights in Zaire, Third Report, UN Doc. E/CN.4/1997/6, 28 January 1997, §§ 198, 199 and 207.

²²¹ UN Commission on Human Rights, Special Rapporteur on the Situation of Human Rights in Zaire, Report on the mission carried out at the request of the High Commissioner for Human Rights between 25 and 29 March 1997 to the area occupied by rebels in eastern Zaire, UN Doc. E/CN.4/1997/6/Add.2, 2 April 1997, §§ 39 and 42.

²²² CDDH, *Official Records*, Vol. XV, CDDH/236/Rev.1, 21 April–11 June 1976, p. 384, § 23.

to the conflict to which they belong, unless this concerns the wounded and sick who require assistance from this Party's medical service.²²³

207. To fulfil its task of disseminating IHL, the ICRC has delegates around the world teaching armed and security forces that "a person who is recognized or who, in the circumstances, should be recognized as being no longer able to participate in combat, shall not be attacked".²²⁴ Furthermore, an "attack of a person known as being hors de combat" constitutes a grave breach of the law of war.²²⁵

208. In 1997, in a working paper on war crimes submitted to the Preparatory Committee for the Establishment of an International Criminal Court, the ICRC included "making a person the object of attack in the knowledge that he/she is *hors de combat*", when committed in an international armed conflict, in the list of war crimes to be subject to the jurisdiction of the Court.²²⁶

VI. Other Practice

209. In 1980, an armed opposition group expressed its acceptance of the fundamental principles of IHL as formulated by the ICRC, including the principle that "it is forbidden to kill or injure an enemy . . . who is *hors de combat*".²²⁷

210. In their commentary on the 1977 Additional Protocols, Bothe, Partsch and Solf explain that:

Paragraph 1 [of Article 41 AP I] protects *hors de combat* personnel from attacks directed at them. It does not protect them against the unintended collateral injury resulting from attacks on legitimate military objectives which might be in their vicinity. The accidental killing or wounding of such persons due to their presence among, or in proximity to, combatants actually engaged, by fire directed against the latter, gives no just cause for complaint, but any anticipated collateral casualties of *hors de combat* persons should not be excessive in relation to the military advantage anticipated.²²⁸

211. In 1985, in a report on violations of the laws of war in Nicaragua, Americas Watch stated that "the following . . . are prohibited by applicable international law rules: . . . Attacks against combatants who . . . are placed *hors de combat*."²²⁹

²²³ Yves Sandoz et al. (eds.), *Commentary on the Additional Protocols*, ICRC, Geneva, 1987, §§ 1621–1622.

²²⁴ Frédéric de Mulinen, *Handbook on the Law of War for Armed Forces*, ICRC, Geneva, 1987, § 487.

²²⁵ Frédéric de Mulinen, *Handbook on the Law of War for Armed Forces*, ICRC, Geneva, 1987, § 778(a).

²²⁶ ICRC, Working paper on war crimes submitted to the Preparatory Committee for the Establishment of an International Criminal Court, New York, 14 February 1997, § 1(b)(v).

²²⁷ ICRC archive document.

²²⁸ Michael Bothe, Karl Joseph Partsch, Waldemar A. Solf (eds.), *New Rules for Victims of Armed Conflicts*, Martinus Nijhoff, The Hague, 1982, p. 220.

²²⁹ Americas Watch, *Violations of the Laws of War by Both Sides in Nicaragua: 1981–1985*, New York, March 1985, p. 33.

212. In 1989, in a report on violations of the laws of war in Angola, Africa Watch stated that “applicable international law rules prohibit the following kinds of practices . . . Attacks against combatants who . . . are placed hors de combat.”²³⁰

Specific categories of persons hors de combat

Note: For practice concerning the use of the white flag of truce, see Chapter 18, section B and Chapter 19, section A.

I. Treaties and Other Instruments

Treaties

213. Article 23(c) of the 1899 HR provides that it is especially prohibited “to kill or wound an enemy who, having laid down arms, or having no longer means of defence, has surrendered at discretion”.

214. Article 23(c) of the 1907 HR provides that it is especially forbidden “to kill or wound an enemy who, having laid down his arms, or having no longer means of defence, has surrendered at discretion”.

215. Article 41 AP I provides that:

1. A person who is recognized or who, in the circumstances, should be recognized to be *hors de combat* shall not be made the object of attack.
2. A person is *hors de combat* if:
 - a) he is in the power of an adverse Party;
 - b) he clearly expresses an intention to surrender;
 - c) he has been rendered unconscious or is otherwise incapacitated by wounds or sickness, and therefore is incapable of defending himself; provided that in any of these cases he abstains from any hostile act and does not attempt to escape.

Article 41 AP I was adopted by consensus.²³¹

216. Article 7(1) of draft AP II submitted by the ICRC to the CDDH provided that:

It is forbidden to kill, injure, ill-treat or torture an adversary *hors de combat*. An adversary *hors de combat* is one who, having laid down his arms, no longer has any means of defence or has surrendered. These conditions are considered to have been fulfilled, in particular, in the case of an adversary who:

- a) is unable to express himself, or
- b) has surrendered or has clearly expressed an intention to surrender
- c) and abstains from any hostile act and does not attempt to escape.²³²

This proposal was amended and adopted by consensus in Committee III of the CDDH.²³³ The text adopted provided that:

²³⁰ Africa Watch, *Angola: Violations of the Laws of War by Both Sides*, New York, April 1989, p. 141.

²³¹ CDDH, *Official Records*, Vol. VI, CDDH/SR.39, 25 May 1977, p. 104.

²³² CDDH, *Official Records*, Vol. I, Part Three, Draft Additional Protocols, June 1973, p. 35.

²³³ CDDH, *Official Records*, Vol. XV, CDDH/III/SR.49, 4 June 1976, p. 108, § 7.

1. A person who is recognized or should, under the circumstances, be recognized to be *hors de combat* shall not be made the object of attack.
2. A person is *hors de combat* if:
 - a) he is in the power of an adverse party; or
 - b) he clearly expresses an intention to surrender; or
 - c) he has been rendered unconscious or is otherwise incapacitated by wounds or sickness, and he is therefore incapable of defending himself; and in any case, provided that he abstains from any hostile act and does not attempt to escape.²³⁴

Eventually, however, this draft article was rejected in the plenary by 22 votes in favour, 15 against and 42 abstentions.²³⁵

217. Under Article 8(2)(b)(vi) of the 1998 ICC Statute, “killing or wounding a combatant who, having laid down his arms or having no longer means of defence, has surrendered at discretion” is a war crime in international armed conflicts.

Other Instruments

218. Article 71 of the 1863 Lieber Code provides that “whoever intentionally inflicts additional wounds on an enemy already wholly disabled, or kills such an enemy . . . shall suffer death, if duly convicted, whether he belongs to the Army of the United States, or is an enemy captured after having committed his misdeed”.

219. Article 13(c) of the 1874 Brussels Declaration states that “murder of an enemy who, having laid down his arms or having no longer means of defence, has surrendered at discretion” is “especially forbidden”.

220. Article 9(b) of the 1880 Oxford Manual provides that “it is forbidden . . . to injure or kill an enemy who has surrendered at discretion or is disabled”.

221. Article 17(1) of the 1913 Oxford Manual of Naval War states that it is forbidden “to kill or to wound an enemy who, having laid down his arms or having no longer means of defence, has surrendered at discretion”.

222. The 2000 UNTAET Regulation No. 2000/15 establishes panels with exclusive jurisdiction over serious criminal offences, including war crimes. According to Section 6(1)(b)(vi), “killing or wounding a combatant who, having laid down his arms or having no longer means of defence, has surrendered at discretion” is a war crime in international armed conflicts.

II. National Practice

Military Manuals

223. Argentina’s Law of War Manual (1969) states that “it is prohibited to kill or injure an enemy who has laid down his arms or who is defenceless and has surrendered”.²³⁶

²³⁴ CDDH, *Official Records*, Vol. XV, CDDH/236/Rev.1, 21 April–11 June 1976, p. 420.

²³⁵ CDDH, *Official Records*, Vol. VII, CDDH/SR.52, 6 June 1977, p. 129.

²³⁶ Argentina, *Law of War Manual* (1969), § 1.006.

224. Argentina's Law of War Manual (1989) prohibits:

making an enemy *hors de combat* the object of an attack, understood as any person who:

- 1) is in the power of his enemy.
- 2) clearly expresses his intention to surrender.
- 3) is incapable of defending himself.

provided that in any of these cases he abstains from any hostile act and does not attempt to escape.²³⁷

225. Australia's Commanders' Guide states that:

Military members who abandon a sinking ship should not be attacked unless they show hostile intent or are armed and so close to shore as to be capable of completing their military mission. If their conduct suggests a desire to surrender, this must be accepted.

Protected from the moment of their surrender or capture, PW and PW camps must not be made the object of attack . . .

...

An enemy who indicates a desire to surrender should not be attacked . . .

...

Combatants become protected when incapacitated, sick, wounded or shipwrecked to the extent that they are incapable of fighting.²³⁸

The manual also states that:

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

- a. is in the power of an enemy;
- b. clearly expresses an intention to surrender;
- c. or has been rendered unconscious or is otherwise incapacitated,

provided that in any of these cases he abstains from any hostile act and does not attempt to escape.²³⁹

The manual further provides that "the following examples constitute grave breaches or serious war crimes likely to warrant institution of criminal proceedings: . . . making PW or the sick and wounded the object of attack; . . . denying an enemy the right to surrender".²⁴⁰

226. Australia's Defence Force Manual states that:

Combatants who are unable to continue hostile action and refrain from attempting to do so must be treated in the same fashion as noncombatants. Prisoners of war, military personnel who are surrendering or attempting to surrender, and those who are wounded or sick must not be attacked. The basic principle is that any person who

²³⁷ Argentina, *Law of War Manual* (1989), § 1.06(5).

²³⁸ Australia, *Commanders' Guide* (1994), §§ 413, 414, 416 and 621.

²³⁹ Australia, *Commanders' Guide* (1994), § 906.

²⁴⁰ Australia, *Commanders' Guide* (1994), § 1305(i) and (o).

is hors de combat, whether by choice or circumstance, is entitled to be treated as a noncombatant provided they refrain from any further participation in hostilities.

... A person is *hors de combat* if that person:

- a. is under the control of an enemy;
- b. clearly expresses an intention to surrender, or has been rendered unconscious, or is otherwise incapacitated; and
- c. abstains from any hostile act and does not attempt to escape.²⁴¹

The manual also states that “the following examples constitute grave breaches or serious war crimes likely to warrant institution of criminal proceedings: ... making PW or the sick and wounded the object of attack; ... denying an enemy the right to surrender”.²⁴²

227. Under Belgium’s Field Regulations, “it is forbidden to mistreat... an enemy, who having laid down his arms, has surrendered at discretion”.²⁴³

228. Belgium’s Law of War Manual provides that “it is prohibited to kill or injure an adversary who, having laid down his arms or having no longer means of defence, has surrendered ‘at discretion’, i.e. unconditionally”.²⁴⁴

229. Belgium’s Teaching Manual for Officers stipulates that “any adversary *hors de combat* may no longer be made the object of attack. This is the case of combatants who surrender, who are wounded or sick [or] of shipwrecked.”²⁴⁵

230. Belgium’s Teaching Manual for Soldiers states that surrendering soldiers may not be fired at. It explains that “the intention to surrender may be expressed in different ways: laid down arms, raised hand, white flag”. The manual also provides that “the shipwrecked do not constitute any longer a military threat. [Wounded and shipwrecked] combatants obviously lose their protection and may be attacked if they themselves open fire... For the same reasons of humanity, the wounded and sick must be spared.”²⁴⁶

231. Benin’s Military Manual states that “it is prohibited to kill or injure an adversary who surrenders”.²⁴⁷ The manual also provides that “any person recognised, or who should be recognised, as not being able to participate any longer in combat shall not be attacked (for example: in case of surrender, wounds, ... shipwreck ...).” It specifies that an intention to surrender must be clearly expressed and gives a few examples, such as raising hands, laying down arms and waving a white flag.²⁴⁸

232. The Instructions to the Muslim Fighter issued by the ARBiH in Bosnia and Herzegovina in 1993 state that it is “left to the military command’s discretion

²⁴¹ Australia, *Defence Force Manual* (1994), §§ 518 and 707, see also §§ 519 and 836 (prohibition to kill or wound an enemy who surrenders in air warfare) and § 839 (prohibition to fire upon shipwrecked personnel in air warfare).

²⁴² Australia, *Defence Force Manual* (1994), § 1315(i) and (o).

²⁴³ Belgium, *Field Regulations* (1964), § 23. ²⁴⁴ Belgium, *Law of War Manual* (1983), p. 33.

²⁴⁵ Belgium, *Teaching Manual for Officers* (1994), Part I, Title II, p. 34.

²⁴⁶ Belgium, *Teaching Manual for Soldiers* (undated), pp. 15 and 16.

²⁴⁷ Benin, *Military Manual* (1995), Fascicule II, p. 4, see also Fascicule I, p. 16 and Fascicule II, p. 18.

²⁴⁸ Benin, *Military Manual* (1995), Fascicule II, p. 9.

to decide whether it is more useful or in the general interest to free, exchange or liquidate enemy prisoners of war".²⁴⁹

233. Burkina Faso's Disciplinary Regulations provides that, under the laws and customs of war, it is prohibited "to fire at, injure or kill an enemy who surrenders or who is captured", as well as "to refuse an unconditional surrender".²⁵⁰

234. Cameroon's Disciplinary Regulations provides that, under the laws and customs of war, it is prohibited "to fire at, injure or kill an enemy who surrenders or who is captured", as well as "to refuse an unconditional surrender".²⁵¹

235. Cameroon's Instructors' Manual states that "all combatants who are unable to fight must be spared".²⁵² It further notes that:

An enemy *hors de combat* may:

- raise his arm as an indication of surrender
- lay down his weapon
- display the white flag of parlementaires.²⁵³

In addition, the manual specifies that "captured enemy combatants are prisoners of war and shall not be attacked".²⁵⁴

236. Canada's LOAC Manual provides that:

It is prohibited to attack a combatant who is, or should be recognized as being, *hors de combat* (out of combat).

A combatant is *hors de combat* if that person:

- a. is in the power of an adverse Party (i.e., a prisoner);
- b. clearly expresses an intention to surrender; or
- c. has been rendered unconscious or is otherwise incapacitated by wounds or sickness, and therefore is incapable of self defence;

provided that in any of these cases this person abstains from any hostile act and does not attempt to escape.²⁵⁵

The manual also states that "killing or wounding an enemy who, having laid down his arms or no longer having a means of defence, has surrendered" constitutes a war crime.²⁵⁶ Likewise, "firing upon shipwrecked personnel" is a war crime "recognized by the LOAC".²⁵⁷

237. Canada's Code of Conduct instructs: "Do not attack those who surrender."²⁵⁸ It adds that "it is unlawful to refuse to accept someone's surrender... Anyone who wishes to surrender must clearly show an intention to do

²⁴⁹ Bosnia and Herzegovina, *Instructions to the Muslim Fighter* (1993), § c.

²⁵⁰ Burkina Faso, *Disciplinary Regulations* (1994), Article 35(2).

²⁵¹ Cameroon, *Disciplinary Regulations* (1975), Article 32.

²⁵² Cameroon, *Instructors' Manual* (1992), p. 30, § 132.

²⁵³ Cameroon, *Instructors' Manual* (1992), p. 32, § 132.22.

²⁵⁴ Cameroon, *Instructors' Manual* (1992), p. 96, § II.

²⁵⁵ Canada, *LOAC Manual* (1999), p. 6-2, §§ 16 and 17 (land warfare), see also pp. 3-2 and 3-3, §§ 17 and 18, p. 4-5, §§ 42 and 43 and p. 7-3, §§ 21 and 22 (air warfare).

²⁵⁶ Canada, *LOAC Manual* (1999), p. 16-3, § 20(c).

²⁵⁷ Canada, *LOAC Manual* (1999), pp. 16-3 and 16-4, § 21(f).

²⁵⁸ Canada, *Code of Conduct* (2001), Rule 5.

so (e.g., hands up, throwing away his weapon, or showing a white flag).²⁵⁹ The manual further provides that “members of opposing forces who have been rendered unconscious or are otherwise incapacitated by wounds or sickness, and therefore are incapable of defending themselves, shall not be made the object of attack provided that they abstain from any hostile act”.²⁶⁰

238. Colombia’s Circular on the Fundamental Rules of IHL states that “it is prohibited to kill or injure an adversary who surrenders”.²⁶¹

239. Congo’s Disciplinary Regulations provides that, under the laws and customs of war, it is prohibited “to fire at, injure or kill an enemy who surrenders or who is captured”, as well as “to refuse an unconditional surrender”.²⁶²

240. Croatia’s LOAC Compendium and Soldiers’ Manual instruct soldiers to spare captured enemy combatants.²⁶³

241. Croatia’s Commanders’ Manual states that “a combatant who is recognised (or should be recognised) as being out of combat (surrendering, wounded, shipwrecked in water . . .) may not be attacked. The intent to surrender can be shown with a white flag.”²⁶⁴

242. Under Croatia’s Instructions on Basic Rules of IHL, it is prohibited to kill or injure members of the enemy armed forces who have surrendered.²⁶⁵

243. The Military Manual of the Dominican Republic forbids attacks against non-combatants, including soldiers who surrender or who are sick, wounded or captured.²⁶⁶ It further states that:

The enemy soldier may reach the point where he would rather surrender than fight. He may signal to you with a white flag, by emerging from his position with arms raised or by yelling to cease fire. The manner he expresses his wish to surrender may vary, but you must give him the opportunity to surrender once he has manifested it. It is illegal to fire at an enemy who has laid down his arms as a sign of surrender.²⁶⁷

244. Ecuador’s Naval Manual states that:

Members of the armed forces incapable of participating in combat due to injury or illness may not be the object of attack.

...

Shipwrecked persons, whether military or civilian, may not be the object of attack.

...

Combatants cease to be subject to attack when they have individually laid down their arms to surrender, when they are no longer capable of resistance or when the unit in which they are serving or embarked has surrendered or has been captured.²⁶⁸

²⁵⁹ Canada, *Code of Conduct* (2001), Rule 5, §§ 2 and 3.

²⁶⁰ Canada, *Code of Conduct* (2001), Rule 7, § 2.

²⁶¹ Colombia, *Circular on the Fundamental Rules of IHL* (1992), § 2.

²⁶² Congo, *Disciplinary Regulations* (1986), Article 32(2).

²⁶³ Croatia, *LOAC Compendium* (1991), p. 46; *Soldiers’ Manual* (1992), p. 4.

²⁶⁴ Croatia, *Commanders’ Manual* (1992), § 72.

²⁶⁵ Croatia, *Instructions on Basic Rules of IHL* (1993), § 1.

²⁶⁶ Dominican Republic, *Military Manual* (1980), p. 3.

²⁶⁷ Dominican Republic, *Military Manual* (1980), pp. 6–7.

²⁶⁸ Ecuador, *Naval Manual* (1989), §§ 11.4, 11.6 and 11.8, see also § 8.2.1.

The manual also states that:

The following acts constitute war crimes:

- ...
3. Offences against the sick and wounded, including killing, wounding, or mistreating enemy forces disabled by sickness or wounds.
 4. ... offences against combatants who have laid down their arms and surrendered.
 5. Offences against the survivors of ships and aircraft lost at sea, including killing, wounding, or mistreating the shipwrecked, and failing to provide for the safety of survivors as military circumstances permit.²⁶⁹

245. El Salvador's Soldiers' Manual states that "a person wounded or sick is *hors de combat*".²⁷⁰ It also instructs: "Do not kill ... enemies who have laid down their arms and surrendered."²⁷¹

246. France's Disciplinary Regulations as amended states that, under international conventions, it is prohibited "to fire at, injure or kill an enemy who surrenders or who is captured", as well as "to refuse an unconditional surrender".²⁷²

247. France's LOAC Summary Note provides that "it is prohibited to kill or wound an adversary who surrenders".²⁷³

248. France's LOAC Teaching Note provides that "it is prohibited to attack, kill or wound an adversary who surrenders". It adds that "prisoners shall be spared".²⁷⁴

249. France's LOAC Manual incorporates the content of Article 41 AP I. The manual adds that "any intention to surrender must be clearly expressed: by raising hands, throwing down weapons or waving a white flag".²⁷⁵

250. Germany's Military Manual states that "an enemy who, having laid down his arms, or having no longer means of defence, surrenders or is otherwise unable to fight or to defend himself shall no longer be made the object of attack".²⁷⁶ It further states that "grave breaches of international humanitarian law are in particular: ... launching attacks against defenceless persons".²⁷⁷

251. Germany's Soldiers' Manual contains the rule: "Never fight against an opponent who has laid down arms or has surrendered."²⁷⁸

²⁶⁹ Ecuador, *Naval Manual* (1989), § 6.2.5(3)–(5).

²⁷⁰ El Salvador, *Soldiers' Manual* (undated), p. 7.

²⁷¹ El Salvador, *Soldiers' Manual* (undated), p. 8.

²⁷² France, *Disciplinary Regulations as amended* (1975), Article 9 bis (2).

²⁷³ France, *LOAC Summary Note* (1992), § 2.1.

²⁷⁴ France, *LOAC Teaching Note* (2000), p. 2.

²⁷⁵ France, *LOAC Manual* (2001), p. 105, see also p. 104.

²⁷⁶ Germany, *Military Manual* (1992), § 705.

²⁷⁷ Germany, *Military Manual* (1992), § 1209.

²⁷⁸ Germany, *Soldiers' Manual* (1996), § 604, picture 601, pp. 33–34.

252. Indonesia's Air Force Manual states that "it is prohibited to kill or injure the enemy who has surrendered".²⁷⁹ It further states that:

It is prohibited to attack:

- a. Enemy ships which are obviously intending to surrender;
- b. Shipwrecked crew, including the crew of military air craft of the adverse party.²⁸⁰

253. Israel's Manual on the Laws of War provides that:

The laws of war do set clear bars to the possibility of harming combatants when the combatant is found "outside the frame of hostilities", as when he asks to surrender, or when he is wounded in a way that does not allow him to take an active part in the fighting. In such situations, it is absolutely prohibited to harm the combatant.

...

When is a combatant regarded as leaving the sphere of hostilities? While storming at zero distance, must a combatant hold his fire against a combatant raising his hands, but still holding his weapon? This is a difficult question to answer, especially under combat conditions. At any rate, there are several criteria that can guide us: Does the combatant show clear intent to surrender using universally accepted signs, such as raising his hands? Is the soldier seeking to surrender liable to jeopardize our forces or is the range considered not dangerous? Did the surrenderer lay down his arms?²⁸¹

254. Italy's IHL Manual states that it is prohibited to use violence "to kill or injure an enemy... when he, having laid down arms or having no longer means of defence, has surrendered at discretion". It also forbids "firing at the shipwrecked".²⁸²

255. Italy's LOAC Elementary Rules Manual states that "a combatant who is recognised (or should be recognised) as being out of combat may not be attacked (surrendering, wounded, shipwrecked in water...). The intent to surrender can be shown with a white flag."²⁸³ Furthermore, one of the rules to be observed when confronted with enemy combatants who surrender is "to spare them".²⁸⁴

256. Kenya's LOAC Manual states that "the enemy combatant who is no longer in a position to fight is no longer to be attacked... This is the case for combatants who surrender, for the injured, ... for the shipwrecked."²⁸⁵ The manual further insists that:

It is forbidden to kill or wound someone who has surrendered having laid down his arms or who no longer has any means of defence...

²⁷⁹ Indonesia, *Air Force Manual* (1990), § 15(b)3.

²⁸⁰ Indonesia, *Air Force Manual* (1990), § 15(b)3.

²⁸¹ Israel, *Manual on the Laws of War* (1998), pp. 42 and 45.

²⁸² Italy, *IHL Manual* (1991), Vol. I, § 8(2) and (3).

²⁸³ Italy, *LOAC Elementary Rules Manual* (1991), § 72.

²⁸⁴ Italy, *LOAC Elementary Rules Manual* (1991), p. 29.

²⁸⁵ Kenya, *LOAC Manual* (1997), Précis No. 2, p. 15.

Any intention to surrender must be clearly expressed, raising arms, throwing away one's weapons or waving a white flag, etc. . . .

Combatants who are captured (with or without having surrendered) shall no longer be attacked. Their protective status starts from the moment of capture, and applies only to captured combatants who then abstain from any hostile act and do not attempt to escape.²⁸⁶

257. South Korea's Military Law Manual states that combatants who are disabled shall not be attacked.²⁸⁷

258. South Korea's Operational Law Manual states that combatants who are unwilling to fight or express their intention to surrender shall not be attacked.²⁸⁸

259. Lebanon's Army Regulations and Field Manual prohibit attacks against persons intending to surrender, and against the wounded, sick, shipwrecked and prisoners.²⁸⁹

260. Madagascar's Military Manual provides that "a combatant who is recognised (or should be recognised) as being *hors de combat* shall not be attacked (surrendering, wounded, shipwrecked . . .). The intent to surrender can be shown with a white flag."²⁹⁰ The manual adds that "captured enemy combatants, whether having surrendered or not, are prisoners of war and shall no longer be attacked".²⁹¹

261. Mali's Army Regulations provides that, under the laws and customs of war, it is prohibited "to fire at, injure or kill an enemy who surrenders or who is captured", as well as "to refuse an unconditional surrender".²⁹²

262. Morocco's Disciplinary Regulations provides that, under the laws and customs of war, it is prohibited "to fire at, injure or kill an enemy who surrenders or who is captured", as well as "to refuse an unconditional surrender".²⁹³

263. The Military Manual of the Netherlands states that:

It is prohibited to attack an adversary who has laid down his arms or has surrendered.

In addition, an adversary who has indicated his intention to surrender may not be attacked.

May not be attacked either an adversary who is unconscious or who is otherwise placed *hors de combat* by wounds or sickness, and who is no longer capable of defending himself. In general, any person who is in the power of an adverse party may not be attacked.

A combatant who has just become prisoner of war and uses violence or escapes ceases to be *hors de combat* and may again be the target of attack.²⁹⁴

²⁸⁶ Kenya, *LOAC Manual* (1997), Précis No. 3, pp. 6 and 7, see also Précis No. 2, p. 15 and Précis No. 3, p. 14.

²⁸⁷ South Korea, *Military Law Manual* (1996), p. 86.

²⁸⁸ South Korea, *Operational Law Manual* (1996), p. 43.

²⁸⁹ Lebanon, *Army Regulations* (1971), § 17; *Field Manual* (1996), §§ 7 and 8(a), (e) and (f).

²⁹⁰ Madagascar, *Military Manual* (1994), Fiche No. 7-O, § 17, see also Fiche No. 5-T, § 4.

²⁹¹ Madagascar, *Military Manual* (1994), Fiche No. 6-SO, § A.

²⁹² Mali, *Army Regulations* (1979), Article 36.

²⁹³ Morocco, *Disciplinary Regulations* (1974), Article 25(2).

²⁹⁴ Netherlands, *Military Manual* (1993), pp. IV-3 and IV-4.

264. The Military Handbook of the Netherlands states that “it is prohibited to attack . . . combatants who are no longer fighting because of wounds or sickness and who have surrendered”.²⁹⁵ It adds that “wounded and sick soldiers who have laid down their arms have to be spared and protected, whatever party they belong to”.²⁹⁶

265. The IFOR Instructions of the Netherlands provides that “members of enemy troops who want to surrender may not be maltreated”.²⁹⁷

266. New Zealand’s Military Manual provides that:

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

- a) he is in the power of an adverse Party;
- b) he clearly expresses an intention to surrender; or
- c) he has been rendered unconscious or is otherwise incapacitated by wounds or sickness, and is therefore incapable of defending himself;

provided that in any of these cases he abstains from any hostile act and does not attempt to escape.²⁹⁸

The manual further states that “killing or wounding an enemy who, having laid down his arms or no longer having a means of defence, has accordingly surrendered” is a war crime.²⁹⁹ Likewise, “among other war crimes recognised by the customary law of armed conflict are . . . firing upon shipwrecked personnel”.³⁰⁰

267. Nigeria’s Operational Code of Conduct states that “soldiers who surrender will not be killed”.³⁰¹

268. Under Nigeria’s Military Manual, it is prohibited “to kill or wound an enemy who, having laid down his arms, or having no longer any means of defence, has surrendered at discretion”.³⁰²

269. Nigeria’s Manual on the Laws of War considers “killing or injuring an enemy who has laid down his weapons” as an “illegitimate tactic”.³⁰³

270. Under Nigeria’s Soldiers’ Code of Conduct, it is prohibited “to kill or wound an enemy who, having laid down his arms, or having no longer any means of defence has surrendered at discretion”.³⁰⁴

²⁹⁵ Netherlands, *Military Handbook* (1995), p. 7-36.

²⁹⁶ Netherlands, *Military Handbook* (1995), p. 7-40.

²⁹⁷ Netherlands, *IFOR Instructions* (1995), § 4.

²⁹⁸ New Zealand, *Military Manual* (1992), § 503(2) (land warfare), see also § 612(2) (air warfare).

²⁹⁹ New Zealand, *Military Manual* (1992), § 1704(2)(c).

³⁰⁰ New Zealand, *Military Manual* (1992), § 1704(5).

³⁰¹ Nigeria, *Operational Code of Conduct* (1967), § 4(e).

³⁰² Nigeria, *Military Manual* (1994), p. 39, § 5(1)(iii).

³⁰³ Nigeria, *Manual on the Laws of War* (undated), § 14(a)(5).

³⁰⁴ Nigeria, *Soldiers’ Code of Conduct* (undated), § 12(d).

271. Peru's Human Rights Charter of the Security Forces states that it is prohibited to kill defenceless persons and adds that "the life of captured, surrendered and wounded persons must be respected".³⁰⁵

272. The Soldier's Rules of the Philippines instructs: "Do not fight enemies... who surrender. Disarm them and hand them over to your superior."³⁰⁶

273. The Rules for Combatants of the Philippines provides that "it is forbidden to attack... a wounded enemy combatant; an enemy combatant who surrenders...".³⁰⁷

274. Romania's Soldiers' Manual instructs combatants that the "killing or injuring of an adversary who surrenders... is prohibited".³⁰⁸

275. Russia's Military Manual provides that it is prohibited "to kill or injure enemy persons who have laid down their arms, who have no means of defending themselves, who have surrendered".³⁰⁹

276. Senegal's Disciplinary Regulations provides that, under the laws and customs of war, it is prohibited "to fire at, injure or kill an enemy who surrenders or who is captured", as well as "to refuse an unconditional surrender".³¹⁰

277. South Africa's LOAC Manual states that "making a person... who is wounded or has surrendered... the object of attack knowing that that person is out of combat" constitutes a grave breach of API and a war crime.³¹¹ It explains that "surrender may be by any means that communicates the intention to give up".³¹²

278. Spain's LOAC Manual provides that:

It is prohibited to attack an enemy who is *hors de combat*:

- a) because he is in the power of an adverse party;
- b) because he clearly expresses his intention to surrender;
- c) because he is unconscious or is otherwise incapacitated by wounds or sickness, and is therefore incapable of defending himself.

In any of these cases, he always abstains from any hostile act and does not attempt to escape. Otherwise, the prohibition [to attack him] disappears.³¹³

279. Sweden's IHL Manual notes that:

The [1907 HR] and [the 1949] Geneva Conventions include rules intended to afford protection to combatants in situations where they have laid down their arms or are no longer capable of defending themselves... or where combatants have become sick, are wounded, shipwrecked or captured. These fundamental rules have not

³⁰⁵ Peru, *Human Rights Charter of the Security Forces* (1991), pp. 6 and 7.

³⁰⁶ Philippines, *Soldier's Rules* (1989), § 4.

³⁰⁷ Philippines, *Rules for Combatants* (1989), § 3.

³⁰⁸ Romania, *Soldiers' Manual* (1991), p. 32, see also p. 5.

³⁰⁹ Russia, *Military Manual* (1990), § 5(h).

³¹⁰ Senegal, *Disciplinary Regulations* (1990), Article 34(2).

³¹¹ South Africa, *LOAC Manual* (1996), §§ 37(c) and 41.

³¹² South Africa, *LOAC Manual* (1996), § 30, note 1.

³¹³ Spain, *LOAC Manual* (1996), Vol. I, § 3.3.c.(3), see also §§ 4.5.b.(1)b), 10.6.a and 10.8.f.(1).

always been applied in combat situations, and for this reason it has been considered necessary to reaffirm certain of the older provisions to assert their fundamental importance . . .

Personnel attempting to save themselves from a sinking vessel shall according to international humanitarian law be considered as distressed, and may not be attacked.³¹⁴

280. Switzerland's Basic Military Manual provides that "it is prohibited to kill or wound an enemy who, having laid down his arms or having no longer means of defence, has surrendered". Furthermore, "a person who surrenders must clearly indicate his intention by his behaviour; he must no longer attempt to fight or escape".³¹⁵ The manual adds that "the life of an individual who surrenders must be spared. During the Second World War, and subsequent conflicts, this rule has been frequently violated."³¹⁶ It further provides that it is prohibited to finish off or exterminate the wounded and sick.³¹⁷ The manual also notes that "prisoners of war are protected persons" and that "captivity starts as soon as a member of the armed forces falls into enemy hands".³¹⁸ In addition, "to finish off the wounded", "to machine-gun the shipwrecked" and "to kill or injure an enemy who is surrendering" constitute war crimes under the manual.³¹⁹

281. Togo's Military Manual states that "it is prohibited to kill or injure an adversary who surrenders".³²⁰ The manual also provides that "any person recognised, or who should be recognised, as not being able to participate any longer in combat shall not be attacked (for example: in case of surrender, wounds, . . . shipwreck . . .)". It specifies that an intention to surrender must be clearly expressed and gives a few examples, such as raising hands, laying down arms and waving a white flag.³²¹

282. Uganda's Code of Conduct orders troops to "never kill . . . any captured prisoners, as the guns should only be reserved for armed enemies or opponents".³²²

283. The UK Military Manual provides that:

It is forbidden to kill or wound an enemy who, having laid down his arms, or having no longer the means of defence, has surrendered at discretion, *i.e.*, unconditionally . . . A combatant is entitled to commit acts of violence up to the moment of his surrender without losing the benefits of quarter.³²³

³¹⁴ Sweden, *IHL Manual* (1991), Section 3.2.1.2, pp. 32 and 33.

³¹⁵ Switzerland, *Basic Military Manual* (1987), Article 19, including commentary.

³¹⁶ Switzerland, *Basic Military Manual* (1987), Article 20, commentary.

³¹⁷ Switzerland, *Basic Military Manual* (1987), Article 69, commentary.

³¹⁸ Switzerland, *Basic Military Manual* (1987), Articles 96(2) and 109.

³¹⁹ Switzerland, *Basic Military Manual* (1987), Articles 192, commentary and 200(2)(e).

³²⁰ Togo, *Military Manual* (1996), Fascicule II, p. 4, see also Fascicule I, p. 17 and Fascicule II, p. 18.

³²¹ Togo, *Military Manual* (1996), Fascicule II, p. 9.

³²² Uganda, *Code of Conduct* (1986), § A.4. ³²³ UK, *Military Manual* (1958), § 119.

The manual also states that “even if a capitulation is unconditional, the victor has nowadays no longer the power of life and death over his prisoners, and is not absolved from observing the laws of war towards them”.³²⁴

284. The UK LOAC Manual provides that it is forbidden “to kill or wound someone who has surrendered, having laid down his arms, or who no longer has any means of defence”.³²⁵ It also states that “shipwrecked persons may not be made the object of attack”.³²⁶

285. The US Field Manual provides that “it is especially forbidden . . . to kill or wound an enemy who, having laid down his arms, or having no longer means of defense, has surrendered at discretion”.³²⁷

286. The US Air Force Pamphlet provides that “the law of armed conflict clearly forbids the killing or wounding of an enemy who, in good faith, surrenders”.³²⁸ Furthermore, “in addition to the grave breaches of the Geneva Conventions of 1949, the following acts are representative of situations involving individual criminal responsibility: . . . deliberate attack on . . . shipwrecked survivors”.³²⁹

287. The US Soldier’s Manual forbids attacks against non-combatants, including soldiers who surrender or who are sick, wounded or captured.³³⁰ It further states that:

Enemy soldiers may reach the point where they would rather surrender than fight. They may signal to you by waving a white flag, by crawling from their positions with arms raised, or by yelling at you to stop firing so that they can give up. The way they signal their desire to surrender may vary, but you must allow them to give up once you receive the signal. It is illegal to fire on enemy soldiers who have thrown down their weapons and offered to surrender.³³¹

288. The US Health Service Manual notes that the meaning of the words “wounded and sick” is a matter of common sense and good faith. It adds that “it is the act of falling or laying down of arms which constitutes the claim to protection. Only the soldier who is himself seeking to kill may be killed.”³³²

289. The US Rules of Engagement for Operation Desert Storm instructs: “Do not engage anyone who has surrendered, is out of battle due to sickness or wounds, [or] is shipwrecked.”³³³

290. The US Operational Law Handbook prohibits the “killing or wounding of enemy who have surrendered or are incapacitated and incapable of resistance”.³³⁴

³²⁴ UK, *Military Manual* (1958), § 476.

³²⁵ UK, *LOAC Manual* (1981), Section 4, p. 12, § 2(b), see also Annex A, p. 44, § 12 and p. 47, § 10(f).

³²⁶ UK, *LOAC Manual* (1981), Section 7, p. 26, § 2. ³²⁷ US, *Field Manual* (1956), § 29.

³²⁸ US, *Air Force Pamphlet* (1976), § 4-2(d). ³²⁹ US, *Air Force Pamphlet* (1976), § 15-3(c)(1).

³³⁰ US, *Soldier’s Manual* (1984), p. 5. ³³¹ US, *Soldier’s Manual* (1984), p. 13.

³³² US, *Health Service Manual* (1991), p. A-2.

³³³ US, *Rules of Engagement for Operation Desert Storm* (1991), § A.

³³⁴ US, *Operational Law Handbook* (1993), p. Q-182(h).

291. The US Naval Handbook provides that:

Members of the armed forces incapable of participating in combat due to injury or illness may not be the object of attack . . .

Similarly, shipwrecked persons, whether military or civilian, may not be the object of attack.

...

Combatants cease to be subject to attack when they have individually laid down their arms to surrender . . . or when the unit in which they are serving or embarked has surrendered . . . However, the law of armed conflict does not precisely define when surrender takes effect or how it may be accomplished in practical terms. Surrender involves an offer by the surrendering party (a unit or individual combatant) and an ability to accept on the part of the opponent. The latter may not refuse an offer of surrender when communicated, but that communication must be made at a time when it can be received and properly acted upon – an attempt to surrender in the midst of a hard-fought battle is neither easily communicated nor received. The issue is one of reasonableness.³³⁵

The Handbook also states that:

The following acts are representative war crimes:

...

3. Offenses against the sick and wounded, including killing, wounding, or mistreating enemy forces disabled by sickness or wounds
4. . . . offenses against combatants who have laid down their arms and surrendered
5. Offenses against the survivors of ships and aircraft lost at sea, including killing, wounding, or mistreating the shipwrecked; and failing to provide for the safety of survivors as military circumstances permit.³³⁶

292. The YPA Military Manual of the SFRY (FRY) states that “the armed forces are an instrument of force and [may be] the direct object of attack. It is permitted to kill, wound or disable their members in combat, except when they surrender or when due to wounds or sickness they are disabled for combat.”³³⁷ The manual prohibits killing or injuring members of the armed forces as of the moment of surrender.³³⁸

National Legislation

293. Azerbaijan’s Criminal Code provides that “directing attacks against a person who . . . having laid down his arms, or having no longer means of defence, has surrendered at discretion” constitutes a war crime in international and non-international armed conflicts.³³⁹

294. Under the Criminal Code of the Federation of Bosnia and Herzegovina, whoever “kills or wounds an enemy who has laid down arms or unconditionally

³³⁵ US, *Naval Handbook* (1995), §§ 11.4 and 11.7, see also § 8.2.1.

³³⁶ US, *Naval Handbook* (1995), § 6.2.5(3)–(5).

³³⁷ SFRY (FRY), *YPA Military Manual* (1988), § 49.

³³⁸ SFRY (FRY), *YPA Military Manual* (1988), § 68.

³³⁹ Azerbaijan, *Criminal Code* (1999), Article 116(13).

surrendered or has no means of defence" commits a war crime.³⁴⁰ The Criminal Code of the Republika Srpska contains the same provision.³⁴¹

295. Under Burundi's Draft Law on Genocide, Crimes against Humanity and War Crimes, "killing or injuring a combatant who, having laid down his arms or having no longer means of defence, has surrendered at discretion" constitutes a war crime in international armed conflicts.³⁴²

296. Canada's Crimes against Humanity and War Crimes Act provides that the war crimes defined in Article 8(2) of the 1998 ICC Statute are "crimes according to customary international law" and, as such, indictable offences under the Act.³⁴³

297. Colombia's Penal Code imposes a criminal sanction on anyone who, during an armed conflict, commits acts aimed at leaving no survivors or at killing the wounded and sick.³⁴⁴

298. Congo's Genocide, War Crimes and Crimes against Humanity Act defines war crimes with reference to the categories of crimes defined in Article 8 of the 1998 ICC Statute.³⁴⁵

299. Under Croatia's Criminal Code, whoever "kills or wounds an enemy who has laid down arms, or has surrendered at discretion, or has no longer any means of defence" commits a war crime.³⁴⁶

300. Egypt's Military Criminal Code punishes anyone who commits violence against a person incapacitated by wounds or sickness if that person is incapable of defending himself.³⁴⁷

301. The Draft Amendments to the Penal Code of El Salvador provide for a prison sentence for "anyone who, during an international or non-international armed conflict, attacks protected persons". Protected persons are defined as including, *inter alia*, the wounded, sick and shipwrecked, combatants who have laid down their arms, prisoners of war and persons detained during an internal conflict.³⁴⁸ In addition, "anyone who, during an international or non-international armed conflict, knowing of the existence of unequivocal acts of surrender by the adversary, continues to attack persons *hors de combat*, with the aim of leaving no survivors [or] of killing the wounded and sick" is punishable.³⁴⁹

³⁴⁰ Bosnia and Herzegovina, Federation, *Criminal Code* (1998), Article 158(1).

³⁴¹ Bosnia and Herzegovina, Republika Srpska, *Criminal Code* (2000), Article 438(1).

³⁴² Burundi, *Draft Law on Genocide, Crimes against Humanity and War Crimes* (2001), Article 4(B)(f).

³⁴³ Canada, *Crimes against Humanity and War Crimes Act* (2000), Section 4(1) and (4).

³⁴⁴ Colombia, *Penal Code* (2000), Article 145.

³⁴⁵ Congo, *Genocide, War Crimes and Crimes against Humanity Act* (1998), Article 4.

³⁴⁶ Croatia, *Criminal Code* (1997), Article 161(1).

³⁴⁷ Egypt, *Military Criminal Code* (1966), Article 137.

³⁴⁸ El Salvador, *Draft Amendments to the Penal Code* (1998), Article entitled "Ataque a personas protegidas".

³⁴⁹ El Salvador, *Draft Amendments to the Penal Code* (1998), Article entitled "Ataques contra actos inequívocos de rendición".

302. Under Estonia's Penal Code, "a person who kills... enemy combatants after they have laid down their arms and are placed *hors de combat* by sickness, wounds or another reason" commits a war crime.³⁵⁰

303. Ethiopia's Penal Code punishes "whosoever, in time of war... kills or wounds an enemy who has surrendered or laid down his arms, or for any other reason is incapable of defending, or has ceased to defend, himself".³⁵¹

304. Under Georgia's Criminal Code, the wilful killing or wounding of "persons who... have no means of defence, as well as... wounded and sick" in international or non-international armed conflicts is a crime.³⁵² Furthermore, any war crime provided for by the 1998 ICC Statute, which is not explicitly mentioned in the Code, such as "killing or wounding a combatant who, having laid down his arms... has surrendered at discretion" in international armed conflicts, is a crime.³⁵³

305. Germany's Law Introducing the International Crimes Code punishes anyone who, in connection with an international or a non-international armed conflict, "wounds a member of the opposing armed forces or a combatant of the adverse party after the latter has surrendered unconditionally".³⁵⁴

306. Ireland's Geneva Conventions Act as amended provides that any "minor breach" of AP I, including violations of Article 41 AP I, is a punishable offence.³⁵⁵

307. Italy's Law of War Decree as amended provides that it is prohibited to use violence "to kill or injure an enemy... when he, having laid down arms and having no longer means of defence, has surrendered at discretion". It also forbids "firing at the shipwrecked".³⁵⁶

308. Under Lithuania's Criminal Code as amended, "killing... persons who have surrendered by giving up their arms or having no means to put up resistance, the wounded, sick persons or the crew of a sinking ship" during an international armed conflict or occupation is a war crime.³⁵⁷

309. Under Mali's Penal Code, "killing or injuring a combatant who, having laid down his arms or having no longer means of defence, has surrendered at discretion" is a war crime in international armed conflicts.³⁵⁸

310. The International Crimes Act of the Netherlands provides that the following constitutes a crime, when committed in time of international armed conflict:

killing or wounding a combatant who is in the power of the adverse party, who has clearly indicated he wished to surrender, or who is unconscious or otherwise *hors de combat* as a result of wounds or sickness and is therefore unable to defend

³⁵⁰ Estonia, *Penal Code* (2001), § 101. ³⁵¹ Ethiopia, *Penal Code* (1957), Article 287(a).

³⁵² Georgia, *Criminal Code* (1999), Article 411(2)(a).

³⁵³ Georgia, *Criminal Code* (1999), Article 413(d).

³⁵⁴ Germany, *Law Introducing the International Crimes Code* (2002), Article 1(8)(2).

³⁵⁵ Ireland, *Geneva Conventions Act as amended* (1962), Section 4(1) and (4).

³⁵⁶ Italy, *Law of War Decree as amended* (1938), Article 35(2) and (3).

³⁵⁷ Lithuania, *Criminal Code as amended* (1961), Article 333, see also Article 337.

³⁵⁸ Mali, *Penal Code* (2001), Article 31(i)(6).

himself, provided that he refrains in all these cases from any hostile act and does not attempt to escape.³⁵⁹

311. Under New Zealand's International Crimes and ICC Act, war crimes include the crimes defined in Article 8(2)(b)(vi) of the 1998 ICC Statute.³⁶⁰

312. Nicaragua's Military Penal Code punishes any soldier "who maltreats an enemy who . . . is defenceless".³⁶¹

313. Nicaragua's Draft Penal Code punishes "anyone who, during an international or internal armed conflict, attacks protected persons", defined as including the wounded, sick and shipwrecked, combatants who have laid down their arms, prisoners of war and persons detained during an internal conflict.³⁶² It also punishes "anyone who, during an international or internal armed conflict, knowing of the existence of unequivocal acts of surrender by the adversary, continues to attack persons *hors de combat*, with the aim of leaving no survivors [or] of killing the wounded and sick".³⁶³

314. Under Norway's Military Penal Code as amended, "anyone who contravenes or is accessory to the contravention of provisions relating to the protection of persons or property laid down in . . . the two additional protocols to [the Geneva] Conventions . . . is liable to imprisonment".³⁶⁴

315. Peru's Code of Military Justice punishes the persons "who finish off . . . the surrendered or wounded enemy who does not put up resistance".³⁶⁵

316. Poland's Penal Code punishes anyone who "kills . . . persons who, having laid down their arms or having no longer means of defence, have surrendered at discretion".³⁶⁶

317. Under Slovenia's Penal Code, whoever "kills or wounds an enemy who has laid down arms or surrendered unconditionally or who is defenceless" commits a war crime.³⁶⁷

318. Spain's Royal Ordinance for the Armed Forces states that "the combatant shall not refuse the unconditional surrender of the enemy".³⁶⁸

319. Spain's Military Criminal Code punishes any soldier "who mistreats an enemy who has surrendered or who has no longer means of defending himself".³⁶⁹

320. Under Sweden's Penal Code as amended, "attacks . . . on persons who are injured or disabled" are "crimes against international law".³⁷⁰

³⁵⁹ Netherlands, *International Crimes Act* (2003), Article 5(3)(e).

³⁶⁰ New Zealand, *International Crimes and ICC Act* (2000), Section 11(2).

³⁶¹ Nicaragua, *Military Penal Code* (1996), Article 53.

³⁶² Nicaragua, *Draft Penal Code* (1999), Article 449.

³⁶³ Nicaragua, *Draft Penal Code* (1999), Article 451.

³⁶⁴ Norway, *Military Penal Code as amended* (1902), § 108(b).

³⁶⁵ Peru, *Code of Military Justice* (1980), Article 94.

³⁶⁶ Poland, *Penal Code* (1997), Article 123(1)(1).

³⁶⁷ Slovenia, *Penal Code* (1994), Article 379(1).

³⁶⁸ Spain, *Royal Ordinance for the Armed Forces* (1978), Article 138.

³⁶⁹ Spain, *Military Criminal Code* (1985), Article 69.

³⁷⁰ Sweden, *Penal Code as amended* (1962), Chapter 22, § 6(3).

321. Switzerland's Military Criminal Code as amended punishes "anyone who kills or injures an enemy who has surrendered or who has otherwise ceased to defend himself" in time of armed conflict.³⁷¹

322. Under Trinidad and Tobago's Draft ICC Act, it is a punishable offence to commit a war crime as defined in Article 8(2)(b)(vi) of the 1998 ICC Statute.³⁷²

323. Under the UK ICC Act, it is a punishable offence to commit a war crime as defined in Article 8(2)(b)(vi) of the 1998 ICC Statute.³⁷³

324. Under the US War Crimes Act as amended, violations of Article 23(c) of the 1907 HR are war crimes.³⁷⁴

325. According to Venezuela's Code of Military Justice as amended, it is a crime against international law to "make a serious attempt on the life of those who surrender".³⁷⁵

326. Under the Penal Code as amended of the SFRY (FRY), "a person who kills . . . the enemy who has laid down his arms or has surrendered unconditionally or has no means of defence" commits a war crime.³⁷⁶ The commentary on the Penal Code specifies that "in the case of an armed conflict, it is irrelevant for this act whether it is international in nature or whether it is a civil war".³⁷⁷

National Case-law

327. In its judgement in the *Military Junta case* in 1985, Argentina's National Court of Appeals established that, in a situation of internal violence, "the combatants incapacitated by sickness or wounds shall not be killed and shall be given quarter".³⁷⁸

328. In its judgement in the *Stenger and Cruisus case* after the First World War, Germany's Leipzig Court specified that an order to shoot down men who were abusing the privileges of captured or wounded men

would not have been contrary to international principles, for the protection afforded by the regulations for land warfare does not extend to such wounded who take up arms again and renew the fight. Such men have by doing so forfeited the claim for mercy granted to them by the laws of warfare.³⁷⁹

329. In the *Llandoverly Castle case* in 1921, Germany's Reichsgericht found the accused, two crew officers, guilty of having fired upon enemies in lifeboats in violation of the laws and customs of war after their hospital ship had been sunk. The prosecutor emphasised that "in war at sea the killing of ship-wrecked persons who have taken refuge in lifeboats is forbidden". The Court rejected

³⁷¹ Switzerland, *Military Criminal Code as amended* (1927), Article 112.

³⁷² Trinidad and Tobago, *Draft ICC Act* (1999), Section 5(1)(a).

³⁷³ UK, *ICC Act* (2001), Sections 50(1) and 51(1) (England and Wales) and Section 58(1) (Northern Ireland).

³⁷⁴ US, *War Crimes Act as amended* (1996), Section 2441(c)(2).

³⁷⁵ Venezuela, *Code of Military Justice as amended* (1998), Article 474(2).

³⁷⁶ SFRY (FRY), *Penal Code as amended* (1976), Article 146(1).

³⁷⁷ SFRY (FRY), *Penal Code as amended* (1976), commentary on Article 146.

³⁷⁸ Argentina, National Court of Appeals, *Military Junta case*, Judgement, 9 December 1985.

³⁷⁹ Germany, Leipzig Court, *Stenger and Cruisus case*, Judgement, 1921.

the accused's defence of superior orders on the ground that the rule prohibiting firing on lifeboats was "simple and universally known".³⁸⁰

330. In 1968, in a Nigerian case referred to by the ICTY Appeals Chamber in the interlocutory appeal in the *Tadić case*, "a Nigerian Lieutenant was court-martialled, sentenced to death and executed by a firing squad at Port-Harcourt for killing a rebel Biafran soldier who had surrendered to Federal troops near Aba".³⁸¹

331. The *Peleus case* before the UK Military Court at Hamburg in 1945 concerned the sinking, during the Second World War, of a Greek steamship by a German U-boat on the high seas and the subsequent killing of shipwrecked members of the crew of the Greek boat. Four members of the crew of the German U-boat were accused of having violated the laws and usages of war by firing and throwing grenades on the survivors of the sunken ship. The Court held that there was no case of justifiable recourse to the plea of necessity when the accused killed by machine-gun fire survivors of a sunken ship, in order to destroy every trace of sinking and thus make the pursuit of the submarine improbable. In summing up, the Judge Advocate underlined that it was a fundamental usage of war that the killing of unarmed enemies was forbidden as a result of the experience of civilised nations through many centuries. He also stated that to fire so as to kill helpless survivors of a torpedoed ship was a grave breach of the law of nations. He added that the right to punish the perpetrators of such an act had clearly been recognised for many years. The accused were found guilty of the war crimes charged.³⁸²

332. In the *Renoth case* before the UK Military Court at Elten in 1946, the accused, two German policemen and two German customs officials, were accused of committing a war crime for their involvement in the killing of an Allied airman whose plane had crashed on German soil. After he had emerged from his aircraft unhurt, the pilot was arrested by Renoth, then attacked and beaten, before Renoth shot him. All the accused were found guilty.³⁸³

333. In the *Von Ruchteschell case* before the UK Military Court at Hamburg in 1947, the accused was charged, *inter alia*, of having continued to fire on a British merchant vessel after the latter had indicated surrender. He was found guilty on that count. The central question concerned the ways of indicating surrender. The Court noted that, even if the accused did not receive a signal of surrender, he could still be convicted because he "deliberately or recklessly avoided any question of surrender by making it impossible for the ship to make a signal", which constituted a violation of the customary rules of sea warfare.³⁸⁴

³⁸⁰ Germany, Reichsgericht, *Llandoverly Castle case*, Judgement, 16 July 1921.

³⁸¹ Nigeria, Case of 3 September 1968 cited in *Daily Times – Nigeria*, 3 September 1968, p. 1; *Daily Times – Nigeria*, 4 September 1968, p. 1; referred to in ICTY, *Tadić case*, Interlocutory Appeal, 2 October 1995, § 106.

³⁸² UK, Military Court at Hamburg, *Peleus case*, Judgement, 20 October 1945.

³⁸³ UK, Military Court at Elten, *Renoth case*, Judgement, 10 January 1946.

³⁸⁴ UK, Military Court at Hamburg, *Von Ruchteschell case*, Judgement, 21 May 1947.

334. In the *Dostler case* before the US Military Commission at Rome in 1945, the accused, the commander of a German army corps, was found guilty of having ordered the shooting of 15 American prisoners of war in violation of the 1907 HR and of long-established laws and customs of war. The accused relied on the defence of superior orders based, *inter alia*, on the *Führer's* order of 18 October 1942. This order provided that enemy soldiers participating in commando operations should be given no quarter, but added that these provisions did not apply to enemy soldiers who surrendered and to those who were captured in actual combat within the limits of normal combat activities (offensives, large-scale air or seaborne landings), nor did they apply to enemy troops captured during naval engagements.³⁸⁵

Other National Practice

335. In 1958, during the Algerian war of independence, in an armed clash between the ALN and French soldiers, the commander of the ALN battalion gave the order to spare enemy soldiers who wanted to surrender. The four French soldiers who surrendered were the only ones to survive the attack.³⁸⁶

336. In a speech at the Stockholm International Peace Research Institute in 1995, the Australian Minister of Foreign Affairs referred to the UNTAC Rules of Engagement, which specifies that "attacks on soldiers who have laid down their arms" are a criminal act.³⁸⁷

337. In a case against the State relative to the takeover of the Palacio de Justicia by guerrillas in 1985, a Colombian administrative court cited a document of the Colombian Ministry of Defence stating that a commander should "respect the life of the enemy who offers to surrender".³⁸⁸

338. Cuban practice during the 1960s was reported in several sources. One commentator described witnessing "the surrender of hundreds of *Batistianos* from a small-town garrison":

They were gathered within a hollow square of rebel Tommy-gunners and harangued by Raul Castro: "We hope that you will stay with us and fight against the master who so ill-used you. If you decide to refuse this invitation – and I am not going to repeat it – you will be delivered to the Cuban Red Cross tomorrow. Once you are under Batista's orders again, we hope that you will not take arms against us. But, if you do, remember this: we took you this time. We can take you again. And when

³⁸⁵ US, Military Commission at Rome, *Dostler case*, Judgement, 12 October 1945.

³⁸⁶ *El Moudjahid*, L'opération militaire du 11 janvier 1958, Vol. 1, pp. 298–299, Report on the Practice of Algeria, 1997, Chapter 2.1.

³⁸⁷ Australia, Minister of Foreign Affairs, Keynote Address entitled "The Use of Force in Peace Operations", SIPRI and Australian Department of Foreign Affairs and Trade Seminar, Stockholm, 10 April 1995, cited in Sarah Roberts (ed.), *Australian Practice in International Law 1995*, *Australian Yearbook of International Law*, 1996, Vol. 17, p. 769.

³⁸⁸ Colombia, Cundinamarca Administrative Court, *Case No. 4010*, Opinion of the Minister of Defence given before the House of Representatives, "Las fuerzas armadas de Colombia y la defensa de las instituciones democráticas", Record of evidence.

we do, we will not frighten or torture or kill you . . . If you are captured a second time or even a third . . . we will again return you exactly as we are doing now.³⁸⁹

339. According to a statement by the Egyptian Minister of War in 1984 in the context of the conflict with Israel, persons are “really” *hors de combat* when they are incapacitated or unable to endanger the life of others. Furthermore, when an Israeli soldier raised his hands, “he was taken as a prisoner of war”.³⁹⁰

340. Referring to India’s Army Act, the Report on the Practice of India states that any violation of the “duty not to attack someone who is incapable or unwilling to fight” may constitute “disgraceful conduct of a cruel, indecent or unnatural kind”.³⁹¹

341. The Report on the Practice of Iraq refers to a speech made by the Iraqi President in 1980 in which he called on the Iraqi armed forces to spare those incapacitated by wounds, sickness or unconsciousness.³⁹²

342. The Report on the Practice of Israel comments that:

It should nevertheless be understood that during combat operations, it is often impossible to ascertain exactly at which point an opposing soldier becomes incapacitated, as opposed to merely taking cover, hiding, or “playing dead” in order to open fire at a later stage. Therefore, the practical implementation of this rule requires the commanders in the field to make best-judgment decisions as to whether or not that person continues to pose a threat to friendly forces.³⁹³

343. In 1993, an international commission of inquiry on human rights violations in Rwanda mandated by four NGOs reported the killing by the FAR of 150 combatants of the FPR after they had laid down their arms.³⁹⁴ According to the Report on the Practice of Rwanda, when the Rwandan government reacted to the report in April 1993, it did not condemn or deplore these acts nor did it express any intention of bringing those responsible to justice.³⁹⁵

344. In 1982, in reply to a question in the House of Commons, the UK Prime Minister stated that, following the sinking of an Argentine cruiser by a UK warship during the war in the South Atlantic, another UK warship returning to

³⁸⁹ D. Chapelle, *How Castro Won*, in T. N. Greene (ed.), *The Guerrilla – And How to Fight Him: Selections from the Marine Corps Gazette*, Frederick A. Praeger, New York, 1962, p. 233; also cited in Michael Walzer, *Just and Unjust Wars: A Moral Argument with Historical Illustrations*, Basic Books, New York, 1977.

³⁹⁰ Egypt, Statement by the Minister of War, 1984, Report on the Practice of Egypt, 1997, Chapter 2.1 and Answers to additional questions on Chapter 2.1.

³⁹¹ Report on the Practice of India, 1997, Chapter 2.1, referring to the *Army Act* (1950), Section 46.

³⁹² Iraq, Speech by the President of Iraq, 28 September 1980, Report on the Practice of Iraq, 1998, Chapter 2.1.

³⁹³ Report on the Practice of Israel, 1997, Chapter 2.1.

³⁹⁴ International Commission of Inquiry on Human Rights Violations in Rwanda, *Rapport final de la Commission internationale d’enquête sur les violations des droits de l’homme au Rwanda depuis le 1er octobre 1990*, in *Rapport sur les droits de l’homme au Rwanda, octobre 1992–octobre 1993*, Association rwandaise pour la défense des droits de la personne et des libertés publiques, Kigali, December 1993, p. 64.

³⁹⁵ Report on the Practice of Rwanda, 1997, Chapter 2.1.

the area where the sinking had occurred was instructed not to attack warships engaged in rescuing the survivors.³⁹⁶

345. A training video on IHL produced by the UK Ministry of Defence illustrates the rule that “it is forbidden to kill or wound anyone who has laid down arms”.³⁹⁷

346. In 1991, before the UK Parliamentary Defence Committee, the officer commanding the UK forces in the Gulf War confirmed that the rules of engagement were modified in order to minimise casualties when it was realised that the Iraqis were seeking to surrender (the initial rules of engagement were to destroy the enemy). The plan was adjusted to encourage surrender rather than resistance.³⁹⁸

347. In 1987, the Deputy Legal Adviser of the US Department of State affirmed that “we support the principle that all the wounded, sick, and shipwrecked . . . not be made the object of attacks”.³⁹⁹

348. In 1991, in response to an ICRC memorandum on the applicability of IHL in the Gulf region, the US pointed out that its practice was consistent with the prohibition to attack those who had surrendered, as well as defenceless combatants, such as the wounded, sick and shipwrecked.⁴⁰⁰

349. In 1992, in its final report to Congress on the conduct of the Gulf War, the US Department of Defense stated that:

The law of war obligates a party to a conflict to accept the surrender of enemy personnel and thereafter treat them in accordance with the provisions of the 1949 Geneva Conventions for the Protection of War Victims . . .

However, there is a gap in the law of war in defining precisely when surrender takes effect or how it may be accomplished in practical terms. Surrender involves an offer by the surrendering party (a unit or an individual soldier) and an ability to accept on the part of his opponent. The latter may not refuse an offer of surrender when communicated, but that communication must be made at a time when it can be received and properly acted upon – an attempt at surrender in the midst of a hard-fought battle is neither easily communicated nor received. The issue is one of reasonableness.

A combatant force involved in an armed conflict is not obliged to offer its opponent an opportunity to surrender before carrying out an attack . . . In the process [of military operations], Coalition forces continued to accept legitimate Iraqi offers of surrender in a manner consistent with the law of war. The large number of Iraqi

³⁹⁶ UK, Letter of the Prime Minister in reply to a question asked in the House of Commons on the subject of the Falkland Islands situation, 1982, *BYIL*, Vol. 55, 1984, p. 595, § 13.

³⁹⁷ UK, Ministry of Defence, Training Video: The Geneva Conventions, 1986, Report on UK Practice, 1997, Chapter 2.1.

³⁹⁸ UK, Minutes of Evidence taken before the Parliamentary Defence Committee, 8 May 1991, *Defence Committee's Tenth Report*, 1991, § 86.

³⁹⁹ US, Remarks of Michael J. Matheson, Deputy Legal Adviser, US Department of State, The Sixth Annual American Red Cross-Washington College of Law Conference on International Humanitarian Law: A Workshop on Customary International Law and the 1977 Protocols Additional to the 1949 Geneva Conventions, *American University Journal of International Law and Policy*, Vol. 2, 1987, p. 423.

⁴⁰⁰ US, Letter from the Department of the Army to the legal adviser of the US armed forces deployed in the Gulf region, 11 January 1991, § 8(J), Report on US Practice, 1997, Chapter 2.8.

prisoners of war is evidence of Coalition compliance with its law of war obligations with regard to surrendering forces.⁴⁰¹

The report also referred to two incidents during the Gulf War in which there had been allegations that quarter had been denied. The first incident involved an armoured assault on an entrenched position where tanks equipped with earthmoving plough blades were used to breach the trench line and then turned to fill in the trenches and the bunkers. The Department of Defense defended this tactic as consistent with the law of war. It noted that:

In the course of the breaching operations, the Iraqi defenders were given the opportunity to surrender, as indicated by the large number of EPWs [enemy prisoners of war] taken by the division. However, soldiers must make their intent to surrender clear and unequivocal, and do so rapidly. Fighting from fortified emplacements is not a manifestation of an intent to surrender, and a soldier who fights until the very last possible moment assumes certain risks. His opponent either may not see his surrender, may not recognize his actions as an attempt to surrender in the heat and confusion of battle, or may find it difficult (if not impossible) to halt an onrushing assault to accept a soldier's last-minute effort at surrender.⁴⁰²

The second incident concerned the attack on Iraqi forces while they were retreating from Kuwait City. The Department of Defense again defended the attack as consistent with the law of war. It noted that:

The law of war permits the attack of enemy combatants and enemy equipment at any time, wherever located, whether advancing, retreating or standing still. Retreat does not prevent further attack . . .

In the case at hand, neither the composition, degree of unit cohesiveness, nor intent of the Iraqi military forces engaged was known at the time of the attack. At no time did any element within the formation offer to surrender. CENTCOM [Central Command] was under no law of war obligation to offer the Iraqi forces an opportunity to surrender before the attack.⁴⁰³

350. The Report on US Practice states that:

The *opinio juris* of the United States is that quarter must not be refused to an enemy who communicates an offer to surrender under circumstances permitting that offer to be understood and acted upon by U.S. forces. A combatant who appears merely incapable or unwilling to fight, e.g., because he has lost his weapon or is retreating from the battle, but who has not communicated an offer to surrender, is still subject to attack. (Persons hors de combat due to wounds, sickness or shipwreck must of course be respected in all circumstances, in accordance with the First and Second Geneva Conventions of 1949).⁴⁰⁴

⁴⁰¹ US, Department of Defense, Final Report to Congress on the Conduct of the Persian Gulf War, Appendix O, The Role of the Law of War, 10 April 1992, *ILM*, Vol. 31, 1992, p. 641.

⁴⁰² US, Department of Defense, Final Report to Congress on the Conduct of the Persian Gulf War, Appendix O, The Role of the Law of War, 10 April 1992, *ILM*, Vol. 31, 1992, pp. 642 and 643.

⁴⁰³ US, Department of Defense, Final Report to Congress on the Conduct of the Persian Gulf War, Appendix O, The Role of the Law of War, 10 April 1992, *ILM*, Vol. 31, 1992, pp. 643 and 644.

⁴⁰⁴ Report on US Practice, 1997, Chapter 2.1.

351. Order No. 579 issued in 1991 by the YPA Chief of Staff of the SFRY (FRY) provides that YPA units shall “apply all means to prevent any . . . mistreatment of . . . persons who surrender or hoist the white flag in order to surrender”.⁴⁰⁵

352. In 1994, in a meeting with the ICRC, officials of a State admitted that their soldiers killed all enemies, including wounded combatants.⁴⁰⁶

353. In 1997, it was reported that the army of a State executed 125 members of an armed opposition group who had been handed over by the army of another State. The State justified the act on the grounds that the prisoners had tried to escape. According to an ICRC note, the army could not explain how no one had survived.⁴⁰⁷

III. Practice of International Organisations and Conferences

United Nations

354. In 1998, in a statement by its President regarding the situation in the DRC, the UN Security Council condemned “the killing or wounding of combatants who have laid down their weapons”.⁴⁰⁸

355. In a resolution adopted in 1980 in the context of the conflict in Kampuchea (Cambodia), the UN Commission on Human Rights urged the parties to “spare the lives of those enemy combatants who surrender or are captured”.⁴⁰⁹

356. In 1970, in a report on respect for human rights in armed conflict, the UN Secretary-General stated that the clarification of the rule prohibiting the killing or wounding of an enemy who surrenders should be made on the basis of the following principles:

- a) It should be prohibited to kill or harm a combatant who has obviously laid down his arms or who has obviously no longer any weapons, without need for any expression of surrender on his part. Only such force as is strictly necessary in the circumstances to capture him should be applied.
- b) In the case of a combatant who has still some weapons or whenever, as frequently happens, it cannot be ascertained whether he has weapons, an expression of surrender should be required.⁴¹⁰

357. In 1992, in a report on the situation of human rights in Guatemala, the Independent Expert of the UN Commission on Human Rights reported that military sources had announced the death of three persons during an armed confrontation. The Expert mentioned he had access to photographs showing that the victims were given a “*coup de grâce*”. He also referred to the case of a commander officially killed in an armed confrontation, but who, according to

⁴⁰⁵ SFRY (FRY), Chief of General Staff of the YPA, Political Department, Order No. 579, 14 October 1991, § 2.

⁴⁰⁶ ICRC archive document. ⁴⁰⁷ ICRC archive document.

⁴⁰⁸ UN Security Council, Statement by the President, UN Doc. S/PRST/1998/26, 31 August 1998, p. 1.

⁴⁰⁹ UN Commission on Human Rights, Res. 29 (XXXVI), 11 March 1980, § 5.

⁴¹⁰ UN Secretary-General, Report on respect for human rights in armed conflict, UN Doc. A/8052, 18 September 1970, § 107.

the URNG, was captured alive. The Expert asked the authorities to respect his life and physical integrity.⁴¹¹

358. In 1993, in a report on extrajudicial, summary or arbitrary executions, the Special Rapporteur of the UN Commission on Human Rights noted, with reference to the territories occupied by Israel, that he had received a number of reports indicating that "Palestinians were killed by members of the Israeli military after they had come out of the attacked houses and at a time when they did not pose any threat to the lives of the soldiers, some of them even after they had surrendered without showing any resistance".⁴¹² In the section of the same report relative to Turkey, the Special Rapporteur referred to a communication concerning eight security officers who were charged with the manslaughter of a group of people they were attempting to capture. The Rapporteur did not say if the people in question were civilians or alleged members of the armed opposition. However, in his conclusion, the Rapporteur listed Turkey as a country where there was a conflict and called for the application of IHL.⁴¹³

359. In 1991, in a report on El Salvador, the Director of the Human Rights Division of ONUSAL described its investigation into a complaint brought by the FMLN Command concerning a combatant wounded in an armed skirmish who had allegedly been killed by members of the Salvadoran armed forces. ONUSAL could not corroborate the facts but stated that the case concerned the situation of a person *hors de combat* who should "in all circumstances be treated humanely".⁴¹⁴

360. In 1993, the UN Commission on the Truth for El Salvador examined, *inter alia*, a case concerning the killing of two soldiers wounded after a US helicopter was shot down by an FMLN patrol. The survivors of the crash had been left on the scene, but shortly afterwards, a member of the patrol was sent back and killed the two wounded men. According to the report,

FMLN... began by denying that any wounded men had been executed... [Then,] it admitted that the wounded men had been executed and... announced that [the perpetrators] would be tried for the offence.

...

The Commission considers that there is sufficient proof that United States soldiers... who survived the shooting down of the helicopter... but were wounded and defenceless, were executed in violation of international humanitarian law...

...

FMLN acknowledged the criminal nature of the incident and detained and tried the accused.⁴¹⁵

⁴¹¹ UN Commission on Human Rights, Independent Expert on the Situation of Human Rights in Guatemala, Report, UN Doc. E/CN.4/1993/10, 18 December 1992, §§ 65–66.

⁴¹² UN Commission on Human Rights, Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions, Report, UN Doc. E/CN.4/1994/7, 7 December 1993, § 381.

⁴¹³ UN Commission on Human Rights, Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions, Report, UN Doc. E/CN.4/1994/7, 7 December 1993, §§ 595, 604, 610 and 706.

⁴¹⁴ ONUSAL, Director of the Human Rights Division, Report, UN Doc. A/46/658-S/23222, 15 November 1991, Annex, p. 18, §§ 52–53.

⁴¹⁵ UN Commission on the Truth for El Salvador, Report, UN Doc. S/25500, 1 April 1993, pp. 167–169.

361. In 1993 and 1994, the UN Special Committee to Investigate Israeli Practices Affecting the Human Rights of the Palestinian People and other Arabs of the Occupied Territories reported accounts of surrendered persons being fired at, as well as of a number of cases in which unarmed persons or those who had surrendered had been killed.⁴¹⁶

Other International Organisations

362. In 1985, in an explanatory memorandum on a draft resolution on the situation in Afghanistan, the Parliamentary Assembly of the Council of Europe noted that “captured combatants have been systematically put to death”. It referred to these incidents as “violations of human rights”.⁴¹⁷

363. In 1998, during a debate in the Sixth Committee of the UN General Assembly, South Africa stated on behalf of the SADC that the 1998 ICC Statute “would also serve as a reminder that even during armed conflict the rule of law must be upheld. For example, it was unlawful . . . for a combatant who had surrendered, having laid down his arms, to be killed or wounded . . . [This act] was a war crime and would be punished.”⁴¹⁸

International Conferences

364. The Final Declaration of the International Conference for the Protection of War Victims in 1993 stated that the participants refused to accept that the “wounded are shown no mercy”.⁴¹⁹

IV. Practice of International Judicial and Quasi-judicial Bodies

365. In the interlocutory appeal in the *Tadić case* in 1995, the ICTY Appeals Chamber referred to instructions given to the PLA by the leader of the Chinese Communist Party not to “kill or humiliate any of Chiang Kai-Shek’s army officers and men who lay down their arms” as an illustration of the extension of some general principles of the laws of warfare to internal armed conflicts.⁴²⁰

366. In 1982, in a communication received by the IACiHR, it was alleged that Bolivian regiments:

attacked Caracoles with guns, mortars, tanks and light warplanes. The miners defended themselves . . . most of the miners were killed. Some of the survivors fled

⁴¹⁶ UN Special Committee to Investigate Israeli Practices Affecting the Human Rights of the Palestinian People and other Arabs of the Occupied Territories, Twenty-fifth report, UN Doc. A/48/557, 1 November 1993, § 874; Twenty-sixth report, UN Doc. A/49/511, 18 October 1994, § 142.

⁴¹⁷ Council of Europe, Parliamentary Assembly, Report on the deteriorating situation in Afghanistan, Doc. 5495, 15 November 1985, Chapter II, §§ 16 and 17.

⁴¹⁸ SADC, Statement by South Africa on behalf of the SADC before the Sixth Committee of the UN General Assembly, UN Doc. A/C.6/53/SR.9, 21 October 1998, § 13.

⁴¹⁹ International Conference for the Protection of War Victims, Geneva, 30 August–1 September 1993, Final Declaration, § I(1).

⁴²⁰ ICTY, *Tadić case*, Interlocutory Appeal, 2 October 1995, § 102.

to the hills and others fled to the houses in Villa Carmen. The soldiers pursued them and finished them off in their homes. They took others and tortured them and bayoneted many of them. They also cut the throats of the wounded.

The Commission pointed out to the Bolivian government that these incidents constituted serious violations of the 1969 ACHR (right to life, right to humane treatment, right to personal liberty) and of common Article 3 of the 1949 Geneva Conventions.⁴²¹

367. In 1991, the IACiHR reported the case of the killing of two soldiers wounded after a US helicopter was shot down by an FMLN patrol in El Salvador. According to information obtained by the Commission,

The pilot of the helicopter . . . was killed, while the other two occupants . . . survived but were seriously injured. While the FMLN group sent the people from the village for help, the two surviving servicemen were killed, summarily executed by an FMLN combatant. The FMLN has admitted to what happened and has said that those responsible have been charged with committing a war crime by violating the FMLN's code of conduct and the Geneva Conventions. The FMLN has said that the trial of the accused will be open and independent observers will participate.⁴²²

368. In 1997, in the case before the IACiHR concerning the events at La Tablada in Argentina, the perpetrators of the initial attack on the Argentine military barracks alleged that, after the fighting ceased, agents of the State participated in the summary executions and torture of some of the captured attackers.⁴²³ In its report, the Commission stated that the violent clash between the attackers and the armed forces "triggered application of the provisions of Common Article 3 [of the 1949 Geneva Conventions], as well as other rules relevant to the conduct of internal hostilities".⁴²⁴ The IACiHR emphasised that:

The persons who participated in the attack on the military base were legitimate military targets only *for such time as they actively participated in the fighting*. Those who surrendered, were captured or wounded and ceased their hostile acts, fell effectively within the power of Argentine state agents, who could no longer lawfully attack or subject them to other acts of violence. Instead, they were absolutely entitled to the non-derogable guarantees of humane treatment set forth in both Common Article 3 of the Geneva Conventions and Article 5 of the [1969 ACHR]. The intentional mistreatment, much less summary execution, of such wounded or captured persons would be a particularly serious violation of both instruments.⁴²⁵ [emphasis in original]

The Commission found that the Argentine State was responsible for violations of the right to life and of the right to physical integrity protected by Articles 4

⁴²¹ IACiHR, *Case 7481 (Bolivia)*, Resolution, 8 March 1982, pp. 36–40.

⁴²² IACiHR, *Annual Report 1990–1991*, Doc. OEA/Ser.L/V/II.79.rev.1 Doc. 12, 22 February 1991, p. 442.

⁴²³ IACiHR, *Case 11.137 (Argentina)*, Report, 18 November 1997, § 3.

⁴²⁴ IACiHR, *Case 11.137 (Argentina)*, Report, 18 November 1997, § 156.

⁴²⁵ IACiHR, *Case 11.137 (Argentina)*, Report, 18 November 1997, § 189.

and 5 of the 1969 ACHR.⁴²⁶ Furthermore, the perpetrators of the initial attack alleged, *inter alia*, that “the Argentine military deliberately ignored the attempt of the attackers to surrender”.⁴²⁷ They added that “some parts of the barracks were reduced to rubble, without any acceptance of the attackers’ surrender or even any attempt to engage them in dialogue”.⁴²⁸ The petitioners produced a videotape which depicted attempted surrender. The Commission considered that:

The tape is . . . notable for what it does not show. In fact, it does not identify the precise time or day of the putative surrender attempt. Nor does it show what was happening at the same time in other parts of the base where other attackers were located. If these persons, for whatever reasons, continued to fire or commit hostile acts, the Argentine military might not unreasonably have believed that the white flag was an attempt to deceive or divert them.⁴²⁹

The Commission found that the evidence was incomplete and stated that it “must conclude that the killing or wounding of the attackers which occurred *prior to the cessation of combat on January 24, 1989* were legitimately combat related and, thus, did not constitute violations of the [1969 ACHR] or applicable humanitarian law rules”.⁴³⁰ (emphasis in original)

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

369. To fulfil its task of disseminating IHL, the ICRC has delegates around the world teaching armed and security forces that:

A person who is recognized or who, in the circumstances, should be recognized as being no longer able to participate in combat, shall not be attacked (e.g. surrendering, wounded, . . . shipwrecked in water).

Any intention to surrender must be clearly expressed: raising one’s arms, throwing away one’s weapons, bearing a white flag, etc.

...

Combatants who are captured (with or without surrender) are prisoners of war and shall no longer be attacked . . .

Treatment as prisoner of war applies only to captured combatants who then abstain from any hostile act and do not attempt to escape.⁴³¹

370. In an appeal issued in 1979 with respect to the conflict in Rhodesia/Zimbabwe, the ICRC appealed to all the parties to “spare the lives of those

⁴²⁶ IACiHR, *Case 11.137 (Argentina)*, Report, 18 November 1997, §§ 244–247 and 379–380.

⁴²⁷ IACiHR, *Case 11.137 (Argentina)*, Report, 18 November 1997, § 182.

⁴²⁸ IACiHR, *Case 11.137 (Argentina)*, Report, 18 November 1997, § 9.

⁴²⁹ IACiHR, *Case 11.137 (Argentina)*, Report, 18 November 1997, § 184.

⁴³⁰ IACiHR, *Case 11.137 (Argentina)*, Report, 18 November 1997, §§ 185–188.

⁴³¹ Frédéric de Mulinen, *Handbook on the Law of War for Armed Forces*, ICRC, Geneva, 1987, §§ 487, 488 and 496.

who surrender". It also specifically requested that the Patriotic Front "cease the killing of captured enemy combatants".⁴³²

371. In an appeal issued in 1983 concerning the Iran–Iraq War, the ICRC pointed to grave violations of IHL committed by both countries, including "summary execution of captive soldiers".⁴³³

372. In 1989, the ICRC transmitted to the governmental forces of a State allegations of misconduct of some of the members of its armed forces. A first incident involved a soldier who had shown a clear intention to shoot a wounded combatant and was prevented from doing so by an ICRC delegate. A second incident involved the killing of a wounded combatant brought to hospital. The ICRC delegate considered the incidents as clear violations both of IHL and of the regulations of the government forces.⁴³⁴

373. In an appeal issued in 1991, the ICRC enjoined the parties to the conflict in the former Yugoslavia "to spare the lives of those who surrender".⁴³⁵

374. In a press release issued in 1992, the ICRC urged the parties to the conflict in Bosnia and Herzegovina "to spare the lives of those who surrender".⁴³⁶

375. On several occasions in 1992, the ICRC enjoined the parties to the conflict in Afghanistan to spare the lives of those who surrendered.⁴³⁷

376. In a press release issued in 1992, the ICRC urged all the parties involved in the conflict in Tajikistan "to spare the lives of people who surrender".⁴³⁸

377. In 1994, in a Memorandum on Respect for International Humanitarian Law in Angola, the ICRC stated that "captured combatants and persons who have laid down their arms no longer represent any danger and must be respected; they shall be handed over to the immediate hierarchical superior; killing such persons constitutes a crime and is absolutely forbidden".⁴³⁹

378. In 1994, in a Memorandum on Compliance with International Humanitarian Law by the Forces Participating in Opération Turquoise in the Great Lakes region, the ICRC stated that "combatants and other persons who are captured, and those who have laid down their arms... shall be handed over

⁴³² ICRC, Conflict in Southern Africa: ICRC appeal, 19 March 1979, §§ 5 and 7, *IRRC*, No. 209, 1979, pp. 88–89.

⁴³³ ICRC, Conflict between Iraq and Iran: ICRC Appeal, *IRRC*, No. 235, 1983, p. 221.

⁴³⁴ ICRC archive document.

⁴³⁵ ICRC, Appeal in behalf of civilians in Yugoslavia, Geneva, 4 October 1991.

⁴³⁶ ICRC, Press Release No. 1705, Bosnia and Herzegovina: ICRC calls for protection of civilians, 10 April 1992.

⁴³⁷ ICRC, Press Release No. 1712, Afghanistan: ICRC appeals for compliance with humanitarian rules, 5 May 1992; Press Release No. 1724, Kabul: ICRC urges respect for civilians as medical facilities struggle to cope, 20 July 1992; Press Release No. 1726, Afghanistan: New ICRC appeal for compliance with humanitarian rules, 14 August 1992.

⁴³⁸ ICRC, Press Release, Tajikistan: ICRC urges respect for humanitarian rules, ICRC Dushanbe, 23 November 1992.

⁴³⁹ ICRC, Memorandum on Respect for International Humanitarian Law in Angola, 8 June 1994, § I, *IRRC*, No. 320, 1997, p. 503.

to their immediate military superior and shall not, in particular, be killed or ill-treated".⁴⁴⁰

379. In a press release issued in 1994 regarding the situation in Bihac (Bosnia and Herzegovina), the ICRC recalled that "the lives of all people who surrendered must be spared".⁴⁴¹

380. In a press release issued in 1994, the ICRC urged the parties involved in the conflict in Chechnya "to spare the lives of people who surrender".⁴⁴²

381. In a communication to the press issued in 2000 in the context of the conflict in Colombia, the ICRC condemned two separate incidents in which "wounded combatants being evacuated by its delegates were seized and summarily executed by men belonging to enemy forces. These acts . . . constitute grave breaches of international humanitarian law."⁴⁴³

382. In a communication to the press issued in 2001 in the context of the conflict in Afghanistan, the ICRC stated that "a fighter who clearly indicates his intention to surrender to an enemy is no longer a legitimate target and is entitled to the protection afforded him by the law".⁴⁴⁴

VI. *Other Practice*

383. In 1977, in a meeting with the ICRC, an armed opposition group denounced the practice by troops of a State of systematically killing all combatants, even those had been wounded or who were no longer fighting.⁴⁴⁵

384. In 1980, an armed opposition group expressed its acceptance of the fundamental principles of IHL as formulated by the ICRC, including the principle that "it is forbidden to kill or injure an enemy who surrenders".⁴⁴⁶

385. In their commentary on the 1977 Additional Protocols, Bothe, Partsch and Solf state that "under customary rules, protection from attack begins when the individual has ceased to fight, when his unit has surrendered, or when he is no longer capable of resistance either because he has been overpowered or is weaponless".⁴⁴⁷

⁴⁴⁰ ICRC, Memorandum on Compliance with International Humanitarian Law by the Forces Participating in *Opération Turquoise*, 23 June 1994, § I, reprinted in Marco Sassòli and Antoine A. Bouvier, *How Does Law Protect in War?*, ICRC, Geneva, 1999, p. 1308.

⁴⁴¹ ICRC, Press Release No. 1792, Bihac: urgent appeal, 26 November 1994.

⁴⁴² ICRC, Press Release No. 1793, Chechnya: ICRC urges respect for humanitarian rules, 28 November 1994.

⁴⁴³ ICRC, Communication to the Press No. 00/36, Colombia: ICRC condemns grave breaches of international humanitarian law, suspends medical evacuations of wounded combatants, 3 October 2000.

⁴⁴⁴ ICRC, Communication to the Press No. 01/58, Afghanistan: ICRC calls on all parties to comply with international humanitarian law, 23 November 2001.

⁴⁴⁵ ICRC archive document. ⁴⁴⁶ ICRC archive document.

⁴⁴⁷ Michael Bothe, Karl Joseph Partsch, Waldemar A. Solf (eds.), *New Rules for Victims of Armed Conflicts*, Martinus Nijhoff, The Hague, 1982, pp. 219–220, citing William E. S. Flory, *Prisoners of War: A Study in the Development of International Law*, American Council of Public Affairs, Washington, 1942, p. 39.

386. In 1985, in a report on violations of the laws of war in Nicaragua, Americas Watch stated that “the following . . . are prohibited by applicable international law rules: . . . Attacks against combatants who are captured [or] surrender.”⁴⁴⁸ The report mentioned a number of instances in which the *contras* executed combatants who had surrendered. Some witnesses confirmed that members of the militia who had resisted attacks by the *contras* and then surrendered were not hurt, but others described murders of military prisoners who had been captured unarmed.⁴⁴⁹ Americas Watch further found that “in combination, the *contra* forces have systematically violated the applicable laws of war throughout the conflict. They . . . have murdered those placed *hors de combat* by their wounds.”⁴⁵⁰ The report noted that “the insurgents have only rarely taken prisoners in combat. They claim to disarm and release them on the spot. In regard to the FDN [one of the *contra* groups], however, credible testimony indicates that, at least on some occasions, their forces have actually ‘finished off’ wounded opponents.”⁴⁵¹ Representatives of the insurgent organisations claimed that governmental forces also executed the wounded on the spot, but according to the report, these claims could not be substantiated. However, the report mentioned instances of abuse of prisoners.⁴⁵² The conflict was regarded as non-international and it was considered that the parties were “bound to abide by the provisions of Article 3 common to the Geneva Conventions of 1949 and by customary international law rules applicable to internal armed conflicts”⁴⁵³

387. In 1985, in a meeting with the ICRC, an armed opposition group declared its intention to respect the fundamental rules of IHL and expressed the wish to demonstrate its ability to take prisoners.⁴⁵⁴

388. In 1986, in a report on human rights in Nicaragua, Americas Watch underlined that “in several years of armed struggle, neither the FDN [one of the *contra* groups] nor its predecessor organizations took prisoners. A recently published book explicitly describes the FDN practice of murdering enemy soldiers placed *hors de combat*.”⁴⁵⁵ The report also noted abuses by the governmental forces, including killings, disappearances and mistreatment of prisoners, apparently aimed at individuals suspected of aiding the *contras*. The report stated that,

⁴⁴⁸ Americas Watch, *Violations of the Laws of War by Both Sides in Nicaragua: 1981–1985*, New York, March 1985, p. 33.

⁴⁴⁹ Americas Watch, *Violations of the Laws of War by Both Sides in Nicaragua: 1981–1985*, New York, March 1985, p. 42.

⁴⁵⁰ Americas Watch, *Violations of the Laws of War by Both Sides in Nicaragua: 1981–1985*, New York, March 1985, p. 6.

⁴⁵¹ Americas Watch, *Violations of the Laws of War by Both Sides in Nicaragua: 1981–1985*, New York, March 1985, p. 41.

⁴⁵² Americas Watch, *Violations of the Laws of War by Both Sides in Nicaragua: 1981–1985*, New York, March 1985, pp. 56 and 57.

⁴⁵³ Americas Watch, *Violations of the Laws of War by Both Sides in Nicaragua: 1981–1985*, New York, March 1985, p. 4.

⁴⁵⁴ ICRC archive document.

⁴⁵⁵ Americas Watch, *Human Rights in Nicaragua: 1985–1986*, New York, March 1986, p. 102.

“in addition to violating other human rights norms, they constitute violations of the laws of war”.⁴⁵⁶

389. In 1987, in a meeting with the ICRC, an armed opposition group admitted that, in response to the violence and aggression of governmental troops, it often gave no quarter to prisoners.⁴⁵⁷

390. In 1989, in a report on violations of the laws of war in Angola, Africa Watch stated that “applicable international law rules prohibit . . . [a]ttacks against combatants who are captured [or] surrender”.⁴⁵⁸

391. In 1990, an extract from a document from the Rwandan Press Agency mentioned that Ugandan journalists were permitted to visit prisoners of war in Kigali, evidencing the fact that, in some cases, FAR soldiers did give quarter to those who surrendered. The journalists reported that many of the 17 prisoners were young, since they were the ones most likely to surrender when confronted by the FAR.⁴⁵⁹

392. In a resolution adopted in 1991, the Politico-Military High Command of the SPLM/A stated that “whenever an enemy soldier is disarmed or unarmed, his or her life will be spared, protected and respected as a prisoner of war (POW) under the Geneva Conventions”.⁴⁶⁰

393. In 1994, in a meeting with the ICRC, officials of an entity denied that wounded enemy combatants were not spared. The low number of captured combatants was attributed to the military tactics used and the defensive nature of the position of the entity's forces.⁴⁶¹

394. In 1995, in a meeting with the ICRC, the representative of an armed opposition group accused government troops of not taking prisoners and of killing all captured combatants.⁴⁶²

Quarter under unusual circumstances of combat

I. Treaties and Other Instruments

Treaties

395. Article 41(3) AP I provides that “when persons entitled to protection as prisoners of war have fallen into the power of an adverse Party under unusual conditions of combat which prevent their evacuation . . . they shall be released and all feasible precautions shall be taken to ensure their safety”. Article 41 AP I was adopted by consensus.⁴⁶³

⁴⁵⁶ Americas Watch, *Human Rights in Nicaragua: 1985–1986*, New York, March 1986, p. 67.

⁴⁵⁷ ICRC archive document.

⁴⁵⁸ Africa Watch, *Angola: Violations of the Laws of War by Both Sides*, New York, April 1989, p. 141.

⁴⁵⁹ Agence Rwandaise de Presse, Bulletin No. 003847, 1 December 1990, pp. 1–2.

⁴⁶⁰ SPLM/A, PMHC Resolution No. 15: Human Rights and Civil Liberties, 11 September 1991, § 15.3, Report on SPLM/A Practice, 1998, Chapter 2.1.

⁴⁶¹ ICRC archive document. ⁴⁶² ICRC archive document.

⁴⁶³ CDDH, *Official Records*, Vol. VI, CDDH/SR.39, 25 May 1977, p. 104.

396. Upon ratification (or signature) of API Algeria, Belgium, Canada, France, Germany, Ireland, Italy, Netherlands, Spain and UK made statements to the effect that feasible precautions are those which are practicable or practically possible, taking into account all circumstances ruling at the time, including humanitarian and military considerations. These are set out in Chapter 5, Section A, and are not repeated here.

Other Instruments

397. Article 60 of the 1863 Lieber Code provides that “a commander is permitted to direct his troops to give no quarter, in great straits, when his own salvation makes it *impossible* to cumber himself with prisoners”. (emphasis in original)

II. National Practice

Military Manuals

398. The Instructions to the Muslim Fighter issued by the ARBiH in Bosnia and Herzegovina in 1993 state that it is “left to the military command’s discretion to decide whether it is more useful or in the general interest to free, exchange or liquidate enemy prisoners of war”.⁴⁶⁴

399. Canada’s LOAC Manual states that:

Where persons entitled to protection as prisoners of war (PWs) have fallen into the power of an adverse party under unusual conditions of combat that prevent their evacuation as provided for in [GC III], they shall be released and all feasible precautions shall be taken to ensure their safety.

...

The “unusual conditions of combat” may include, for example, the capture of a PW by a long-range patrol that does not have the ability to properly evacuate the PW. In such circumstances, there would be an obligation to release the PW and take all feasible precautions to ensure his safety. Such precautions might include providing the PW with sufficient food and water or other aids to assist in rejoining unit lines.⁴⁶⁵

400. France’s LOAC Manual states that, “when the capturing unit is not able to evacuate its prisoners or to keep them until the evacuation is possible, the unit must free them while guaranteeing its own and the prisoners’ security”.⁴⁶⁶

401. Israel’s Manual on the Laws of War states that:

Considerations such as the delay involved in guarding prisoners of war as opposed to the attainment of an objective, or even the allocation of manpower for transferring them to the rear line, do not permit the harming of prisoners who surrendered

⁴⁶⁴ Bosnia and Herzegovina, *Instructions to the Muslim Fighter* (1993), § c.

⁴⁶⁵ Canada, *LOAC Manual* (1999), p. 6-3, §§ 18 and 19.

⁴⁶⁶ France, *LOAC Manual* (2001), p. 102.

and were disarmed. It is hard to imagine a military mission so urgent as to render impossible the evacuation of prisoners to the rear or even binding them until additional forces arrive and which justifies their murder.⁴⁶⁷

402. Kenya's LOAC Manual states that, when the capturing unit, such as a small patrol operating in isolation, is not in a position to evacuate prisoners, "that unit shall release them and take precautions: a) for its own safety . . .; and b) for the released's safety (e.g. giving them water and food, the means to signal their location, and subsequently providing information about their location to rescue teams)".⁴⁶⁸

403. The Military Manual of the Netherlands provides that, when a person falls into the hands of the adversary under exceptional circumstances preventing his evacuation as a prisoner of war, this person must be released. This situation can occur, for instance, for a long-range post.⁴⁶⁹

404. Spain's LOAC Manual states that when the conditions of combat make it impossible to treat prisoners of war properly and to evacuate them (e.g. isolated special operations, small units, mass capture which exceeds the possibility of the unit in question), the prisoners must be released and all feasible precautions must be taken to ensure their safety.⁴⁷⁰

405. Switzerland's Basic Military Manual provides that "if a commando raids an enemy post and captures soldiers by surprise without being able to take them along with it in its retreat, it shall not have the right to kill or injure them. It may disarm them, but it shall free them."⁴⁷¹

406. The UK Military Manual provides that:

A commander may not put his prisoners of war to death because their presence retards his movements or diminishes his power of resistance by necessitating a large guard, or by reason of their consuming supplies, or because it appears that they will regain their liberty through the impending success of the forces to which they belong. It is unlawful for a commander to kill prisoners of war on grounds of self-preservation. This principle admits of no exception, even in the case of airborne or so-called commando operations. . . .

Whether a commander may release prisoners of war in the circumstances stated in the text is not clear . . . If such a release be made, it would seem clear that the commander should supply the prisoners with that modicum of food, water and weapons as would give them a chance of survival.⁴⁷²

407. The US Field Manual states that:

A commander may not put his prisoners to death because their presence retards his movements or diminishes his power of resistance by necessitating a large guard, or by reason of their consuming supplies, or because it appears certain that they

⁴⁶⁷ Israel, *Manual on the Laws of War* (1998), p. 45.

⁴⁶⁸ Kenya, *LOAC Manual* (1997), Précis No. 3, p. 8.

⁴⁶⁹ Netherlands, *Military Manual* (1993), p. IV-4.

⁴⁷⁰ Spain, *LOAC Manual* (1996), Vol. I, § 7.4.c.

⁴⁷¹ Switzerland, *Basic Military Manual* (1987), Article 109, commentary.

⁴⁷² UK, *Military Manual* (1958), § 137, including footnote 1.

will regain their liberty through the impending success of their forces. It is likewise unlawful for a commander to kill prisoners on grounds of self-preservation, even in the case of airborne or commando operations.⁴⁷³

National Legislation

408. Under Ireland's Geneva Conventions Act as amended, any "minor breach" of AP I, including violations of Article 41(3) AP I, is a punishable offence.⁴⁷⁴

409. Under Norway's Military Penal Code as amended, "anyone who contravenes or is accessory to the contravention of provisions relating to the protection of persons or property laid down in . . . the two additional protocols to [the Geneva] Conventions . . . is liable to imprisonment".⁴⁷⁵

National Case-law

410. In the *Griffen case* in 1968, a US Army Board of Review confirmed the sentence of unpremeditated murder for having executed a Vietnamese prisoner, following a "manifestly illegal" order to do so. The accused declared that "he felt that the security of the platoon would have been violated if the prisoner were kept, since their operations had already been observed by another suspect". The Board of Review cited paragraph 85 of the US Field Manual prohibiting the killing of prisoners of war. It added that the "killing of a docile prisoner taken during military operations is not justifiable homicide".⁴⁷⁶

Other National Practice

411. The Report on UK Practice cites a former director of the UK Army Legal Services who stated that UK soldiers were not required to risk their own lives in granting quarter. He added that it may not be practicable to accept surrender of one group of enemy soldiers while under fire from another enemy position. Capture was to take place when circumstances permitted.⁴⁷⁷

III. Practice of International Organisations and Conferences

United Nations

412. No practice was found.

Other International Organisations

413. No practice was found.

⁴⁷³ US, *Field Manual* (1956), § 85.

⁴⁷⁴ Ireland, *Geneva Conventions Act as amended* (1962), Section 4(1) and (4).

⁴⁷⁵ Norway, *Military Penal Code as amended* (1902), § 108(b).

⁴⁷⁶ US, Army Board of Review, *Griffen case*, Judgement, 2 July 1968.

⁴⁷⁷ Report on UK Practice, 1997, Notes on a meeting with a former Director of Army Legal Services, 19 June 1997, Chapter 2.1.

International Conferences

414. The Report of Committee III of the CDDH stated that:

Paragraph 3 [of Article 41 AP I] dealing with the release of prisoners who could not be evacuated proved quite difficult. The phrase "unusual conditions of combat" was intended to reflect the fact that that circumstance would be abnormal. What, in fact, most representatives referred to was the situation of the long distance patrol which is not equipped to detain and evacuate prisoners. The requirement that all "feasible precautions" be taken to ensure the safety of released prisoners was intended to emphasize that the detaining power, even in those extraordinary circumstances, was expected to take all measures that were practicable in the light of the combat situation. In the case of the long distance patrol, it need not render itself ineffective by handing the bulk of its supplies over to the released prisoners, but it should do all that it reasonably can do, in view of all the circumstances, to ensure their safety.⁴⁷⁸

IV. Practice of International Judicial and Quasi-judicial Bodies

415. No practice was found.

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

416. No practice was found.

VI. Other Practice

417. In their commentary on the 1977 Additional Protocols, Bothe, Partsch and Solf mention Articles 19 and 20 GC III (which require the prompt and humane evacuation of prisoners of war from the combat zone to places out of the danger area) and underline that "in certain types of operations, particularly airborne operations, commando raids, and long range reconnaissance patrols, compliance with these articles is clearly impractical, and there has been dispute as to what is required in such cases"⁴⁷⁹.

418. In 1985, in a meeting with the ICRC, an armed opposition group declared that it would keep prisoners only if their detention could be assured and the security of its combatants was not compromised. If not, it would execute them. However, the commander in chief of the group agreed to reconsider his position if keeping captured combatants alive proved beneficial to the resistance.⁴⁸⁰

419. In 1985, in a meeting with the ICRC, an armed opposition group explained its change of policy from immediate execution of captured combatants to giving them a choice between joining the movement or being transferred to party

⁴⁷⁸ CDDH, *Official Records*, Vol. XV, CDDH/236/Rev.1, 21 April–11 June 1976, p. 384, § 24.

⁴⁷⁹ Michael Bothe, Karl Joseph Partsch, Waldemar A. Solf (eds.), *New Rules for Victims of Armed Conflicts*, Martinus Nijhoff, The Hague, 1982, pp. 223 and 224.

⁴⁸⁰ ICRC archive document.

authorities. It stressed, however, that it was impossible for the resistance group, for security reasons, to detain prisoners, even for a short while.⁴⁸¹

420. In 1987, in a meeting with the ICRC, an armed opposition group admitted that “prisoners are released or executed due to the difficulties of detention”.⁴⁸²

C. Attacks against Persons Parachuting from an Aircraft in Distress

I. Treaties and Other Instruments

Treaties

421. Article 42 AP I provides that:

1. No person parachuting from an aircraft in distress shall be made the object of attack during his descent.
2. Upon reaching the ground in territory controlled by an adverse Party, a person who has parachuted from an aircraft in distress shall be given an opportunity to surrender before being made the object of attack, unless it is apparent that he is engaging in a hostile act.
3. Airborne troops are not protected by this Article.

Article 42 AP I was adopted by 71 votes in favour, 12 against and 11 abstentions.⁴⁸³

422. Article 39(1) of draft AP I (now Article 42) submitted by the ICRC to the CDDH provided that “the occupants of aircraft in distress shall never be attacked when they are obviously *hors de combat*, whether or not they have abandoned the aircraft in distress”.⁴⁸⁴ At the CDDH, an amendment submitted by 16 Arab States aimed at inserting at the end of draft Article 39(1) AP I (now Article 42) the proviso: “. . . unless it is apparent that he will land in territory controlled by the Party to which he belongs or by an ally of that Party”.⁴⁸⁵ The disagreements on draft Article 39 AP I arose because some representatives considered that parachutists landing on territory controlled by their own party could not be considered *hors de combat*, while others believed that airmen should be immune from attacks in all circumstances.⁴⁸⁶ For example, Egyptian stated that:

As far as military interests were concerned, a pilot was of great value and worth hundreds of ordinary combatants; in many cases of combat, the number of pilots would determine the outcome of hostilities. A combatant of such military value was therefore, in terms of law, a legitimate target of attack, the only exception being

⁴⁸¹ ICRC archive document. ⁴⁸² ICRC archive document.

⁴⁸³ CDDH, *Official Records*, Vol. VI, CDDH/SR.39, 25 May 1977, p. 110.

⁴⁸⁴ CDDH, *Official Records*, Vol. I, Part Three, Draft Additional Protocols, June 1973, p. 13.

⁴⁸⁵ CDDH, *Official Records*, Vol. III, CDDH/414, 24 May 1977, p. 173 (amendment proposed by Democratic Yemen, Iraq, Jordan, Kuwait, Lebanon, Libya, Mauritania, Morocco, Qatar, Saudi Arabia, Somalia, Sudan, Syria, Tunisia, UAE and Yemen).

⁴⁸⁶ Yves Sandoz *et al.* (eds.), *Commentary on the Additional Protocols*, ICRC, Geneva, 1987, § 1636.

if he had been disabled by wounds or sickness or was in a position to surrender as a prisoner of war.⁴⁸⁷

In the plenary, the ICRC made a statement calling for the rejection of the draft amendment. It declared, *inter alia*, that:

Whether an airman landed in friendly or hostile territory, whether he rejoined his unit or was taken prisoner, should remain secondary considerations . . .

If there had been occasions when, in exceptional circumstances, airmen in distress had been fired on, such was not the rule which prevailed in international practice. All national manuals on the conduct of hostilities said that airmen parachuting from an aircraft to save their lives were not to be fired on. The ICRC would be dismayed to see a provision making it lawful to kill an unarmed enemy who was not himself in a position to kill introduced into law which had hitherto been purely humanitarian.⁴⁸⁸

The ICRC statement was supported by Austria, Belgium, Canada, FRG, GDR, Sweden, Switzerland, UK and US, while Iraq, Libya and Syria voiced opposing views.⁴⁸⁹ The draft amendment was eventually rejected in the plenary by 47 votes in favour, 23 against and 26 abstentions.⁴⁹⁰

Other Instruments

423. Article 20 of the 1923 Hague Rules of Air Warfare provides that “in the event of an aircraft being disabled, the persons trying to escape by means of parachutes must not be attacked during their descent”.

II. National Practice

Military Manuals

424. Argentina’s Law of War Manual (1969) provides that “it is prohibited to open fire at persons who descend by parachute from aircraft in technical emergency. This prohibition, however, does not apply to members of airborne units and to any other parachutist descending on enemy territory on hostile mission.”⁴⁹¹

425. Argentina’s Law of War Manual (1989) states that “it is prohibited . . . to attack persons bailing out with parachutes from an aircraft in distress . . . When reaching the ground, they must be offered the opportunity to surrender before

⁴⁸⁷ Egypt, Statement at the CDDH, *Official Records*, Vol. XV, CDDH/III/SR.48, 1 June 1976, p. 104, § 13.

⁴⁸⁸ ICRC, Statement at the CDDH, *Official Records*, Vol. VI, CDDH/SR.39, 25 May 1977, p. 107, §§ 89–90.

⁴⁸⁹ CDDH, *Official Records*, Vol. VI, CDDH/SR.39, 25 May 1977, pp. 108 and 109, § 98 (Austria), p. 109, § 99 (Belgium), p. 109, § 102 (Canada), p. 108, § 92 (FRG), p. 107, § 91 (GDR), p. 108, §§ 96 and 97 (Iraq), p. 109, § 103 (Libya) p. 108, § 93 (Sweden), p. 109, § 104 (Switzerland), p. 106, § 82 (Syria), p. 108, § 94 (UK) and p. 108, § 95 (US).

⁴⁹⁰ CDDH, *Official Records*, Vol. VI, CDDH/SR.39, 25 May 1977, p. 110.

⁴⁹¹ Argentina, *Law of War Manual* (1969), § 1.009.

being attacked, unless they commit hostile acts. This rule does not apply to airborne troops."⁴⁹²

426. Australia's Commanders' Guide provides that "parachutists are defined as those who abandon a disabled aircraft. Parachutists are not legitimate military targets . . . It is appreciated that it may be difficult to distinguish a parachutist from a paratrooper, especially while in the air."⁴⁹³ It also states that:

Aircrew who have baled out of a damaged aircraft are to be considered as *hors de combat* and should not be attacked during their descent. However, should the parachutist land in enemy territory he must be given an opportunity to surrender before being made the object of an attack unless it is apparent that he is engaged in a hostile act. If he lands within territory occupied by his own national authority, he is liable to be attacked by the enemy, like any other combatant, unless wounded and, therefore, protected by LOAC.

...

The ban on shooting down those descending by parachute does not extend to the dropping of agents or paratroops.⁴⁹⁴

427. Australia's Defence Force Manual states that "aircrew descending by parachute from a disabled aircraft are immune from attack. If such personnel land in enemy territory they must be given an opportunity to surrender before being made the object of an attack, unless it is apparent that they are engaging in some hostile act."⁴⁹⁵ The manual adds that:

If the crew of a disabled aircraft lands by parachute in territory occupied by their own forces or under the control of their own national authority, they may be attacked in the same way as any other combatant, unless wounded, in which case they are protected. If in a raft or similar craft at sea after parachuting, they are to be treated as if shipwrecked and may not be attacked.

Paratroopers and other airborne troops may be attacked, even during their descent. If the carrying aircraft has been disabled it may be difficult to distinguish between members of the crew abandoning such aircraft who are immune from attack, and the airborne troops who are not so protected.⁴⁹⁶

428. Belgium's Teaching Manual for Officers provides that:

No person parachuting from an aircraft in distress shall be made the object of an attack during the descent by parachute.

While landing, he shall have the opportunity to indicate his intention to surrender. However, if he attempts to escape or commits a hostile act, he may be attacked. Airborne troops are never protected, even if the aircraft is in distress.⁴⁹⁷

429. Belgium's Teaching Manual for Soldiers provides that:

⁴⁹² Argentina, *Law of War Manual* (1989), § 1.06(6).

⁴⁹³ Australia, *Commanders' Guide* (1994), § 412.

⁴⁹⁴ Australia, *Commanders' Guide* (1994), §§ 964 and 965 (land warfare), see also §§ 412, 621, 705 and 1033 (air warfare).

⁴⁹⁵ Australia, *Defence Force Manual* (1994), § 847, see also § 708.

⁴⁹⁶ Australia, *Defence Force Manual* (1994), §§ 849–850.

⁴⁹⁷ Belgium, *Teaching Manual for Officers* (1994), Part I, Title II, p. 35.

Pilots and aircrew who parachute from an aircraft in distress . . . are not to be attacked during their descent . . . They may be attacked during their descent and/or once they have reached the ground only if they themselves open fire or attempt to escape. Airborne troops, however, constitute a combatant unit as soon as they get out of the aircraft and may be made the object of an attack during their descent by parachute as well as on the ground.⁴⁹⁸

430. Benin's Military Manual provides that "a person parachuting from an aircraft in distress and who does not commit hostile acts shall not be attacked . . . However, the members of enemy paratroops descending by parachute are legitimate military targets."⁴⁹⁹

431. Burkina Faso's Disciplinary Regulations states that, under the laws and customs of war, it is prohibited "to fire at the crew and passengers of civilian or military aircraft parachuting from an aircraft in distress, except when they participate in an airborne operation".⁵⁰⁰

432. Cameroon's Disciplinary Regulations states that, under the laws and customs of war, it is prohibited "to fire at the crew and passengers of civilian or military aircraft parachuting from an aircraft in distress, except when they participate in an airborne operation".⁵⁰¹

433. Cameroon's Instructors' Manual provides that the crew of an aircraft in distress shall not be attacked during their descent by parachute or on the ground, unless they commit hostile acts.⁵⁰² It adds, however, that "airborne troops in combat formation may be attacked during their descent".⁵⁰³

434. Canada's LOAC Manual affirms that aircraft may not "fire upon shipwrecked personnel, including those who may have parachuted into the sea or otherwise come from downed aircraft, unless they carry out acts inconsistent with their status as 'hors de combat'".⁵⁰⁴ The manual also states that:

34. Aircrew descending by parachute from a disabled aircraft are immune from attack. If such personnel land in enemy territory they must be given an opportunity to surrender before being made the object of an attack, unless it is apparent that they are engaging in some hostile act.
35. If personnel from a disabled aircraft do not surrender on being called upon to do so, they may be attacked in the same way as any other combatant. If a member of the crew of a disabled aircraft lands by parachute in the territory occupied by his own forces or under the control of his own national authority, he may be attacked by the enemy in the same way as any other combatant, unless he is *hors de combat* (out of combat), in which case he is protected.
36. Paratroops and other airborne troops may be attacked even during their descent.⁵⁰⁵

⁴⁹⁸ Belgium, *Teaching Manual for Soldiers* (undated), p. 16.

⁴⁹⁹ Benin, *Military Manual* (1995), Fascicule II, p. 9.

⁵⁰⁰ Burkina Faso, *Disciplinary Regulations* (1994), Article 35(2).

⁵⁰¹ Cameroon, *Disciplinary Regulations* (1975), Article 32.

⁵⁰² Cameroon, *Instructors' Manual* (1992), p. 32, § 24 and p. 63, § 233, see also p. 149, § 531.

⁵⁰³ Cameroon, *Instructors' Manual* (1992), p. 32, § 24, see also p. 63, § 233.

⁵⁰⁴ Canada, *LOAC Manual* (1999), p. 7-3, § 24.

⁵⁰⁵ Canada, *LOAC Manual* (1999), p. 7-4, §§ 34-36.

435. Congo's Disciplinary Regulations states that, under the laws and customs of war, it is prohibited "to fire at the crew and passengers of civilian or military aircraft parachuting from an aircraft in distress, except when they participate in an airborne operation".⁵⁰⁶

436. Croatia's Commanders' Manual states that "a combatant who is recognised (or should be recognised) as being out of combat (... descending by parachute in distress) may not be attacked".⁵⁰⁷

437. The Military Manual of the Dominican Republic provides that:

Individuals parachuting from a burning or disabled aircraft are considered helpless until they reach the ground. You should not fire on them while they are in the air. If they use their weapons or do not surrender upon landing, they must be considered combatants.

On the other hand, paratroopers who are jumping from an airplane to fight against you are targets and you may fire at them while they are still in the air.⁵⁰⁸

438. Ecuador's Naval Manual states that:

Parachutists descending from aircraft *hors de combat* may not be attacked while in the air and, unless they land in a territory controlled by their own forces or launch an attack during their descent, they must be provided an opportunity to surrender upon reaching the ground. Airborne troops, special warfare infiltrators, and intelligence agents parachuting into combat areas or behind enemy lines are not so protected and may be attacked in the air as well as on the ground. Such personnel may not be attacked, however, if they clearly indicate in a timely manner their intention to surrender.⁵⁰⁹

439. France's Disciplinary Regulations as amended states that, under international conventions, it is prohibited "to fire at the crew and passengers of civilian or military aircraft parachuting from an aircraft in distress, except when they participate in an airborne operation".⁵¹⁰

440. France's LOAC Teaching Note states that "it is prohibited to fire at a person parachuting after having evacuated an aircraft in distress until he lands, unless he uses his weapon. It is, however, allowed to fire at airborne troops still in the air or at all combatants who use their parachute as a means of combat."⁵¹¹

441. France's LOAC Manual provides that "it is . . . prohibited to attack a person parachuting from an aircraft in distress . . . This provision, however, does not apply to airborne troops when they parachute."⁵¹² The manual adds that a person parachuting from an aircraft in distress, "when reaching the ground, . . . may be captured or surrender and thus benefits from the status of prisoner of war.

⁵⁰⁶ Congo, *Disciplinary Regulations* (1986), Article 32(2).

⁵⁰⁷ Croatia, *Commanders' Manual* (1992), § 72.

⁵⁰⁸ Dominican Republic, *Military Manual* (1980), p. 5.

⁵⁰⁹ Ecuador, *Naval Manual* (1989), § 11.7.

⁵¹⁰ France, *Disciplinary Regulations as amended* (1975), Article 9 bis (2).

⁵¹¹ France, *LOAC Teaching Note* (2000), p. 3.

⁵¹² France, *LOAC Manual* (2001), p. 104, see also p. 105.

However, if [the person] resumes combat, he does not benefit from any particular protection, and the enemy may again use arms against him."⁵¹³

442. Germany's Military Manual provides that the armed forces are military objectives, "including paratroops in descent but not crew members parachuting from an aircraft in distress".⁵¹⁴

443. Indonesia's Military Manual specifies that:

Persons who are parachuting in distress should not be attacked. Unless he/she enters into combat, once he/she has landed, he/she should be given the opportunity to surrender. However, during combat, parachuting troops are lawful targets, though they are still in the process of parachuting.⁵¹⁵

444. With reference to Israel's Law of War Booklet, the Report on the Practice of Israel states that "IDF internal regulations and practice prohibit firing upon enemy airmen parachuting from their aircraft in distress (as opposed to offensive para-drop operations)".⁵¹⁶

445. Israel's Manual on the Laws of War states that "it is allowed to fire upon paratrooper forces even when they are still in mid-air".⁵¹⁷

446. Italy's IHL Manual prohibits firing at the crew of an aircraft in distress.⁵¹⁸ It adds that, in other cases, "it is lawful to open fire at enemy soldiers who . . . descend by parachute, isolated or in a group".⁵¹⁹ It also defines intentional homicide and mistreatment of persons parachuting in distress as a war crime.⁵²⁰

447. Italy's LOAC Elementary Rules Manual states that "a combatant who is recognised (or should be recognised) as being out of combat may not be attacked (. . . descending by parachute in distress) may not be attacked".⁵²¹

448. Kenya's LOAC Manual provides that:

A person having parachuted from an aircraft in distress shall [be] given an opportunity to surrender before being attacked, unless he engages himself in a hostile act. This rule prohibits shooting at persons who are escaping from disabled aircraft. On the other hand, members of hostile airborne forces descending by parachute are legitimate military targets.⁵²²

449. Lebanon's Army Regulations and Field Manual provide that it is prohibited to fire at those who parachute in emergency, unless they participate in ongoing operations.⁵²³

⁵¹³ France, *LOAC Manual* (2001), p. 105. ⁵¹⁴ Germany, *Military Manual* (1992), § 442.

⁵¹⁵ Indonesia, *Military Manual* (1982), § 106.

⁵¹⁶ Report on the Practice of Israel, 1997, Chapter 2.1, referring to *Law of War Booklet* (1986), p. 10.

⁵¹⁷ Israel, *Manual on the Laws of War* (1998), p. 43.

⁵¹⁸ Italy, *IHL Manual* (1991), Vol. I, § 8(3). ⁵¹⁹ Italy, *IHL Manual* (1991), Vol. I, § 10.

⁵²⁰ Italy, *IHL Manual* (1991), Vol. I, § 84.

⁵²¹ Italy, *LOAC Elementary Rules Manual* (1991), § 72.

⁵²² Kenya, *LOAC Manual* (1997), Précis No. 3, pp. 6–7, see also Précis No. 2, p. 15.

⁵²³ Lebanon, *Army Regulations* (1971), § 17; *Field Manual* (1996), § 7.

450. Madagascar's Military Manual provides that "a combatant who is recognised (or should be recognised) to be *hors de combat* shall not be attacked (... person descending in distress by parachute)".⁵²⁴

451. Mali's Army Regulations states that, under the laws and customs of war, it is prohibited "to fire at the crew and passengers of civilian or military aircraft parachuting from an aircraft in distress, except when they participate in an airborne operation".⁵²⁵

452. Morocco's Disciplinary Regulations states that, under the laws and customs of war, it is prohibited "to fire at the crew and passengers of civilian or military aircraft parachuting from an aircraft in distress, except when they participate in an airborne operation".⁵²⁶

453. The Military Manual of the Netherlands provides that:

No person parachuting from an aircraft in distress shall be made the object of attack during his descent. Upon reaching the ground, a person who has parachuted from an aircraft in distress shall be given an opportunity to surrender before being made the object of attack. An opportunity to surrender must not be given if it is apparent that he is engaging in a hostile act.

Airborne troops are obviously not protected this way.⁵²⁷

454. New Zealand's Military Manual states that:

It is generally considered to be a rule of customary law that aircrew who have bailed out of a damaged aircraft are to be considered as *hors de combat* and immune from attack. By AP I Art. 42, this is made part of treaty law so that such persons are protected during their descent. Should such a person land in the territory of an adverse Party, he must be given an opportunity to surrender before being made the object of an attack, unless it is apparent that he is engaged in a hostile act. If he lands within his own lines or in territory occupied by his own national authority, he is liable to immediate attack like any other combatant, unless he is wounded and so protected by the I GC.

The ban on shooting down those descending by parachute does not extend to the dropping of agents or parachute troops.⁵²⁸

The manual adds that "airmen abandoning aircraft in distress may not be attacked during their descent. Any such attack would, therefore, be a war crime."⁵²⁹

455. Under Nigeria's Manual on the Laws of War, "shooting at survivors of an enemy aircraft that has been hit" is an "illegitimate tactic", while "shooting at enemy paratroopers" is a "legitimate tactic".⁵³⁰

⁵²⁴ Madagascar, *Military Manual* (1994), Fiche No. 7-O, § 17.

⁵²⁵ Mali, *Army Regulations* (1979), Article 36.

⁵²⁶ Morocco, *Disciplinary Regulations* (1974), Article 25(2).

⁵²⁷ Netherlands, *Military Manual* (1993), p. IV-4.

⁵²⁸ New Zealand, *Military Manual* (1992), § 522.

⁵²⁹ New Zealand, *Military Manual* (1992), § 1704(2)(c), footnote 34.

⁵³⁰ Nigeria, *Manual on the Laws of War* (undated), § 14.

456. Russia's Military Manual provides that "the attack of . . . persons parachuting from an aircraft in distress (with the exception of paratroopers)" is a prohibited method of warfare.⁵³¹

457. Senegal's Disciplinary Regulations states that, under the laws and customs of war, it is prohibited "to fire at the crew and passengers of civilian or military aircraft parachuting from an aircraft in distress, except when they participate in an airborne operation".⁵³²

458. South Africa's LOAC Manual states that:

Parachutists are presumed to be on military mission and may therefore be targeted during descent. An exception to this presumption is where the parachutists are the crew of a disabled aircraft; they are presumed to be out of combat and may not be targeted unless they show an intent to resist.⁵³³

459. Spain's LOAC Manual provides that persons baling out of an aircraft in distress by parachute may not be attacked during their descent. Furthermore, such persons, "when reaching the ground, shall have the opportunity to surrender before being attacked, unless it is apparent that they are engaged in a hostile act".⁵³⁴ The manual adds that "it is lawful to attack paratroops during their descent".⁵³⁵

460. Sweden's IHL Manual notes that:

Proposals were presented at the [CDDH] to the effect that it should be permitted to employ armed force against a distressed airman expected to land in territory controlled by the enemy. Apart from the practical difficulties in determining whether a distressed parachutist will land on one side of the combat area or on the other, a rule with this content would have highly inhuman effects. These considerations resulted in the proposal being rejected.

During the negotiations [on AP I] it was pointed out that persons seeking to save themselves by parachuting are incapable of any use of weapons during their descent: their sole interest is probably in saving their lives. The situation can of course change when they have reached the ground. This is the background against which Article 42 [AP I] provides protection for distressed persons leaving aircraft in emergency situations. If after landing the person chooses to continue his military resistance, it again becomes permissible to attack him. To avoid the possibility of abuse, it is particularly stated that airborne troops are not protected by the . . . rule.⁵³⁶

461. Switzerland's Basic Military Manual states that:

If the occupants of an aircraft in distress bale out by parachute to save their lives, it is not legitimate to attack them from the ground or from an aircraft during their

⁵³¹ Russia, *Military Manual* (1990), § 5(i).

⁵³² Senegal, *Disciplinary Regulations* (1990), Article 34(2).

⁵³³ South Africa, *LOAC Manual* (1996), § 33.

⁵³⁴ Spain, *LOAC Manual* (1996), Vol. I, § 4.5.b.(1)b), see also § 10.8.f.(1).

⁵³⁵ Spain, *LOAC Manual* (1996), Vol. I, § 7.3.a.(6).

⁵³⁶ Sweden, *IHL Manual* (1991), Section 3.2.1.2, pp. 33–34.

descent. As soon as those persons reach the ground, they may be captured. If they resist or show hostile intent, they may be placed *hors de combat*.

Paratroopers may be placed *hors de combat* even before they reach the ground, whether they parachute alone or in massive groups.⁵³⁷

462. Togo's Military Manual provides that "a person parachuting from an aircraft in distress and who does not commit hostile acts shall not be attacked . . . However, the members of enemy paratroops descending by parachute are legitimate military targets."⁵³⁸

463. The UK Military Manual specifies that:

It is lawful to fire on airborne troops and others engaged, or who appear to be engaged, on hostile missions whilst such persons are descending from aircraft, in particular over territory in control of the opposing forces, whether or not that aircraft has been disabled. It is, on the other hand, unlawful to fire at other persons descending by parachute from disabled aircraft.⁵³⁹

464. The UK LOAC Manual states that the duty to give quarter "prohibits shooting at persons who are escaping from disabled aircraft. On the other hand, members of hostile airborne forces descending by parachute are legitimate military targets."⁵⁴⁰

465. The US Field Manual provides that:

The law of war does not prohibit firing upon paratroops or other persons who are or appear to be bound upon hostile missions while such persons are descending by parachute. Persons other than those mentioned in the preceding sentence who are descending by parachute from a disabled aircraft may not be fired upon.⁵⁴¹

466. The US Air Force Pamphlet states that:

When an aircraft is disabled and the occupants escape by parachutes, they should not be attacked in their descent . . . However, persons descending from an aircraft for hostile purposes, such as paratroops or those who appear to be bound upon hostile missions, are not protected. Any person descending from a disabled aircraft who continues to resist may be attacked. Downed enemy airmen from aircraft in distress are subject to immediate capture and can be attacked if they continue to resist or escape or are behind their own lines. Otherwise they should be afforded a reasonable opportunity to surrender.

...

If downed in their own territory, they remain lawful targets, as combatants, unless rendered *hors de combat* by sickness, wounds or other causes . . . If downed in the attacker's territory and subject to capture, the advantages of capture outweigh any minimal advantage secured by attack.⁵⁴²

⁵³⁷ Switzerland, *Basic Military Manual* (1987), Articles 49 and 50.

⁵³⁸ Togo, *Military Manual* (1996), Fascicule II, p. 9.

⁵³⁹ UK, *Military Manual* (1958), § 119, footnote 1(b).

⁵⁴⁰ UK, *LOAC Manual* (1981), Section 4, p. 12, § 2(b).

⁵⁴¹ US, *Field Manual* (1956), § 30.

⁵⁴² US, *Air Force Pamphlet* (1976), § 4-2(e), including footnote 14.

467. The US Soldier's Manual provides that:

Individuals parachuting from a burning or disabled aircraft are considered helpless until they reach the ground. You should not fire on them while they are in the air. If they use their weapons or do not surrender upon landing, they must be considered combatants. Paratroopers, on the other hand, are jumping from an airplane to fight. They are targets and you may fire at them while they are still in the air.⁵⁴³

468. The US Rules of Engagement for Operation Desert Storm instruct: "Do not engage anyone who . . . is an aircrew member descending by parachute from a disabled aircraft."⁵⁴⁴

469. The US Naval Handbook states that:

Parachutists descending from disabled aircraft may not be attacked while in the air unless they engage in combatant acts while descending. Upon reaching the ground, such parachutists must be provided an opportunity to surrender. Airborne troops, special warfare infiltrators, and intelligence agents parachuting into combat areas or behind enemy lines are not so protected and may be attacked in the air as well as on the ground. Such personnel may not be attacked, however, if they clearly indicate in a timely manner their intention to surrender.⁵⁴⁵

470. The Annotated Supplement to the US Naval Handbook states that Article 42(1) and (2) AP I codifies the customary rule set out in Article 20 of Part II of the 1923 Hague Rules of Air Warfare. It adds that:

Firing a weapon is clearly a combatant act.

A downed airman, who aware of the presence of enemy armed forces, attempts to evade capture, will probably be considered as engaging in a hostile act and, therefore, subject to attack from the ground or from the air. However, mere movement in the direction of one's own lines does not, by itself, constitute an act of hostilities.⁵⁴⁶

471. The YPA Military Manual of the SFRY (FRY) prohibits attacking persons parachuting from an enemy aircraft in distress and refraining from hostile acts, but specifies that this prohibition "does not apply to airborne invasion, not even when some of the aircraft are damaged before reaching the target area of invasion".⁵⁴⁷

National Legislation

472. Ireland's Geneva Conventions Act as amended provides that any "minor breach" of AP I, including violations of Article 42 AP I, is a punishable offence.⁵⁴⁸

⁵⁴³ US, *Soldier's Manual* (1984), p. 6.

⁵⁴⁴ US, *Rules of Engagement for Operation Desert Storm* (1991), § A.

⁵⁴⁵ US, *Naval Handbook* (1995), § 11.6.

⁵⁴⁶ US, *Annotated Supplement to the Naval Handbook* (1997), § 11.6, footnotes 39 and 40.

⁵⁴⁷ SFRY (FRY), *YPA Military Manual* (1988), § 69.

⁵⁴⁸ Ireland, *Geneva Conventions Act as amended* (1962), Section 4(1) and (4).

473. Italy's Law of War Decree as amended prohibits firing at the crew of an aircraft in distress.⁵⁴⁹ It further provides that, in other cases, "it is lawful to open fire at enemy soldiers who . . . descend by parachute, isolated or in group".⁵⁵⁰

474. Under Norway's Military Penal Code as amended, "anyone who contravenes or is accessory to the contravention of provisions relating to the protection of persons or property laid down in . . . the two additional protocols to [the Geneva] Conventions . . . is liable to imprisonment".⁵⁵¹

National Case-law

475. In the *Dostler case* before the US Military Commission at Rome in 1945, the accused, the commander of a German army corps, was found guilty of having ordered the shooting of 15 American prisoners of war in violation of the 1907 HR and of long-established laws and customs of war. The accused relied on the defence of superior orders based, *inter alia*, on the *Führer's* order of 18 October 1942. This order provided that enemy soldiers participating in commando operations should be given no quarter, but added that these provisions did not apply to aviators who had baled out to save their lives during aerial combat.⁵⁵²

Other National Practice

476. According to the Report on the Practice of Egypt, it is the traditional practice of Egypt to spare persons parachuting in distress. The report notably cites military communiqués issued during the 1973 Middle East War.⁵⁵³ However, during the debates at the CDDH, the Egyptian delegation stated that an "airman who attempted to escape capture should not be protected".⁵⁵⁴

477. The Report on the Practice of Iran cites an Iranian military communiqué of 1980 in which Iran denied allegations by Iraq that "angry mobs ha[d] killed parachuting Iraqis". It asserted that pilots were under the control of the army and well treated.⁵⁵⁵

478. According to the Report on the Practice of Iraq, during the Iran–Iraq War, Iraq issued several military communiqués in which it held Iran responsible for sparing the lives and ensuring the safety of Iraqi pilots parachuting from aircraft in distress.⁵⁵⁶ On the basis of the reply by the Ministry of Defence to a

⁵⁴⁹ Italy, *Law of War Decree as amended* (1938), Article 35(3).

⁵⁵⁰ Italy, *Law of War Decree as amended* (1938), Article 38.

⁵⁵¹ Norway, *Military Penal Code as amended* (1902), § 108(b).

⁵⁵² US, Military Commission at Rome, *Dostler case*, Judgement, 12 October 1945.

⁵⁵³ Report on the Practice of Egypt, 1997, Chapter 5.1, referring to Military Communiqué No. 34, 13 October 1973 and Military Communiqué No. 46, 18 October 1973.

⁵⁵⁴ Egypt, Statement at the CDDH, *Official Records*, Vol. XV, CDDH/III/SR.47, 31 May 1976, p. 87, § 12.

⁵⁵⁵ Report on the Practice of Iran, 1997, Chapter 2.1, referring to Military Communiqué, 29 September 1980.

⁵⁵⁶ Report on the Practice of Iraq, 1998, Chapter 5.1, referring to Military Communiqué No. 541, 3 December 1981, Military Communiqué No. 683, 1982, Military Communiqué No. 996, 1 February 1983 and Military Communiqué No. 1383, 2 January 1984.

questionnaire, the report also notes that, during the Iran–Iraq War, members of the opposing forces who were *hors de combat*, including pilots parachuting from aircraft in distress, were well treated, without distinction based on military rank or category.⁵⁵⁷

479. The Report on the Practice of Pakistan notes that Indian pilots who parachuted in distress were taken as prisoners of war in the 1965 and 1971 conflicts.⁵⁵⁸

480. In 1987, the Deputy Legal Adviser of the US Department of State, referring to Article 42 AP I, affirmed that “we support the principle that persons, other than airborne troops, parachuting from an aircraft in distress, not be made the object of attack”.⁵⁵⁹

481. In 1991, in response to an ICRC memorandum on the applicability of IHL in the Gulf region, the US pointed out that its practice was consistent with the prohibition to attack a pilot parachuting from an aircraft in distress and that the protection applied to all air crew rather than to the pilot only.⁵⁶⁰

III. Practice of International Organisations and Conferences

United Nations

482. No practice was found.

Other International Organisations

483. No practice was found.

International Conferences

484. The Rapporteur of Committee III of the CDDH commented that “the Committee decided not to try to define what constituted a hostile act, but there was considerable support for the view that an airman who was aware of the presence of enemy armed forces and tried to escape was engaging in a hostile act”.⁵⁶¹

IV. Practice of International Judicial and Quasi-judicial Bodies

485. No practice was found.

⁵⁵⁷ Report on the Practice of Iraq, 1998, Reply by the Ministry of Defence to a questionnaire, July 1997, Chapter 2.1.

⁵⁵⁸ Report on the Practice of Pakistan, 1998, Chapter 2.1.

⁵⁵⁹ US, Remarks of Michael J. Matheson, Deputy Legal Adviser, US Department of State, The Sixth Annual American Red Cross-Washington College of Law Conference on International Humanitarian Law: A Workshop on Customary International Law and the 1977 Protocols Additional to the 1949 Geneva Conventions, *American University Journal of International Law and Policy*, Vol. 2, 1987, p. 425.

⁵⁶⁰ US, Letter from the Department of the Army to the legal adviser of the US armed forces deployed in the Gulf region, 11 January 1991, § 8(J), Report on US Practice, 1997, Chapter 2.8.

⁵⁶¹ CDDH, *Official Records*, Vol. XV, CDDH/236/Rev.1, 21 April–11 June 1976, p. 386, § 30.

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

486. The ICRC Commentary on the Additional Protocols states that:

This article [42 AP I] is entirely new. The Hague Regulations of 1907, produced at a time when air warfare did not exist, was obviously not concerned with this problem. However, military manuals already contained prohibitions on firing on airmen in distress, in this way confirming its customary law character.⁵⁶²

The Commentary also states that Article 42(2) AP I

goes further than Article 41 (*Safeguard of an enemy hors de combat*), viz., with regard to the question of surrender. The intent to surrender is assumed to exist in an airman whose aircraft has been brought down, and any attack should be suspended until the person concerned has had an opportunity of making this intention known.

...

A priori, fire must therefore not be opened on the ground against persons who have parachuted from an aircraft in distress, whether they land in or behind the enemy lines. These airmen are presumed to have the intention of surrendering, and all possible measures should be taken to enable this surrender to take place under appropriate conditions.⁵⁶³

487. To fulfil its task of disseminating IHL, the ICRC has delegates around the world teaching armed and security forces that:

A person who is recognized or who, in the circumstances, should be recognized as being no longer able to participate in combat, shall not be attacked (*e.g.* . . . descending by parachute from an aircraft in distress).

...

A person having parachuted from an aircraft in distress shall be given an opportunity to surrender before being attacked, unless he appears to engage in a hostile act.⁵⁶⁴

488. In a report submitted to the 21st International Conference of the Red Cross in 1969, the ICRC stated that an "airman in distress, cut off, and not employing any weapon should be respected" and that upon landing, the parachutist should be treated as a prisoner of war.⁵⁶⁵

489. Article 36 of draft AP I submitted by the ICRC at the CE (1972) provided that "the occupants of aircraft in distress who parachute to save their lives, or who are compelled to make a forced landing, shall not be attacked during their

⁵⁶² Yves Sandoz *et al.* (eds.), *Commentary on the Additional Protocols*, ICRC, Geneva, 1987, § 1637.

⁵⁶³ Yves Sandoz *et al.* (eds.), *Commentary on the Additional Protocols*, ICRC, Geneva, 1987, §§ 1644 and 1648.

⁵⁶⁴ Frédéric de Mulinen, *Handbook on the Law of War for Armed Forces*, ICRC, Geneva, 1987, §§ 487 and 489.

⁵⁶⁵ ICRC, Report on the Reaffirmation and Development of Laws and Customs Applicable in Armed Conflicts, May 1969, submitted to the 21st International Conference of the Red Cross, Istanbul, 6–13 September 1969, p. 77.

descent or landing unless their attitude is hostile".⁵⁶⁶ The ICRC Commentary on Article 36 of draft AP I stated that:

This article is entirely new. In the era of The Hague, there was no "vertical" dimension to military operations. Consequently, a proposal, which reflects the customs which have grown up since the appearance of air warfare, was formally submitted to the first session of the Conference of Government Experts and at which the situation of airmen in distress was compared to that of the shipwrecked.⁵⁶⁷

VI. *Other Practice*

490. In their commentary on the 1977 Additional Protocols, Bothe, Partsch and Solf state that:

Article 42 [AP I] codifies a custom which began among some fighter pilots during World War I who considered it to be unchivalrous and inhumane to attack an adversary while he is parachuting to earth from a disabled observation balloon. The custom was further developed during World War II when the use of parachutes by aviators in fixed wing aircraft became routine. The principle of this custom extended to aircraft, was expressed in Art. 20 of the Hague Air Warfare Rules of 1922/1923, which never went into force. It was also expressed in several military law of war manuals and by important publicists.⁵⁶⁸

⁵⁶⁶ ICRC, Draft Instruments submitted to the Second Session of the Conference of Government Experts, 3 May–3 June 1972, *Report on the Work of the Conference*, Vol. II, Geneva, July 1972, p. 6.

⁵⁶⁷ ICRC, Commentary on draft Article 36 submitted to the Second Session of the Conference of Government Experts, 3 May–3 June 1972, *Commentary*, Vol. II, Part One, Geneva, January 1972, p. 70.

⁵⁶⁸ Michael Bothe, Karl Joseph Partsch, Waldemar A. Solf (eds.), *New Rules for Victims of Armed Conflicts*, Martinus Nijhoff, The Hague, 1982, p. 226.

DESTRUCTION AND SEIZURE OF PROPERTY

A. War Booty (practice relating to Rule 49)	§§ 1–49
B. Seizure and Destruction of Property in Case of Military Necessity (practice relating to Rule 50)	§§ 50–243
C. Public and Private Property in Occupied Territory (practice relating to Rule 51)	§§ 244–458
Movable public property in occupied territory	§§ 244–281
Immovable public property in occupied territory	§§ 282–315
Private property in occupied territory	§§ 316–458
D. Pillage (practice relating to Rule 52)	§§ 459–799
General	§§ 459–760
Pillage committed by civilians	§§ 761–799

A. War Booty*I. Treaties and Other Instruments**Treaties*

- Article 4 of the 1899 HR provides with regard to prisoners of war that “all their personal belongings, except arms, horses, and military papers, remain their property”.
- Article 4 of the 1907 HR provides with regard to prisoners of war that “all their personal belongings, except arms, horses, and military papers, remain their property”.
- Article 18, first paragraph, GC III provides that:

All effects and articles of personal use, except arms, horses, military equipment and military documents, shall remain in the possession of prisoners of war, likewise their metal helmets and gas masks and like articles issued for personal protection. Effects and articles used for their clothing or feeding shall likewise remain in their possession, even if such effects and articles belong to their regulation military equipment . . . Badges of rank and nationality, decorations and articles having above all a personal or sentimental value may not be taken from prisoners of war.

Other Instruments

- According to Article 45 of the 1863 Lieber Code, “all captures and booty belong, according to the modern law of war, primarily to the government of the captor”.

II. National Practice

Military Manuals

5. Argentina's Law of War Manual states, in a paragraph on war booty, that "all movable public property captured or found on the battlefield becomes the property of the capturing state . . . The victorious armed forces may only take possession of privately owned weapons and military documents if the latter are found or seized on the battlefield."¹

6. Australia's Commanders' Guide states that "all enemy military equipment captured or found on a battlefield is known as booty and becomes the property of the capturing State. Booty includes all articles captured with prisoners of war and not included under the term 'personal effects'."² Regarding prisoners of war, the manual states that "the enemy is entitled to confiscate any military documents and equipment".³ It adds that "the practice of military forces converting captured enemy war equipment for their own use is recognised by LOAC. Prior to using captured equipment, enemy designations must be replaced with appropriate ADF markings."⁴

7. Australia's Defence Force Manual states that "all enemy military equipment captured or found on a battlefield is known as booty and becomes the property of the capturing State. Booty includes all articles captured with prisoners of war and not included under the term 'personal effects'."⁵ The manual also provides that:

PW must be allowed to retain:

- a. all their personal property, except vehicles, arms, and other military equipment or documents;
- b. protective equipment, such as helmets or respirators;
- c. clothing or articles used for feeding, even though the property of the government of the PW;
- d. badges of nationality or rank and decorations; and
- e. articles of sentimental value.⁶

8. Belgium's Law of War Manual states that all objects of personal use must be retained by prisoners of war.⁷

9. Belgium's Teaching Manual for Soldiers states that the equipment that is not necessary for the prisoner of war's clothing, food and security, arms and all military documents are to be considered as "war booty" and brought to the superiors.⁸

¹ Argentina, *Law of War Manual* (1969), § 1.020.

² Australia, *Commanders' Guide* (1994), § 967.

³ Australia, *Commanders' Guide* (1994), § 712.

⁴ Australia, *Commanders' Guide* (1994), § 1040.

⁵ Australia, *Defence Force Manual* (1994), § 742, see also § 1224.

⁶ Australia, *Defence Force Manual* (1994), § 1023.

⁷ Belgium, *Law of War Manual* (1983), p. 45.

⁸ Belgium, *Teaching Manual for Soldiers* (undated), p. 20.

10. Benin's Military Manual states that "captured enemy military property (with the exceptions of the means of identification, medical and religious objects, ...) become war booty that can be used without restriction. It belongs to the capturing unit and not to individual combatants."⁹

11. The Instructions to the Muslim Fighter issued by the ARBiH in Bosnia and Herzegovina in 1993 contain the following commentary:

(b) War Booty:

... [I]t is clear that a fifth of war booty shall fall to the State treasury, and the other four-fifths belongs to the soldiers. However, in situations where the soldiers receive pay and in which the State has assumed the obligation to care for the soldiers and their families, ... all war booty shall be placed at the disposal of the State ... Because of this the most proper way for the State to dispose of war booty is through its army officers.¹⁰

12. Cameroon's Instructors' Manual states that "captured military objects are war booty. War booty is not regulated by the law of war. It may be utilised without restriction."¹¹

13. Canada's LOAC Manual provides that "all enemy public movable property captured or found on a battlefield is known as 'booty' and becomes the property of the capturing state. Booty includes all articles captured with PWs other than their personal property."¹² It further states that "PWs must be allowed to retain all their personal property, except vehicles, arms, and other military equipment or documents". Protective equipment, clothing, articles used for feeding, badges of nationality or rank, as well as articles of sentimental value, must be left in their possession.¹³ The manual also states that "all property, other than personal property, taken from PWs is known as booty".¹⁴

14. Canada's Code of Conduct provides that "it is prohibited to return to Canada with weapons or ammunition as 'war trophies'. CF personnel who attempt to return to Canada with such items may also run afoul of Canadian criminal and customs laws."¹⁵ With regard to the surrendered enemy, the manual states that:

Disarming includes the search for and the taking away of equipment and documents of military value (e.g., weapons, ammunition, maps, orders, code books, etc.). The following material must remain with the PW or detainee:

⁹ Benin, *Military Manual* (1995), Fascicule II, p. 13.

¹⁰ Bosnia and Herzegovina, *Instructions to the Muslim Fighter* (1993), § c.

¹¹ Cameroon, *Instructors' Manual* (1992), p. 45, § 163.5, see also p. 96.

¹² Canada, *LOAC Manual* (1999), p. 6-5, § 48, see also p. 12-8, § 67.

¹³ Canada, *LOAC Manual* (1999), p. 10-3, § 27.

¹⁴ Canada, *LOAC Manual* (1999), p. 10-4, § 29.

¹⁵ Canada, *Code of Conduct* (2001), Rule 3, § 12.

- a. identification documents/discs;
- b. clothing, items for personal use, or items used for feeding; and
- c. items for personal protection (i.e., helmet, gas mask, flak jacket, etc.) . . .

Only an officer may order the removal of sums of money and valuables for safe-keeping. If such action is taken, a receipt must be issued and the details recorded in a special register.¹⁶

15. The Military Manual of the Dominican Republic states that:

After you have secured, silenced and segregated captives, you may search for items of military value only (weapons, maps or military documents).

It is a violation of the law of war to take from captives objects such as gas masks, mosquito nets or parkas, or objects of no military value, such as jewellery, photos or medals.¹⁷

16. France's LOAC Manual incorporates the content of Article 18 GC III. It adds that:

Captured enemy military objects (with the exceptions of means of identification, cultural property, medical and religious objects and those necessary for the feeding, clothing and protection of captured enemy personnel) *de facto* become war booty (e.g. arms, combat transports and vehicles). They may be used without restriction, and there exists a well established custom according to which all public property which may be used for military operations (arms, ammunitions, military material, etc.) which is captured must not be given back to the adversary.¹⁸

17. Germany's Military Manual states that:

Movable government property which may be used for military purposes shall become the property of the occupying state. . . Upon seizure it shall, without any compensation, become the property of the occupying state. Such property includes, for instance, means of transport, weapons, and food supplies. . . The latter shall not be requisitioned unless the requirements of the civilian population have been taken into account. . . The requirements of the civilian population shall be satisfied first.¹⁹

The manual further states that:

Prisoners of war shall be disarmed and searched. Their military equipment and military documents shall be taken away from them. . .

Prisoners of war shall keep all effects and articles of personal use, their metal helmets and NBC protective equipment as well as all effects and articles used for their clothing and feeding. . . Prisoners of war shall keep their badges of rank and nationality, their decorations and articles of personal or sentimental value.²⁰

¹⁶ Canada, *Code of Conduct* (2001), Rule 5, § 5 and Rule 6, § 5.

¹⁷ Dominican Republic, *Military Manual* (1980), p. 8.

¹⁸ France, *LOAC Manual* (2001), p. 48.

¹⁹ Germany, *Military Manual* (1992), § 556, see also § 448 (downed aircraft becoming spoils of war) and § 1021 (seizure of military aircraft).

²⁰ Germany, *Military Manual* (1992), §§ 706 and 707.

18. Hungary's Military Manual states that "captured enemy military property becomes war booty and the property of the captor".²¹

19. Israel's Manual on the Laws of War states that "it is prohibited to take away prisoners' personal effects and especially their identity papers, as well as the self-defense equipment (except weapons) issued to them by their army (gas masks, plastic sheets, steel helmets)".²² It also provides that:

Over the years, the weapons arsenal of the IDF has grown as a result of capturing spoils courtesy of the Arab armies. Some of them, such as the RPG and Kalashnikov, the T-54, 'Ziel' trucks and 130 mm guns were even introduced into operational use in the IDF.

Other interesting items include an Iraqi MIG 21 plane, whose pilot defected to Israel, and guns captured in the Yom Kippur War and subsequently directed against the Egyptians. The crowning achievement was the case involving the capture of an Egyptian radar coach in the War of Attrition, brought intact to Israel.

One must distinguish between looting and taking spoils of war. Seized weapons, facilities, and property belonging to the enemy's army or state become the property of the seizing state.²³

20. Kenya's LOAC Manual states, with regard to captured enemy combatants and military objects, that:

Disarming comprises the search for and the taking away of equipment and documents of military value (e.g. ammunition, maps, orders, telecommunication material and codes). Such equipment and documents become war booty.

A POW is entitled to keep his identity card and identity disc, his personal property, decorations, badges of rank, articles of sentimental value and military clothing and protective equipment such as steel helmet, gas mask and NBC clothing. . .

Captured enemy military objects (except means of identification, medical and religious objects and those necessary for clothing, feeding and the protection of captured personnel) become war booty (e.g. objects of military value taken from captured enemy military personnel, other military material such as weapons, transport, store goods). War booty may be used without restriction. It belongs to the capturing Party, not to individual combatants.²⁴

21. Madagascar's Military Manual states that "captured enemy military objects become war booty. War booty may be used without restriction. It belongs to the capturing power and not to individual combatants."²⁵

22. The Military Manual of the Netherlands provides that:

Military material (weapons and ammunition in the first place) and other goods destined for military use (including stored goods) may be captured [as well as] goods of military significance which have been taken from prisoners. Medical goods and goods necessary to feed, clothe and otherwise protect prisoners do not constitute

²¹ Hungary, *Military Manual* (1992), p. 78, see also p. 88.

²² Israel, *Manual on the Laws of War* (1998), p. 52.

²³ Israel, *Manual on the Laws of War* (1998), p. 63.

²⁴ Kenya, *LOAC Manual* (1997), Précis No. 3, pp. 7 and 8.

²⁵ Madagascar, *Military Manual* (1994), Fiche No. 6-SO, § D.

booty. Captured goods belong to the party to the armed conflict which has captured them and not to individual combatants. Captured goods may be used without restriction.²⁶

The manual further provides that “appropriation of personal property of prisoners of war” is an “ordinary breach” of the law of war.²⁷

23. New Zealand’s Military Manual states that “all enemy public movable property captured or found on the battlefield is known as ‘booty’ and becomes the property of the capturing state. Booty includes all articles captured with prisoners of war and not included under the term ‘personal effects’.”²⁸ Furthermore, all personal property, effects and articles of personal use, except vehicles, arms, military equipment and documents, must be left in the possession of prisoners of war. They are also entitled to keep protective gear such as helmets and gas masks, articles used for clothing or feeding, badges of nationality or rank, articles of sentimental value and identity documents.²⁹

24. Nigeria’s Manual on the Laws of War provides that “all articles of personal use and items such as gas masks and steel helmets given to the prisoners of war for self-protection, excluding military equipment and military documents, must be left in their possession”.³⁰

25. Spain’s LOAC Manual states that enemy military objects may be captured and requisitioned. Captured enemy military objects become the property of the captor State and not of individual combatants.³¹

26. Togo’s Military Manual states that “captured enemy military property (with the exceptions of the means of identification, medical and religious objects, . . .) become war booty that can be used without restriction. It belongs to the capturing unit and not to individual combatants.”³²

27. The UK Military Manual specifies that “all articles captured with prisoners of war and not included under the term ‘personal effects’ are known as ‘booty’ and become the property of the enemy government and not of the individuals or unit capturing them”.³³ It also provides that:

Public enemy property found or captured on a battlefield becomes, as a general rule, the property of the opposing belligerent. Private enemy property on the battlefield is not (as it was in former times) in every case booty. Arms and ammunition and military equipment and papers are booty, even if they are the property of individuals, but cash, jewellery, and other private articles of value are not.³⁴

²⁶ Netherlands, *Military Manual* (1993), p. IV-5.

²⁷ Netherlands, *Military Manual* (1993), p. IX-6.

²⁸ New Zealand, *Military Manual* (1992), § 526, see also §§ 715 and 920(3) (capture of enemy military aircraft and auxiliaries outside neutral jurisdiction) and § 1334.

²⁹ New Zealand, *Military Manual* (1992), § 527, see also § 920(1).

³⁰ Nigeria, *Manual on the Laws of War* (undated), § 39.

³¹ Spain, *LOAC Manual* (1996), Vol. I, § 7.3.b.(3).

³² Togo, *Military Manual* (1996), Fascicule II, p. 13.

³³ UK, *Military Manual* (1958), § 142. ³⁴ UK, *Military Manual* (1958), § 615.

28. The UK LOAC Manual states that:

PWs should be searched and disarmed and their military papers and equipment removed.

... A PW is entitled to keep his identity card, his personal property, decorations, badges of rank, articles of sentimental value and military clothing and protective equipment such as steel helmets, gas masks and NBC clothing.³⁵

29. The US Field Manual, in a paragraph entitled "Booty of war", provides that:

All enemy public movable property captured or found on a battlefield becomes the property of the capturing State... Enemy private movable property, other than arms, military papers, horses, and the like captured or found on a battlefield, may be appropriated only to the extent that such taking is permissible in occupied areas.³⁶

Concerning the property of prisoners, the manual specifies that:

All effects and articles of personal use, except arms, horses, military equipment and military documents, shall remain in the possession of prisoners of war, likewise their metal helmets and gas masks and like articles issued for personal protection. Effects and articles used for their clothing or feeding shall likewise remain in their possession, even if such effects and articles belong to their regular military equipment.³⁷

30. The US Soldier's Manual states that:

After you have secured, silenced, and segregated captives, you may search them for items of military or intelligence value only, such as weapons, maps, or military documents. Do not take protective items, such as gas masks, mosquito nets, or parkas; or personal items of no military value such as jewelry, photos, or medals from captured or detained personnel.³⁸

31. The US Instructor's Guide provides that:

[Prisoners of war] are entitled to retain most of [their] personal property. The conventions provide that all effects and articles of personal use, except arms, military equipment, and military documents, must remain in the possession of the prisoner unless he could use them to harm himself or others. Articles issued for the prisoner's personal protection, such as gas masks and metal helmets, may also be retained by him.³⁹

32. The US Rules of Engagement for Operation Desert Storm states that "the taking of war trophies [is] prohibited".⁴⁰

³⁵ UK, *LOAC Manual* (1981), Section 8, p. 29, §§ 10 and 11.

³⁶ US, *Field Manual* (1956), § 59(a) and (b), see also § 396.

³⁷ US, *Field Manual* (1956), § 94, see also § 59(c).

³⁸ US, *Soldier's Manual* (1984), p. 19. ³⁹ US, *Instructor's Guide* (1985), p. 11.

⁴⁰ US, *Rules of Engagement for Operation Desert Storm* (1991), Point F.

National Legislation

33. Bangladesh's International Crimes (Tribunal) Act states that the "violation of any humanitarian rules applicable in armed conflicts laid down in the Geneva Conventions of 1949" is a crime.⁴¹

34. Ireland's Geneva Conventions Act as amended provides that any "minor breach" of the Geneva Conventions, including violations of Article 18 GC III, is a punishable offence.⁴²

35. Italy's Law of War Decree provides that enemy military aircraft are subject to capture and confiscation.⁴³

36. Mexico's Code of Military Justice as amended punishes "anyone who improperly appropriates objects belonging to the booty of war".⁴⁴

37. Norway's Military Penal Code as amended punishes any "combatant who arbitrarily (in his own self-interest) seeks to take booty", as well as "anyone who contravenes or is accessory to the contravention of provisions relating to the protection of persons or property laid down in . . . the Geneva Conventions of 12 August 1949".⁴⁵

38. The Articles of War of the Philippines states that:

Any person subject to military law who buys, sells, trades, or in any way deals in or disposes of captured or abandoned property, whereby he shall receive or expect any profit, benefit, or advantage to himself or to any other person directly or indirectly connected with himself or who fails whenever such property comes into his possession or custody or within his control to give notice thereof to the proper authority and to turn over such property to the proper authority without delay, shall, on conviction thereof, be punished by fine or imprisonment.⁴⁶

National Case-law

39. In the *Al-Nawar case* before Israel's High Court in 1985, Judge Shamgar held that:

All movable State property captured on the battlefield may be appropriated by the capturing belligerent State as booty of war, this includes arms and ammunition, depots of merchandise, machines, instruments and even cash.

All private property actually used for hostile purposes found on the battlefield or in a combat zone may be appropriated by a belligerent State as booty of war.⁴⁷

40. The Report on UK Practice refers to a letter from a UK army lawyer which noted that UK courts-martial were held following the Gulf War for the smuggling of AK-47s.⁴⁸

⁴¹ Bangladesh, *International Crimes (Tribunal) Act* (1973), Section 3(2)(e).

⁴² Ireland, *Geneva Conventions Act as amended* (1962), Section 4(1) and (4).

⁴³ Italy, *Law of War Decree* (1938), Article 239.

⁴⁴ Mexico, *Code of Military Justice as amended* (1933), Article 336(I).

⁴⁵ Norway, *Military Penal Code as amended* (1902), §§ 106 and 108(a).

⁴⁶ Philippines, *Articles of War* (1938), Article 81.

⁴⁷ Israel, High Court, *Al-Nawar case*, Judgement, 11 August 1985.

⁴⁸ Report on UK Practice, 1997, Letter from an army lawyer, 24 February 1998, Answers to additional questions on Chapter 2.3.

41. In the *Morrison case* in 1974, the US Court of Claims denied a claim of a former soldier who had discovered \$50,000 in an area abandoned by the enemy. The Court held that the soldier had taken possession of the money solely as an agent of the US and had no legal basis to claim its return.⁴⁹

42. Smith reported that, in the *Le Havre Currency case*, a German military garrison commander had the authority to draw upon the local branch of the Bank of France for funds, the normal limit being 100,000,000 francs a month. When the town was cut off by the Allied advance, the commander persuaded the bank manager to grant a large overdraft. It is doubtful whether the manager had much of an option in the matter, but there was at least formal consent and a receipt was given. Under this arrangement, a sum of 300,000,000 francs was withdrawn. When surrender became imminent, a sum of 195,000,000 francs was returned to the bank, and the remainder, some 37,250,000 francs was packed in bags for return. Le Havre was captured by assault before this money was in fact returned to the bank and the bags were found in a tunnel. Further sums amounting to over 15,000,000 francs were found in various safes. It was ruled that the captured currency was booty of war, and not the property of the bank. Whether the transaction may be regarded as a money contribution or as an overdraft, in either case its legal result was to create a debt due by the German government to the Bank of France. The actual money became the property of the Reich as soon as it was handed over to the German authorities and it remained German State property until it was returned to the bank. The fact that the commander intended to return the money and had begun to do so did not change this.⁵⁰

43. Smith reported that, in the *Cigars Captured in Hapert case*, a German firm delivered to a Dutch manufacturer a large quantity of leaf tobacco to be made into cigars for the German forces. No payment for the leaf tobacco was made by the manufacturer. When the factory was overrun, some 2,000,000 cigars were found ready for dispatch and enough leaf tobacco remained for 5,000,000 more. In this case, both the manufactured cigars and the leaf tobacco were clearly booty of war. The legal position of the manufacturer was that of a workman who had been employed to work upon German materials for German use.⁵¹

44. Smith reported that during the Second World War, the Germans frequently supplied seed to Dutch farmers to raise crops for consumption by the German army or civilian population. It was ruled that in no circumstances could growing crops be treated as booty of war. Only crops that had been requisitioned by the Germans could be seized as booty of war.⁵²

Other National Practice

45. The Report on UK Practice refers to a letter from a UK army lawyer which noted that:

⁴⁹ US, Court of Claims, *Morrison case*, Judgement, 20 February 1974.

⁵⁰ H. A. Smith, *Booty of War, BYIL*, Vol. XXIII, 1946, pp. 232–234.

⁵¹ H. A. Smith, *Booty of War, BYIL*, Vol. XXIII, 1946, pp. 232–234.

⁵² H. A. Smith, *Booty of War, BYIL*, Vol. XXIII, 1946, pp. 232–234.

The current view seems to be that units may lawfully seize enemy property *on the battlefield* and retain it as booty, but individuals doing the same run the risk of being charged with looting. Retention by units and formations of booty is subject to approval by Government whereas appropriation of property by individuals on the battlefield is strictly illegal.⁵³ [emphasis in original]

III. Practice of International Organisations and Conferences

46. No practice was found.

IV. Practice of International Judicial and Quasi-judicial Bodies

47. No practice was found.

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

48. To fulfil its task of disseminating IHL, the ICRC has delegates around the world teaching armed and security forces that:

Captured enemy military objects (except means of identification, medical and religious objects and those necessary for clothing, feeding and the protection of captured personnel) become war booty (e.g. objects of military value taken from captured enemy military personnel, other military material such as weapons, transports, store goods).

War booty may be used without restriction. It belongs to the capturing party, not to individual combatants.⁵⁴

VI. Other Practice

49. No practice was found.

B. Seizure and Destruction of Property in Case of Military Necessity

I. Treaties and Other Instruments

Treaties

50. Under Article 23(g) of the 1899 HR, it is especially prohibited “to destroy or seize the enemy’s property, unless such destruction or seizure be imperatively demanded by the necessities of war”.

51. Under Article 23(g) of the 1907 HR, it is especially forbidden “to destroy or seize the enemy’s property, unless such destruction or seizure be imperatively demanded by the necessities of war”.

⁵³ Report on UK Practice, 1997, Letter from an army lawyer, 24 February 1998, Answers to additional questions on Chapter 2.3.

⁵⁴ Frédéric de Mulinen, *Handbook on the Law of War for Armed Forces*, ICRC, Geneva, 1987, § 526.

52. Article 6(b) of the 1945 IMT Charter (Nuremberg) lists “wanton destruction of cities, towns or villages, or devastation not justified by military necessity” as a war crime.

53. Articles 50 GC I, 51 GC II and 147 GC IV provide that “extensive destruction and appropriation of property, not justified by military necessity and carried out unlawfully and wantonly” are grave breaches.

54. Article 53 GC IV stipulates that:

Any destruction by the Occupying Power of real or personal property belonging individually or collectively to private persons, or to the State, or to other public authorities, or to social or cooperative organizations, is prohibited, except where such destruction is rendered absolutely necessary by military operations.

55. Under Article 8(2)(a)(iv) of the 1998 ICC Statute, “extensive destruction and appropriation of property, not justified by military necessity and carried out unlawfully and wantonly” is a war crime in international armed conflicts. Under Article 8(2)(b)(xiii), “destroying or seizing the enemy’s property unless such destruction or seizure be imperatively demanded by the necessities of war” is also a war crime in international armed conflicts.

56. Under Article 8(2)(e)(xii) of the 1998 ICC Statute, “destroying or seizing the property of an adversary unless such destruction or seizure be imperatively demanded by the necessities of the conflict” is a war crime in non-international armed conflicts.

Other Instruments

57. Article 15 of the 1863 Lieber Code states that “military necessity . . . allows of all destruction of property”.

58. Article 16 of the 1863 Lieber Code states that “military necessity . . . does not admit . . . of the wanton devastation of a district”.

59. Article 44 of the 1863 Lieber Code provides that “all destruction of property not commanded by the authorized officer . . . are prohibited under the penalty of death, or such other severe punishment as may seem adequate for the gravity of the offense.”

60. Article 13(g) of the 1874 Brussels Declaration prohibits “any destruction or seizure of the enemy’s property that is not imperatively demanded by the necessity of war”.

61. Article 18 of the 1913 Oxford Manual of Naval War provides that “it is forbidden to destroy enemy property, except in the cases where such destruction is imperatively required by the necessities of war”.

62. Based on several documents supplying evidence of outrages committed during the First World War, the 1919 Report of the Commission on Responsibility lists violations of the laws and customs of war which should be subject to criminal prosecution, including “confiscation of property” and “wanton devastation and destruction of property”.

63. Article II(1)(b) of the 1945 Allied Control Council Law No. 10 listed the “wanton destruction of cities, towns or villages, or devastation not justified by military necessity” as a war crime.

64. Principle VI(b) of the 1950 Nuremberg Principles adopted by the ILC provides that “wanton destruction of cities, towns, or villages, or devastation not justified by military necessity” is a war crime.

65. Pursuant to Article 22(2)(e) of the 1991 ILC Draft Code of Crimes against the Peace and Security of Mankind, “large-scale destruction of civilian property” is an “exceptionally serious war crime”.

66. Article 2(d) of the 1993 ICTY Statute gives the Tribunal jurisdiction over grave breaches of the Geneva Conventions, including “extensive destruction and appropriation of property, not justified by military necessity and carried out unlawfully and wantonly”. Article 3(b) also gives also the Tribunal jurisdiction over violations of the laws and customs of war, including “wanton destruction of cities, towns or villages, or devastation not justified by military necessity”.

67. Article 20(a)(iv) of the 1996 ILC Draft Code of Crimes against the Peace and Security of Mankind provides that “extensive destruction and appropriation of property, not justified by military necessity and carried out unlawfully and wantonly” is a war crime. In addition, Article 20(e)(ii) defines “wanton destruction of cities, towns or villages, or devastation not justified by military necessity” as a war crime.

68. The 2000 UNTAET Regulation No. 2000/15 establishes panels with exclusive jurisdiction over serious criminal offences, including war crimes. According to Section 6(1)(a)(iv), “extensive destruction and appropriation of property, not justified by military necessity and carried out unlawfully and wantonly” is a war crime in international armed conflicts. According to Section 6(1)(b)(xiii), “destroying or seizing the enemy’s property unless such destruction or seizure be imperatively demanded by the necessities of war” is also a war crime in international armed conflicts.

69. The 2000 UNTAET Regulation No. 2000/15 establishes panels with exclusive jurisdiction over serious criminal offences, including war crimes. According to Section 6(1)(e)(xii), “destroying or seizing the property of an adversary unless such destruction or seizure be imperatively demanded by the necessities of the conflict” is a war crime in non-international armed conflicts.

II. National Practice

Military Manuals

70. Argentina’s Law of War Manual (1969) states that “the destruction of enemy property shall be permissible, as required by military operations”.⁵⁵ It adds that it is prohibited “to appropriate immovable enemy property, except when the

⁵⁵ Argentina, *Law of War Manual* (1969), § 1.018.

appropriation is strictly necessary for reasons of military necessity".⁵⁶ With regard to occupied territory, the manual provides that:

Any destruction by the Occupying Power of real or personal property belonging individually or collectively to private persons, or to the State, or to other public authorities, or to social or cooperative organizations, is prohibited, except where such destruction is rendered absolutely necessary by military operations.⁵⁷

71. Argentina's Law of War Manual (1989) provides that "extensive destruction and appropriation of property not justified by military necessity and carried out unlawfully and wantonly" are grave breaches of the Geneva Conventions and war crimes.⁵⁸

72. Australia's Commanders' Guide states that "the destruction or seizure of civilian property, whether it belongs to private individuals or the State, is forbidden unless the damage or seizure is imperative for military purposes".⁵⁹ It further states that "the following examples constitute grave breaches or serious war crimes likely to warrant institution of criminal proceedings: . . . extensive destruction and appropriation of property which is not justified by military necessity and which is carried out unlawfully and wantonly".⁶⁰

73. Australia's Defence Force Manual states that "the destruction or seizure of civilian property, whether it belongs to private individuals or to the state, to other public authorities or to social or cooperative organisations, is permitted if imperative for military purposes. Otherwise such action is forbidden."⁶¹ As a general rule, "it is forbidden to destroy or requisition enemy property unless it is militarily necessary to do so".⁶² The manual further states that "the following examples constitute grave breaches or serious war crimes likely to warrant institution of criminal proceedings: . . . extensive destruction and appropriation of property which is not justified by military necessity and which is carried out unlawfully and wantonly".⁶³

74. Belgium's Law of War Manual provides that "extensive destruction or appropriation of property not justified by military necessity and carried out unlawfully and wantonly" is a grave breach of the Geneva Conventions and a war crime.⁶⁴

75. Belgium's Teaching Manual for Soldiers states that "civilian property is, in principle, not to be destroyed except as strictly necessary to the execution of the mission".⁶⁵

⁵⁶ Argentina, *Law of War Manual* (1969), § 1.019.

⁵⁷ Argentina, *Law of War Manual* (1969), § 5.013.

⁵⁸ Argentina, *Law of War Manual* (1989), § 8.03.

⁵⁹ Australia, *Commanders' Guide* (1994), § 966.

⁶⁰ Australia, *Commanders' Guide* (1994), § 1305(c).

⁶¹ Australia, *Defence Force Manual* (1994), § 740.

⁶² Australia, *Defence Force Manual* (1994), § 923.

⁶³ Australia, *Defence Force Manual* (1994), § 1315(c).

⁶⁴ Belgium, *Law of War Manual* (1983), p. 55.

⁶⁵ Belgium, *Teaching Manual for Soldiers* (undated), p. 7, see also p. 21.

76. Benin's Military Manual provides that "destruction not motivated by military necessity is . . . prohibited".⁶⁶ It further emphasises that "the combatant must . . . limit destruction according to the necessities of the mission".⁶⁷

77. Cameroon's Instructors' Manual provides that the destruction or seizure of property is prohibited except in case of imperative military necessity.⁶⁸

78. Canada's LOAC Manual states that "the destruction or seizure of enemy property, whether it belongs to private individuals or to the state, is forbidden unless the damage or seizure is imperatively demanded by the necessities of war".⁶⁹ It also provides that, in occupied territory:

Destruction is the partial or total damage of property. Property of any type of ownership may be damaged when such is necessary to, or results from, military operations either during or preparatory to combat. Destruction is forbidden except where there is some reasonable connection between the destruction of the property and the overcoming of the enemy forces.⁷⁰

The manual further states that "destroying or seizing enemy property, unless imperatively demanded by the necessities of war," constitutes a war crime.⁷¹ It also states that "extensive destruction and appropriation of property, not justified by military necessity and carried out unlawfully and wantonly," are grave breaches of the Geneva Conventions and war crimes.⁷²

79. Canada's Code of Conduct provides for respect for civilian property. It states that:

Military necessity may sometimes require the destruction of some civilian property in order to conduct operations. This destruction should not be done needlessly. The wanton destruction, theft or confiscation of civilian property is prohibited and is an offence under the Code of Service Discipline.⁷³

80. Under Colombia's Directive on IHL, "extensive destruction and appropriation of property, when not justified by military necessity and executed unlawfully and wantonly," is a punishable offence.⁷⁴

81. Croatia's Commanders' Manual provides that "destruction not required by the mission . . . is prohibited".⁷⁵

82. The Military Manual of the Dominican Republic instructs soldiers as follows:

The laws [of war] require that you do not cause more destruction than necessary to accomplish your mission . . . Don't destroy an entire town or village to stop sniper

⁶⁶ Benin, *Military Manual* (1995), Fascicule III, p. 4.

⁶⁷ Benin, *Military Manual* (1996), Fascicule I, p. 17, see also Fascicule II, p. 18.

⁶⁸ Cameroon, *Instructors' Manual* (1992), p. 90, § 223.

⁶⁹ Canada, *LOAC Manual* (1999), p. 6-5, § 47.

⁷⁰ Canada, *LOAC Manual* (1999), p. 12-8, § 68.

⁷¹ Canada, *LOAC Manual* (1999), p. 16-3, § 20(g).

⁷² Canada, *LOAC Manual* (1999), p. 16-2, §§ 8(a) and 12.

⁷³ Canada, *Code of Conduct* (2001), Rule 4, § 5.

⁷⁴ Colombia, *Directive on IHL* (1993), Section III(D).

⁷⁵ Croatia, *Commanders' Manual* (1992), § 18.

fire from a single building. Use only that firepower necessary to neutralise the sniper.⁷⁶

The manual also provides that “unnecessary destruction of property [is a violation] of the law of war for which you can be prosecuted”.⁷⁷

83. Ecuador’s Naval Manual provides that “the following acts constitute war crimes: . . . wanton destruction of cities, towns, and villages [and] devastation not justified by the requirements of military operations”.⁷⁸

84. France’s Disciplinary Regulations as amended states that, under international conventions, “any wanton destruction” is prohibited.⁷⁹

85. France’s LOAC Summary Note provides that “destructions not required by the mission . . . are forbidden”.⁸⁰ It adds that “extensive destruction and appropriation of property not justified by military necessities and carried out unlawfully and wantonly” are grave breaches of the law of war and war crimes.⁸¹

86. France’s LOAC Teaching Note provides that “destruction not required by the mission is forbidden”.⁸² It further states that “extensive destruction and appropriation of property not justified by military necessity and carried out unlawfully and wantonly” are grave breaches of the law of armed conflict and war crimes.⁸³

87. France’s LOAC Manual states that “extensive destruction or appropriation of property, not justified by military necessity, and carried out unlawfully and wantonly” is a war crime for which there is no statute of limitation under the 1998 ICC Statute.⁸⁴

88. Germany’s Military Manual states that “the Hague Regulations . . . prohibit the destruction or seizure of enemy property, ‘unless such destruction or seizure be imperatively demanded by the necessity of war’”.⁸⁵ The manual further states that “grave breaches of international humanitarian law are in particular: . . . destruction or appropriation of goods, carried out unlawfully and wantonly without any military necessity”.⁸⁶

89. Indonesia’s Directive on Human Rights in Irian Jaya and Maluku gives the following instructions: “Do not be involved in or permit the unnecessary destruction of property” and “Do not destroy anything which is not related closely to the primary objective of the operation”.⁸⁷

90. Israel’s Manual on the Laws of War states that “unnecessary destruction of enemy property is forbidden . . . The only restriction is to refrain from destroying property senselessly, where there is no military justification.”⁸⁸

⁷⁶ Dominican Republic, *Military Manual* (1980), pp. 3–4.

⁷⁷ Dominican Republic, *Military Manual* (1980), p. 9.

⁷⁸ Ecuador, *Naval Manual* (1989), § 6.2.5(6).

⁷⁹ France, *Disciplinary Regulations as amended* (1975), Article 9 bis (2).

⁸⁰ France, *LOAC Summary Note* (1992), § 1.7.

⁸¹ France, *LOAC Summary Note* (1992), § 3.4.

⁸² France, *LOAC Teaching Note* (2000), p. 2.

⁸³ France, *LOAC Teaching Note* (2000), p. 7.

⁸⁴ France, *LOAC Manual* (2001), p. 45.

⁸⁵ Germany, *Military Manual* (1992), § 132.

⁸⁶ Germany, *Military Manual* (1992), § 1209.

⁸⁷ Indonesia, *Directive on Human Rights in Irian Jaya and Maluku* (1995), § 9.

⁸⁸ Israel, *Manual on the Laws of War* (1998), p. 62.

91. Italy's IHL Manual states that "it is specifically prohibited . . . to destroy or seize enemy property, unless it is imperatively demanded by the necessities of war".⁸⁹ The manual further states that "purposeless destruction of houses and devastation not justified by military necessity" constitute war crimes.⁹⁰ It also states that the occupying State has the obligation "not to destroy movable and immovable property belonging to private persons, to the occupied State and other public organisations or cooperatives . . . except in case of absolute military necessity".⁹¹

92. Italy's LOAC Elementary Rules Manual provides that "superfluous destruction . . . is prohibited".⁹² It also instructs troops, as a rule for behaviour in action, to "restrict destruction to what your mission requires".⁹³

93. Kenya's LOAC Manual provides that "civilian property is not to be destroyed except when this is strictly necessary for the execution of the mission".⁹⁴ It also states that "it is forbidden to destroy or requisition enemy property unless it is militarily necessary to do so".⁹⁵

94. Under South Korea's Military Regulation 187, meaningless destruction is a war crime.⁹⁶

95. Lebanon's Army Regulations and Field Manual prohibit destruction which is not rendered necessary by military operations.⁹⁷

96. Madagascar's Military Manual states that destruction which is not required by the mission is prohibited.⁹⁸

97. The Military Manual of the Netherlands considers that "extensive destruction and appropriation of property not justified by military necessity and carried out unlawfully and wantonly" is a grave breach of the Geneva Conventions.⁹⁹ It adds that "the damaging of a civilian object without necessity" is an "ordinary breach" of the law of war.¹⁰⁰

98. New Zealand's Military Manual provides that "the destruction or seizure of enemy property, whether it belongs to private individuals or to the State, is forbidden unless the damage or seizure is imperatively demanded by the necessities of war".¹⁰¹ The manual further states that "extensive destruction and appropriation of property, not justified by military necessity and carried out unlawfully and wantonly," is a grave breach of the Geneva Conventions and a war crime.¹⁰² It also states that "destroying or seizing enemy property, unless

⁸⁹ Italy, *IHL Manual* (1991), Vol. I, § 8(8).

⁹⁰ Italy, *IHL Manual* (1991), Vol. I, § 84.

⁹¹ Italy, *IHL Manual* (1991), Vol. I, § 48(12).

⁹² Italy, *LOAC Elementary Rules Manual* (1991), § 18.

⁹³ Italy, *LOAC Elementary Rules Manual* (1991), § 29.

⁹⁴ Kenya, *LOAC Manual* (1997), Précis No. 2, p. 15.

⁹⁵ Kenya, *LOAC Manual* (1997), Précis No. 4, p. 3.

⁹⁶ South Korea, *Military Regulation 187* (1991), Article 4.2.

⁹⁷ Lebanon, *Army Regulations* (1971), § 17; *Field Manual* (1996), § 8.

⁹⁸ Madagascar, *Military Manual* (1994), Fiche No. 3-O, § 18.

⁹⁹ Netherlands, *Military Manual* (1993), pp. IX-4 and IX-5.

¹⁰⁰ Netherlands, *Military Manual* (1993), p. IX-6.

¹⁰¹ New Zealand, *Military Manual* (1992), § 525.

¹⁰² New Zealand, *Military Manual* (1992), §§ 1701(1) and 1702(1).

imperatively demanded by the necessities of war" constitutes a war crime.¹⁰³ In addition, in the case of occupied territory, the manual states that:

Destruction of property may be partial or total. Property of any type of ownership may be damaged, when this is necessary to, or results from, military operations either during or preparatory to combat. Destruction is forbidden except where there is some reasonable connection between the destruction of the property and the overcoming of the enemy forces.¹⁰⁴

99. Nigeria's Operational Code of Conduct gives the following directive: "No property, building, etc. will be destroyed maliciously".¹⁰⁵

100. Nigeria's Military Manual states that "destruction should be limited to what a particular mission requires".¹⁰⁶ It adds that it is prohibited "to destroy or seize the enemy's property, unless such destruction or seizure be imperatively demanded by the necessity of war".¹⁰⁷

101. Nigeria's Manual on the Laws of War states that "as a rule, extensive destruction of property on enemy territory, whether it is the property of the state or the property of individuals, is forbidden. Destruction is permitted only in case of military necessity."¹⁰⁸ The manual also states that grave breaches of the Geneva Conventions are considered serious war crimes, including "extensive destruction and confiscation of property not justified by military necessity".¹⁰⁹

102. Nigeria's Soldiers' Code of Conduct states that "destruction should be limited to what the particular mission requires".¹¹⁰ It is also prohibited "to destroy or seize the enemy's property, unless such destruction or seizure be imperatively demanded by the necessities of war".¹¹¹

103. Peru's Human Rights Charter of the Security Forces provides that it is forbidden to cause more destruction than is required by the mission.¹¹²

104. The Soldier's Rules of the Philippines instructs soldiers: "Destroy no more than your mission requires."¹¹³

105. Romania's Soldiers' Manual instructs combatants: "Limit destruction to what is required by your mission."¹¹⁴

106. Russia's Military Manual provides that "destruction or seizure of enemy property, unless such actions are required by military necessity," are prohibited methods of warfare.¹¹⁵

¹⁰³ New Zealand, *Military Manual* (1992), § 1704(2)(g).

¹⁰⁴ New Zealand, *Military Manual* (1992), § 1335.

¹⁰⁵ Nigeria, *Operational Code of Conduct* (1967), § 4(f).

¹⁰⁶ Nigeria, *Military Manual* (1994), p. 39, § 5(d).

¹⁰⁷ Nigeria, *Military Manual* (1994), p. 40, § 5(1)(vi).

¹⁰⁸ Nigeria, *Manual on the Laws of War* (undated), § 29.

¹⁰⁹ Nigeria, *Manual on the Laws of War* (undated), § 6.

¹¹⁰ Nigeria, *Soldiers' Code of Conduct* (undated), § 4.

¹¹¹ Nigeria, *Soldiers' Code of Conduct* (undated), § 12(c).

¹¹² Peru, *Human Rights Charter of the Security Forces* (1991), p. 11.

¹¹³ Philippines, *Soldier's Rules* (1989), § 3.

¹¹⁴ Romania, *Soldiers' Manual* (1991), p. 4.

¹¹⁵ Russia, *Military Manual* (1990), § 5(j).

107. Senegal's Disciplinary Regulations states that, under the laws and customs of war, "any wanton destruction" is forbidden.¹¹⁶

108. South Africa's LOAC Manual states that soldiers must "restrict destruction to that required by the mission".¹¹⁷ It also considers "purposeless destruction" and "extensive destruction and appropriation of property, not justified by military necessity and carried out unlawfully and wantonly," to be grave breaches of the Geneva Conventions and war crimes.¹¹⁸

109. Spain's LOAC Manual provides that "destruction and appropriation of civilian property, which are not justified by military necessity or by combat operations, are prohibited".¹¹⁹ It further states that "destruction not required by the mission is prohibited".¹²⁰ The manual also considers the "extensive destruction and appropriation of property not justified by military necessity" to be grave breaches and war crimes.¹²¹

110. Sweden's IHL Manual states that "according to [the 1907 HR], it is prohibited to destroy or confiscate an enemy's belongings so long as this is not absolutely necessary as a consequence of the demands of war".¹²² It adds that, "in most cases, property of importance for the adversary's military operations can be eliminated by destruction or confiscation (= capture)".¹²³ The manual also regards "illegal, extensive and arbitrary destruction and appropriation of property where this is not justified by military necessity" as a grave breach of the Geneva Conventions.¹²⁴

111. Switzerland's Basic Military Manual provides that "it is prohibited to destroy or seize enemy property except in cases where such destruction and seizure are imperatively demanded by the necessities of war".¹²⁵ It adds that "extensive destruction and appropriation of property, not justified by military necessity and carried out unlawfully and wantonly," is a grave breach of the Geneva Conventions and a war crime.¹²⁶

112. Togo's Military Manual provides that "destruction not motivated by military necessity is...prohibited".¹²⁷ It further emphasises that "the combatant must...limit destruction according to the necessities of the mission".¹²⁸

113. The UK Military Manual recalls that "the destruction or seizure of enemy property, whether it belongs to private individuals or to the State, is forbidden

¹¹⁶ Senegal, *Disciplinary Regulations* (1990), Article 34(2).

¹¹⁷ South Africa, *LOAC Manual* (1996), § 25(d).

¹¹⁸ South Africa, *LOAC Manual* (1996), §§ 39(h), 40 and 41.

¹¹⁹ Spain, *LOAC Manual* (1996), Vol. I, § 2.4.b.(1).

¹²⁰ Spain, *LOAC Manual* (1996), Vol. I, § 10.8.b.

¹²¹ Spain, *LOAC Manual* (1996), Vol. I, § 11.8.b.(1).

¹²² Sweden, *IHL Manual* (1991), Section 3.2.1.5, p. 52.

¹²³ Sweden, *IHL Manual* (1991), Section 3.2.1.5, pp. 54 and 55.

¹²⁴ Sweden, *IHL Manual* (1991), Section 4.2, p. 93.

¹²⁵ Switzerland, *Basic Military Manual* (1987), Article 21.

¹²⁶ Switzerland, *Basic Military Manual* (1987), Article 192(d).

¹²⁷ Togo, *Military Manual* (1996), Fascicule III, p. 4.

¹²⁸ Togo, *Military Manual* (1996), Fascicule I, p. 18, see also Fascicule II, p. 18.

unless the damage or seizure is imperatively demanded by the necessities of war".¹²⁹ It also provides that "once a defended locality has surrendered, only such further damage is permitted as is demanded by the exigencies of war, for example, the removal of the fortifications, demolition of military buildings, destruction of stores, and measures for clearing the foreground".¹³⁰ In addition, "extensive destruction and appropriation of property not justified by military necessity and carried out unlawfully and wantonly" constitute grave breaches of the Geneva Conventions and war crimes.¹³¹

114. The UK LOAC Manual provides that "it is forbidden to destroy or requisition enemy property unless it is militarily necessary to do so".¹³² It also contains a rule for non-commissioned officers, stating that "enemy property is not to be taken, damaged or destroyed unless there is a military need to do so".¹³³ With respect to occupied territory, the manual states that "the destruction of property is forbidden except where absolutely necessitated by military operations".¹³⁴

115. The US Field Manual provides that:

The measure of permissible devastation is found in the strict necessities of war. Devastation as an end in itself or as a separate measure of war is not sanctioned by the law of war. There must be some reasonably close connection between the destruction of property and the overcoming of the enemy's army. Thus the rule requiring respect for private property is not violated through damage resulting from operations, movements, or combat activity of the army; that is, real estate may be used for marches, camp sites, construction of field fortifications, etc. Buildings may be destroyed for sanitary purposes or used for shelter for troops, the wounded and sick and vehicles and for reconnaissance, cover, and defense. Fences, woods, crops, buildings, etc., may be demolished, cut down, and removed to clear a field of fire, to clear the ground for landing field, or to furnish building materials or fuel if imperatively needed for the army.¹³⁵

The manual also states that "it is especially forbidden to destroy or seize the enemy's property, unless such destruction or seizure be imperatively demanded by the necessities of war".¹³⁶ It further states that "extensive destruction and appropriation of property, not justified by military necessity and carried out unlawfully and wantonly," is a grave breach of GCI, II and IV and a war crime.¹³⁷ Likewise, the manual states that "in addition to the 'grave breaches' of the Geneva Conventions of 1949, the following acts are representative of violations of the law of war ('war crimes'): . . . purposeless destruction".¹³⁸

¹²⁹ UK, *Military Manual* (1958), § 588, see also § 616.

¹³⁰ UK, *Military Manual* (1958), § 287. ¹³¹ UK, *Military Manual* (1958), § 625(c) and (d).

¹³² UK, *LOAC Manual* (1981), Section 4, p. 15, § 6.

¹³³ UK, *LOAC Manual* (1981), Annex A, p. 46, § 8.

¹³⁴ UK, *LOAC Manual* (1981), Section 9, p. 35, § 12. ¹³⁵ US, *Field Manual* (1956), § 56.

¹³⁶ US, *Field Manual* (1956), § 58, see also § 393 (prohibition of destruction of real or personal private or public property in occupied territory, except when rendered absolutely necessary by military operations).

¹³⁷ US, *Field Manual* (1956), § 502. ¹³⁸ US, *Field Manual* (1956), § 504(j).

116. The US Air Force Pamphlet incorporates the content of Article 23(g) of the 1907 HR, i.e., that “it is especially forbidden . . . to destroy or seize the enemy’s property, unless such destruction or seizure be imperatively demanded by the necessities of war”.¹³⁹ It further states that “in addition to the grave breaches of the Geneva Conventions of 1949, the following acts are representative of situations involving individual criminal responsibility: . . . wilful and wanton destruction and devastation not justified by military necessity”.¹⁴⁰

117. The US Soldier’s Manual gives the following instructions: “Don’t cause destruction beyond the requirement of your mission. Don’t destroy an entire town or village to stop sniper fire from a single building. . . . Limit destruction only to that necessary to accomplish your mission. Avoid unnecessary . . . damage to property.”¹⁴¹ The manual further provides that “unnecessary destruction of property [is a violation] of the law of war for which you can be prosecuted”.¹⁴²

118. The US Instructor’s Guide provides that:

The Hague and the Geneva Conventions and the customary law of war require that American soldiers –

Not inflict unnecessary destruction . . . in accomplishing the military mission.

...

The customary law of war and [the 1907 HR] . . . established definite rules which prohibit the destruction or the seizure of enemy property unless necessary . . .

Any excessive destruction . . . not required to accomplish the objective is illegal as a violation of the law of war . . .

[C]ause no greater destruction of enemy property than necessary to accomplish the military mission.¹⁴³

119. The US Rules of Engagement for Operation Desert Storm reminds troops to “restrict destruction to what your mission requires”.¹⁴⁴

120. The US Naval Handbook considers that “the following acts are representative war crimes: . . . Wanton destruction of cities, towns, and villages or devastation not justified by the requirements of military operations.”¹⁴⁵

National Legislation

121. Argentina’s Draft Code of Military Justice punishes any soldier who “destroys, damages or appropriates, without any military necessity, something which does not belong to him”.¹⁴⁶

122. Under Armenia’s Penal Code, the “wilful destruction or appropriation of property, not justified by military necessity, and carried out unlawfully”,

¹³⁹ US, *Air Force Pamphlet* (1976), § 5-2(b)(1), see also § 14–6(b) (citing Article 53 GC IV which is “comparable to Article 23(g) [of the 1907] HR”).

¹⁴⁰ US, *Air Force Pamphlet* (1976), § 15-3(c)(5).

¹⁴¹ US, *Soldier’s Manual* (1984), p. 8. ¹⁴² US, *Soldier’s Manual* (1984), p. 20.

¹⁴³ US, *Instructor’s Guide* (1985), pp. 4–7.

¹⁴⁴ US, *Rules of Engagement for Operation Desert Storm* (1991), § 4.

¹⁴⁵ US, *Naval Handbook* (1995), § 6.2.5(6).

¹⁴⁶ Argentina, *Draft Code of Military Justice* (1998), Article 293, introducing a new Article 877(5) in the *Code of Military Justice as amended* (1951).

during an armed conflict, constitutes a crime against the peace and security of mankind.¹⁴⁷

123. Australia's War Crimes Act considers "any war crime within the meaning of the instrument of appointment of the Board of Inquiry [set up to investigate war crimes committed by enemy subjects]" as a war crime, including confiscation of property and wanton devastation and destruction of property.¹⁴⁸

124. Australia's Geneva Conventions Act as amended provides that "a person who, in Australia or elsewhere, commits a grave breach of any of the [Geneva] Conventions . . . is guilty of an indictable offence".¹⁴⁹

125. Australia's ICC (Consequential Amendments) Act incorporates in the Criminal Code the war crimes defined in Article 8(2)(a)(iv), (b)(xiii) and (e)(xii) of the 1998 ICC Statute.¹⁵⁰

126. Azerbaijan's Criminal Code (1999) provides that "destroying property unless such destruction is imperatively demanded by war necessity; . . . destroying of [civilian] property, illegal seizure of property under the pretext of military need" constitute war crimes in international and non-international armed conflicts.¹⁵¹

127. Bangladesh's International Crimes (Tribunal) Act states that the "wanton destruction of cities, towns or villages or devastation not justified by military necessity" is a war crime. It adds that the "violation of any humanitarian rules applicable in armed conflicts laid down in the Geneva Conventions of 1949" is a crime.¹⁵²

128. The Geneva Conventions Act of Barbados provides that "a person who commits a grave breach of any of the Geneva Conventions of 1949 . . . may be tried and punished by any court in Barbados that has jurisdiction in respect of similar offences in Barbados as if the grave breach had been committed in Barbados".¹⁵³

129. The Criminal Code of Belarus provides that "the destruction and appropriation of property not justified by military necessity, executed on a large scale, unlawfully and wantonly," is a war crime.¹⁵⁴

130. Belgium's Law concerning the Repression of Grave Breaches of the Geneva Conventions and their Additional Protocols as amended provides that "extensive destruction and appropriation of property not justified by military necessity as permitted by international law and carried out unlawfully and wantonly" constitutes a crime under international law.¹⁵⁵

¹⁴⁷ Armenia, *Penal Code* (2003), Article 390.2(6).

¹⁴⁸ Australia, *War Crimes Act* (1945), Section 3.

¹⁴⁹ Australia, *Geneva Conventions Act as amended* (1957), Section 7(1).

¹⁵⁰ Australia, *ICC (Consequential Amendments) Act* (2002), Schedule 1, §268.29, 268.51 and 268.94.

¹⁵¹ Azerbaijan, *Criminal Code* (1999), Article 116(6) and (11).

¹⁵² Bangladesh, *International Crimes (Tribunal) Act* (1973), Section 3(2)(d) and (e).

¹⁵³ Barbados, *Geneva Conventions Act* (1980), Section 3(2).

¹⁵⁴ Belarus, *Criminal Code* (1999), Article 136(6).

¹⁵⁵ Belgium, *Law concerning the Repression of Grave Breaches of the Geneva Conventions and their Additional Protocols as amended* (1993), Article 1(3)(8).

131. Under the Criminal Code of the Federation of Bosnia and Herzegovina, “property confiscation, . . . [and] illegal and wilful destruction and appropriation of property on a large scale and not justified by military needs” are war crimes.¹⁵⁶ The Criminal Code of the Republika Srpska contains the same provision.¹⁵⁷

132. Botswana’s Geneva Conventions Act punishes “any person, whatever his nationality, who, whether in or outside Botswana, commits, or aids, abets or procures the commission by any other person of, any such grave breach of any of the [Geneva] conventions”.¹⁵⁸

133. Bulgaria’s Penal Code as amended provides that “a person who, in violation of the rules of international law for waging war . . . unlawfully or arbitrarily perpetrates or orders the perpetration of destruction or appropriation of property on a large scale” commits a war crime.¹⁵⁹

134. Under Burundi’s Draft Law on Genocide, Crimes against Humanity and War Crimes, “the extensive destruction and appropriation of property, not justified by military necessity, and carried out unlawfully and wantonly” constitutes a war crime in international armed conflicts.¹⁶⁰ It also adds that “destroying or seizing enemy property, except in case where such destruction or seizure would be imperatively demanded by the necessities of war,” is a war crime in both international and non-international armed conflicts.¹⁶¹

135. Cambodia’s Law on the Khmer Rouge Trial provides that “the Extraordinary Chambers shall have the power to bring to trial all suspects who committed or ordered the commission of grave breaches of the Geneva Convention[s] of 12 August 1949 . . . which were committed during the period from 17 April 1975 to 6 January 1979”.¹⁶²

136. Canada’s Geneva Conventions Act as amended provides that “every person who, whether within or outside Canada, commits a grave breach [of the Geneva Conventions] . . . is guilty of an indictable offence”.¹⁶³

137. Canada’s National Defence Act punishes “every person who . . . without orders from the person’s superior officer, improperly destroys or damages any property”.¹⁶⁴

138. Canada’s Crimes against Humanity and War Crimes Act provides that the war crimes defined in Article 8(2) of the 1998 ICC Statute are “crimes

¹⁵⁶ Bosnia and Herzegovina, Federation, *Criminal Code* (1998), Article 154(1).

¹⁵⁷ Bosnia and Herzegovina, Republika Srpska, *Criminal Code* (2000), Article 433(1).

¹⁵⁸ Botswana, *Geneva Conventions Act* (1970), Section 3(1).

¹⁵⁹ Bulgaria, *Penal Code as amended* (1968), Article 412(f).

¹⁶⁰ Burundi, *Draft Law on Genocide, Crimes against Humanity and War Crimes* (2001), Article 4(A)(d).

¹⁶¹ Burundi, *Draft Law on Genocide, Crimes against Humanity and War Crimes* (2001), Article 4(B)(m) and (D)(l).

¹⁶² Cambodia, *Law on the Khmer Rouge Trial* (2001), Article 6.

¹⁶³ Canada, *Geneva Conventions Act as amended* (1985), Section 3(1).

¹⁶⁴ Canada, *National Defence Act* (1985), Section 77(d).

according to customary international law" and, as such, indictable offences under the Act.¹⁶⁵

139. Chile's Code of Military Justice provides for a prison sentence for "anyone who, contrary to instructions received and uncompelled by the operations of war, destroys lines of communication, telegraphic or other links" and for "military personnel who, failing in the obedience they owe to their superiors, burn or destroy buildings or other property".¹⁶⁶

140. China's Law Governing the Trial of War Criminals provides that "indiscriminate destruction of property" constitutes a war crime.¹⁶⁷

141. The DRC Code of Military Justice as amended, which applies in times of war or in an area where a state of siege or a state of emergency has been proclaimed, punishes any "abusive or illegal requisition, confiscation or spoliation".¹⁶⁸

142. Congo's Genocide, War Crimes and Crimes against Humanity Act defines war crimes with reference to the categories of crimes defined in Article 8 of the 1998 ICC Statute.¹⁶⁹

143. The Geneva Conventions and Additional Protocols Act of the Cook Islands punishes "any person who in the Cook Islands or elsewhere commits, or aids or abets or procures the commission by another person of, a grave breach of any of the [Geneva] Conventions".¹⁷⁰

144. Under Croatia's Criminal Code, "the confiscation of property [and] the unlawful and wanton destruction or large-scale appropriation of property not justified by military necessity" are war crimes.¹⁷¹

145. Cuba's Military Criminal Code punishes "anyone who, in an area of military operations, ... unlawfully destroys ... property under the pretext of military necessity".¹⁷²

146. Cyprus's Geneva Conventions Act punishes "any person who, whatever his nationality, commits in the Republic or outside the Republic, any grave breach or takes part, or assists or incites another person in the commission of grave breaches of the Geneva Conventions".¹⁷³

147. The Czech Republic's Criminal Code as amended punishes "whoever in a theatre of war, on the battlefield or in places affected by military operations ... arbitrarily destroys another person's property or takes it under the pretext of military necessity".¹⁷⁴

¹⁶⁵ Canada, *Crimes against Humanity and War Crimes Act* (2000), Section 4(1) and (4).

¹⁶⁶ Chile, *Code of Military Justice* (1925), Articles 261(2) and 262.

¹⁶⁷ China, *Law Governing the Trial of War Criminals* (1946), Article 3(27).

¹⁶⁸ DRC, *Code of Military Justice as amended* (1972), Article 525.

¹⁶⁹ Congo, *Genocide, War Crimes and Crimes against Humanity Act* (1998), Article 4.

¹⁷⁰ Cook Islands, *Geneva Conventions and Additional Protocols Act* (2002), Section 5(1).

¹⁷¹ Croatia, *Criminal Code* (1997), Article 158(1).

¹⁷² Cuba, *Military Criminal Code* (1979), Article 44(1).

¹⁷³ Cyprus, *Geneva Conventions Act* (1966), Section 4(1).

¹⁷⁴ Czech Republic, *Criminal Code as amended* (1961), Article 264(b).

148. Egypt's Military Criminal Code prohibits wilful destruction of property without the authorisation of an officer.¹⁷⁵

149. El Salvador's Code of Military Justice punishes any "soldier who, in time of international or civil war, burns or destroys ships, aircraft, buildings or other property, when not required by the operations of war".¹⁷⁶

150. Under El Salvador's Penal Code, "wanton destruction of cities or villages, or devastation not justified by military necessity" during an international or a civil war is a crime.¹⁷⁷

151. Under Estonia's Penal Code, "a person belonging to the armed forces or participating in acts of war who destroys or illegally appropriates property on a large scale in a war zone or an occupied territory, whereas such act is not required by military necessity," commits a war crime.¹⁷⁸

152. Under Ethiopia's Penal Code, it is a war crime to organise, order or engage, in time of war, armed conflict or occupation, in "the confiscation of estates, the destruction or appropriation of property" of the civilian population, in violation of the rules of IHL.¹⁷⁹

153. Gambia's Armed Forces Act punishes "every person subject to this Act who . . . without orders from his superior officer, improperly destroys or damages any property".¹⁸⁰

154. Under Georgia's Criminal Code, "extensive destruction or appropriation of property, not justified by military necessity and carried out wantonly," in an international or non-international armed conflict is a crime.¹⁸¹ Furthermore, under the Code, any war crime provided for by the 1998 ICC Statute, which is not explicitly mentioned in the Code, such as "destroying or seizing the enemy's property unless such destruction or seizure be imperatively demanded by the necessities of war" in international or non-international armed conflicts, is also a crime.¹⁸²

155. Germany's Law Introducing the International Crimes Code punishes anyone who, in connection with an international or a non-international armed conflict, "unless this is imperatively demanded by the necessities of the armed conflict, . . . extensively destroys, appropriates or seizes property of the adverse party contrary to international law, such property being in the hands of the perpetrator's party".¹⁸³

156. Ghana's Armed Forces Act punishes "every person subject to the Code of Service Discipline who . . . without orders from his superior officer, improperly destroys or damages any property".¹⁸⁴

¹⁷⁵ Egypt, *Military Criminal Code* (1966), Article 141.

¹⁷⁶ El Salvador, *Code of Military Justice* (1934), Article 68.

¹⁷⁷ El Salvador, *Penal Code* (1997), Article 362.

¹⁷⁸ Estonia, *Penal Code* (2001), § 108.

¹⁷⁹ Ethiopia, *Penal Code* (1957), Article 282(h).

¹⁸⁰ Gambia, *Armed Forces Act* (1985), Section 40(d).

¹⁸¹ Georgia, *Criminal Code* (1999), Article 411(2)(h).

¹⁸² Georgia, *Criminal Code* (1999), Article 413(d).

¹⁸³ Germany, *Law Introducing the International Crimes Code* (2002), Article 1, § 9(1).

¹⁸⁴ Ghana, *Armed Forces Act* (1962), Section 18(d).

157. India's Geneva Conventions Act provides that "if any person within or without India commits or attempts to commit, or abets or procures the commission by any other person of, a grave breach of any of the [Geneva] Conventions he shall be punished".¹⁸⁵

158. Iraq's Military Penal Code punishes "every person who, while unnecessitated by war, damages or destroys movable or immovable property, cuts down trees, destroys agricultural crops, or orders to commit such acts".¹⁸⁶

159. Ireland's Geneva Conventions Act as amended provides that grave breaches of the Geneva Conventions are punishable offences.¹⁸⁷ It adds that any "minor breach" of the Geneva Conventions, including violations of Article 53 GC IV, is also a punishable offence.¹⁸⁸

160. Israel's Nazis and Nazi Collaborators (Punishment) Law punishes persons who have committed war crimes, including "wanton destruction of cities, towns or villages . . . and devastation not justified by military necessity".¹⁸⁹

161. Under Italy's Law of War Decree, it is prohibited "to destroy or seize enemy property, unless it is imperatively demanded by the necessities of war".¹⁹⁰

162. Italy's Wartime Military Penal Code punishes "anyone who, in enemy territory, without being constrained by the necessity of military operations, sets fire to a house, an edifice, or through any other means destroys them".¹⁹¹

163. Jordan's Military Criminal Code punishes "any member [of the armed forces] . . . who intentionally destroys or damages any property without having received the order of his superior officer to do so".¹⁹²

164. Under Jordan's Draft Military Criminal Code, "the destruction or seizure of property, not justified by military necessity and executed in an unlawful and wanton manner", in time of armed conflict is a war crime.¹⁹³

165. Kenya's Geneva Conventions Act punishes "any person, whatever his nationality, who, whether within or outside Kenya commits, or aids, abets or procures the commission by any other person of any grave breach of any of the [Geneva] Conventions".¹⁹⁴

166. Under Latvia's Criminal Code, "the unjustified destruction of cities and other entities" is a war crime.¹⁹⁵

167. Under the Draft Amendments to the Code of Military Justice of Lebanon, "extensive destruction or appropriation of property not justified by military necessity [and carried out] unlawfully and wantonly" constitutes a war crime.¹⁹⁶

¹⁸⁵ India, *Geneva Conventions Act* (1960), Section 3(1).

¹⁸⁶ Iraq, *Military Penal Code* (1940), Article 113.

¹⁸⁷ Ireland, *Geneva Conventions Act as amended* (1962), Section 3(1).

¹⁸⁸ Ireland, *Geneva Conventions Act as amended* (1962), Section 4(1) and (4).

¹⁸⁹ Israel, *Nazis and Nazi Collaborators (Punishment) Law* (1950), Section 1.

¹⁹⁰ Italy, *Law of War Decree* (1938), Article 35(8).

¹⁹¹ Italy, *Wartime Military Penal Code* (1941), Article 187.

¹⁹² Jordan, *Military Criminal Code* (1952), Article 12(2).

¹⁹³ Jordan, *Draft Military Criminal Code* (2000), Article 41(A)(8).

¹⁹⁴ Kenya, *Geneva Conventions Act* (1968), Section 3(1).

¹⁹⁵ Latvia, *Criminal Code* (1998), Section 74.

¹⁹⁶ Lebanon, *Draft Amendments to the Code of Military Justice* (1997), Article 146(8).

168. Under Lithuania's Criminal Code as amended, "confiscation of property, or its extensive appropriation or destruction, unjustified by military necessity" in time of war, armed conflict or occupation is a war crime.¹⁹⁷

169. Under Luxembourg's Law on the Repression of War Crimes, "excessive or unlawful requisitions, confiscations or expropriations" committed in time of war are war crimes.¹⁹⁸

170. Luxembourg's Law on the Punishment of Grave Breaches punishes grave breaches of the Geneva Conventions, including "the extensive destruction or appropriation of property, not justified by military necessity and carried out unlawfully and wantonly" as crimes under international law.¹⁹⁹

171. Malawi's Geneva Conventions Act punishes "any person, whatever his nationality, who, whether within or without Malawi commits or aids, abets or procures the commission by any other person of any such grave breach of any of the [Geneva] Conventions".²⁰⁰

172. Malaysia's Geneva Conventions Act punishes "any person, whatever his citizenship or nationality, who, whether in or outside the Federation, commits, or aids, abets or procures the commission by any other person of any such grave breach of any of the . . . [Geneva] conventions".²⁰¹

173. Malaysia's Armed Forces Act punishes "every person subject to service law under this Act who . . . without orders from his superior officer wilfully destroys or damages any property".²⁰²

174. Under Mali's Penal Code, "the extensive destruction, and appropriation, of property, not justified by military necessity and carried out unlawfully and wantonly", constitutes a war crime.²⁰³ In addition, "destroying or seizing enemy property, except when those destructions or seizures are imperatively demanded by the necessities of war" also constitutes a war crime in international armed conflicts.²⁰⁴

175. The Geneva Conventions Act of Mauritius punishes "any person who in Mauritius or elsewhere commits, or is an accomplice in the commission by another person of, a grave breach of any of the [Geneva] Conventions".²⁰⁵

176. Mexico's Code of Military Justice as amended punishes "anyone who, without being absolutely required by war operations, burns buildings [or] devastates crops".²⁰⁶ It also punishes "anyone who, taking advantage of his own authority or the authority of the armed forces, maliciously and arbitrarily destroys . . . goods or other objects belonging to another person, when it is not required by military operations". The Code further punishes the

¹⁹⁷ Lithuania, *Criminal Code as amended* (1961), Article 336.

¹⁹⁸ Luxembourg, *Law on the Repression of War Crimes* (1947), Article 2(6).

¹⁹⁹ Luxembourg, *Law on the Punishment of Grave Breaches* (1985), Article 1(9).

²⁰⁰ Malawi, *Geneva Conventions Act* (1967), Section 4(1).

²⁰¹ Malaysia, *Geneva Conventions Act* (1962), Section 3(1).

²⁰² Malaysia, *Armed Forces Act* (1972), Section 46(c).

²⁰³ Mali, *Penal Code* (2001), Article 31(d).

²⁰⁴ Mali, *Penal Code* (2001), Article 31(i)(13).

²⁰⁵ Mauritius, *Geneva Conventions Act* (1970), Section 3(1).

²⁰⁶ Mexico, *Code of Military Justice as amended* (1933), Article 209.

“devastation of farms, plantations, agricultural lands, forests or public roads of communication”.²⁰⁷

177. Moldova’s Penal Code punishes “destruction or illegal appropriation of property, under the pretext of war necessity, committed against the population of the area of military operations”.²⁰⁸

178. Mozambique’s Military Criminal Law punishes “anyone who... appropriates or destroys without interest or necessity the property of another”.²⁰⁹

179. The Definition of War Crimes Decree of the Netherlands includes “confiscation of property” and “wanton devastation and destruction of property” in its list of war crimes.²¹⁰

180. Under the International Crimes Act of the Netherlands, it is a crime to commit “in the case of an international armed conflict, one of the grave breaches of the Geneva Conventions”, including “extensive intentional and unlawful destruction and appropriation of goods without military necessity”.²¹¹ Furthermore, “destroying or seizing property of the adversary unless such destruction or seizure be imperatively demanded by the necessities of the conflict” is a crime, whether committed in an international or a non-international armed conflict.²¹²

181. New Zealand’s Geneva Conventions Act as amended provides that “any person who in New Zealand or elsewhere commits, or aids or abets or procures the commission by another person of, a grave breach of any of the [Geneva] Conventions... is guilty of an indictable offence”.²¹³

182. Under New Zealand’s International Crimes and ICC Act, war crimes include the crimes defined in Article 8(2)(a)(iv), (b)(xiii) and (e)(xii) of the 1998 ICC Statute.²¹⁴

183. Nicaragua’s Military Penal Law punishes “anyone who, during military operations, ... destroys or illegally occupies property under the pretext of military necessity”.²¹⁵

184. Nicaragua’s Military Penal Code punishes any “soldier who... without being required by the necessities of war, burns, destroys or seriously damages buildings, ships, aircraft or other non-military enemy property”.²¹⁶ It also punishes any soldier who “unlawfully and without necessity requisitions buildings or movable property located in enemy territory”.²¹⁷

²⁰⁷ Mexico, *Code of Military Justice as amended* (1933), Article 334.

²⁰⁸ Moldova, *Penal Code* (2002), Article 390.

²⁰⁹ Mozambique, *Military Criminal Law* (1987), Article 83(c).

²¹⁰ Netherlands, *Definition of War Crimes Decree* (1946), Article 1.

²¹¹ Netherlands, *International Crimes Act* (2003), Article 5(1)(d).

²¹² Netherlands, *International Crimes Act* (2003), Articles 5(5)(t) and 6(3)(h).

²¹³ New Zealand, *Geneva Conventions Act as amended* (1958), Section 3(1).

²¹⁴ New Zealand, *International Crimes and ICC Act* (2000), Section 11(2).

²¹⁵ Nicaragua, *Military Penal Law* (1980), Article 82.

²¹⁶ Nicaragua, *Military Penal Code* (1996), Article 59.

²¹⁷ Nicaragua, *Military Penal Code* (1996), Article 60(1).

185. According to Niger's Penal Code as amended, "the extensive destruction and appropriation of property, not justified by military necessity as allowed by international law, and carried out unlawfully and wantonly" are war crimes, when such property is protected under the 1949 Geneva Conventions or their Additional Protocols of 1977.²¹⁸

186. Nigeria's Geneva Conventions Act punishes any person who "whether in or outside the Federation, . . . whatever his nationality, commits, or aids, abets or procures any other person to commit any such grave breach of any of the [Geneva] Conventions".²¹⁹

187. Norway's Military Penal Code as amended punishes "anyone who, without necessity, destroys or damages foreign property", as well as "anyone who contravenes or is accessory to the contravention of provisions relating to the protection of persons or property laid down in . . . the Geneva Conventions of 12 August 1949".²²⁰

188. Norway's Act on the Punishment of Foreign War Criminals states that "confiscation of property, requisitioning, imposition of contributions, illegal imposition of fines, and any other form of economic gain illegally acquired by force or threat, are deemed to be crimes against the Civil Criminal Code".²²¹

189. Papua New Guinea's Geneva Conventions Act punishes any "person who, in Papua New Guinea or elsewhere, commits a grave breach of any of the Geneva Conventions".²²²

190. Paraguay's Military Penal Code punishes any soldier who, in time of war, "in a foreign country, without superior order and without being obliged by the necessity of defence, wilfully sets fire to a house or other buildings", as well as any soldier who destroys or damages such objects.²²³ The Code further provides for a prison sentence for any soldier who, "without authorisation or necessity, and in a foreign country, exacts war contributions of any kind".²²⁴

191. Peru's Code of Military Justice provides that it is a punishable offence for a soldier "to destroy without necessity buildings or other property" in time of war.²²⁵

192. Under the War Crimes Trial Executive Order of the Philippines, applicable to acts committed during the Second World War, "wanton destruction of cities, towns or villages [and] devastation not justified by military necessity" are war crimes.²²⁶

²¹⁸ Niger, *Penal Code* as amended (1961), Article 208.3(8).

²¹⁹ Nigeria, *Geneva Conventions Act* (1960), Section 3(1).

²²⁰ Norway, *Military Penal Code as amended* (1902), §§ 103 and 108(a).

²²¹ Norway, *Act on the Punishment of Foreign War Criminals* (1946), Article 2.

²²² Papua New Guinea, *Geneva Conventions Act* (1976), Section 7(2).

²²³ Paraguay, *Military Penal Code* (1980), Articles 282 and 283.

²²⁴ Paraguay, *Military Penal Code* (1980), Article 294.

²²⁵ Peru, *Code of Military Justice* (1980), Article 95(4).

²²⁶ Philippines, *War Crimes Trial Executive Order* (1947), § II(b)(2).

193. Under Portugal's Penal Code, "unjustified appropriation or destruction of property of high value", in time of war, armed conflict or occupation, constitutes a war crime.²²⁷

194. Romania's Penal Code punishes "partial or total destruction or appropriation under any form, unjustified by military necessity and committed on a large scale, of any . . . goods".²²⁸

195. Russia's Decree on the Punishment of War Criminals states that the "German fascist invaders are guilty of . . . barbaric destruction of thousands of towns and villages".²²⁹

196. The Geneva Conventions Act of the Seychelles punishes "any person, whatever his nationality, who whether in or outside Seychelles, commits, or aids, abets or procures the commission by any other person of, any such grave breach of any of the [Geneva] Conventions".²³⁰

197. Singapore's Geneva Conventions Act punishes "any person, whatever his citizenship or nationality, who, whether in or outside Singapore, commits, aids, abets or procures the commission by any other person of any such grave breach of any [Geneva] Convention".²³¹

198. Slovakia's Criminal Code as amended punishes "whoever in a theatre of war, on the battlefield or in places affected by military operations . . . arbitrarily destroys another person's property or takes it under the pretext of military necessity".²³²

199. Under Slovenia's Penal Code, "confiscation of property, . . . unlawful and arbitrary destruction or large-scale appropriation of property not justified by military needs" are war crimes.²³³

200. Spain's Military Criminal Code punishes any soldier who "burns, destroys or severely damages buildings, ships, aircraft or any other enemy property not of a military character, without being required by the necessities of war".²³⁴

201. Spain's Penal Code punishes "anyone who, during an armed conflict, . . . destroys, damages or appropriates, without military necessity, belongings from another person [or] forces someone to surrender such belongings".²³⁵

202. Sri Lanka's Army Act as amended punishes "every person subject to military law who while on active service . . . without orders from his superior officer wilfully destroys or damages any property".²³⁶

²²⁷ Portugal, *Penal Code* (1996), Article 241(1)(h).

²²⁸ Romania, *Penal Code* (1968), Article 359.

²²⁹ Russia, *Decree on the Punishment of War Criminals* (1965), preamble.

²³⁰ Seychelles, *Geneva Conventions Act* (1985), Section 3(1).

²³¹ Singapore, *Geneva Conventions Act* (1973), Section 3(1).

²³² Slovakia, *Criminal Code as amended* (1961), Article 264(b), see also Article 262(2)(a).

²³³ Slovenia, *Penal Code* (1994), Article 374(1).

²³⁴ Spain, *Military Criminal Code* (1985), Article 73.

²³⁵ Spain, *Penal Code* (1995), Article 613(1)(e).

²³⁶ Sri Lanka, *Army Act as amended* (1949), Section 96(b).

203. Sri Lanka's Air Force Act as amended punishes "every person subject to this Act who while on active service . . . without orders from his superior officer wilfully destroys or damages any property".²³⁷

204. Sri Lanka's Draft Geneva Conventions Act provides that "a person, whatever his nationality, who, in Sri Lanka or elsewhere, commits or aids, abets or procures any other person to commit . . . a grave breach of any of the [Geneva] Conventions . . . is guilty of an indictable offence".²³⁸

205. Tajikistan's Criminal Code punishes "extensive destruction and appropriation of property, not justified by military necessity and carried out wantonly," in an international or internal armed conflict, against civilians or the civilian population in the occupied territory or in the combat zone.²³⁹

206. Under Trinidad and Tobago's Draft ICC Act, it is a punishable offence to commit a war crime as defined in Article 8(2)(a)(iv), (b)(xiii) and (e)(xii) of the 1998 ICC Statute.²⁴⁰

207. Uganda's Geneva Conventions Act punishes "any person, whatever his nationality, who, whether within or without Uganda commits or aids, abets or procures the commission by any other person of any grave breach of the [Geneva] Conventions".²⁴¹

208. Uganda's National Resistance Army Statute punishes any "person subject to military law who . . . without orders from his superior officer, improperly destroys or damages any property".²⁴²

209. Under Ukraine's Criminal Code, "unlawful destruction or taking of property under the pretext of military necessity" is a war crime.²⁴³

210. The UK Geneva Conventions Act as amended punishes "any person, whatever his nationality, who, whether in or outside the United Kingdom, commits, or aids, abets or procures the commission by any other person of, a grave breach of any of the [Geneva] conventions".²⁴⁴

211. Under the UK ICC Act, it is a punishable offence to commit a war crime as defined in Article 8(2)(a)(iv), (b)(xiii) and (e)(xii) of the 1998 ICC Statute.²⁴⁵

212. The US Regulations Governing the Trials of Accused War Criminals in the Pacific Region I established military commissions which had jurisdiction over offences such as "wanton destruction of cities, towns or villages" and "devastation, destruction or damage of public or private property not justified by military necessity".²⁴⁶

²³⁷ Sri Lanka, *Air Force Act as amended* (1950), Section 96(b).

²³⁸ Sri Lanka, *Draft Geneva Conventions Act* (2002), Section 3(1)(a).

²³⁹ Tajikistan, *Criminal Code* (1998), Article 403(2)(h).

²⁴⁰ Trinidad and Tobago, *Draft ICC Act* (1999), Section 5(1)(a).

²⁴¹ Uganda, *Geneva Conventions Act* (1964), Section 1(1).

²⁴² Uganda, *National Resistance Army Statute* (1992), Section 35(c).

²⁴³ Ukraine, *Criminal Code* (2001), Article 433(1).

²⁴⁴ UK, *Geneva Conventions Act as amended* (1957), Section 1(1).

²⁴⁵ UK, *ICC Act* (2001), Sections 50(1) and 51(1) (England and Wales) and Section 58(1) (Northern Ireland).

²⁴⁶ US, *Regulations Governing the Trials of Accused War Criminals in the Pacific Region I* (1945), Regulation 5.

- 213.** The US Regulations Governing the Trials of Accused War Criminals in the Pacific Region II established military commissions which had jurisdiction over offences such as “wanton destruction of cities, towns or villages; or devastation not justified by military necessity”.²⁴⁷
- 214.** Under the US War Crimes Act as amended, grave breaches of the Geneva Conventions, as well as violations of Article 23(g) of the 1907 HR, are war crimes.²⁴⁸
- 215.** Uzbekistan’s Criminal Code punishes “the meaningless destruction of towns and inhabited places”.²⁴⁹
- 216.** Vanuatu’s Geneva Conventions Act provides that “any grave breach of the Geneva Conventions that would, if committed in Vanuatu, be an offence under any provision of the Penal Code Act Cap. 135 or any other law shall be an offence under such provision of the Penal Code or any other law if committed outside Vanuatu”.²⁵⁰
- 217.** Venezuela’s Code of Military Justice as amended punishes soldiers who “failing the obedience they owe to their superiors, burn or destroy buildings or other property”.²⁵¹
- 218.** Vietnam’s Penal Code punishes “anyone who exceeds the limits of military necessity in performing a mission and thereby causes serious damage to property of the State, of social organisations or of citizens”.²⁵²
- 219.** Under the Penal Code as amended of the SFRY (FRY), “property confiscation, . . . extensive unlawful and wanton destruction and appropriation of property not justified by military necessity” are war crimes.²⁵³
- 220.** Zimbabwe’s Geneva Conventions Act as amended punishes “any person, whatever his nationality, who, whether in or outside Zimbabwe, commits any such grave breach of [any of the Geneva] Conventions”.²⁵⁴

National Case-law

- 221.** In the *Holstein case* before a French Military Tribunal in 1947, some of the accused, members of various German units, were found guilty of war crimes for having destroyed by arson inhabited buildings. The Tribunal found that there was no necessity to set the houses on fire, as required by Article 23(g) of the 1907 HR. The acts of arson committed were thus not justified by the laws and customs of war.²⁵⁵

²⁴⁷ US, *Regulations Governing the Trials of Accused War Criminals in the Pacific Region II* (1945), Regulation 2(b).

²⁴⁸ US, *War Crimes Act as amended* (1996), § 2441(c)(1) and (2).

²⁴⁹ Uzbekistan, *Criminal Code* (1994), Article 152.

²⁵⁰ Vanuatu, *Geneva Conventions Act* (1982), Section 4(1).

²⁵¹ Venezuela, *Code of Military Justice as amended* (1998), Article 474(17).

²⁵² Vietnam, *Penal Code* (1990), Article 274.

²⁵³ SFRY (FRY), *Penal Code as amended* (1976), Article 142(1).

²⁵⁴ Zimbabwe, *Geneva Conventions Act as amended* (1981), Section 3(1).

²⁵⁵ France, Permanent Military Tribunal at Dijon, *Holstein case*, Judgement, 3 February 1947.

222. In the *General Devastation case* before a German court in 1947, a German officer who gave the order that on the approach of the Soviet army any valuable machinery in mills appropriated by Germany in occupied territories was to be destroyed was found guilty of a war crime when one of the factories in question was destroyed by fire. The court stated that "his conduct may be regarded as a war crime in the meaning of Article II(I)(b) of [the 1945 Allied] Control Council Law No. 10. In that paragraph acts of devastation which are not justified by military necessity, are described as war crimes."²⁵⁶

223. In the *Al-Nawar case* before Israel's High Court in 1985, Judge Shamgar held that Article 23(g) of the 1907 HR "does not accord protection to property used for hostile purposes. Such property enjoys protection from arbitrary destruction, but it is still subject to the enemy's right of appropriation as booty."²⁵⁷

224. In its judgement in the *Wingten case* in 1949, the Special Court of Cassation of the Netherlands found the accused, a member of the German security forces in occupied Netherlands, guilty of the war crime of "devastation not justified by military necessity" as contained in Article 6(b) of the 1945 IMT Charter, for the arson of several houses near Amsterdam.²⁵⁸

225. In the *List (Hostages Trial) case* before the US Military Tribunal at Nuremberg in 1948, the accused, high-ranking officers in the German army, were charged with war crimes, *inter alia*, for wanton destruction of cities, towns and villages and other acts of devastation for which there was no military necessity. In its judgement, the Tribunal stated that:

Military necessity has been invoked by the defendants as justifying . . . the destruction of villages and towns in the occupied territory. Military necessity permits a belligerent, subject to the laws of war, to apply any amount and kind of force to compel the complete submission of the enemy with the least possible expenditure of time, life and money. In general, it sanctions measures by an occupant necessary to protect the safety of his forces and to facilitate the success of his operations . . . The destruction of property to be lawful must be imperatively demanded by the necessities of war. Destruction as an end in itself is a violation of International Law. There must be some reasonable connection between the destruction of property and the overcoming of the enemy forces. It is lawful to destroy railways, lines of communication or any other property that might be utilised by the enemy. Private homes and churches even may be destroyed if necessary for military operations. It does not admit of wanton devastation of a district or the wilful infliction of suffering upon its inhabitants for the sake of suffering alone.

With regard to the destruction ordered by one of the accused, the Tribunal held that:

There is evidence in the record that there was no military necessity for this destruction and devastation. An examination of the facts in retrospect can well sustain this

²⁵⁶ Germany, Oberlandsgericht of Dresden, *General Devastation case*, Judgement, 21 March 1947. (Although it appeared that the fire in the factory was accidental, the accused was found guilty of aiding and abetting the factory's destruction.)

²⁵⁷ Israel, High Court, *Al-Nawar case*, Judgement, 11 August 1985.

²⁵⁸ Netherlands, Special Court of Cassation, *Wingten case*, Judgement, 6 July 1949.

conclusion. But we are obliged to judge the situation as it appeared to the defendant at the time. If the facts were such as would justify the action by the exercise of judgement, after giving consideration to all factors and existing possibilities, even though the conclusion reached may have been faulty, it cannot be said to be criminal. After giving careful consideration to all the evidence on the subject, we are convinced that the defendant cannot be held criminally responsible although when viewed in retrospect, the danger did not actually exist.

...

The Hague Regulations prohibited "The destruction or seizure of enemy property except in cases where this destruction or seizure is urgently required by the necessities of war." . . . The Hague Regulations are mandatory provisions of International Law. The prohibitions therein contained control and are superior to military necessities of the most urgent nature except where the Regulations themselves specifically provide the contrary. The destruction of public and private property by retreating military forces which would give aid and comfort to the enemy, may constitute a situation coming within the exceptions contained in Article 23(g). We are not called upon to determine whether urgent military necessity for the devastation and destruction in the province of Finnmark actually existed. We are concerned with the question whether the defendant at the time of its occurrence acted within the limits of honest judgment on the basis of the conditions prevailing at the time. The course of a military operation by the enemy is loaded with uncertainties, such as the numerical strength of the enemy, the quality of his equipment, his fighting spirit, the efficiency and daring of his commanders, and the uncertainty of his intentions. These things when considered with his own military situation provided the facts or want thereof which furnished the basis for the defendant's decision to carry out the "scorched earth" policy in Finnmark as a precautionary measure against an attack by superior forces. It is our considered opinion that the conditions as they appeared to the defendant at the time were sufficient, upon which he could honestly conclude that urgent military necessity warranted the decision made. This being true, the defendant may have erred in the exercise of his judgment but he was guilty of no criminal act. We find the defendant not guilty on this portion of the charge.²⁵⁹

226. In the *Von Leeb (The High Command Trial)* case before the US Military Tribunal at Nuremberg in 1948, the accused, former high-ranking officers in the German army and navy, were charged, *inter alia*, with war crimes and crimes against humanity against civilians in that they participated in atrocities such as wanton destruction of cities, towns and villages and devastation not justified by military necessity. The Tribunal stated that "most of the prohibitions of both the Hague and Geneva Conventions, considered in substance, are clearly an expression of the accepted views of civilized nations". The Tribunal found that:

The devastation prohibited by the [1907 HR] and the usages of war is that not warranted by military necessity. This rule is clear enough but the factual determination as to what constitutes military necessity is difficult. Defendants in this case were in many instances in retreat under arduous conditions wherein their commands were in serious danger of being cut off. Under such circumstances, a commander must

²⁵⁹ US, Military Tribunal at Nuremberg, *List (Hostages Trial) case*, Judgement, 19 February 1948.

necessarily make quick decisions to meet the particular situation of his command. A great deal of latitude must be accorded to him under such circumstances. What constitutes devastation beyond military necessity in these situations requires detailed proof of an operational and tactical nature. We do not feel that in this case the proof is ample to establish the guilt of any defendant herein on this charge.²⁶⁰

Other National Practice

227. According to the Report on the Practice of China, in the context of the Sino-Japanese War (1937–1945), the Chinese population suffered greatly from the Japanese policy of devastation. The Japanese armed forces “destroyed the materials . . . , set houses on fire, destroyed the farming facilities, took away [livestock], burned the grain and damaged green crops in the fields”.²⁶¹

228. In its written statement submitted to the ICJ in the *Nuclear Weapons case* in 1995, Egypt restated the prohibition contained in Article 23(g) of the 1907 HR “to destroy . . . the enemy’s property, unless such destruction . . . be imperatively demanded by the necessities of war”.²⁶²

229. According to the Report on the Practice of Iran, on several occasions during the Iran–Iraq War, Iran denounced the devastation of cities and residential areas as a war crime, notably in 1985 at the Disarmament Conference, as well as in various diplomatic correspondence.²⁶³

230. In a memorandum entitled “International Law Providing Protection to the Environment in Times of Armed Conflict” submitted to the Sixth Committee of the UN General Assembly in 1992 prior to the adoption of Resolution 47/37, Jordan and the US stated, *inter alia*, that “it is a grave breach of international humanitarian law, and is a war crime, as set out in article 147 of the Fourth Geneva Convention of 1949, to extensively destroy and appropriate property when not justified by military necessity and carried out unlawfully and wantonly”.²⁶⁴

231. In 1992, in its final report to Congress on the conduct of the Gulf War, the US Department of Defense stated that:

On their departure, Iraqi forces set off previously placed explosive charges on Kuwait’s oil wells, a vengeful act of wanton destruction . . .

As a general principle, the law of war prohibits the intentional destruction of civilian objects not imperatively required by military necessity.

. . .

Specific Iraqi war crimes include: . . .

²⁶⁰ US, Military Tribunal at Nuremberg, *Von Leeb (The High Command Trial) case*, Judgement, 28 October 1948.

²⁶¹ Report on the Practice of China, 1997, Chapter 4.1, referring to Deng Xiaoping, *The Economic Construction of the Area of Taihang Mountain*, 2 July 1943, *Selected Works of Deng Xiaoping*, Vol. I, The People’s Press, p. 78.

²⁶² Egypt, Written statement before the ICJ, *Nuclear Weapons case*, 20 June 1995, p. 11, § 17.

²⁶³ Report on the Practice of Iran, 1997, Chapter 6.5.

²⁶⁴ Jordan and US, *International Law Providing Protection to the Environment in Times of Armed Conflict*, annexed to Letter dated 28 September 1992 to the Chairman of the Sixth Committee of the UN General Assembly, UN Doc. A/C.6/47/3, 28 September 1992, § 1(e).

- Unnecessary destruction of Kuwaiti private and public property, in violation of Article 23(g), [1907 HR]...
- In its indiscriminate Scud missile attacks, unnecessary destruction of Saudi Arabian and Israeli property, in violation of Article 23(g) [1907 HR].
- In its intentional release of oil into the Persian Gulf and its sabotage of the Al-Burqan and Ar-Rumaylah oil fields in Kuwait, unnecessary destruction in violation of Articles 23(g) ... [1907 HR and] 53 and 147, GC [IV].²⁶⁵

232. In 1992, in a report submitted pursuant to paragraph 5 of UN Security Council Resolution 771 (1992) on grave breaches of GC IV committed in the former Yugoslavia, the US mentioned several acts of wanton devastation and destruction of property.²⁶⁶

III. Practice of International Organisations and Conferences

United Nations

233. No practice was found.

Other International Organisations

234. No practice was found.

International Conferences

235. The Plan of Action for the years 2000–2003 adopted in 1999 by the 27th international Conference of the Red Cross and Red Crescent proposed that all the parties to an armed conflict take effective measures to ensure that “strict orders are given to prevent all serious violations of international humanitarian law, including ... wanton property destruction ... and threats to carry out such actions”.²⁶⁷

IV. Practice of International Judicial and Quasi-judicial Bodies

236. In the *Nikolić case* before the ICTY in 1994, the accused was charged with grave breaches of the Geneva Conventions for having participated, “during a period of armed conflict or occupation, in the extensive appropriation of property not justified by military necessity and carried out unlawfully and wantonly, including but not limited to private property of persons detained at Sušica Camp”.²⁶⁸ In the review of the indictment in 1995, the ICTY held that there were “reasonable grounds for believing that the appropriations were

²⁶⁵ US, Department of Defense, Final Report to Congress on the Conduct of the Persian Gulf War, Appendix O, The Role of the Law of War, 10 April 1992, *ILM*, Vol. 31, 1992, pp. 620, 622, 634 and 635, see also p. 633.

²⁶⁶ US, Former Yugoslavia: Grave breaches of the Fourth Geneva Convention, annexed to Letter dated 22 September 1992 to the UN Secretary-General, UN Doc. S/24583, 23 September 1992, pp. 8 and 9.

²⁶⁷ 27th International Conference of the Red Cross and Red Crescent, Geneva, 31 October–6 November 1999, Res. I, Annex 2, Plan of Action for the years 2000–2003, Actions proposed for final goal 1.1, § 1(b).

²⁶⁸ ICTY, *Nikolić case*, Initial Indictment, 4 November 1994, § 21.1.

not justified by military necessity and were carried out unlawfully and wantonly". It further considered that the acts could also be regarded as characterising persecution on religious grounds. The Tribunal considered the conflict was international and that the victims were persons protected under the Geneva Conventions.²⁶⁹

237. In the *Karadžić and Mladić case* before the ICTY in 1995, the accused were charged, based on their responsibility as commanders, with grave breaches of the Geneva Conventions, for having "individually and in concert with others planned, instigated, ordered or otherwise aided and abetted in the planning, preparation or execution of the extensive, wanton and unlawful destruction of Bosnian Muslim and Bosnian Croat property, not justified by military necessity". The indictment added that "the purpose of this unlawful destruction was to ensure that the inhabitants could not and would not return to their homes and communities". The accused were also charged with grave breaches of the Geneva Conventions because Bosnian Serb military and police personnel, as well as other agents of the Bosnian Serb administration, under their direction had allegedly "systematically and wantonly appropriated and looted the real and personal property of Bosnian Muslim and Bosnian Croat civilians. The appropriation of property was extensive and not justified by military necessity." Both counts constituted violations of Article 2(d) of the 1993 ICTY Statute.²⁷⁰ In the review of the indictments in 1996, the ICTY considered that the conflict was international and that the victims were protected by the Geneva Conventions and confirmed the counts of the indictments. The facts were described as follows:

In the cities and villages of Bosnia and Herzegovina which had come under their command, the Bosnian Serb military personnel and police, along with other agents of the Bosnian Serb administration, committed various sorts of arbitrary large-scale appropriation of real and moveable property belonging to Bosnian Muslim and Bosnian Croat civilians. Prior to their forced transfer, many detainees in the internment camps were forced to sign official Bosnian Serb documents by which they "voluntarily" gave up their titles of ownership and their possessions to the Bosnian Serb administration . . .

Elsewhere, in order to rule out any possibility of return by the dispossessed, Bosnian forces systematically destroyed buildings.²⁷¹

238. In the *Rajić case* before the ICTY in 1995, the accused was charged with grave breaches of the Geneva Conventions for the extensive destruction and appropriation of property, not justified by military necessity and carried out unlawfully and wantonly, as recognised by Article 2(d) of the 1993 ICTY Statute, and of violations of the laws and customs of war for the wanton destruction of a village not justified by military necessity, as recognised by Article 3(b) of the

²⁶⁹ ICTY, *Nikolić case*, Review of the Indictment, 20 October 1995, §§ 22 and 30.

²⁷⁰ ICTY, *Karadžić and Mladić case*, First Indictment, 24 July 1995, §§ 27, 29 and 41, see also §§ 42–43.

²⁷¹ ICTY, *Karadžić and Mladić case*, Review of the Indictments, 11 July 1996, §§ 1, 6, 14, 87–89 and Disposition.

Statute.²⁷² In the review of the indictment in 1996, the ICTY Trial Chamber stated that it was satisfied that there were grounds to confirm all counts of the indictment.²⁷³

239. In the *Blaškić case* before the ICTY in 1997, the accused was charged with violations of the laws and customs of war (devastation not justified by military necessity), for “wanton destruction not justified by military necessity in . . . cities, towns and villages”, in violation of Article 3(b) of the 1993 ICTY Statute. He was also charged with grave breaches of the Geneva Conventions (extensive destruction of property), for having, in violation of Article 2(d) of the Statute, “planned, instigated, ordered or otherwise aided and abetted in the planning, preparation or execution of the wanton and extensive destruction, devastation . . . of Bosnian Muslim dwellings, buildings, businesses, civilian personal property and livestock”.²⁷⁴ The accused was found guilty on both counts.²⁷⁵ In its judgement in 2000, the ICTY stated, in relation to these counts of the indictment, that:

An Occupying Power is prohibited from destroying movable and non-movable property except where such destruction is made absolutely necessary by military operations. To constitute a grave breach, the destruction unjustified by military necessity must be extensive, unlawful and wanton. The notion of “extensive” is evaluated according to the facts of the case – a single act, such as the destruction of a hospital, may suffice to characterise an offence under this count.

...

Similar to the grave breach constituting part of Article 2(d) of the Statute, the devastation of property is prohibited except where it may be justified by military necessity. So as to be punishable, the devastation must have been perpetrated intentionally or have been the foreseeable consequence of the acts of the accused.²⁷⁶

240. In the *Kordić and Čerkez case* before the ICTY in 1998, the accused were charged with grave breaches of the Geneva Conventions (extensive destruction of property), in violation of Article 2(d) of the 1993 ICTY Statute, as well as violations of the laws or customs of war (wanton destruction not justified by military necessity), in violation of Article 3(b) of the Statute, for having “caused, planned, instigated, ordered or committed, or aided and abetted the planning, preparation or execution of, the unlawful, wanton and extensive destruction [and] devastation . . . of Bosnian Muslim dwellings, buildings, businesses, civilian personal property and livestock, which was not justified by military necessity”.²⁷⁷ In its judgement in 2001, the ICTY held that:

²⁷² ICTY, *Rajić case*, Initial Indictment, 23 August 1995, §§ 12 and 13.

²⁷³ ICTY, *Rajić case*, Review of the Indictment, 13 September 1996, §§ 57 and 72.

²⁷⁴ ICTY, *Blaškić case*, Second Amended Indictment, 25 April 1997, §§ 8 and 10.

²⁷⁵ ICTY, *Blaškić case*, Judgement, 3 March 2000, Part VI (Disposition).

²⁷⁶ ICTY, *Blaškić case*, Judgement, 3 March 2000, §§ 157 and 183.

²⁷⁷ ICTY, *Kordić and Čerkez case*, First Amended Indictment, 30 September 1998, §§ 55 and 56, see also §§ 34, 37 and 39 (count of persecution as a crime against humanity, *inter alia*, through wanton and extensive destruction of Bosnian Muslim civilian property, with no military justification); see also *Kordić and Čerkez case*, Initial Indictment, 10 November 1995, § 32 (count of persecution as a crime against humanity, *inter alia*, through system-

The crime of extensive destruction of property as a grave breach comprises the following elements, either:

- (i) Where the property destroyed is of a type accorded general protection under the Geneva Conventions of 1949, regardless of whether or not it is situated in occupied territory; and the perpetrator acted with the intent to destroy the property in question or in reckless disregard of the likelihood of its destruction; or
- (ii) Where the property destroyed is accorded protection under the Geneva Conventions, on account of its location in occupied territory; and the destruction occurs on a large scale; and
- (iii) the destruction is not justified by military necessity; and the perpetrator acted with the intent to destroy the property in question or in reckless disregard of the likelihood of its destruction.²⁷⁸

When considering wanton destruction not justified by military necessity, the Tribunal held that it “has already been criminalised under customary international law”.²⁷⁹ The Tribunal also stated that:

While property situated on enemy territory is not protected under the Geneva Conventions, and is therefore not included in the crime of extensive destruction of property listed as a grave breach of the Geneva Conventions, the destruction of such property is criminalised under Article 3 of the [ICTY] Statute.²⁸⁰

Both accused were found guilty, *inter alia*, of violations of the laws and customs of war, as recognised by Article 3(b) (wanton destruction not justified by military necessity) of the ICTY Statute, but not guilty of extensive destruction of property not justified by military necessity, as recognised by Article 2(d) of the Statute.²⁸¹

V. Practice of the International Red Cross and Crescent Movement

241. To fulfil its task of disseminating IHL, the ICRC has delegates around the world teaching armed and security forces that destruction and seizure of property “without military necessity” are prohibited.²⁸² Delegates also teach that “when not justified by military necessity and carried out unlawfully and wantonly, . . . extensive destruction of property [and] extensive appropriation of property” constitute grave breaches of the law of war.²⁸³

242. In a working paper on war crimes submitted in 1997 to the Preparatory Committee for the Establishment of an International Criminal Court, the ICRC

atic and wanton destruction of Bosnian Muslim homes, personal property, livestock and businesses of Bosnian Muslims) and § 38 (counts of extensive destruction of property and wanton devastation not justified by military necessity).

²⁷⁸ ICTY, *Kordić and Čerkez case*, Judgement, 26 February 2001, § 341.

²⁷⁹ ICTY, *Kordić and Čerkez case*, Judgement, 26 February 2001, § 205.

²⁸⁰ ICTY, *Kordić and Čerkez case*, Judgement, 26 February 2001, § 347.

²⁸¹ ICTY, *Kordić and Čerkez case*, Judgement, 26 February 2001, Part V (Disposition).

²⁸² Frédéric de Mulinen, *Handbook on the Law of War for Armed Forces*, ICRC, Geneva, 1987, §§ 206 and 207.

²⁸³ Frédéric de Mulinen, *Handbook on the Law of War for Armed Forces*, ICRC, Geneva, 1987, § 777.

included “extensive destruction and appropriation of property, not justified by military necessity and carried out unlawfully and wantonly”, when committed in an international armed conflict, in its list of war crimes to be subject to the jurisdiction of the Court.²⁸⁴

VI. Other Practice

243. No practice was found.

C. Public and Private Property in Occupied Territory

Movable public property in occupied territory

I. Treaties and Other Instruments

Treaties

244. Article 53 of the 1899 HR provides that “an army of occupation can only take possession of the cash, funds, and property liable to requisition belonging strictly to the State, depots of arms, means of transport, stores and supplies, and, generally, movable property of the State which may be used for military operations”.

245. Article 53 of the 1907 HR provides that “an army of occupation can only take possession of cash, funds, and realizable securities which are strictly the property of the State, depots of arms, means of transport, stores and supplies, and, generally, all movable property belonging to the State which may be used for military operations”.

Other Instruments

246. Article 31 of the 1863 Lieber Code provides that “a victorious army appropriates all public money, seizes all public movable property until further direction by its government”.

247. Article 6 of the 1874 Brussels Declaration provides that:

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

248. The 1880 Oxford Manual provides that:

Although the occupant replaces the enemy State in the government of the invaded territory, his power is not absolute. So long as the fate of this territory remains in suspense – that is, until peace – the occupant is not free to dispose of what still

²⁸⁴ ICRC, Working paper on war crimes submitted to the Preparatory Committee for the Establishment of an International Criminal Court, New York, 14 February 1997, § 1(a)(viii).

belongs to the enemy and is not of use in military operation. Hence the following rules:

Art. 50. The occupant can only take possession of cash, funds and realizable or negotiable securities which are strictly the property of the State, depots of arms, supplies, and, in general, movable property of the State of such character as to be useful in military operations.

Art. 51. Means of transportation (railways, boats, & c.), as well as land telegraphs and landing-cables, can only be appropriated to the use of the occupant. Their destruction is forbidden, unless it be demanded by military necessity. They are restored when peace is made in the condition in which they then are.

249. Based on several documents supplying evidence of outrages committed during the First World War, the 1919 Report of the Commission on Responsibility lists violations of the laws and customs of war which should be subject to criminal prosecution, including "confiscation of property".

250. The 1943 Inter-Allied Declaration against Acts of Dispossession provides that "it is important to leave no doubt whatsoever of their [the authors of the Declaration] resolution not to accept or tolerate the misdeeds of their enemies in the field of property, however these may be cloaked".

II. National Practice

Military Manuals

251. Argentina's Law of War Manual provides that "an army of occupation can only take possession of cash, funds, and realizable securities which are the property of the State, depots of arms, means of transport, stores and supplies, and, generally, all movable property belonging to the State which may be used for military operations".²⁸⁵

252. Australia's Defence Force Manual states that, in occupied areas, "confiscation is the taking of enemy public movable property without the obligation to compensate the state to which it belongs. All enemy public movable property which may be useable for the operations of war may be confiscated."²⁸⁶

253. Canada's LOAC Manual states that "confiscation is the taking of enemy public movable property without the obligation to compensate the state to which it belongs. All enemy public movable property which may be usable for military operations may be confiscated."²⁸⁷

254. France's LOAC Manual incorporates the content of Article 53 of the 1907 HR.²⁸⁸

255. Germany's Military Manual provides that:

Movable government property which may be used for military purposes shall become spoils of war . . . Upon seizure it shall, without any compensation, become

²⁸⁵ Argentina, *Law of War Manual* (1969), § 5.014(2).

²⁸⁶ Australia, *Defence Force Manual* (1994), § 1225.

²⁸⁷ Canada, *LOAC Manual* (1999), p. 12-8, § 69.

²⁸⁸ France, *LOAC Manual* (2001), pp. 35-36.

the property of the occupying State. Such property includes, for instance, means of transport, weapons, and food supplies . . . The latter shall not be requisitioned unless the requirements of the civilian population have been taken into account . . . The requirements of the civilian population shall be satisfied first.²⁸⁹

256. Italy's IHL Manual states that, in occupied territory, "cash, funds, realisable securities, depots of arms, means of transportation, stores and in general all movable property belonging to the enemy public administration become the property of the occupying State".²⁹⁰

257. New Zealand's Military Manual provides that, in occupied territory, "confiscation is the taking of enemy public movable property without the obligation to compensate the State to which it belongs. All enemy public movable property which may be usable for the operations of war may be confiscated."²⁹¹

258. Nigeria's Manual on the Laws of War states that:

Movable property in an occupied territory belonging to the enemy state may be seized only if it is useful to the conduct of war. Vehicles, signal equipment, weapons and other equipment required for immediate military use may also be seized . . .

...

All movable property, belonging to the enemy state, seized in the battlefield, becomes property of the opposing belligerent. The rules relating to the seizure of private movable property in occupied territories are also applicable to such property seized in the battlefield.²⁹²

259. The Joint Circular on Adherence to IHL and Human Rights of the Philippines provides that "members of the AFP and PNP shall inhibit themselves from unnecessary military/police actions that could cause destruction to . . . public properties".²⁹³

260. Switzerland's Basic Military Manual provides that, in occupied territory, "property belonging to the State or public authorities, to social or cooperative organisations, shall not be destroyed, except where such destruction is rendered absolutely necessary by military operations".²⁹⁴

261. The UK Military Manual states, regarding public property, that:

The occupation army is only allowed to seize cash funds and negotiable securities which are strictly State property, stores of arms, means of transport, stores of supplies, and generally, all movable property of the State which can be used for military operations.

...

Other movable public property, not susceptible of use for military operations, as well as that belonging to the institutions mentioned above, which is to be treated as private property must be respected and cannot be appropriated, for instance,

²⁸⁹ Germany, *Military Manual* (1992), § 556.

²⁹⁰ Italy, *IHL Manual* (1991), Vol. I, § 42, see also § 49(9).

²⁹¹ New Zealand, *Military Manual* (1992), § 1336.

²⁹² Nigeria, *Manual on the Laws of War* (undated), §§ 27–28.

²⁹³ Philippines, *Joint Circular on Adherence to IHL and Human Rights* (1991), 2a(4).

²⁹⁴ Switzerland, *Basic Military Manual* (1987), Article 169.

crown jewels, pictures, collections of works of art, and archives. However, papers connected with the war may be seized, even when forming part of archives.

...

Where there is any doubt whether the property found in the possession of the enemy is public or private, as may frequently occur in the case of bank deposits, stores and supplies obtained from contractors, it should be considered to be public property unless and until its private character is clearly shown.²⁹⁵

262. The US Field Manual provides in the case of occupied territory that:

Valid capture or seizure of property requires both an intent to take such action and a physical act of capture or seizure. The mere presence within occupied territory of property which is subject to appropriation under international law does not operate to vest title thereto in the occupant.

...

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

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

...

All movable property belonging to the State susceptible of military use may be taken possession of and utilized for the benefit of the occupant's government. Under modern conditions of warfare, a large proportion of State property may be regarded as capable of being used for military purposes. However, movable property which is *not* susceptible of military use must be respected and cannot be appropriated.²⁹⁶ [emphasis in original]

National Legislation

263. Colombia's Military Penal Code provides for a prison sentence for "anyone who during military service and without proper cause, destroys... public property".²⁹⁷

264. Italy's Law of War Decree states that, in occupied territory, "cash, funds, realisable securities, depots of arms, means of transportation, stores and in general all movable property belonging to the enemy public administration, which may be used for war operations, become the property of the [occupying] State".²⁹⁸ Regarding property in enemy territory, the Decree provides that "arms, ammunition, foodstuffs and any other object belonging to the enemy State are subject to confiscation when directly usable for military purposes".²⁹⁹

²⁹⁵ UK, *Military Manual* (1958), §§ 612–614.

²⁹⁶ US, *Field Manual* (1956), §§ 395, 403 and 404.

²⁹⁷ Colombia, *Military Penal Code* (1999), Article 174.

²⁹⁸ Italy, *Law of War Decree* (1938), Article 60.

²⁹⁹ Italy, *Law of War Decree* (1938), Article 292.

265. The Articles of War of the Philippines states that:

All public property taken from the enemy is the property of the Government of the Philippines and shall be secured for the service thereof, and any person subject to military law who neglects to secure such property or is guilty of wrongful appropriation thereof shall be punished as a court-martial may direct.³⁰⁰

266. Under the US Uniform Code of Military Justice, members of the armed forces “shall secure all public property taken from the enemy for the service of the United States, and shall give notice and turn over to the proper authority without delay all captured or abandoned property in their possession, custody or control”.³⁰¹

267. The Criminal Offences against the Nation and State Act of the SFRY (FRY) considers that, during war or enemy occupation, “any person who . . . ordered or committed arson, destruction . . . of . . . public property [or] . . . any transport, . . . or other material, . . . or any public property” committed war crimes.³⁰²

National Case-law

268. In the *Flick case* before the US Military Tribunal at Nuremberg in 1947, the accused, the principal proprietor of a large group of German industrial enterprises (and four officials of the same group), which included coal and iron mines and steel producing plants, was charged with war crimes, *inter alia*, for offences against property in the countries and territories occupied by Germany. Flick was found guilty on this count of the indictment. In its judgement, the Tribunal quoted, *inter alia*, Article 53 of the 1907 HR. It also found that:

The only exception to the public property rule that the occupying power, or its agents, is limited by the rules of usufruct is the right to “take possession of” certain types of public property under Article 53 [of the 1907 HR]. But the exception applied only with respect to certain named properties and “all moveable property belonging to the State which may be used for military operations”, and thus is not applicable to such properties as means of production.³⁰³

269. In the *Krupp case* before the US Military Tribunal at Nuremberg in 1948, the accused, officials of the Krupp industrial enterprises occupying high positions in political, financial, industrial and economic circles in Germany, were charged with war crimes, *inter alia*, for the destruction and removal of property, and the seizure of machinery, equipment, raw materials and other property. The Tribunal quoted Article 53 of the 1907 HR. It also stated that it “fully concurs with the Judgement of the I.M.T. that the [1907 Hague Convention (IV)], to which Germany was a party, had by 1939 become customary law and

³⁰⁰ Philippines, *Articles of War* (1938), Article 80.

³⁰¹ US, *Uniform Code of Military Justice* (1950), Article 103(a).

³⁰² SFRY (FRY), *Criminal Offences against the Nation and State Act* (1945), Article 3(3) and (13).

³⁰³ US, Military Tribunal at Nuremberg, *Flick case*, Judgement, 22 December 1947.

was, therefore, binding on Germany not only as Treaty Law but also as Customary".³⁰⁴

270. In the *Krauch (I. G. Farben Trial)* case before the US Military Tribunal at Nuremberg in 1948, the accused, officials of I.G. Farben Industrie A.G., were charged, *inter alia*, with war crimes for offences against property in countries and territories which came under the belligerent occupation of Germany. The charges were regarded as violations of, *inter alia*, Article 53 of the 1907 HR. Some of the accused were convicted on this count. The Tribunal held that:

The foregoing provisions of the Hague Regulations are broadly aimed at preserving the inviolability of property rights to both public and private property during military occupancy. They admit of exceptions of expropriation, use, and requisition, all of which are subject to well-defined limitations set forth in the articles.

...

The payment of a price or other adequate consideration does not, under such circumstances, relieve the act of its unlawful character. Similarly where a private individual or a juristic person becomes a party to unlawful confiscation of public... property by planning and executing a well-defined design to acquire such property permanently, acquisition under such circumstances subsequent to confiscation constitutes conduct in violation of the Hague Regulations.

...

[I]t is illustrative of the view that offences against property of the character described in the [1943 Inter-Allied Declaration against Acts of Dispossession] were considered by the signatory powers to constitute action in violation of existing international law.³⁰⁵

271. In the *Von Leeb (The High Command Trial)* case before the US Military Tribunal at Nuremberg in 1948, the accused, former high-ranking officers in the German army and navy, were charged, *inter alia*, with war crimes and crimes against humanity against civilians in that they participated in atrocities such as wanton destruction of cities, towns and villages and devastation not justified by military necessity. The Tribunal stated that "most of the prohibitions of both the Hague and Geneva Conventions, considered in substance, are clearly an expression of the accepted views of civilized nations". It notably mentioned Article 53 of the 1907 HR.³⁰⁶

Other National Practice

272. On the basis of the reply by Iraq's Ministry of Defence to a questionnaire, the Report on the Practice of Iraq states that strict measures should be taken to protect cities that fall under the control of armed forces, including measures to protect and ensure the safety of public property.³⁰⁷

³⁰⁴ US, Military Tribunal at Nuremberg, *Krupp case*, Judgement, 30 June 1948.

³⁰⁵ US, Military Tribunal in Nuremberg, *Krauch (I. G. Farben Trial) case*, Judgement, 29 July 1948.

³⁰⁶ US, Military Tribunal at Nuremberg, *Von Leeb (The High Command Trial) case*, Judgement, 28 October 1948.

³⁰⁷ Report on the Practice of Iraq, 1998, Reply by the Ministry of Defence to a questionnaire, July 1997, Chapter 2.3.

273. In 1992, in its final report to Congress on the conduct of the Gulf War, the US Department of Defense stated that:

In violation of [the 1907 HR]...public (municipal and national) property was confiscated... (Confiscation of private property is prohibited under any circumstance, as is the confiscation of municipal public property. Confiscation of movable national public property is prohibited without military need and cash compensation...).³⁰⁸

III. Practice of International Organisations and Conferences

United Nations

274. In 1996, in a report on the situation of human rights in Somalia, the Independent Expert of the UN Commission on Human Rights described, in a section entitled "Civil war and violations of human rights", the practices of the different Somali factions, including the fact that the winning faction would engage in destruction of public property.³⁰⁹

Other International Organisations

275. In the Final Communiqué of its 36th Session in 1990, the GCC Ministerial Council emphasised that "public... establishments and property must be safeguarded in accordance with the noble stipulations of Islamic law". It insisted that "the Iraqi authorities must ensure the protection of all public... establishments and all movable... property in the State of Kuwait".³¹⁰

276. In the Final Communiqué of its 11th Session in 1990, the GCC Supreme Council demanded that "the Iraqi régime... must safeguard... public installations and property in accordance with Islamic law, the provisions of the 1949 Geneva Convention relative to the Protection of Civilian Persons in Time of War and the international humanitarian covenants and conventions".³¹¹

277. In a resolution adopted in 1990, the Council of the League of Arab States, with reference to Islamic law, GC IV, the 1948 UDHR and international covenants and conventions relating to the protection of human rights, decided "to insist that the Iraqi authorities must ensure the protection of all public... establishments and all movable... property in the State of Kuwait,

³⁰⁸ US, Department of Defense, Final Report to Congress on the Conduct of the Persian Gulf War, Appendix O, The Role of the Law of War, 10 April 1992, *ILM*, Vol. 31, 1992, p. 620.

³⁰⁹ UN Commission on Human Rights, Independent Expert on Assistance to Somalia in the Field of Human Rights, Report on the situation of human rights in Somalia, UN Doc. E/CN.4/1996/14/Add.1, 10 April 1996, § 10.

³¹⁰ GCC, Ministerial Council, 36th Session, Jeddah, 5–6 September 1990, Final Communiqué, annexed to Letter dated 6 September 1990 from Oman to the UN Secretary-General, UN Doc. S/21719, 6 September 1990, p. 3, preamble and § 3.

³¹¹ GCC, Supreme Council, 11th Session, Doha, 22–25 December 1990, Final Communiqué, annexed to Note verbale dated 26 December 1990 from Qatar to the UN Secretary-General, UN Doc. A/45/908, 27 December 1990, p. 3.

and to regard any measures incompatible with such a commitment as null and void".³¹²

International Conferences

278. No practice was found.

IV. Practice of International Judicial and Quasi-judicial Bodies

279. No practice was found.

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

280. No practice was found.

VI. Other Practice

281. No practice was found.

Immovable public property in occupied territory

I. Treaties and Other Instruments

Treaties

282. Article 55 of the 1899 HR provides that:

The occupying State shall only be regarded as administrator and usufructuary of the public buildings, real property, forests and agricultural works belonging to the hostile State, and situated in the occupied country. It must protect the capital of these properties, and administer it according to the rules of usufruct.

283. Article 55 of the 1907 HR provides that:

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

Other Instruments

284. Article 31 of the 1863 Lieber Code provides that "a victorious army . . . sequesters for its own benefit or of that of its government all the revenues of real property belonging to the hostile government or nation. The title

³¹² League of Arab States, Council, Res. 5038, 31 August 1990, annexed to Letter dated 31 August 1990 from Qatar to the UN Secretary-General, UN Doc. S/21693, 31 August 1990, p. 4. (Libya opposed the resolution and Algeria, Iraq, Jordan, Mauritania, Palestine, Sudan, Tunisia and Yemen did not participate in the work of the session.)

to such real property remains in abeyance during military occupation, and until the conquest is made complete.”

285. Article 7 of the 1874 Brussels Declaration provides that:

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

286. The 1880 Oxford Manual provides that:

Although the occupant replaces the enemy State in the government of the invaded territory, his power is not absolute. So long as the fate of this territory remains in suspense – that is, until peace – the occupant is not free to dispose of what still belongs to the enemy and is not of use in military operation. Hence the following rules:

...

Art. 52. The occupant can only act in the capacity of provisional administrator in respect to real property, such as buildings, forests, agricultural establishments, belonging to the enemy State (Article 6). It must safeguard the capital of these properties and see to their maintenance.

287. The 1943 Inter-Allied Declaration against Acts of Dispossession provides that “it is important to leave no doubt whatsoever of their [the authors of the Declaration] resolution not to accept or tolerate the misdeeds of their enemies in the field of property, however these may be cloaked”.

II. National Practice

Military Manuals

288. Argentina’s Law of War Manual provides that:

The occupying State shall be regarded only as administrator and usufructuary of public buildings, real estate, forests, and agricultural estates belonging to the hostile State, and situated in the occupied territory. It must safeguard the capital of these properties, and administer them in accordance with the rules of usufruct.³¹³

289. Australia’s Defence Force Manual states that, in occupied areas, “enemy public immovable property may be administered and used but it may not be confiscated”.³¹⁴

290. Canada’s LOAC Manual provides that, in occupied territory:

Enemy public immovable property may be administered and used but it may not be confiscated.

...

Real property belonging to the State which is essentially of a civil or non-military character, such as public buildings and offices, land, forests, parks, farms, and mines,

³¹³ Argentina, *Law of War Manual* (1969), § 5.014(1).

³¹⁴ Australia, *Defence Force Manual* (1994), § 1225.

may not be damaged unless their destruction is imperatively demanded by the exigencies of war. The occupant becomes the administrator of the property and is liable to use the property, but must not exercise its rights in such a wasteful or negligent way as will decrease its value. The occupant has no right of disposal or sale.

Public real property which is of an essentially military nature such as airfields and arsenals remain at the absolute disposal of the occupant.³¹⁵

291. Germany's Military Manual provides that "immovable government property may only be requisitioned but not confiscated. . . . The title to this property shall not pass to the occupying state. Upon termination of the war, the items and real estate seized shall be restored."³¹⁶

292. Italy's IHL Manual states that "all immovable property and factories located in occupied territory and belonging to the enemy public administration pass into the possession of the occupying State which, however, becomes only the administrator and usufructuary".³¹⁷

293. New Zealand's Military Manual provides that, in the case of occupied territory:

Enemy public immovable property may be administered and used but it may not be confiscated.

...

Real property belonging to the State which is essentially of a civil or non-military character, such as public buildings and offices, land, forests, parks, farms, and mines, may not be damaged unless its destruction is imperatively demanded by the exigencies of war. The Occupying Power becomes the administrator and usufructuary of the property and must not exercise its rights in such a wasteful or negligent way as will decrease the property's value. A usufructuary has no right of disposal or sale.

The Occupying Power may, however, let or utilize public land and buildings, sell the crops on public land, cut and sell timber and work the mines but he must not make a contract or lease extending beyond the conclusion of the war and the cutting or mining must not exceed what is necessary or usual. It must not constitute abusive exploitation.

Public real property which is of an essentially military nature such as airfields and arsenals remain at the absolute disposal of the Occupying Power.³¹⁸

294. Nigeria's Manual on the Laws of War provides that:

Real property of military character belonging to the enemy State, such as fortifications, dockyards, railways and bridges, remains at the absolute disposal of the occupant until the end of the war. Such property may be destroyed if absolutely necessary for military operations.

³¹⁵ Canada, *LOAC Manual* (1999), p. 12-8, § 69 and p. 12-9, §§ 80 and 81.

³¹⁶ Germany, *Military Manual* (1992), § 557.

³¹⁷ Italy, *IHL Manual* (1991), Vol. I, § 42.

³¹⁸ New Zealand, *Military Manual* (1992), §§ 1336 and 1341.

Real property of a non-military character belonging to the enemy state such as public buildings, forests, parks and mines should not be damaged or destroyed unless it is imperatively demanded by the exigencies of war.

...

The temporary use of real property for military purposes during a combat operation is justified, although such use may diminish the value of the property.³¹⁹

295. The Joint Circular on Adherence to IHL and Human Rights of the Philippines provides that “members of the AFP and PNP shall inhibit themselves from unnecessary military/police actions that could cause destruction to . . . public properties”.³²⁰

296. Switzerland’s Basic Military Manual provides that “the occupying State shall only be considered as administrator and usufructuary of public buildings, real estate, forests, and agricultural estates belonging to the enemy State, and situated in the occupied territory”.³²¹

297. The UK Military Manual provides that, once a defended locality has surrendered, “it is not permissible to burn public buildings . . . in such a place merely because it was defended”.³²² It also states that:

Real property belonging to the State which is of a military character, such as strong points, arsenals, dockyards, magazines, barracks and stores, as well as railways, canals, bridges, piers, and wharves, airfields and their installations, remains at the absolute disposal of the Occupant until the end of the war. Such buildings may, however, be damaged or destroyed only when such acts are rendered absolutely necessary by military operations . . .

Real property belonging to the State which is essentially of a civil or non-military character, such as public buildings and offices, land, forests, parks, farms, and mines, may not be damaged unless their destruction is imperatively demanded by the exigencies of war. The Occupant becomes the administrator and usufructuary of the property, but he must not exercise his rights in such a wasteful or negligent way as will decrease its value. He has no right of disposal or sale.

...

The Occupant may, however, let or utilize public land and buildings, sell the crops on public land, cut and sell timber and work the mines. But he must not make a contract or lease extending beyond the conclusion of the war, and the cutting or mining must not exceed what is necessary or usual. It must not constitute abusive exploitation.³²³

298. The US Field Manual provides that, in the case of occupied territory:

Valid capture or seizure of property requires both an intent to take such action and a physical act of capture or seizure. The mere presence within occupied territory of property which is subject to appropriation under international law does not operate to vest title thereto in the occupant.

...

³¹⁹ Nigeria, *Manual on the Laws of War* (undated), §§ 27 and 28.

³²⁰ Philippines, *Joint Circular on Adherence to IHL and Human Rights* (1991), 2a(4).

³²¹ Switzerland, *Basic Military Manual* (1987), Article 169.

³²² UK, *Military Manual* (1958), § 287. ³²³ UK, *Military Manual* (1958), §§ 608–610.

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

...

Real property of a State which is of direct military use, such as forts, arsenals, dockyards, magazines, barracks, railways, bridges, piers, wharves, airfields, and other military facilities, remains in the hands of the occupant until the close of the war, and may be destroyed or damaged, if deemed necessary to military operations.

...

Real property of the enemy State which is essentially of a non-military nature, such as public buildings and offices, land, forests, parks, farms, and mines, may not be damaged or destroyed unless such destruction is rendered absolutely necessary by military operations... The occupant does not have the right of sale or unqualified use of such property. As administrator, or usufructuary, he should not exercise his rights in such a wasteful and negligent manner as seriously to impair its value. He may, however, lease or utilize public lands or buildings, sell the crops, cut and sell timber, and work the mines. The term of a lease or contract should not extend beyond the conclusion of the war.³²⁴

National Legislation

299. Colombia's Military Penal Code provides for a prison sentence for "anyone who, during military service and without proper cause, destroys... public property".³²⁵

300. Italy's Law of War Decree states that, in occupied territory "the [occupying] State may only be the administrator and usufructuary of immovable property and factories located in occupied territory and belonging to the enemy public administration".³²⁶

301. The Criminal Offences against the Nation and State Act of the SFRY (FRY) considers that, during war or enemy occupation, "any person who... ordered or committed arson, destruction... of... public property [or]... any... building or... any water supply system, public warehouse or any public property" committed war crimes.³²⁷

National Case-law

302. In the *Greiser case* before Poland's Supreme National Tribunal in 1946, the accused, a governor and *gauleiter* of the Nazi party for provinces incorporated in the German Reich, was charged with war crimes for having incited, assisted

³²⁴ US, *Field Manual* (1956), §§ 395 and 400–402.

³²⁵ Colombia, *Military Penal Code* (1999), Article 174.

³²⁶ Italy, *Law of War Decree* (1938), Article 59.

³²⁷ SFRY (FRY), *Criminal Offences against the Nation and State Act* (1945), Article 3(3) and (13).

in the commission of, and committed, *inter alia*, acts of illegal seizure of public property in violation of Article 55 of the 1907 HR. Notably, the accused was indicted for having taken part in "extortion and appropriation . . . of all public property in the territories in question".³²⁸

303. In the *Flick case* before the US Military Tribunal at Nuremberg in 1947, the accused, the principal proprietor of a large group of German industrial enterprises (and four officials of the same group), which included coal and iron mines and steel producing plants, was charged with war crimes, *inter alia*, for offences against property in the countries and territories occupied by Germany. Flick was found guilty on this count of the indictment. The Tribunal quoted, *inter alia*, Article 55 of the 1907 HR. With reference to the plants located in Ukraine and Latvia and regarded as State property, the Tribunal found that:

The Dnjepr Stahl plant had been used for armament production by the Russians. The other was devoted principally to production of railroad cars and equipment. No single one of the Hague Regulations . . . is exactly in point, but adopting the method used by the I.M.T., we deduce from all of them, considered as a whole, the principle that State-owned property of this character may be seized and operated for the benefit of the belligerent occupant for the duration of the occupancy. The attempt of the German Government to seize them as the property of the Reich of course was not effective. Title was not acquired nor could it be conveyed by the German Government. The occupant, however, had a usufructuary privilege. Property which the Government itself could have operated for its benefit could also legally be operated by a trustee. We regard as immaterial Flick's purpose ultimately to acquire title. To covet is a sin under the Decalogue but not a violation of the Hague Regulations nor a war crime.

...

The conclusion follows that, wherever the occupying power acts or holds itself out as owner of the public property owned by the occupied country, Article 55 [of the 1907 HR] is violated. The same applies if the occupying power or its agents who took possession of public buildings or factories or plants, assert ownership, remove equipment of machinery, and ship it to their own country, or make any other use of the property which is incompatible with usufruct.³²⁹

304. In the *Krupp case* before the US Military Tribunal at Nuremberg in 1948, the accused, officials of the Krupp industrial enterprises occupying high positions in political, financial, industrial and economic circles in Germany, were charged with war crimes, *inter alia*, for the destruction and removal of property, and the seizure of machinery, equipment, raw materials and other property. The Tribunal quoted Article 55 of the 1907 HR. It also stated that it "fully concurs with the Judgement of the I.M.T. that the [1907 Hague Convention (IV)], to which Germany was a party, had by 1939 become customary law and was,

³²⁸ Poland, Supreme National Tribunal, *Greiser case*, Judgement, 7 July 1946.

³²⁹ US, Military Tribunal at Nuremberg, *Flick case*, Judgement, 22 December 1947.

therefore, binding on Germany not only as Treaty Law but also as Customary Law".³³⁰

305. In the *Krauch (I. G. Farben Trial)* case before the US Military Tribunal at Nuremberg in 1948, the accused, officials of I.G. Farben Industrie A.G., were charged, *inter alia*, with war crimes for offences against property in countries and territories which came under the belligerent occupation of Germany. The charges were regarded as violations of, *inter alia*, Article 55 of the 1907 HR. Some of the accused were convicted on this count. The Tribunal held that:

The foregoing provisions of the Hague Regulations are broadly aimed at preserving the inviolability of property rights to both public and private property during military occupancy. They admit of exceptions of expropriation, use, and requisition, all of which are subject to well-defined limitations set forth in the articles.

...
[I]t is illustrative of the view that offences against property of the character described in the [1943 Inter-Allied Declaration against Acts of Dispossession] were considered by the signatory powers to constitute action in violation of existing international law.³³¹

Other National Practice

306. On the basis of a reply by Iraq's Ministry of Defence to a questionnaire, the Report on the Practice of Iraq states that strict measures should be taken to protect cities that fall under the control of armed forces, including measures to protect and ensure the safety of public property.³³²

307. In 1992, in its final report to Congress on the conduct of the Gulf War, the US Department of Defense stated that:

In violation of [the 1907 HR]... public (municipal and national) property was confiscated... [I]mmovable national public property may be temporarily confiscated under the concept of usufruct – the right to use another's property so long as it is not damaged.

...
Specific Iraqi war crimes include:

- ...
 - Illegal confiscation/inadequate safeguarding of Kuwaiti public property, in violation of Article 55 [of the 1907 HR]...
 - In its intentional release of oil into the Persian Gulf and its sabotage of the Al-Burqan and Ar-Rumaylah oil fields in Kuwait, unnecessary destruction in violation of [Article] 55 [of the 1907 HR].³³³

³³⁰ US, Military Tribunal at Nuremberg, *Krupp case*, Judgement, 30 June 1948.

³³¹ US, Military Tribunal in Nuremberg, *Krauch (I. G. Farben Trial)* case, Judgement, 29 July 1948.

³³² Report on the Practice of Iraq, 1998, Reply by the Ministry of Defence to a questionnaire, July 1997, Chapter 2.3.

³³³ US, Department of Defense, Final Report to Congress on the Conduct of the Persian Gulf War, Appendix O, The Role of the Law of War, 10 April 1992, *ILM*, Vol. 31, 1992, pp. 620, 634 and 635, see also p. 633.

III. Practice of International Organisations and Conferences

United Nations

308. No practice was found.

Other International Organisations

309. In the Final Communiqué of its 36th Session in 1990, the GCC Ministerial Council emphasised that “public . . . establishments and property must be safeguarded in accordance with the noble stipulations of Islamic law”. It insisted that “the Iraqi authorities must ensure the protection of all public . . . establishments and all . . . immovable property in the State of Kuwait”.³³⁴

310. In the Final Communiqué of its 11th Session in 1990, the GCC Supreme Council demanded that “the Iraqi régime . . . must safeguard . . . public installations and property in accordance with Islamic law, the provisions of the 1949 Geneva Convention relative to the Protection of Civilian Persons in Time of War and the international humanitarian covenants and conventions”.³³⁵

311. In a resolution adopted in 1990, the Council of the League of Arab States, with reference to Islamic law, GC IV, the 1948 UDHR and international covenants and conventions relating to the protection of human rights, decided “to insist that Iraqi authorities must ensure the protection of all public . . . establishments and all . . . immovable property in the State of Kuwait, and to regard any measures incompatible with such a commitment as null and void”.³³⁶

International Conferences

312. No practice was found.

IV. Practice of International Judicial and Quasi-judicial Bodies

313. No practice was found.

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

314. No practice was found.

³³⁴ GCC, Ministerial Council, 36th Session, Jeddah, 5–6 September 1990, Final Communiqué, annexed to Letter dated 6 September 1990 from Oman to the UN Secretary-General, UN Doc. S/21719, 6 September 1990, p. 3, preamble and § 3.

³³⁵ GCC, Supreme Council, 11th Session, Doha, 22–25 December 1990, Final Communiqué, annexed to Note verbale dated 26 December 1990 from Qatar to the UN Secretary-General, UN Doc. A/45/908, 27 December 1990, p. 3.

³³⁶ League of Arab States, Council, Res. 5038, 31 August 1990, annexed to Letter dated 31 August 1990 from Qatar to the UN Secretary-General, UN Doc. S/21693, 31 August 1990, p. 4. (Libya opposed the resolution and Algeria, Iraq, Jordan, Mauritania, Palestine, Sudan, Tunisia and Yemen did not participate in the work of the session.)

VI. Other Practice

315. No practice was found.

Private property in occupied territory*I. Treaties and Other Instruments**Treaties*

316. The 1899 HR provides, in the case of occupied territories, that:

Art. 46....[P]rivate property...must be respected. Private property cannot be confiscated.

...

Art. 52. Neither requisitions in kind nor services can be demanded from communes or inhabitants except for the necessities of the army of occupation. They must be in proportion to the resources of the country, and of such a nature as not to involve the population in the obligation of taking part in military operations against their country.

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

The contributions in kind shall, as far as possible, be paid for in ready money; if not, their receipt shall be acknowledged.

Art. 53.... Railway plant, land telegraphs, telephones, steamers and other ships, apart from cases governed by maritime law, as well as depots of arms and, generally, all kinds of munitions of war, even though belonging to companies or to private persons, are likewise material which may serve for military operations, but they must be restored at the conclusion of peace, and indemnities paid for them.

317. The 1907 HR provides, in the case of occupied territories, that:

Art. 46....[P]rivate property...must be respected. Private property cannot be confiscated.

...

Art. 52. Requisitions in kind and services shall not be demanded from municipalities or inhabitants except for the needs of the army of occupation. They shall be in proportion to the resources of the country, and of such a nature as not to involve the inhabitants in the obligation of taking part in military operations against their own country.

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

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

Art. 53.... All appliances, whether on land, at sea, or in the air, adapted for the transmission of news, or for the transport of persons or things, exclusive of cases governed by naval law, depots of arms, and, generally, all kinds of munitions of war, may be seized, even if they belong to private individuals, but they must be restored and compensation fixed when peace is made.

318. Article 55, second paragraph, GC IV provides that:

The Occupying Power may not requisition foodstuffs, articles or medical supplies available in the occupied territory, except for use by the occupation forces and administration personnel, and then only if the requirements of the civilian population have been taken into account. Subject to the provisions of other international Conventions, the Occupying Power shall make arrangements to ensure that fair value is paid for any requisitioned goods.

Other Instruments

319. Article 22 of the 1863 Lieber Code provides that:

As civilization has advanced during the last centuries, so has likewise steadily advanced, especially in war on land, the distinction between the private individual belonging to a hostile country and the hostile country itself, with its men in arms. The principle has been more and more acknowledged that the unarmed citizen is to be spared in person, *property*, and honor as much as the exigencies of war will admit. [emphasis added]

320. Article 37 of the 1863 Lieber Code states that “the United States acknowledge and protect, in hostile countries occupied by them, . . . strictly private property . . . This rule does not interfere with the right of the victorious invader . . . to appropriate property, especially houses, lands, boats or ships, and churches, for temporary and military uses.”

321. Article 38 of the 1863 Lieber Code provides that “private property . . . can be seized only by way of military necessity, for the support or other benefit of the army or of the United States. If the owner has not fled, the commanding officer will cause receipts to be given, which may serve the spoliated owner to obtain indemnity.”

322. The 1874 Brussels Declaration provides that:

Art. 6. Railway plant, land telegraphs, steamers and other ships, apart from cases governed by maritime law, as well as depots of arms and, generally, all kinds of war material, even if belonging to companies or to private persons, are likewise material which may serve for military operations and which cannot be left by the army of occupation at the disposal of the enemy. Railway plant, land telegraphs, as well as steamers and other ships above mentioned shall be restored and compensation fixed when peace is made.

...

Art. 38. . . . [P]roperty of persons . . . must be respected. Private property cannot be confiscated.

...

Art. 40. As private property should be respected, the enemy will demand from communes or inhabitants only such payments and services as are connected with the generally recognized necessities of war, in proportion to the resources of the country, and not implying, with regard to the inhabitants, the obligation of taking part in operations of war against their country.

...

Art. 42. Requisitions shall be made only with the authorization of the commander in the territory occupied. For every requisition indemnity shall be granted or a receipt delivered.

323. The 1880 Oxford Manual provides, with respect to private property, that:

If the powers of the occupant are limited with respect to the property of the enemy State, with greater reason are they limited with respect to the property of individuals.

Art. 54. Private property, whether belonging to individuals or corporations, must be respected, and can be confiscated only under the limitations contained in the following articles.

Art. 55. Means of transportation (railways, boats, & c.), telegraphs, depots of arms and munitions of war, although belonging to companies or to individuals, may be seized by the occupant, but must be restored, if possible, and compensation fixed when peace is made.

Art. 56. Impositions in kind (requisitions) demanded from communes or inhabitants should be in proportion to the necessities of war as generally recognized, and in proportion to the resources of the country.

Requisitions can only be made on the authority of the commander in the locality occupied.

...

Art. 60. Requisitioned articles, when they are not paid for in cash, and war contributions are evidenced by receipts. Measures should be taken to assure the "bona fide" character and regularity of these receipts.

324. Based on several documents supplying evidence of outrages committed during the First World War, the 1919 Report of the Commission on Responsibility lists violations of the laws and customs of war which should be subject to criminal prosecution, including "exaction of illegitimate or of exorbitant contributions and requisitions".

325. The 1943 Inter-Allied Declaration against Acts of Dispossession provides that "it is important to leave no doubt whatsoever of their [the authors of the Declaration] resolution not to accept or tolerate the misdeeds of their enemies in the field of property, however these may be cloaked".

326. Article 3(7) of Part IV of the 1998 Comprehensive Agreement on Respect for Human Rights and IHL in the Philippines prohibits at any time and in any place whatsoever "the destruction of the lives and property of the civilian population".

II. National Practice

Military Manuals

327. With regard to occupied territory, Argentina's Law of War Manual provides that:

All appliances, whether on land, at sea, or in the air, adapted for the transmission of news, or for the transport of persons or things, exclusive of cases governed by naval law, depots of arms, and, generally, all kinds of munitions of war, may also

be confiscated, even if they belong to private individuals, but they must be restored and compensation fixed when peace is made.

...

Private property cannot be confiscated.

...

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

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

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

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

The Occupying Power may not requisition foodstuffs, articles or medical supplies available in the occupied territory, except for use by the occupation forces and administration personnel, and then only if the requirements of the civilian population have been taken into account. Subject to the provisions of other international Conventions, the Occupying Power shall make arrangements to ensure that fair value is paid for any requisitioned goods.³³⁷

328. Australia's Commanders' Guide states that:

In rare cases, privately-owned civilian property may be requisitioned by a military force whether on a battlefield or while exercising the power granted to it as an occupier. Requisition is only lawful if the property is essential to the success of military operations, the taking does not cause unnecessary hardship or deprivation, and adequate and reasonable compensation is paid.³³⁸

329. Australia's Defence Force Manual states that, in occupied areas:

Private property may not be confiscated.

...

The seizure of private movable property is governed by Article 53 [of the 1907 HR]. By this rule all appliances adapted for the transmission of news or for the transport of persons or goods by land, sea or air, except where naval law governs, stores of arms and in general every kind of war material, even if they belong to private individuals, may be seized, but they must be restored and the indemnity fixed when peace is made.

These objects may be seized by, but they do not become the property of, the occupying power. The seizure operates merely as a transfer of the possession of the object to the occupying power while ownership remains with the private owner. In so far as the objects seized are capable of physical restoration, they must be restored at the conclusion of peace, and in so far as they have been consumed or have been destroyed or have perished, a cash indemnity must be paid when peace is made.

...

Requisition may be made of all commodities necessary for the maintenance of the occupying army such as: food and fuel supplies, liquor and tobacco, cloth for uniforms, leather for boots, and the like. The taking of such articles is forbidden unless

³³⁷ Argentina, *Law of War Manual* (1969), §§ 5.014(2)–5.015 and 5.018.

³³⁸ Australia, *Commanders' Guide* (1994), § 610, see also § 1041.

they are actually required for the needs of the occupying forces. Goods or medical supplies available in the occupied territory are subject to requisition because they are needed for the forces of occupation and for administrative personnel. They may be requisitioned only after the requirements of the civilian population have been taken into account. In every case, the articles taken must be duly requisitioned, and be in proportion to the resources of the country.

Articles requisitioned should be paid for in ready money, but if this is not possible a receipt must be given for them and payment of the amount due must be made as soon as possible. Articles properly requisitioned become the property of the occupying power and pass out of the ownership of their former owner.

The prices to be paid for requisitioned supplies may be fixed by the commander of the occupying force. The prices of commodities on sale may also be regulated.

The right to billet troops on the inhabitants follows from the rights to requisition.³³⁹

330. Benin's Military Manual requires that soldiers "respect, and avoid causing damage to or stealing," civilian property.³⁴⁰

331. Burkina Faso's Disciplinary Regulations states that, under the laws and customs of war, "wanton destruction... in particular of private property" is forbidden.³⁴¹

332. Cameroon's Disciplinary Regulations states that, under the laws and customs of war, "any wanton destruction... in particular of private property" is forbidden.³⁴²

333. Canada's LOAC Manual states that "enemy private movable property, other than arms and military papers captured or found on a battlefield, may be appropriated only to the extent such taking is permissible in an occupied area".³⁴³ It further provides that, in occupied territory:

Private property may not be confiscated.

...

The seizure of private movable property is governed by the [1907 HR]. All appliances adapted for the transmission of news or for the transport of persons or goods by land, sea or air, stores of arms and in general every kind of war material, even if they belong to private individuals, may be seized. If seized, however, they must be restored and the indemnity fixed when peace is made.

These objects may be seized by, but they do not become the property of, the occupant. The seizure merely acts as a transfer of the possession of the object to the occupant while the ownership remains in the private owner.

Insofar as the objects seized are capable of physical restoration they must be restored at the conclusion of peace, and insofar as they have been consumed or have been destroyed or have perished a cash indemnity must be paid when peace is made.

No provision in the [1907 HR] obliges the belligerent who effects the seizure to give a receipt, or to carry out the seizure in any formal manner, but the fact of

³³⁹ Australia, *Defence Force Manual* (1994), §§ 1225–1231.

³⁴⁰ Benin, *Military Manual* (1995), Fascicule I, p. 16.

³⁴¹ Burkina Faso, *Disciplinary Regulations* (1994), Article 35(2).

³⁴² Cameroon, *Disciplinary Regulations* (1975), Article 32.

³⁴³ Canada, *LOAC Manual* (1999), p. 6-5, § 49.

seizure should obviously be established in some way, if only to give the owner an opportunity of claiming the compensation expressly provided for.

Requisition may be made of all commodities necessary for the maintenance of the occupying army. This includes: food and supplies, liquor and tobacco, cloth for uniforms, leather for boots, and the like. The taking of such articles is forbidden unless they are actually required for the needs of the occupying army. Even if food-stuffs, goods or medical supplies available in the occupied territory are subject to requisition because they are needed for the forces of occupation and for administrative personnel, they may be requisitioned only after the requirements of the civilian population have been taken into account. In any case, the articles taken must be duly requisitioned, and the amount taken must be in proportion to the resources of the country.

Articles requisitioned should be paid for in ready money, but if this is not possible a receipt must be given and payment of the amount due must be made as soon as possible. Articles properly requisitioned become the property of the occupant and pass out of the ownership of their former owner.

Requisitions of supplies may be made in bulk, that is, a community may be called upon to supply certain quantities, or a return may be called for from inhabitants giving the amount in their possession of which a proportion may then be requisitioned, or the householders may be requisitioned to feed or partly feed the soldiers quartered on them. In fact, any way that is convenient may be employed provided that the above-mentioned rules and the provisions of [GC IV] are observed.

The right to billet troops on the inhabitants follows from the right to requisition.³⁴⁴

334. Canada's Code of Conduct states that:

[Respecting civilian property] is one important difference between a disciplined professional force and a band of marauders. Respect for the property rights of civilians, including civilians in the territory of the opposing force, requires discipline. If you do not obey this rule, the civilian population may turn against you. The mission may thus be jeopardised and the conflict prolonged.

You must make every effort to avoid alienating the local civilian population. Reckless destruction of civilian property and disregard for personal ownership rights will place the overall military mission at risk as well as damage the reputation of Canada and its soldiers . . .

The CF may purchase or requisition property and services from the local population but only for the use of our forces. Requisitioned material should always be paid for in cash, or a receipt should be provided which then should be honoured as soon as possible. Where requisitioning is authorized, appropriate procedures will be established and published.³⁴⁵

335. Under Colombia's Basic Military Manual, it is forbidden "to seize . . . personal property" of non-combatants.³⁴⁶

336. According to Colombia's Instructors' Manual, the instructor must recall the theme of respect for civilian property, livestock, money and movable and immovable objects. It emphasises that, during the conflict in Colombia, the

³⁴⁴ Canada, *LOAC Manual* (1999), pp. 12-8 and 12-9, §§ 69-77.

³⁴⁵ Canada, *Code of Conduct* (2001), Rule 4, §§ 4-6.

³⁴⁶ Colombia, *Basic Military Manual* (1995), p. 29.

property of the civilian population has not been properly respected. Livestock have been killed, houses destroyed and crops devastated, all acts that military personnel must not commit.³⁴⁷

337. Colombia's *Soldiers' Manual* orders troops to respect civilian property.³⁴⁸

338. Congo's *Disciplinary Regulations* states that, under the laws and customs of war, "any wanton destruction . . . in particular of private property" is forbidden.³⁴⁹

339. The *Military Manual of the Dominican Republic* instructs troops: "Do not start fires in civilians' homes or buildings or burn their property unless the necessities of war urgently require it. When searching dwellings in enemy towns or villages, do not take nonmilitary items."³⁵⁰

340. El Salvador's *Human Rights Charter of the Armed Forces* orders troops to "respect the property of others".³⁵¹ It also instructs as follows: "Do not steal, do not cause damage or destroy what is not yours."³⁵² It further states that "all acts against property shall be denounced".³⁵³

341. France's *LOAC Manual* incorporates the content of Articles 52 and 53 of the 1907 HR.³⁵⁴

342. Germany's *Military Manual* provides that:

A local commander may demand contributions in kind and services (requisitions) from the population and the authorities of the occupied territory to satisfy the needs of the occupational forces . . . The requisitions shall be in proportion to the capabilities of the country . . .

Requisitions shall, on principle, be paid for in cash. If this is not possible, a receipt shall be given. Payment shall be effected as soon as possible . . .

. . .

Movable private property which may be used for military purposes . . . may only be requisitioned but not confiscated . . . The title to this property shall not pass to the occupying state. Upon termination of the war, the items and real estate seized shall be restored.

All private property shall be protected from permanent seizure . . . – except for commodities designed for consumption.³⁵⁵

343. Hungary's *Military Manual* states that civilian property in occupied territory must be respected.³⁵⁶

344. Indonesia's *Directive on Human Rights in Irian Jaya and Maluku* provides that "appropriation . . . of the property of the population is a criminal offence".³⁵⁷

³⁴⁷ Colombia, *Instructors' Manual* (1999), pp. 30 and 31.

³⁴⁸ Colombia, *Soldiers' Manual* (1999), p. 26.

³⁴⁹ Congo, *Disciplinary Regulations* (1986), Article 32(2).

³⁵⁰ Dominican Republic, *Military Manual* (1980), p. 10.

³⁵¹ El Salvador, *Human Rights Charter of the Armed Forces* (undated), p. 3, see also p. 9.

³⁵² El Salvador, *Human Rights Charter of the Armed Forces* (undated), p. 9, see also pp. 10 and 18.

³⁵³ El Salvador, *Human Rights Charter of the Armed Forces* (undated), p. 16.

³⁵⁴ France, *LOAC Manual* (2001), pp. 35–36 and 109.

³⁵⁵ Germany, *Military Manual* (1992), §§ 554–555 and 557–558.

³⁵⁶ Hungary, *Military Manual* (1992), p. 97.

³⁵⁷ Indonesia, *Directive on Human Rights in Irian Jaya and Maluku* (1995), § 9(e).

345. Israel's Manual on the Laws of War states that:

Private property that does not belong to the state is immune to seizure and conversion to booty. Nevertheless, a military commander is allowed to seize also private property if this serves an important military need. For example, a commander may commandeer a civilian vehicle to evacuate wounded urgently or take possession of a house porch if this is necessary for carrying out surveillance.³⁵⁸

346. Italy's IHL Manual states that, in occupied territory:

Private property is respected and not subject to confiscation. The inhabitants of the occupied territory keep their property rights and the possession of their goods, with all the rights inherent thereto.

However, the occupying military authority may seize all kinds of arms and ammunitions, as well as all means of communication and transportation, including ships and aircraft, belonging to private persons, which may be used for war operations, provided that they be restored or compensated when peace is made.

...

The powers exercised by an occupying State, through the military Authority, in an occupied territory are the following:

...

(11) requisition private property in accordance with appropriate procedure and in proportion to the resources of the country.³⁵⁹

347. Mali's Army Regulations provides that, under the laws and customs of war, "any wanton destruction...in particular of private property" is forbidden.³⁶⁰

348. Morocco's Disciplinary Regulations states that, under the laws and customs of war, "any wanton destruction...in particular of private property" is forbidden.³⁶¹

349. New Zealand's Military Manual provides that "enemy private movable property, other [than] arms and military papers captured or found on a battlefield may be appropriated only to the extent such taking is permissible in an occupied area".³⁶² It further states that, in occupied territory:

If property is of mixed ownership, that is partly owned by the State and partly owned by private persons, then, if the Occupying Power appropriates the property for its own benefit, the private owners should be compensated for their portion of the property.

...

Private property may not be confiscated.

...

The seizure of private movable property is governed by Art. 53 [of the 1907 HR]. By this rule, all appliances adapted for the transmission of news or for the transport of persons or goods by land, sea or air, except where naval law governs, stores or arms

³⁵⁸ Israel, *Manual on the Laws of War* (1998), p. 63.

³⁵⁹ Italy, *IHL Manual* (1991), Vol. I, §§ 43 and 49(11), see also § 49(9).

³⁶⁰ Mali, *Army Regulations* (1979), Article 36.

³⁶¹ Morocco, *Disciplinary Regulations* (1974), Article 25(2).

³⁶² New Zealand, *Military Manual* (1992), § 528.

(in general, every kind of war material, even if it belongs to private individuals), may be seized, but they must be restored and the compensation fixed when peace is made.

These objects may be seized by, but do not become the property of, the Occupying Power. The seizure operated merely as a transfer of the possession of the object to the Occupying Power while the ownership remains in the private owner. Insofar as the objects seized are capable of physical restoration they must be restored at the conclusion of peace and insofar as they have been consumed or have been destroyed or have perished, a cash indemnity must be paid when peace is made. Within this rule fall: cables, telegraph and telephone plant; television, telecommunications and radio equipment; horses, motorcars, bicycles, carts and carriages; railways and railway plant, tramways; ships in port, river and canal craft; aircraft of all descriptions, except ambulance aircraft; sporting weapons; and all kinds of property which could serve as war material.

No provision in [the 1907] HR obliges the belligerent who effects the seizure to give a receipt or to carry out the seizure in any formal manner, but the fact of seizure should obviously be established in some way, if only to give the owner an opportunity of claiming the compensation expressly provided for.

...
Requisition may be made of all commodities necessary for the maintenance of the occupying army. Within this category fall such things as: food and fuel supplies, liquor and tobacco, cloth for uniforms, leather for boots, and the like. The taking of such articles is forbidden unless they are actually required for the needs of the occupying army. Even if foodstuffs, goods or medical supplies available in the occupied territory are subject to requisition because they are needed for the forces of occupation and for administrative personnel, they may be requisitioned only after the requirements of the civilian population have been taken into account. In any case, the articles taken must be duly requisitioned and the amount taken must be in proportion to the resources of the country.

Articles requisitioned should be paid for in ready money but, if this is not possible, a receipt must be given for them and payment of the amount due must be made as soon as possible. Articles properly requisitioned become the property of the Occupying Power and pass out of the ownership of their former owner. As payment for these articles is made either at the time of requisition or becomes due at that time and is made later, a requisition may, in effect, be a compulsory sale on the order of the Occupying Power.

Requisition can only be demanded on the authority of the commander in the locality occupied. It is not necessary, however, that his order for the requisition should be produced, as the articles taken must be paid for or a receipt given. The assistance of the local authorities of the invaded territory may be invoked to obtain the supplies. When it is impossible to obtain this assistance, special parties under an officer should be detailed to collect what is required. Except in case of emergency, no one under the rank of commissioned officer is, by the regulations of practically all armies, permitted to requisition.

Requisitions of supplies may be made in bulk, that is, a community may be called upon to supply certain quantities, or a return may be called for from inhabitants giving the amounts in their possession of which a proportion may then be requisitioned, or the householders may be requisitioned to feed or partly feed the soldiers quartered on them. In fact, any way that is convenient may be employed provided that the above mentioned rules and the provisions of [GC IV] are observed.

The right to billet troops on the inhabitants follows from the right to requisition. The prices to be paid for requisitioned supplies may be fixed by the commander of the occupying force. The prices of commodities on sale may also be regulated.³⁶³

350. Nigeria's Military Manual provides that "[civilian] property [shall be] safeguarded against theft and damage".³⁶⁴

351. Nigeria's Manual on the Laws of War states that:

Vehicles, signal equipment, weapons and other equipment required for immediate military use may also be seized (but if they belong to private individuals they will be restored when peace is established or indemnity would be for them).

...

Private property should be respected. It must not be confiscated . . . even if found in an occupied territory. In war it is difficult to avoid damage to private property as practically every military operation, movement or combat occasions such damage but unnecessary damage to the property of civilians must definitely be avoided.

Food, liquor and clothes of private individuals should not be requisitioned; but if they are required by the occupying army they can be taken and paid for in cash. If immediate payment is not possible a receipt must be given for them and payment of the amount due must be made as soon as possible.

...

The temporary use of real property for military purposes during a combat operation is justified, although such use may diminish the value of the property. For example, in addition to the necessary use of grounds during combat for marching, encampment and building strong-points, the citizens can be forced to accommodate in their houses soldiers, the sick and the wounded or keep army vehicles. Buildings may be used for observation posts, shelter, defence, etc. . . . If necessary, houses and fences may be destroyed to prepare a field of fire or to supply material for bridges, fuel, etc., needs essential to the army. When private property is used for accommodation of troops the owners and occupants should be given substitute accommodation. When military necessity requires the evacuation of the occupants they should be given an early warning and enable to carry with them their necessities.

When houses of missing persons are being used they should be taken care of in their absence. [T]heir absence does not authorise . . . damage and a note should be left if anything is taken in case of military necessity.³⁶⁵

352. Nigeria's Soldiers' Code of Conduct provides that "civilian property shall be safeguarded against theft and damage".³⁶⁶

353. Peru's Human Rights Charter of the Security Forces instructs troops: "Do not to steal or destroy what is not yours."³⁶⁷ It states that the property of others must be respected.³⁶⁸ It also states that all acts committed against property must be denounced.³⁶⁹

³⁶³ New Zealand, *Military Manual* (1992), §§ 1333 and 1336–1338.

³⁶⁴ Nigeria, *Military Manual* (1994), p. 39, § 5(k).

³⁶⁵ Nigeria, *Manual on the Laws of War* (undated), §§ 27–28.

³⁶⁶ Nigeria, *Soldiers' Code of Conduct* (undated), § 11.

³⁶⁷ Peru, *Human Rights Charter of the Security Forces* (1991), p. 10.

³⁶⁸ Peru, *Human Rights Charter of the Security Forces* (1991), p. 27.

³⁶⁹ Peru, *Human Rights Charter of the Security Forces* (1991), p. 21.

354. The Soldier's Rules of the Philippines instructs troops: "Respect other people's property."³⁷⁰

355. The Joint Circular on Adherence to IHL and Human Rights of the Philippines provides that "members of the AFP and PNP shall inhibit themselves from unnecessary military/police actions that could cause destruction to private . . . properties".³⁷¹

356. Romania's Soldiers' Manual instructs soldiers to respect private property, not to damage or seize it.³⁷²

357. South Africa's LOAC Manual states that soldiers must "respect civilians and their property".³⁷³

358. Switzerland's Basic Military Manual states that, in occupied territory, "foodstuffs, articles or medical supplies may in principle not be requisitioned. In exceptional circumstances, the occupying Power may requisition such objects against indemnity, provided that they are used to satisfy directly the needs of the occupying forces and administration."³⁷⁴ Furthermore, the manual states that "private property may not be confiscated. The destruction of movable or immovable property belonging individually or collectively to private persons is prohibited, except if imperative military reasons exist."³⁷⁵

359. Togo's Military Manual requires that soldiers "respect, and avoid causing damage to or stealing," civilian property.³⁷⁶

360. Uganda's Code of Conduct instructs troops to "never take anything in the form of money or property from any member of the public" and "to pay promptly for anything you take in cash".³⁷⁷

361. Uganda's Operational Code of Conduct provides that "the offence of undermining relationship with the civilian population shall include . . . trespassing on civilian property; . . . failing to pay for goods purchased".³⁷⁸

362. The UK Military Manual states that, once a defended locality has surrendered, "it is not permissible to burn . . . private houses in such a place merely because it was defended".³⁷⁹ The manual provides that:

Private property must be respected. It must not be confiscated . . . even if found in a captured town or other place. This prohibition embodied in the [1907 HR] did not constitute a new rule . . . The rule that private property must be respected admits, however, of exceptions necessitated by the exigencies of war. In the first instance practically every operation, movement or combat occasions damage to private property. Further, the right of an army to requisition and to make use of

³⁷⁰ Philippines, *Soldier's Rules* (1989), § 11.

³⁷¹ Philippines, *Joint Circular on Adherence to IHL and Human Rights* (1991), 2a(4).

³⁷² Romania, *Soldiers' Manual* (1991), p. 16.

³⁷³ South Africa, *LOAC Manual* (1996), § 25(c).

³⁷⁴ Switzerland, *Basic Military Manual* (1987), Article 163(1) and (2).

³⁷⁵ Switzerland, *Basic Military Manual* (1987), Article 168.

³⁷⁶ Togo, *Military Manual* (1996), Fascicule I, p. 17.

³⁷⁷ Uganda, *Code of Conduct* (1986), § A(2) and (3).

³⁷⁸ Uganda, *Operational Code of Conduct* (1986), § 12(c) and (e).

³⁷⁹ UK, *Military Manual* (1958), § 287.

certain property is fully admitted. What is clearly forbidden is the destruction by the Occupant of private property unless military operations render such destruction absolutely necessary and all extensive destruction and appropriation of private property not justified by military necessity, and carried out unlawfully and wantonly. Requisitions in kind must be in proportion to the resources of the country and limited to the needs of the Occupation army. Seizure is limited to certain types of property set out in [Article 53 of the 1907 HR] which must be restored at the peace and indemnities paid.

...

Generally, therefore, no damage may be done that is not required by military operations. Any destruction of property whether belonging to private individuals, to the State or to social or co-operative organisations, is prohibited and "except when such destruction is rendered absolutely necessary by military operations".

...

Land and buildings belonging to private individuals or commercial undertakings may not be appropriated or alienated, nor may they be used, let or hired for private or public profit.

...

The temporary use of land or buildings for the needs of the army is justified, even though such use may impair its value... Buildings may be used for purposes of observation, reconnaissance, cover, defence, *etc.*, and, if necessary, houses, fences and woods may be demolished, cut down, or removed to clear a field of fire or to provide material for bridges, fuel, *etc.*, imperatively needed by the occupying army.

...

The owner of property may claim neither rent for its use nor compensation for damage caused by the necessities of war. If time allows, however, a note of the use or damage should be kept, or given to the owner, so that in the event of funds being provided by either belligerent at the close of hostilities to compensate the inhabitants, there may be evidence to assist the assessors.

When troops are quartered in private dwellings some rooms should be left to the inhabitants; the latter should not be driven into the streets and left without shelter. If for military reasons, whether for operational purposes or to protect men and animals from the weather, it is imperative to remove the inhabitants, efforts should be made to give them notice and provide them with facilities for taking essential baggage with them.

When use is made of unoccupied buildings, care should be taken of the structure and internal fixtures and fittings. The fact that the owners are away does not authorise... damage. A note should be left if anything is taken. There is, however, no obligation to protect abandoned property.

...

The seizure of private movable property is governed by [Article 53 of the 1907 HR]. By this rule, all appliances adapted for the transmission of news or for the transport of persons or goods by land, sea or air, except where naval law governs, stores of arms and in general every kind of war material, even if they belong to private individuals, may be seized, but they must be restored and the indemnity fixed when peace is made. These objects may be seized by, but they do not become the property of, the Occupant. The seizure operates merely as a transfer of the possession of the objects to the Occupant while the ownership remains in the private owner. Insofar as the objects seized are capable of physical restoration they must be restored at the conclusion of peace, and insofar as they have been consumed or have been destroyed

or have perished a cash indemnity must be paid when peace is made. Within this rule fall: cables, telegraph, and telephone plant; television, telecommunications and radio equipment; horses, motorcars, bicycles, carts, carriages, railways and railway plant, tramways, ships in port, river and canal craft, aircraft of all descriptions, except ambulance aircraft, sporting weapons, and all kinds of property which could serve as war material. No provision in the [1907 HR] obliges the belligerent who effects the seizure to give a receipt, or to carry out the seizure in any formal manner, but the fact of seizure should obviously be established in some way, if only to give the owner an opportunity of claiming the compensation expressly provided for.

...

Under [Article 52 of the 1907 HR] requisition may be made of all commodities necessary for the maintenance of the occupying army. Within this category fall such things as: foods and fuel supplies, liquor and tobacco, cloth for uniforms, leather for boots, and the like. The taking of such articles is forbidden unless they are actually required for the needs of the occupying army. Moreover, [GC IV] lays down expressly that even if foodstuffs, goods or medical supplies available in the occupied territory are subject to requisition because they are needed for the forces of occupation and for administrative personnel, they may be requisitioned only after the requirements of the civilian population have been taken into account. In any case, the articles taken must be duly requisitioned, and the amount taken must be in proportion to the resources of the country.

...

Articles requisitioned should be paid for in ready money, but if this is not possible a receipt must be given for them and payment of the amount due must be made as soon as possible.

Articles properly requisitioned under [Article 52 of the 1907 HR] become the property of the Occupant and pass out of the ownership of their former owner. As payment for these articles is made either at the time of requisition or becomes due at that time and is made later, a requisition under this [Article] is, in effect, a compulsory sale on the order of the Occupant.

...

Requisitions can only be demanded within the limits of the [1907 HR] and [GC IV] on the authority of the commander in the locality occupied. However, it is not necessary that his order for the requisition should be produced, as the articles taken must be paid for or a receipt given. The assistance of the local authorities of the invaded territory may be invoked to obtain the supplies. When it is impossible to obtain this assistance special parties under an officer should be detailed to collect what is required. Except in cases of emergency, no one under the rank of commissioned officer is, by the regulations of practically all armies, permitted to requisition.

...

Requisitions of supplies may be made in bulk, that is, a community may be called upon to supply certain quantities, or a return may be called for from inhabitants giving the amounts in their possession of which a proportion may then be requisitioned, or the householders may be requisitioned to feed or partly feed the soldiers quartered on them. In fact, any way that is convenient may be employed provided that the above-mentioned rules and the provisions of [GC IV] are observed.

...

The right to billet troops on the inhabitants follows from the right to requisition. The prices to be paid for requisitioned supplies may be fixed by the commander of the occupying force. The prices of commodities on sale may also be regulated. Supplies in the hands of private inhabitants may not be destroyed except where such destruction is rendered absolutely necessary by military operations.³⁸⁰

363. The US Field Manual provides, in the case of occupied territory, that:

If property which is appropriated by the occupant is beneficially owned in part by the State and in part by private interests, the occupation authorities should compensate the private owners to the extent of their interest. Such compensation should bear the same relationship to the full compensation which would be paid if the property were entirely privately owned as their interest bears to the total value of the property concerned. The occupant may take what measures it deems necessary to assure that no portion of the compensation paid on account of private interests accrues to the State.

If it is unknown whether certain property is public or private, it should be treated as public property until its ownership is ascertained.

...

Valid capture or seizure of property requires both an intent to take such action and a physical act of capture or seizure. The mere presence within occupied territory of property which is subject to appropriation under international law does not operate to vest title thereto in the occupant.

...

Private property cannot be confiscated . . .

The foregoing prohibition extends not only to outright taking in violation of the law of war but also to any acts which, through the use of threats, intimidation, or pressure or by actual exploitation of the power of the occupant, permanently or temporarily deprive the owner of the use of his property without his consent or without authority under international law.

...

Immovable private enemy property may under no circumstances be seized. It may, however, be requisitioned.

...

If private property is seized in conformity with the preceding paragraph, a receipt therefor should be given the owner or a record made of the nature and quantity of the property and the name of the owner or person in possession in order that restoration and compensation may be made at the conclusion of the war.

...

The rule stated in the foregoing paragraph includes everything susceptible of direct military use, such as cables, telephone and telegraph plants, radio, television, and telecommunications equipment, motor vehicles, railways, railway plants, port facilities, ships in port, barges and other watercraft, airfields, aircraft, depots of arms, whether military or sporting, documents connected with the war, all varieties of military equipment, including that in the hands of manufacturers, component parts of or material suitable only for use in the foregoing, and in general all kinds of war material.

The destruction of the foregoing property and all damage to the same is justifiable only if it is rendered absolutely necessary by military operations.

³⁸⁰ UK, *Military Manual* (1958), §§ 589–595 and 597–604.

...

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

The foregoing provision applies only to activities on land and does not deal with seizure or destruction of cables in the open sea.

...

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

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

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

. . . Practically everything may be requisitioned under this article that is necessary for the maintenance of the army, such as fuel, food, clothing, building materials, machinery, tools, vehicles, furnishings for quarters, etc. Billeting of troops in occupied areas is also authorized.

...

The Occupying Power may not requisition foodstuffs, articles or medical supplies available in the occupied territory, except for use by the occupation forces and administration personnel, and then only if the requirements of the civilian population have been taken into account. Subject to the provisions of other international Conventions, the Occupying Power shall make arrangements to ensure that fair value is paid for any requisitioned goods.

...

Requisitions must be made under the authority of the commander in the locality. No prescribed method is fixed, but if practicable requisitions should be accomplished through the local authorities by systematic collection in bulk. They may be made direct by detachments if local authorities fail or if circumstances preclude resort to such authorities.

...

The prices of articles and services requisitioned will be fixed by agreement if possible, otherwise by military authority. Receipts should be taken up and compensation paid promptly.³⁸¹

364. The US Air Force Pamphlet, analysing the situation in occupied territories, recalls that "Article 46 [of the 1907] HR confirms that private property ' . . . must be respected' and that 'Private property cannot be confiscated'".³⁸² It adds that "foodstuffs, articles or medical supplies may be requisitioned for the use of occupation forces and administrative personnel, but only if the requirements of the civilian population have been taken into account".³⁸³

365. The US Soldier's Manual instructs troops: "Do not start fires in civilians' homes or buildings or burn their property unless the necessities of war urgently

³⁸¹ US, *Field Manual* (1956), §§ 394(b) and (c), 395, 406–407, 409–413 and 415–416.

³⁸² US, *Air Force Pamphlet* (1976), § 14-6(a). ³⁸³ US, *Air Force Pamphlet* (1976), § 14-6(b).

require it. When searching dwellings in enemy towns and villages, do not take nonmilitary items.”³⁸⁴

366. The US Instructor’s Guide provides that:

Under the law of war, seizing and destroying certain enemy property is a crime. Assume, for example, that you are conducting a search in a built-up area. As you go from one building to another, you discover only a few weapons. But in one home you see some interesting art objects – hand-carved figures, for instance – and you decide to take one. Taking the hand-carved figure would be a crime which violates the law of war and the Uniform Code of Military Justice. You have no right to take such property. If, during that same search, you deliberately smash dishes, burn books, and scatter clothing, you would also violate the law of war by destroying property when it was not necessary, and you could be prosecuted for these crimes.³⁸⁵

The Guide also emphasises that “in addition to the grave breaches of the Geneva Conventions, the following acts are further examples of war crimes: . . . purposelessly burning homes”.³⁸⁶

367. Under the US Rules of Engagement for Operation Desert Storm, troops are ordered to:

Treat all civilians and their property with respect and dignity. Before using privately owned property, check to see if publicly owned property can substitute. No requisitioning of civilian property, including vehicles, without permission of a company level commander and without giving a receipt. If an ordering officer can contract the property, then do not requisition it.³⁸⁷

National Legislation

368. Argentina’s Law on National Defence and Decree on the Law on National Defence permit requisitions in times of emergency or extreme gravity. An indemnity must be paid.³⁸⁸

369. Under Argentina’s Constitution, no armed or security forces may make requisitions or require assistance of any kind.³⁸⁹

370. Argentina’s Draft Code of Military Justice punishes any soldier who “requisitions unlawfully and without necessity buildings or movable objects in occupied territory”.³⁹⁰

371. Azerbaijan’s Law concerning the Protection of Civilian Persons and the Rights of Prisoners of War provides that, in international and non-international

³⁸⁴ US, *Soldier’s Manual* (1984), p. 23.

³⁸⁵ US, *Instructor’s Guide* (1985), pp. 5 and 6.

³⁸⁶ US, *Instructor’s Guide* (1985), p. 13.

³⁸⁷ US, *Rules of Engagement for Operation Desert Storm* (1991), § H.

³⁸⁸ Argentina, *Law on National Defence* (1966), Articles 36 and 37; *Decree on the Law on National Defence* (1967), Articles 45 and 75.

³⁸⁹ Argentina, *Constitution* (1994), Article 17.

³⁹⁰ Argentina, *Draft Code of Military Justice* (1998), Article 295, introducing a new Article 879(1) in the *Code of Military Justice as amended* (1951).

armed conflicts, the destruction or annihilation of civilian movable or immovable property which is not necessary for military operations is prohibited.³⁹¹

372. Bangladesh's International Crimes (Tribunal) Act states that the "violation of any humanitarian rules applicable in armed conflicts laid down in the Geneva Conventions of 1949" is a crime.³⁹²

373. Under the Criminal Code of the Federation of Bosnia and Herzegovina, "the taking of an illegal and disproportionate contribution or requisition" is a war crime.³⁹³ The Criminal Code of the Republika Srpska contains the same provision.³⁹⁴

374. Bulgaria's Penal Code as amended states that "a person who... appropriates, damages, destroys or unlawfully takes away property belonging to the population located in the region of military operations" commits a crime.³⁹⁵

375. Canada's National Defence Act punishes "every person who... commits any offence against the property... of any inhabitant or resident of a country in which he is serving".³⁹⁶

376. Chile's Code of Military Justice provides that "any individual working for the Army, whether military or not, who abusively orders or commits requisitions, or who does not give receipts after lawful requisitions" commits a punishable offence.³⁹⁷

377. China's Law Governing the Trial of War Criminals provides that "unlawful extortion or demanding of contributions or requisitions", "confiscation of property", as well as "taking money or property by force or extortion", constitute war crimes.³⁹⁸

378. Colombia's Military Penal Code provides for a prison sentence for "anyone who, without any justification, orders or commits requisitions", as well as for "anyone who requisitions without fulfilling the required formalities and without special circumstances obliging him to do so".³⁹⁹

379. Under Croatia's Criminal Code, "unlawful and disproportionately large contributions and requisitions" are war crimes.⁴⁰⁰

380. Czechoslovakia's Decree No. 16 on the Punishment of Nazi Criminals as amended punishes offences against property during the period of imminent danger to the Republic and cloaked in the form of judicial or official acts.⁴⁰¹

³⁹¹ Azerbaijan, *Law concerning the Protection of Civilian Persons and the Rights of Prisoners of War* (1995), Article 17(7).

³⁹² Bangladesh, *International Crimes (Tribunal) Act* (1973), Section 3(2)(e).

³⁹³ Bosnia and Herzegovina, Federation, *Criminal Code* (1998), Article 154(1).

³⁹⁴ Bosnia and Herzegovina, Republika Srpska, *Criminal Code* (2000), Article 433(1).

³⁹⁵ Bulgaria, *Penal Code as amended* (1968), Article 404.

³⁹⁶ Canada, *National Defence Act* (1985), Section 77(f).

³⁹⁷ Chile, *Code of Military Justice* (1925), Article 329.

³⁹⁸ China, *Law Governing the Trial of War Criminals* (1946), Article 3(25), (33) and (36).

³⁹⁹ Colombia, *Military Penal Code* (1999), Articles 176 and 177.

⁴⁰⁰ Croatia, *Criminal Code* (1997), Article 158(1).

⁴⁰¹ Czechoslovakia, *Decree No. 16 on the Punishment of Nazi Criminals as amended* (1945), Sections 8 and 9.

381. The Czech Republic's Criminal Code as amended punishes a commander who intentionally "causes harm by a military operation to civil inhabitants or to their . . . property".⁴⁰²

382. Estonia's Criminal Code as amended provides for the punishment of unlawful destruction and requisitions of property.⁴⁰³

383. Gambia's Armed Forces Act punishes "every person subject to this Act who . . . commits any offence against the property . . . of any inhabitant or resident of a country in which he is serving".⁴⁰⁴

384. Ghana's Armed Forces Act punishes "every person subject to the Code of Service Discipline who . . . commits any offence against the property . . . of any inhabitant or resident of a country in which he is serving".⁴⁰⁵

385. Hungary's Criminal Code as amended provides that "a military commander who, violating the rules of international law of warfare . . . pursues a war operation which causes serious damage to . . . the goods of the civilian population" commits a war crime.⁴⁰⁶

386. Ireland's Geneva Conventions Act as amended provides that any "minor breach" of the Geneva Conventions, including violations of Article 55 GC IV, is a punishable offence.⁴⁰⁷

387. Italy's Law of War Decree states that, in occupied territory:

Private property is not subject to confiscation.

...

The occupying military authority may seize all kinds of arms and ammunitions, as well as all means of communication and transportation, including ships and aircraft, belonging to private persons, which may be used for war operations, provided that they be restored or compensated when peace is made.

...

Requisitions in kind and services may be demanded from the local authorities and population only to satisfy the needs of the occupying forces.

They must be in proportion to the resources of the country, and of such a nature as not to involve the population in the obligation of taking part in military operations against their country.

The contributions in kind shall, as far as possible, be paid for in ready money; if not, the requisitions shall be acknowledged through the giving of a receipt and payment of the amount due must be made as soon as possible.

Requisitions cannot be demanded without the authority of the local commander of the occupying force.⁴⁰⁸

Regarding property in enemy territory, the Decree states that "property belonging to an enemy national may be requisitioned against indemnity".⁴⁰⁹

⁴⁰² Czech Republic, *Criminal Code as amended* (1961), Article 262(2)(a).

⁴⁰³ Estonia, *Criminal Code as amended* (1992), Section 61/2.

⁴⁰⁴ Gambia, *Armed Forces Act* (1985), Section 40(f).

⁴⁰⁵ Ghana, *Armed Forces Act* (1962), Section 18(f).

⁴⁰⁶ Hungary, *Criminal Code as amended* (1978), Section 160(a).

⁴⁰⁷ Ireland, *Geneva Conventions Act as amended* (1962), Section 4(1) and (4).

⁴⁰⁸ Italy, *Law of War Decree* (1938), Articles 58, 60 and 62.

⁴⁰⁹ Italy, *Law of War Decree* (1938), Article 294.

388. Italy's Wartime Military Penal Code punishes any soldier who in enemy territory, and without authorisation or necessity, imposes excessive requisitions or war contributions.⁴¹⁰

389. Under Lithuania's Criminal Code as amended, "imposing unlawful and excessively large indemnities and requisitions" in time of war, armed conflict or occupation is a war crime.⁴¹¹

390. Malta's Armed Forces Act as amended punishes "any person subject to military law who, in any country or territory outside Malta, commits any offence against the . . . property of any member of the civilian population".⁴¹²

391. Moldova's Penal Code punishes "unlawful requisition of private property, committed against the civilian population in the area of military operations".⁴¹³

392. Under Mozambique's Military Criminal Law, it is prohibited to abuse one's military position, or the fear caused by the war, to impose excessive war contributions or to appropriate money or any movable property of the population, as well as to destroy or damage goods and other objects of the civilian population.⁴¹⁴

393. Myanmar's Defence Service Act punishes "any person subject to this Act who commits . . . any offence against the property or person of any inhabitant of, or resident in the country in which he is serving".⁴¹⁵

394. The Extraordinary Penal Law Decree as amended of the Netherlands punishes whoever

during the time of [the Second World War] intentionally makes or threatens to make use of the power, opportunity or means, offered him by the enemy or by the fact of the enemy occupation, unlawfully to injure another in his possessions or unlawfully benefit himself or another.⁴¹⁶

395. The Definition of War Crimes Decree of the Netherlands includes "exaction of illegitimate or of exorbitant contributions and requisitions" in its list of war crimes.⁴¹⁷

396. Norway's Military Penal Code as amended punishes any combatant "who, with the purpose of acquiring for himself or others unwarranted gain in violation of the law, . . . increases rightful requisitions or . . . refuses to issue receipt for confiscated or requisitioned property", as well as "anyone who contravenes or is accessory to the contravention of provisions relating to the protection of persons or property laid down in . . . the Geneva Conventions of 12 August 1949".⁴¹⁸

⁴¹⁰ Italy, *Wartime Military Penal Code* (1941), Article 224.

⁴¹¹ Lithuania, *Criminal Code as amended* (1961), Article 336.

⁴¹² Malta, *Armed Forces Act as amended* (1970), Section 68.

⁴¹³ Moldova, *Penal Code* (1961), Article 268.

⁴¹⁴ Mozambique, *Military Criminal Law* (1987), Articles 87 and 88.

⁴¹⁵ Myanmar, *Defence Service Act* (1959), Section 66(f).

⁴¹⁶ Netherlands, *Extraordinary Penal Law Decree as amended* (1943), Article 27.

⁴¹⁷ Netherlands, *Definition of War Crimes Decree* (1946), Article 1.

⁴¹⁸ Norway, *Military Penal Code as amended* (1902), §§ 100(2) and (3) and 108(a).

397. Under Paraguay's Penal Code, the deliberate destruction of private property in time of war, armed conflict or military occupation is a war crime.⁴¹⁹

398. Under Slovenia's Penal Code, the "imposition of unlawful and excessive contributions [or] requisitions" is a war crime.⁴²⁰

399. Spain's Military Criminal Code punishes any soldier who "requisitions unduly or unnecessarily buildings or movable objects in occupied territory".⁴²¹

400. Uganda's National Resistance Army Statute punishes any "person subject to military law who . . . commits any offence against the property . . . of any inhabitant or resident of a country in which he is serving".⁴²²

401. The UK Army Act as amended punishes "any person subject to military law who, in any country or territory outside the United Kingdom, commits any offence against the . . . property of any member of the civil population".⁴²³

402. The UK Air Force Act as amended punishes "any person subject to air-force law who, in any country or territory outside the United Kingdom, commits any offence against the . . . property of any member of the civil population".⁴²⁴

403. The Criminal Offences against the Nation and State Act of the SFRY (FRY) considers that, during war or enemy occupation, "any person who . . . ordered or committed arson, destruction . . . of private . . . property" committed war crimes.⁴²⁵

404. Under the Penal Code as amended of the SFRY (FRY), "taking unlawful and disproportionately high contributions and requisitions" is a war crime.⁴²⁶

National Case-law

405. In the *Bijelić case* in 1997, a Bosnian Serb was convicted by a Bosnian court, *inter alia*, of unlawful seizure of property. The trial was supported by the ICTY.⁴²⁷

406. In the *Takashi Sakai case* in 1946, a Chinese Military Tribunal found the accused, a Japanese military commander in China during the Second World War, guilty, *inter alia*, of "inciting or permitting his subordinates . . . to cause destruction of property", notably 700 houses which were set on fire. The Tribunal said that, in so doing, "he had violated the [1907 HR] . . . These offences are war crimes and crimes against humanity." It found that Article 46 of the 1907 HR had been violated.⁴²⁸

⁴¹⁹ Paraguay, *Penal Code* (1997), Article 320(7).

⁴²⁰ Slovenia, *Penal Code* (1994), Article 374(1).

⁴²¹ Spain, *Military Criminal Code* (1985), Article 74(1).

⁴²² Uganda, *National Resistance Army Statute* (1992), Section 35(e).

⁴²³ UK, *Army Act as amended* (1955), Section 63.

⁴²⁴ UK, *Air Force Act as amended* (1955), Section 63.

⁴²⁵ SFRY (FRY), *Criminal Offences against the Nation and State Act* (1945), Article 3(3).

⁴²⁶ SFRY (FRY), *Penal Code as amended* (1976), Article 142(1).

⁴²⁷ Bosnia and Herzegovina, Cantonal Court of Bihac, *Bijelić case*, Judgement, 30 April 1997.

⁴²⁸ China, War Crimes Military Tribunal of the Ministry of National Defence at Nanking, *Takashi Sakai case*, Judgement, 29 August 1946.

407. During the First World War, France adopted a law to extend the jurisdiction of its courts to offences committed in invaded territory and on this basis a number of German officers and soldiers were convicted by courts-martial, *inter alia*, for arson.⁴²⁹

408. In the *Szabados case* before a French Military Tribunal in 1946, the accused, a former German non-commissioned officer of the 19th Police Regiment stationed in occupied France, was charged with, and found guilty of, *inter alia*, arson and wanton destruction of inhabited buildings. The accused ordered the inhabitants of several houses in Ugine, regarded as harbouring "terrorists", to leave the premises, whereupon three houses were set on fire. He personally threw hand-grenades into the houses. He also took part in the destruction by dynamite of a block of three more houses which it was found difficult to set on fire. The wanton destruction of inhabited houses by fire and explosive was regarded by the court as being a crime under Article 434 of the French Penal Code.⁴³⁰

409. In the *Rust case* before a French Military Tribunal in 1948, the accused, a German *Obersturmführer*, was charged, *inter alia*, with "abusive and illegal requisitioning" of French property, a case which, according to the prosecution, amounted to pillage in time of war, under Article 221 of the French Code of Military Justice and Article 2(8) of the 1944 Ordinance on Repression of War Crimes. Without giving reasons therefor, the Tribunal, however, made alterations in respect of the offences and found the accused guilty of "abusing powers conferred upon him for the purpose of requisitioning . . . vehicles by refusing to deliver receipts for such requisitions". The accused was under an obligation to pay, or deliver receipts in lieu of immediate payment, for the requisition.⁴³¹

410. In its judgement in the *Roechling case* in 1948, the General Tribunal at Rastadt of the Military Government for the French Zone of Occupation in Germany held that the accused, the proprietor of a German industrial trust and Reich Commissioner for the iron industry of the departments of Moselle and Meurthe-et-Moselle, was guilty of war crimes, *inter alia*, for the exploitation and removal of important plant from metallurgical undertakings in occupied territories and for unlawful seizure of raw materials and commodities in those countries. The Court found that the foregoing actions amounted to a fraudulent seizure of private property belonging to the inhabitants of occupied countries, in violation of the 1907 HR.⁴³²

⁴²⁹ J. Rampon, *La justice militaire en France et le droit international humanitaire*, Mémoire de DEA, Faculté de Droit, Université de Montpellier I, 1997–1998, p. 30, referring to cases of the Conseil de Guerre de Rennes, 26 February 1915 and of the Conseil de Guerre de Toulouse, 16 July 1916.

⁴³⁰ France, Permanent Military Tribunal at Clermont-Ferrand, *Szabados case*, Judgement, 23 June 1946.

⁴³¹ France, Permanent Military Tribunal at Metz, *Rust case*, Judgement, 5 March 1948.

⁴³² France, General Tribunal at Rastadt of the Military Government for the French Zone of Occupation in Germany, *Roechling case*, Judgement, 30 June 1948.

411. In the *Jorgić case* in 1997, Germany's Higher Regional Court at Düsseldorf found the accused guilty of genocide committed in the context of the conflict in the former Yugoslavia. In 1999, the Federal Supreme Court confirmed the judgement of first instance in most parts. Both courts referred to the taking of property, such as money and furniture, and to the destruction and arson of buildings and private houses as part of the general background in which the genocide took place.⁴³³

412. In the *Ayub case* in 1979, Israel's High Court heard a petition from several Arab landowners whose lands in Al-Bireh and Tubas had been requisitioned in 1970 and 1975 pursuant to orders issued by the military commander of the region. The orders stated that the military commander deemed the requisition to be necessary for military and security purposes. At the initiative of the Israeli civilian government, Jewish settlements were established on the requisitioned lands in 1978, whereupon the Arab landowners petitioned the High Court of Justice for an injunction against the requisition orders and for the return of their lands. In considering the petition, the Court held that:

The 1907 Hague Convention is generally regarded as customary international law, whereas provisions of the 1949 Fourth Geneva Convention remain conventional in their nature. Consequently the petitioners may rely in this Court on the 1907 Hague Convention – which thus forms part of Israeli internal law – but not on provisions of the 1949 Fourth Geneva Convention . . . It therefore remained for the Court to decide whether the requisition of the petitioners' lands violates, inter alia, Articles 23 and 46 of the Hague Regulations prohibiting confiscation of private property. It was proven to the Court that the lands in question were seized only to be used and that rental was offered to the petitioners, who retained their ownership of the lands. This kind of seizure – namely requisition – is lawful under Article 52 of the Hague Regulations . . . The Court also adopts von Glahn's view regarding the question of how to deal with land which the occupant army does not really need for its own purposes but which must not be left in the possession of the owners lest it serve the interests of the enemy.⁴³⁴

413. In the *Sakhwil case* in 1979, a petition was filed with Israel's High Court by two Arab women from the West Bank. The women asked the Court to issue an injunction preventing the respondent from sealing off or demolishing or expropriating the houses in which they and their families resided. One of the rooms of the second petitioner had indeed been ordered to be sealed off. The Court, taking cognisance of the purpose for which the room had served (shelter for a member of the Al-Fatah organisation and hiding place for a sack of explosives), "found the argument on the illegality of the respondent's order to be groundless". The Court stated that the room could be lawfully sealed pursuant to Regulation 119(1) of the Defence (Emergency) Regulations of 1945, which constituted Jordanian legislation that had remained in force since the

⁴³³ Germany, Higher Regional Court at Düsseldorf, *Jorgić case*, Judgement, 26 September 1997; Federal Supreme Court, *Jorgić case*, Judgement, 30 April 1999.

⁴³⁴ Israel, High Court, *Ayub case*, Judgement, 15 March 1979.

period of the British Mandate. According to the Court, Regulation 119 permitted destruction of private property in certain circumstances. The Court added that "there is no contradiction between the provisions of that Convention [GC IV] . . . and the use of the authority vested in the respondent by legislation which was in force at the time". Consequently, the petition was rejected.⁴³⁵

414. In the *Al-Nawar case* before Israel's High Court in 1985, Judge Shamgar held that Article 46(2) of the 1907 HR "does not extend to property 'actually in use by the hostile army'".⁴³⁶

415. In its judgement in the *Religious Organisation Hokekyoji case* in 1956, a Japanese District Court emphasised that occupying armed forces must observe the 1907 HR, notably the fact that, in accordance with Article 46, "private property cannot be confiscated".⁴³⁷

416. In its judgement in the *Takada case* in 1959, a Japanese District Court stated that "there is no doubt that the principle of the respect for private property is an established custom of international law".⁴³⁸

417. In its judgement in the *Suikosha case* in 1966, a Japanese District Court considered that the prohibition of confiscation of private property as contained in Article 46 of the 1907 HR was part of customary international law.⁴³⁹

418. In its judgement on appeal in the *Esau case* in 1949, the Special Court of Cassation of the Netherlands considered that the removal of scientific instruments and gold from factories in the Netherlands was unlawful unless the property fell within one of the categories of goods which the occupant was exceptionally entitled to seize from private individuals by virtue of Article 53 of the 1907 HR. The Court held that the term "munitions of war" used in Article 53 should not be extended to materials and apparatus such as boring machines, lathes, lamps, tubes and gold, but they could be for technical or scientific reasons. Accordingly, the Court concluded that, with the exception of the short wave transmitter, none of the goods could be deemed to be excepted from the general inviolability of private property in war.⁴⁴⁰

419. In the *Fiebig case* before the Special Criminal Court at The Hague in the Netherlands in 1949, the accused, a delegate of the Minister of the Reich for Armaments and Munitions, was charged with, and convicted of, illegal requisitions. In its judgement, the Court emphasised that the requisitions were not covered by Article 23(g) of the 1907 HR and that they constituted a violation of Article 52 of the 1907 HR. Clearly, according to the Court, Article 23(g) could not be construed as authorising the systematic removal of Dutch property to Germany and the emptying of numbers of factories, warehouses and private

⁴³⁵ Israel, High Court, *Sakhwil case*, Judgement, 6 November 1979.

⁴³⁶ Israel, High Court, *Al-Nawar case*, Judgement, 11 August 1985.

⁴³⁷ Japan, District Court of Chiba, *Religious Organisation Hokekyoji case*, Judgement, 10 April 1956.

⁴³⁸ Japan, District Court of Tokyo, *Takada case*, Judgement, 28 January 1959.

⁴³⁹ Japan, District Court of Tokyo, *Suikosha case*, Judgement, 28 February 1966.

⁴⁴⁰ Netherlands, Special Court of Cassation, *Esau case*, Judgement on Appeal, 21 February 1949.

houses. Article 52 was violated because most of the removed commodities did not serve the necessities of the occupying army but supported the general war effort of Germany. Furthermore, no authorisation of requisition was granted by the military commander. In addition, the requisitioned property did not fall within the category of private property susceptible of seizure in accordance with Article 53 of the 1907 HR.⁴⁴¹

420. In the *Greiser case* before Poland's Supreme National Tribunal in 1946, the accused, a governor and *gauleiter* of the Nazi party for provinces incorporated in the German Reich, was charged for war crimes for having incited, assisted in the commission of, and committed, *inter alia*, acts of systematic and illegal deprivation of the Polish population of its private property, in contravention of Articles 46, 52 and 55 of the 1907 HR. Notably, the accused was charged with having taken part in "extortion and appropriation of the movables of Polish citizens, . . . in the territories in question . . . either by seizure, confiscation or by simply depriving of them persons being deported".⁴⁴²

421. In the *Flick case* before the US Military Tribunal at Nuremberg in 1947, the accused, the principal proprietor of a large group of German industrial enterprises (and four officials of the same group), which included coal and iron mines and steel producing plants, was charged with war crimes, *inter alia*, for offences against property in the countries and territories occupied by Germany. Flick was found guilty on this count of the indictment. The Tribunal quoted, *inter alia*, Articles 46, 52 and 53 of the 1907 HR. In respect of the seizure and management of private property, the Tribunal affirmed that:

The seizure of Rombach [a plant in occupied Alsace] in the first instance may be defended upon the ground of military necessity. The possibility of its use by the French, the absence of responsible management and the need for finding work for the idle population are all factors that the German authorities may have taken into consideration. Military necessity is a broad term. Its interpretation involves the exercise of some discretion. If after seizure the German authorities had treated their possession as conservatory for the rightful owners' interests, little fault could be found with the subsequent conduct of those in possession.

...

But some time after the seizure the Reich Government in the person of Goering, Plenipotentiary for the Four Year Plan, manifested the intention that it should be operated as the property of the Reich. This is clearly shown by the quoted statement in the contract which Flick signed. It was, no doubt, Goering's intention to exploit it to the fullest extent for the German war effort. We do not believe that this intent was shared by Flick. Certainly what was done by his company in the course of its management falls far short of such exploitation. Flick's expectation of ownership caused him to plough back into the physical property the profits of operation. This policy ultimately resulted to the advantage of the owners. In all of this we find no exploitation either for Flick's present personal advantage or to fulfil the aims of Goering.

⁴⁴¹ Netherlands, Special Criminal Court at The Hague, *Fiebig case*, Judgement, 28 June 1949.

⁴⁴² Poland, Supreme National Tribunal, *Greiser case*, Judgement, 7 July 1946.

...
While the original seizure may not have been unlawful, its subsequent detention from the rightful owners was wrongful. For this and other damage they may be compensated.

...
In this case, Flick's acts and conduct contributed to a violation of [Article 46 of the 1907 HR] that is, that private property must be respected. Of this there can be no doubt. But his acts were not within his knowledge intended to contribute to a programme of "systematic plunder" conceived by the Hitler regime and for which many of the major war criminals have been punished. If they added anything to this programme of spoliation, it was in a very small degree.⁴⁴³

422. In the *Krupp case* before the US Military Tribunal at Nuremberg in 1948, the accused, officials of the Krupp industrial enterprises occupying high positions in political, financial, industrial and economic circles in Germany, were charged with war crimes, *inter alia*, for the destruction and removal of property, and the seizure of machinery, equipment, raw materials and other property. The Tribunal quoted Articles 46 and 52 of the 1907 HR. It also stated that it "fully concurs with the Judgement of the I.M.T. that the [1907 Hague Convention (IV)], to which Germany was a party, had by 1939 become customary law and was, therefore, binding on Germany not only as Treaty Law but also as Customary Law". The Tribunal further stated that Articles 46 and 52 of the 1907 HR

are clear and unequivocal. Their essence is: if, as a result of war action, a belligerent occupies territory of the adversary, he does not, thereby, acquire the right to dispose of property in that territory, except according to the strict rules laid down in the Regulations. The economy of the belligerently occupied territory is to be kept intact, except for the carefully defined permissions given to the occupying authority – permissions which all refer to the army of occupation. Just as the inhabitants of the occupied territory must not be forced to help the enemy in waging the war against their own country or their own country's allies, so must the economic assets of the occupied territory not be used in such a manner.

...
When discriminatory laws are passed which affect the property rights of private individuals, subsequent transactions based on those laws and involving such property will in themselves constitute violations of Article 46 of the Hague Regulations.

...
Another erroneous contention put forward by the Defence is that the laws and customs of war do not prohibit the seizure and exploitation of property in belligerently occupied territory so long as no definite transfer of title was accomplished. The Hague Regulations are very clear on this point. Article 46 stipulates that "private property . . . must be respected." However, if, for example, a factory is being taken over in a manner which prevents the rightful owner from using it and deprives him from lawfully exercising his prerogative as owner, it cannot be said that his property "is respected" under Article 46 as it must be.

⁴⁴³ US, Military Tribunal at Nuremberg, *Flick case*, Judgement, 22 December 1947.

...

The general rule contained in Article 46 is further developed in Articles 52 and 53. Article 52 speaks of the "requisitions in kind and services" which may be demanded from municipalities or inhabitants, and it provides that such requisitions and services "shall not be demanded except for the needs of the Army of Occupation." As all authorities are agreed, the requisitions and services which are here contemplated and which alone are permissible, must refer to the needs of the Army of Occupation. It has never been contended that the Krupp firm belonged to the Army of Occupation. For this reason alone, the "requisitions in kind" by or on behalf of the Krupp firm were illegal. All authorities are again in agreement that the requisitions in kind and services referred to in Article 52, concern such matters as billets for the occupying troops and the occupation authorities, garages for their vehicles, stables for their horses, urgently needed equipment and supplies for the proper functioning of the occupation authorities, food for the Army of Occupation, and the like.⁴⁴⁴

423. In the *Krauch (I. G. Farben Trial)* case before the US Military Tribunal at Nuremberg in 1948, the accused, officials of I.G. Farben Industrie A.G., were charged, *inter alia*, with war crimes for offences against property in countries and territories which came under the belligerent occupation of Germany. The charges were regarded as violations of, *inter alia*, Articles 46, 52 and 53 of the 1907 HR. Some of the accused were found guilty of this count. The Tribunal held that:

The foregoing provisions of the Hague Regulations are broadly aimed at preserving the inviolability of property rights to both public and private property during military occupancy. They admit of exceptions of expropriation, use, and requisition, all of which are subject to well-defined limitations set forth in the articles. Where private individuals, including juristic persons, proceed to exploit the military occupancy by acquiring private property against the will and consent of the former owner, such action, not being expressly justified by any applicable provision of the Hague Regulations, is in violation of international law.

...

The payment of a price or other adequate consideration does not, under such circumstances, relieve the act of its unlawful character. Similarly where a private individual or a juristic person becomes a party to unlawful confiscation of... private property by planning and executing a well-defined design to acquire such property permanently, acquisition under such circumstances subsequent to confiscation constitutes conduct in violation of the Hague Regulations.

...

[I]t is illustrative of the view that offences against property of the character described in the [1943 Inter-Allied Declaration against Acts of Dispossession] were considered by the signatory powers to constitute action in violation of existing international law.

...

[W]ith respect to private property, these provisions relate to plunder, confiscation, and requisition which, in turn, imply action in relation to property committed against the will and without the consent of the owner... If, in fact, there is no

⁴⁴⁴ US, Military Tribunal at Nuremberg, *Krupp case*, Judgement, 30 June 1948.

coercion present in an agreement relating to the purchase of industrial enterprises or interests equivalent thereto, even during time of military occupancy, and if, in fact, the owner's consent is voluntarily given, we do not find such action to be violation of the Hague Regulations... On the other hand, when action by the owner is not voluntary because his consent is obtained by threats, intimidation, pressure, or by exploiting the position and power of the military occupant under circumstances indicating that the owner is being induced to part with his property against his will, it is clearly a violation of the Hague Regulations.⁴⁴⁵

424. In the *Von Leeb (The High Command Trial)* case before the US Military Tribunal at Nuremberg in 1948, the accused, former high-ranking officers in the German army and navy, were charged, *inter alia*, with war crimes and crimes against humanity against civilians in that they participated in atrocities such as wanton destruction of cities, towns and villages and devastation not justified by military necessity. The Tribunal stated that "most of the prohibitions of both the Hague and Geneva Conventions, considered in substance, are clearly an expression of the accepted views of civilized nations". It notably mentioned Articles 46 and 52 of the 1907 HR. The Tribunal found that the accused gave orders to seize or destroy foodstuffs and other property, such as cattle and horses, but the evidence did not show that these measures were not warranted by military necessity. The Tribunal emphasised that military necessity "does [not] justify the seizure of property or goods beyond that which is necessary for the use of the army of occupation".⁴⁴⁶

425. In its judgement in the *John Schultz* case in 1952, the US Court of Military Appeals listed arson as a crime "universally recognized as properly punishable under the law of war".⁴⁴⁷

Other National Practice

426. Working documents for the German army state that an army of occupation is allowed to appropriate goods from the civilian population if this is necessary to satisfy the needs of the army.⁴⁴⁸

427. In 1995, during a debate in the UN Security Council concerning the situation in the former Yugoslavia, Honduras condemned the practice of "ethnic cleansing", *inter alia*, "through... confiscation of property and destruction of homes, we have seen in Bosnian and Croatian territory the systematic elimination of one ethnic group by another. All of these acts deserve the condemnation and repudiation of the international community."⁴⁴⁹

⁴⁴⁵ US, Military Tribunal in Nuremberg, *Krauch (I. G. Farben Trial)* case, Judgement, 29 July 1948.

⁴⁴⁶ US, Military Tribunal at Nuremberg, *Von Leeb (The High Command Trial)* case, Judgement, 28 October 1948.

⁴⁴⁷ US, Court of Military Appeals, *John Schultz* case, Judgement, 5 August 1952.

⁴⁴⁸ Germany, *Materialien zur Weiterbildung in Kriegsvölkerrecht: Kampführung und Schutz der Zivilbevölkerung*, Zentrum Innere Führung, Koblenz, 1988, p. 36.

⁴⁴⁹ Honduras, Statement before the UN Security Council, UN Doc. S/PV.3591, 9 November 1995, p. 6.

428. On the basis of a reply by Iraq's Ministry of Defence to a questionnaire, the Report on the Practice of Iraq states that strict measures should be taken to protect cities that fall under the control of armed forces, including measures to protect and ensure the safety of private property.⁴⁵⁰

429. In 1990, in a letter to the UN Secretary-General, Kuwait accused the Iraqi occupation forces of burning and destroying homes.⁴⁵¹

430. In 1995, during a debate in the UN Security Council concerning the situation in the former Yugoslavia, Russia declared that "the continuing large-scale violations of the rights of the Serbian population in the former Sectors West, North and South – including burnings... of homes... – are causing serious concern".⁴⁵²

431. In 1992, in its final report to Congress on the conduct of the Gulf War, the US Department of Defense stated that "in violation of [the 1907 HR]... private... property was confiscated... [Confiscation of private property is prohibited under any circumstance...]"⁴⁵³

III. Practice of International Organisations and Conferences

United Nations

432. In a resolution adopted in 1990 following Iraq's invasion of Kuwait, the UN Security Council condemned "the treatment by Iraqi forces of Kuwaiti nationals, including... mistreatment of... property in Kuwait in violation of international law".⁴⁵⁴

433. In a resolution adopted in 1995 on violations of international humanitarian law in the former Yugoslavia, the UN Security Council expressed its deep concern "at reports... of serious violations of international humanitarian law... including burning of houses".⁴⁵⁵

434. In 1995, in a statement by its President regarding the situation in Croatia, the UN Security Council stated that it was "concerned by the reports of human rights violations including the burning of houses" and demanded that the government of Croatia "immediately investigate all such reports and take appropriate measures to put an end to such acts".⁴⁵⁶

435. In January 1996, in a statement by its President regarding the situation in Croatia, the UN Security Council strongly condemned "the violations

⁴⁵⁰ Report on the Practice of Iraq, 1998, Reply by the Ministry of Defence to a questionnaire, July 1997, Chapter 2.3.

⁴⁵¹ Kuwait, Letter dated 8 September 1990 to the UN Secretary-General, UN Doc. S/21730, 9 September 1990.

⁴⁵² Russia, Statement before the UN Security Council, UN Doc. S/PV.3591, 9 November 1995, p. 8.

⁴⁵³ US, Department of Defense, Final Report to Congress on the Conduct of the Persian Gulf War, Appendix O, The Role of the Law of War, 10 April 1992, *ILM*, Vol. 31, 1992, p. 620.

⁴⁵⁴ UN Security Council, Res. 670, 25 September 1990, preamble.

⁴⁵⁵ UN Security Council, Res. 1019, 9 November 1995, preamble.

⁴⁵⁶ UN Security Council, Statement by the President, UN Doc. S/PRST/1995/44, 7 September 1995, p. 1.

of international humanitarian law and human rights in the former sectors North and South in the Republic of Croatia, ...including systematic and widespread ... arson and other forms of destruction of property". The Council further urged the government of Croatia "to make every effort to arrest all perpetrators and bring them promptly to trial".⁴⁵⁷

436. In December 1996, in a statement by its President regarding the situation in Croatia, the UN Security Council deplored "the continued failure by the Government of Croatia to safeguard effectively ... property rights [of Croatian Serb refugees], especially the situation where many of those Serbs who have returned to the former sectors have been unable to regain possession of their properties".⁴⁵⁸

437. In a resolution adopted in 1995 on the situation of human rights in Bosnia and Herzegovina, Croatia and the FRY, the UN General Assembly condemned "violations of human rights and international humanitarian law, including ... the burning ... of houses".⁴⁵⁹

438. In a resolution adopted in 1993, the UN Commission on Human Rights condemned "the ongoing Israeli violations of human rights in southern Lebanon consisting, in particular, in ... the demolition of ... homes [of civilians and] the confiscation of their property".⁴⁶⁰

439. In a resolution adopted in 1996 on the situation of human rights in Bosnia and Herzegovina, Croatia and the FRY, the UN Commission on Human Rights condemned:

in the strongest terms all violations of human rights and international humanitarian law during the conflict, in particular in areas which were under the control of the self-proclaimed Bosnian and Croatian Serb authorities, in particular massive and systematic violations, including, *inter alia*, ... burning ... of houses, shelling of residential areas ...⁴⁶¹

440. In a resolution adopted in 1998 on the situation of human rights in southern Lebanon and western Bekaa, the UN Commission on Human Rights deplored "the destruction of ... dwellings [of Lebanese citizens], the confiscation of their property ...". It called upon Israel "to put an immediate end to such practices".⁴⁶²

441. In a resolution adopted in 2000 on the situation in Chechnya, the UN Commission on Human Rights deplored "the suffering inflicted on the civilian population by all parties, including the serious and systematic destruction of installations and infrastructure, contrary to international humanitarian law".⁴⁶³

⁴⁵⁷ UN Security Council, Statement by the President, UN Doc. S/PRST/1996/2, 8 January 1996, p. 1.

⁴⁵⁸ UN Security Council, Statement by the President, UN Doc. S/PRST/1996/48, 20 December 1996, p. 1.

⁴⁵⁹ UN General Assembly, Res. 50/193, 22 December 1995, § 6.

⁴⁶⁰ UN Commission on Human Rights, Res. 1993/67, 10 March 1993, § 1.

⁴⁶¹ UN Commission on Human Rights, Res. 1996/71, 23 April 1996, § 1.

⁴⁶² UN Commission on Human Rights, Res. 1998/62, 21 April 1998, § 1.

⁴⁶³ UN Commission on Human Rights, Res. 2000/58, 25 April 2000, preamble.

442. In 1995, in a report concerning the conflict in the former Yugoslavia, the UN Secretary-General noted that UNCRO continued to document serious violations of the human rights of the Croatian Serbs who had remained in the sectors reconquered by the Croatian army, including the burning of houses.⁴⁶⁴

443. In 1996, in a report on UNOMIL in Liberia, the UN Secretary-General reported that his "Special Representative has, on several occasions, . . . exhorted Liberian faction leaders to exert proper command and control over their combatants so that the . . . property of civilians can be protected and human rights abuses stopped".⁴⁶⁵

444. In 1996, in a report on the situation of human rights in Croatia, the UN Secretary-General reported that:

Since the end of November 1995, the incidence of human rights violations, including acts of . . . arson . . . committed in the former Sectors West, North and South has continued to decline . . . The Government of Croatia eventually responded with a series of measures intended to protect its citizens' human rights, and these initiatives seem to have begun to have a positive effect.⁴⁶⁶

445. In 1998, in a report on the situation in Sierra Leone, the UN Secretary-General noted that:

From all parts of the country there are reports of . . . destruction of residential and commercial premises and property. It will remain important to document these actions with a view to tackling issues of impunity and as an element in the process of promoting reconciliation and healing of society.⁴⁶⁷

446. In 1996, in a report on the situation of human rights in the Sudan, the Special Rapporteur of the UN Commission on Human Rights listed as "grave violations of human rights" the indiscriminate killing of civilians during raids by the army and by the PDF, which were regularly accompanied by the burning of houses.⁴⁶⁸

447. In 1996, in a report on the situation of human rights in Somalia, the Independent Expert of the UN Commission on Human Rights described, in a section entitled "Civil war and violations of human rights", the practices of the different Somali factions, including the fact that the winning faction would engage in destruction of private property.⁴⁶⁹

⁴⁶⁴ UN Secretary-General, Report pursuant to Security Council Resolutions 981 (1995), 982 (1995) and 983 (1995), UN Doc. S/1995/987, 23 November 1995, § 7.

⁴⁶⁵ UN Secretary-General, Fifteenth progress report on UNOMIL, UN Doc. S/1996/47, 23 January 1996, § 28.

⁴⁶⁶ UN Secretary-General, Further report on the situation of human rights in Croatia pursuant to Security Council Resolution 1019 (1995), UN Doc. S/1996/109, 14 February 1996, § 6.

⁴⁶⁷ UN Secretary-General, Fifth report on the situation in Sierra Leone, UN Doc. S/1998/486, 9 June 1998, § 37.

⁴⁶⁸ UN Commission on Human Rights, Special Rapporteur on the Situation of Human Rights in the Sudan, Report, UN Doc. E/CN.4/1996/62, 20 February 1996, § 96(a).

⁴⁶⁹ UN Commission on Human Rights, Independent Expert on Assistance to Somalia in the Field of Human Rights, Report, UN Doc. E/CN.4/1996/14/Add.1, 10 April 1996, § 10.

Other International Organisations

448. In the Final Communiqué of its 10th Session in 1989, the GCC Supreme Council appealed for “an end to the Israelis’ oppressive measures, including . . . the demolishing of houses, which run counter to the principles of human rights and international norms and conventions”.⁴⁷⁰

449. In the Final Communiqué of its 36th Session in 1990, the GCC Ministerial Council emphasised that “civilians in the Kuwaiti territory under Iraqi occupation must be respected and the integrity of their lives and property ensured” and that “private establishments and property must be safeguarded in accordance with the noble stipulations of Islamic law”. It insisted that “the Iraqi authorities must ensure the protection of all . . . private establishments and all movable and immovable property in the State of Kuwait”.⁴⁷¹

450. In the Final Communiqué of its 11th Session in 1990, the GCC Supreme Council demanded that:

The Iraqi régime must respect the status of civilians and ensure the safety of their lives and property and must safeguard private . . . installations and property in accordance with Islamic law, the provisions of the 1949 Geneva Convention relative to the Protection of Civilian Persons in Time of War and the international humanitarian covenants and conventions.⁴⁷²

451. In a resolution adopted in 1990, the Council of the League of Arab States, with reference to Islamic law, GC IV, the 1948 UDHR and international covenants and conventions relating to the protection of human rights, decided “to insist that the Iraqi authorities must ensure the protection of all . . . private establishments and all movable and immovable property in the State of Kuwait, and to regard any measures incompatible with such a commitment as null and void”. In another resolution adopted the same day, the Council decided “to urge the Iraqi authorities to meet their established international obligations towards third-country nationals by . . . ensuring the safety of their . . . property” and “to hold the Republic of Iraq fully responsible for any damage . . . to their property as a result of a breach on the part of the Iraqi authorities of their international obligations in this respect”.⁴⁷³

⁴⁷⁰ GCC, Supreme Council, 10th Session, Muscat, 18–21 December 1989, Final Communiqué, annexed to Letter dated 29 December 1989 from Oman to the UN Secretary-General, UN Doc. A/45/73-S/21065, 2 January 1990, p. 4.

⁴⁷¹ GCC, Ministerial Council, 36th Session, Jeddah, 5–6 September 1990, Final Communiqué, annexed to Letter dated 6 September 1990 from Oman to the UN Secretary-General, UN Doc. S/21719, 6 September 1990, p. 3, preamble and § 3.

⁴⁷² GCC, Supreme Council, 11th Session, Doha, 22–25 December 1990, annexed to Note verbale dated 26 December 1990 from Qatar to the UN Secretary-General, UN Doc. A/45/908, 27 December 1990, p. 3.

⁴⁷³ League of Arab States, Council, Res. 5038, 31 August 1990, annexed to Letter dated 31 August 1990 from Qatar to the UN Secretary-General, UN Doc. S/21693, 31 August 1990, p. 4; Res. 5039, 31 August 1990, annexed to Letter dated 31 August 1990 from Qatar to the UN Secretary-General, UN Doc. S/21693, 31 August 1990, p. 7. (Libya opposed the resolutions and Algeria, Iraq, Jordan, Mauritania, Palestine, Sudan, Tunisia and Yemen did not participate in the work of the session.)

International Conferences

452. The 25th International Conference of the Red Cross in 1986 adopted a resolution on respect for IHL in armed conflicts and action by the ICRC for persons protected by the Geneva Conventions in which it deplored “the destruction of civilian housing in violation of the laws and customs of war”.⁴⁷⁴

453. In a resolution adopted in 1993 on respect for IHL and support for humanitarian action in armed conflicts, the 90th Inter-Parliamentary Conference condemned the destruction of civilian houses and property.⁴⁷⁵

454. In 1996, in a report submitted to the UN Security Council on the activities of the International Conference on the Former Yugoslavia, the Co-Chairmen of the Steering Committee stated with respect to the remaining Serb population in the Krajina that “human rights violations, including burning . . . of abandoned property . . . were brought to the attention of the Croatian Government at the highest levels on a number of occasions, together with the serious criticisms from the international community”.⁴⁷⁶

IV. Practice of International Judicial and Quasi-judicial Bodies

455. No practice was found.

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

456. In a communication to the press issued in 1993 on the situation in Bosnia and Herzegovina, the ICRC denounced “blatant violations of the basic principles of international humanitarian law”, including the fact that “civilian property, particularly houses, is destroyed and burned by the combatants”.⁴⁷⁷

457. In a communication to the press in 2001, the ICRC reminded the parties to the conflict in Afghanistan of “the requirement that persons not taking part in hostilities must be treated with humanity in all circumstances: . . . their property must be respected”.⁴⁷⁸

VI. Other Practice

458. In 1979, an armed opposition group wrote to the ICRC to confirm its commitment to IHL and to denounce “the arson and destruction of 300,000 homes”.⁴⁷⁹

⁴⁷⁴ 25th International Conference of the Red Cross, Geneva, 23–31 October 1986, Res. I, preamble.

⁴⁷⁵ 90th Inter-Parliamentary Conference, Canberra, 13–18 September 1993, Resolution on Respect for International Humanitarian Law and Support for Humanitarian Action in Armed Conflicts, preamble.

⁴⁷⁶ International Conference on the Former Yugoslavia, Co-Chairmen of the Steering Committee, Final biannual report, UN Doc. S/1996/4, 2 January 1996, Annex, § 10.

⁴⁷⁷ ICRC, Communication to the Press No. 93/16, Bosnia-Herzegovina: The ICRC appeals for humanity, Geneva, 16 June 1993.

⁴⁷⁸ ICRC, Communication to the Press No. 01/47, Afghanistan: ICRC calls on all parties to the conflict to respect international humanitarian law, 24 October 2001.

⁴⁷⁹ ICRC archive documents.

D. Pillage

General

Note: For practice concerning pillage of cultural property, see Chapter 12, section C. For practice concerning protection of the wounded, sick and shipwrecked against pillage, see Chapter 34, section C. For practice concerning protection of the dead against despoliation, see Chapter 35, section B. For practice concerning pillage of the personal belongings of persons deprived of their liberty, see Chapter 37, section E.

I. Treaties and Other Instruments

Treaties

- 459.** Article 28 of the 1899 HR provides that “the pillage of a town or place, even when taken by assault, is prohibited”.
- 460.** Article 47 of the 1899 HR, under the section entitled “On military authority over hostile territory”, provides that “pillage is formally prohibited”.
- 461.** Article 28 of the 1907 HR provides that “the pillage of a town or place, even when taken by assault, is prohibited”.
- 462.** Article 47 of the 1907 HR, under the section entitled “On military authority over the territory of the hostile State”, provides that “pillage is formally forbidden”.
- 463.** Article 7 of the 1907 Hague Convention (IX) provides that “a town or place, even when taken by storm, may not be pillaged”.
- 464.** According to Article 21 of the 1907 Hague Convention (X), its signatory parties “undertake to enact or to propose to their legislatures . . . the measures necessary for checking in time of war individual acts of pillage”.
- 465.** Article 6(b) of the 1945 IMT Charter (Nuremberg) includes “plunder of public or private property” in its list of war crimes, for which there must be individual responsibility.
- 466.** Article 33, second paragraph, GC IV provides that “pillage is prohibited”.
- 467.** Article 4(2)(g) AP II prohibits acts of pillage against “all persons who do not take a direct part or who have ceased to take part in hostilities”. Article 4 AP II was adopted by consensus.⁴⁸⁰
- 468.** Pursuant to Article 8(2)(b)(xvi) and (e)(v) of the 1998 ICC Statute, “pillaging a town or place, even when taken by assault” is a war crime in both international and non-international armed conflicts.
- 469.** Article 3 of the 2002 Statute of the Special Court for Sierra Leone gives the Court jurisdiction over serious violations of common Article 3 of the 1949 Geneva Conventions and of AP II, including pillage.

⁴⁸⁰ CDDH, *Official Records*, Vol. VII, CDDH/SR.50, 3 June 1977, p. 90.

Other Instruments

470. Article 44 of the 1863 Lieber Code provides that “all robbery, all pillage or sacking, even after taking a place by main force . . . are prohibited under the penalty of death, or such other severe punishment as may seem adequate for the gravity of the offense”.

471. Article 18 of the 1874 Brussels Declaration states that “a town taken by assault ought not to be given over to pillage by the victorious troops”.

472. Article 39 of the 1874 Brussels Declaration formally forbids pillage.

473. Article 32 of the 1880 Oxford Manual states that “it is forbidden . . . to pillage, even towns taken by assault”.

474. Article 18 of the 1913 Oxford Manual of Naval War prohibits pillage.

475. Based on several documents supplying evidence of outrages committed during the First World War, the 1919 Report of the Commission on Responsibility lists violations of the laws and customs of war which should be subject to criminal prosecution, including “pillage”.

476. The 1943 Inter-Allied Declaration against Acts of Dispossession affirms the determination of its authors

to combat and defeat the plundering by the enemy Powers of the territories which have been overrun or brought under enemy control. The systematic spoliation of occupied or controlled territory has followed immediately upon each fresh aggression. This has taken every sort of form, from open looting to the most cunningly camouflaged financial penetration, and it has extended to every sort of property – from works of art to stocks of commodities, from bullion and bank-notes to stocks and shares in business and financial undertakings. But the object is always the same – to seize everything of value that can be put to the aggressors’ profit and then to bring the whole economy of the subjugated countries under control so that they must slave to enrich and strengthen their oppressors . . .

[T]hey intend to do their utmost to defeat the methods of dispossession practised by the Governments with which they are at war against the countries and peoples who have been so wantonly assaulted and despoiled . . .

The wording of the Declaration . . . clearly covers all forms of looting to which the enemy has resorted. It applies, e.g. to the stealing or forced purchase of works of art just as much as to the theft or forced transfer of bearer bonds.

477. Article II(1)(b) of the 1945 Allied Control Council Law No. 10 includes “plunder of public or private property” in its list of war crimes, for which there must be individual responsibility.

478. Principle VI(b) of the 1950 Nuremberg Principles adopted by the ILC provides that “plunder of public or private property” is a war crime.

479. Under Rule 4 of the 1950 UN Command Rules and Regulations, Military Commissions of the UN Command had jurisdiction over offences such as plunder of public and private property.

480. Article 3(e) of the 1993 ICTY Statute gives the Tribunal jurisdiction over violations of the laws and customs of war, expressly including “plunder of public and private property”.

481. In Article 2(c) of the 1994 Agreement on a Temporary Cease-fire on the Tajik-Afghan Border, the concept of “cessation of hostilities” was said to include the prevention of pillage of the civilian population and servicemen.

482. Article 4(f) of the 1994 ICTR Statute gives the Tribunal jurisdiction over, *inter alia*, violations of common Article 3 of the 1949 Geneva Conventions and AP II, expressly including pillage.

483. Pursuant to Article 20(e)(v) of the 1996 ILC Draft Code of Crimes against the Peace and Security of Mankind, “plunder of public and private property”, in violation of the laws and customs of war, is considered a war crime. Article 20(f)(vi) provides that pillage committed in violation of IHL applicable in armed conflict not of an international character is also regarded as a war crime.

484. Under Section 7.1 and 7.2 of the 1999 UN Secretary-General’s Bulletin, pillage of civilians and persons *hors de combat* is prohibited “at any time and in any place”.

485. The 2000 UNTAET Regulation No. 2000/15 establishes panels with exclusive jurisdiction over serious criminal offences, including war crimes. According to Section 6(1)(b)(xvi) and (e)(v), “pillaging a town or place, even when taken by assault” is a war crime in both international and non-international armed conflicts.

II. National Practice

Military Manuals

486. Argentina’s Law of War Manual (1969) states that “the pillage of towns and localities, even those taken by assault, is prohibited”.⁴⁸¹ Pillage is also forbidden in occupied territories.⁴⁸²

487. Argentina’s Law of War Manual (1989) provides that pillage is “strictly prohibited”.⁴⁸³

488. Australia’s Commanders’ Guide states that “theft or looting of civilian property by armed combatants is prohibited”.⁴⁸⁴ It also provides that “pillage, the violent acquisition of property for private purposes, is prohibited”.⁴⁸⁵ It further states that “stealing or looting private property is not sanctioned by international law and members who engage in it can expect to face criminal prosecution”.⁴⁸⁶

⁴⁸¹ Argentina, *Law of War Manual* (1969), § 1.013.

⁴⁸² Argentina, *Law of War Manual* (1969), § 4.012.

⁴⁸³ Argentina, *Law of War Manual* (1989), § 4.29.

⁴⁸⁴ Australia, *Commanders’ Guide* (1994), § 610.

⁴⁸⁵ Australia, *Commanders’ Guide* (1994), § 970.

⁴⁸⁶ Australia, *Commanders’ Guide* (1994), § 1040.

489. Australia's Defence Force Manual provides that "pillage, the violent acquisition of property for private purposes, is prohibited".⁴⁸⁷ It adds that "pillage is . . . forbidden, even if the town or place concerned is taken by assault".⁴⁸⁸ It also notes that pillage is prohibited in both one's own territory and occupied territory.⁴⁸⁹ In the case of occupation, the manual specifically states that:

Pillage is prohibited. Pillage is the seizure or destruction of enemy private or public property or money by representatives of a belligerent, usually armed forces, for private purposes . . . A military personnel is not allowed to become a thief or a bandit merely because of involvement in a war. The rule against pillage is directed against all private acts of lawlessness committed against enemy property.⁴⁹⁰

490. Belgium's Law of War Manual states that "it is prohibited to pillage a town or a locality, even taken by assault".⁴⁹¹

491. Belgium's Teaching Manual for Soldiers provides that "pillage and theft of [civilian] property are prohibited".⁴⁹²

492. Benin's Military Manual prohibits pillage, "even if the town or location concerned is taken by assault".⁴⁹³

493. Burkina Faso's Disciplinary Regulations states that, under the laws and customs of war, pillage, in particular of civilian property, is forbidden.⁴⁹⁴

494. Cameroon's Disciplinary Regulations states that, under the laws and customs of war, pillage, in particular of civilian property, is forbidden.⁴⁹⁵

495. Under Cameroon's Instructors' Manual, one of the "rules for behaviour in combat" is to respect civilian property and not to steal it.⁴⁹⁶

496. Canada's LOAC Manual provides that "pillage, the violent acquisition of property for private purposes, is prohibited. Pillage is theft, and therefore is an offence under the *Code of Service Discipline*."⁴⁹⁷ In respect of civilians, the manual states that pillage is expressly prohibited in the territories of the parties to the conflict and in occupied territories.⁴⁹⁸ In addition, it states that "the pillage of a town, . . . even when taken by assault, is prohibited".⁴⁹⁹ The manual specifically emphasises that, in occupied territory:

Pillage is prohibited. Pillage is the seizure or destruction of enemy private or public property or money by representatives of a belligerent, usually soldiers, for private

⁴⁸⁷ Australia, *Defence Force Manual* (1994), § 743.

⁴⁸⁸ Australia, *Defence Force Manual* (1994), § 923.

⁴⁸⁹ Australia, *Defence Force Manual* (1994), § 953.

⁴⁹⁰ Australia, *Defence Force Manual* (1994), § 1224.

⁴⁹¹ Belgium, *Law of War Manual* (1983), p. 29.

⁴⁹² Belgium, *Teaching Manual for Soldiers* (undated), p. 7, see also p. 10.

⁴⁹³ Benin, *Military Manual* (1995), Fascicule III, p. 12, see also Fascicule II, p. 19 and Fascicule III, p. 4.

⁴⁹⁴ Burkina Faso, *Disciplinary Regulations* (1994), Article 35(2).

⁴⁹⁵ Cameroon, *Disciplinary Regulations* (1975), Article 32.

⁴⁹⁶ Cameroon, *Instructors' Manual* (1992), p. 151.

⁴⁹⁷ Canada, *LOAC Manual* (1999), Glossary, p. GL-15 and p. 6-5, § 50.

⁴⁹⁸ Canada, *LOAC Manual* (1999), p. 11-4, § 33(c).

⁴⁹⁹ Canada, *LOAC Manual* (1999), p. 6-3, § 31.

purposes... Soldiers are not allowed to become thieves or bandits on their own account merely because they are involved in an armed conflict. The rule against pillage is directed against all private acts of lawlessness committed against enemy property.⁵⁰⁰

The manual lists "looting or gathering trophies" as a war crime "recognized by the LOAC".⁵⁰¹ It also specifically states that, in the course of non-international armed conflicts, pillage is prohibited "at any time and anywhere".⁵⁰²

497. Canada's Code of Conduct provides that "looting is prohibited".⁵⁰³ It adds that:

A battlefield and destroyed civilian areas offer attractive objects for the curiosity seeker. No matter how tempting such objects may be, the taking of souvenirs is prohibited. Looting is theft; it is a serious offence and it may also have direct operational consequences.

...

The taking of personal war trophies is also prohibited. Not only is looting illegal, there is also a significant operational risk that such property may be booby-trapped. An isolated act of theft may impede your mission by turning the local population against you.

...

The Law of Armed Conflict does permit the seizure and use of property belonging to the opposing forces under certain circumstances. However, the taking and use of such property must only be done where properly authorized... Property may never be taken for the personal benefit of individual CF personnel.⁵⁰⁴

498. China's PLA Rules of Discipline instructs: "Do not take a single needle or piece of thread from the masses – Turn in everything captured."⁵⁰⁵

499. Colombia's Basic Military Manual provides that it is prohibited "to steal personal property" of non-combatants, as well as "to plunder the property and belongings" of the civilian population.⁵⁰⁶

500. Colombia's Instructors' Manual recalls that theft is prohibited.⁵⁰⁷

501. Congo's Disciplinary Regulations states that, under the laws and customs of war, pillage, in particular of civilian property, is forbidden.⁵⁰⁸

502. Croatia's Soldiers' Manual instructs soldiers to protect the property of civilians and not to steal it.⁵⁰⁹

503. Croatia's Commanders' Manual prohibits pillage.⁵¹⁰

⁵⁰⁰ Canada, *LOAC Manual* (1999), p. 12-8, § 67.

⁵⁰¹ Canada, *LOAC Manual* (1999), pp. 16-3 and 16-4, § 21(b).

⁵⁰² Canada, *LOAC Manual* (1999), p. 17-3, § 21(f).

⁵⁰³ Canada, *Code of Conduct* (2001), Rule 8.

⁵⁰⁴ Canada, *Code of Conduct* (2001), Rule 8, §§ 1-3.

⁵⁰⁵ China, *PLA Rules of Discipline* (1947), Rules 2 and 3.

⁵⁰⁶ Colombia, *Basic Military Manual* (1995), pp. 29 and 30.

⁵⁰⁷ Colombia, *Instructors' Manual* (1999), p. 30.

⁵⁰⁸ Congo, *Disciplinary Regulations* (1986), Article 32(2).

⁵⁰⁹ Croatia, *Soldiers' Manual* (1992), p. 5.

⁵¹⁰ Croatia, *Commanders' Manual* (1992), § 18.

504. The Military Manual of the Dominican Republic states that:

When searching dwellings in enemy towns or villages, do not take non-military items. Theft is a violation of the laws of war . . . Stealing private property will make civilians more likely to fight you or to support the enemy forces. You do not want to have to fight both the enemy armed forces and civilians.⁵¹¹

505. Ecuador's Naval Manual states that "the following acts constitute war crimes: . . . plunder and pillage of public or private property".⁵¹²

506. El Salvador's Human Rights Charter of the Armed Forces states that pillage and stealing are violations of human rights.⁵¹³

507. France's Disciplinary Regulations as amended provides that, under international conventions, pillage is prohibited.⁵¹⁴

508. France's LOAC Summary Note prohibits pillage.⁵¹⁵

509. France's LOAC Teaching Note provides that "pillage is prohibited".⁵¹⁶

510. France's LOAC Manual provides that pillage is a prohibited method of warfare.⁵¹⁷ It also states that "pillage constitutes an act of spoliation by which one or several military personnel appropriate objects for a personal or private use, without the consent of the owner of those objects. Pillage constitutes a war crime." It stresses that war trophies or souvenirs might be qualified as theft when the owner does not consent to the appropriation.⁵¹⁸ The manual further states that pillage is a crime for which there is no statute of limitation under the 1998 ICC Statute.⁵¹⁹

511. Germany's Military Manual provides for a general prohibition of pillage under the heading "Protection of the civilian population".⁵²⁰ It also prohibits pillage in occupied territories.⁵²¹

512. Germany's IHL Manual prohibits plunder.⁵²²

513. Indonesia's Air Force Manual provides that "it is prohibited to . . . pillage any property of the enemy".⁵²³

514. Indonesia's Directive on Human Rights in Irian Jaya and Maluku states that the "appropriation and theft of the property of the population is a criminal offence".⁵²⁴

⁵¹¹ Dominican Republic, *Military Manual* (1980), p. 10.

⁵¹² Ecuador, *Naval Manual* (1989), § 6.2.5(8).

⁵¹³ El Salvador, *Human Rights Charter of the Armed Forces* (undated), p. 18, see also p. 9.

⁵¹⁴ France, *Disciplinary Regulations as amended* (1975), Article 9 *bis* (2).

⁵¹⁵ France, *LOAC Summary Note* (1992), § 1.7.

⁵¹⁶ France, *LOAC Teaching Note* (2000), p. 2.

⁵¹⁷ France, *LOAC Manual* (2001), p. 85.

⁵¹⁸ France, *LOAC Manual* (2001), p. 36, see also p. 85.

⁵¹⁹ France, *LOAC Manual* (2001), p. 45.

⁵²⁰ Germany, *Military Manual* (1992), § 507.

⁵²¹ Germany, *Military Manual* (1992), § 536.

⁵²² Germany, *IHL Manual* (1996), § 405.

⁵²³ Indonesia, *Air Force Manual* (1990), § 15(b)(7).

⁵²⁴ Indonesia, *Directive on Human Rights in Irian Jaya and Maluku* (1995), § 9.

515. With reference to Israel's Law of War Booklet, the Report on the Practice of Israel states that "IDF regulations . . . strictly prohibit any act of pillage or looting".⁵²⁵

516. Israel's Manual on the Laws of War states that:

Looting is the theft of enemy property (private or public) by individual soldiers for private purposes . . .

Today, at any rate, looting is absolutely prohibited. The Hague Conventions forbid looting in the course of battle as well as in occupied territory . . . Looting is regarded as a despicable act that tarnishes both the soldier and the IDF, leaving a serious moral blot . . . During the Galilee War, there were unfortunately cases of looting of civilians in Lebanon including a case where even officers – a major and captain – were demoted to the rank of private and [received] a long prison term.⁵²⁶

517. Italy's IHL Manual provides that "it is prohibited . . . to pillage a locality, even when taken by assault".⁵²⁷ It is also a duty of an occupying State "to prevent pillage".⁵²⁸ The manual further considers "plunder of public or private property" as a war crime.⁵²⁹

518. Italy's LOAC Elementary Rules Manual prohibits pillage.⁵³⁰ It also notes that civilian property must be respected and shall not be stolen.⁵³¹

519. Kenya's LOAC Manual orders troops to "respect other people's property. Looting is prohibited."⁵³² Likewise, it states that "it is forbidden . . . to commit pillage, even if the town or place concerned is taken by assault".⁵³³

520. South Korea's Military Regulation 187 provides that theft is a war crime.⁵³⁴

521. South Korea's Military Law Manual states that commanders are responsible for acts of pillage committed by soldiers.⁵³⁵

522. Madagascar's Military Manual prohibits pillage.⁵³⁶

523. Mali's Army Regulations provides that, under the laws and customs of war, pillage, in particular of private property, is forbidden.⁵³⁷

524. Morocco's Disciplinary Regulations states that, under the laws and customs of war, pillage, in particular of civilian property, is forbidden.⁵³⁸

525. The Military Manual of the Netherlands states that "pillage is the taking of goods belonging to civilians during an armed conflict. It is a form of theft.

⁵²⁵ Report on the Practice of Israel, 1997, Chapter 2.3, referring to *Law of War Booklet* (1986), p. 19.

⁵²⁶ Israel, *Manual on the Laws of War* (1998), pp. 62–63.

⁵²⁷ Italy, *IHL Manual* (1991), Vol. I, § 8(7).

⁵²⁸ Italy, *IHL Manual* (1991), Vol. I, § 48(6).

⁵²⁹ Italy, *IHL Manual* (1991), Vol. I, § 84.

⁵³⁰ Italy, *LOAC Elementary Rules Manual* (1991), § 18.

⁵³¹ Italy, *LOAC Elementary Rules Manual* (1991), p. 29.

⁵³² Kenya, *LOAC Manual* (1997), Précis No. 3, p. 14.

⁵³³ Kenya, *LOAC Manual* (1997), Précis No. 4, p. 2.

⁵³⁴ South Korea, *Military Regulation 187* (1991), Article 4.2.

⁵³⁵ South Korea, *Military Law Manual* (1996), p. 89.

⁵³⁶ Madagascar, *Military Manual* (1994), Fiche No. 3-O, § 18.

⁵³⁷ Mali, *Army Regulations* (1979), Article 36.

⁵³⁸ Morocco, *Disciplinary Regulations* (1974), Article 25(2).

Pillage is prohibited.⁵³⁹ The manual also specifically states that, in the course of non-international armed conflicts, pillage is prohibited at any time and anywhere.⁵⁴⁰

526. The Military Handbook of the Netherlands provides that “pillage, the taking of property of civilians, is prohibited”.⁵⁴¹

527. New Zealand’s Military Manual states that “pillage, the violent acquisition of property for private purposes, is prohibited”.⁵⁴² The manual also provides that, in occupied territory:

Pillage is prohibited. Pillage is the seizure or destruction of enemy private or public property or money by representatives of a belligerent, usually soldiers, for private purposes. A soldier may under certain circumstances seize enemy property but, once such property has been seized, it belongs to the State which he is serving. He is not allowed to become a thief or a bandit merely because he is involved in a war. The rule against pillage is directed against all private acts of lawlessness committed against enemy property.⁵⁴³

The manual also states that pillage is a war crime.⁵⁴⁴ Likewise, “among other war crimes recognised by the customary law of armed conflict are . . . looting or gathering trophies”.⁵⁴⁵ The manual also specifically states that, in the course of non-international armed conflicts, pillage is prohibited at any time and anywhere.⁵⁴⁶

528. Nigeria’s Operational Code of Conduct gives troops, *inter alia*, the following instruction: “No looting of any kind. (A good soldier will never loot.)”⁵⁴⁷

529. Nigeria’s Military Manual provides that civilian property shall be safeguarded, *inter alia*, against theft.⁵⁴⁸

530. Nigeria’s Manual on the Laws of War states that “looting is most damaging to morale and destructive to discipline. Looting is absolutely prohibited.”⁵⁴⁹ It also considers pillage to be a war crime.⁵⁵⁰ It further states that:

Private property should be respected. It must not be . . . pillaged even if found in an occupied territory . . . Real property belonging to local government such as hospitals and buildings dedicated to public worship, charity, education, religion, science and art should be treated as private property.⁵⁵¹

⁵³⁹ Netherlands, *Military Manual* (1993), p. IV-5.

⁵⁴⁰ Netherlands, *Military Manual* (1993), p. XI-4.

⁵⁴¹ Netherlands, *Military Handbook* (1995), p. 7-43, see also pp. 7-36 and 7-40.

⁵⁴² New Zealand, *Military Manual* (1992), § 529, see also § 1116.

⁵⁴³ New Zealand, *Military Manual* (1992), § 1334.

⁵⁴⁴ New Zealand, *Military Manual* (1992), § 1704(4).

⁵⁴⁵ New Zealand, *Military Manual* (1992), § 1704(5).

⁵⁴⁶ New Zealand, *Military Manual* (1992), § 1812.

⁵⁴⁷ Nigeria, *Operational Code of Conduct* (1967), § 4(h).

⁵⁴⁸ Nigeria, *Military Manual* (1994), p. 39, § 5(k).

⁵⁴⁹ Nigeria, *Manual on the Laws of War* (undated), § 30.

⁵⁵⁰ Nigeria, *Manual on the Laws of War* (undated), § 6.

⁵⁵¹ Nigeria, *Manual on the Laws of War* (undated), § 27.

The manual also provides that the absence of persons from their house does not authorise pillage and damage.⁵⁵²

531. Nigeria's Soldiers' Code of Conduct states that "civilian property shall be safeguarded against theft".⁵⁵³

532. Peru's Human Rights Charter of the Security Forces instructs army and police forces to respect private property.⁵⁵⁴ It emphasises that theft is to be punished. It states that "if you steal, you damage your prestige and the prestige of the Armed Forces".⁵⁵⁵ Theft and plunder are considered to be "violations of human rights".⁵⁵⁶

533. The Military Directive to Commanders of the Philippines tries "to protect troops from false charges of looting", by requesting civil relations groups to immediately conduct a survey of the residents after the operation, and make proper documentation, including witnesses' statements, material and photographs.⁵⁵⁷

534. The Soldier's Rules of the Philippines instructs troops: "Respect other people's property. Looting is prohibited."⁵⁵⁸

535. Russia's Military Manual provides that allowing a town or an area to be pillaged is a prohibited method of warfare.⁵⁵⁹

536. Senegal's Disciplinary Regulations states that, under the laws and customs of war, pillage is forbidden.⁵⁶⁰

537. Senegal's IHL Manual specifies that "every individual is entitled to respect for the minimum universal rules . . . which prohibit . . . pillage".⁵⁶¹

538. South Africa's LOAC Manual provides that pillage and stealing of civilian property is forbidden.⁵⁶² It also states that pillage is a grave breach of the Geneva Conventions and a war crime.⁵⁶³

539. Spain's LOAC Manual states that "pillage and plunder of conquered populations or localities are especially forbidden".⁵⁶⁴

540. Sweden's IHL Manual states that "pillage in connection with the capture of a town or locality is prohibited".⁵⁶⁵

541. Switzerland's Basic Military Manual states that all forms of pillage are prohibited. It refers to Articles 28 of the 1907 HR and 33 GC IV.⁵⁶⁶ It further defines pillage as a war crime.⁵⁶⁷

⁵⁵² Nigeria, *Manual on the Laws of War* (undated), § 28.

⁵⁵³ Nigeria, *Soldiers' Code of Conduct* (undated), § 11.

⁵⁵⁴ Peru, *Human Rights Charter of the Security Forces* (1991), p. 27.

⁵⁵⁵ Peru, *Human Rights Charter of the Security Forces* (1991), p. 11.

⁵⁵⁶ Peru, *Human Rights Charter of the Security Forces* (1991), p. 25.

⁵⁵⁷ Philippines, *Military Directive to Commanders* (1988), p. 30, § 4(i).

⁵⁵⁸ Philippines, *Soldier's Rules* (1989), § 11.

⁵⁵⁹ Russia, *Military Manual* (1990), § 5(f).

⁵⁶⁰ Senegal, *Disciplinary Regulations* (1990), Article 34(2).

⁵⁶¹ Senegal, *IHL Manual* (1999), p. 23.

⁵⁶² South Africa, *LOAC Manual* (1996), § 28(f).

⁵⁶³ South Africa, *LOAC Manual* (1996), §§ 39(h) and 41.

⁵⁶⁴ Spain, *LOAC Manual* (1996), Vol. I, § 7.3.b.(2), see also §§ 10.6.a.(11) and 10.8.b.

⁵⁶⁵ Sweden, *IHL Manual* (1991), Section 3.2.1.5, p. 52.

⁵⁶⁶ Switzerland, *Basic Military Manual* (1987), Article 34, see also Articles 21 and 147(c).

⁵⁶⁷ Switzerland, *Basic Military Manual* (1987), Article 200(2)(i).

542. Togo's Military Manual prohibits pillage, "even if the town or location concerned is taken by assault".⁵⁶⁸

543. Under Uganda's Code of Conduct, "theft of property" is a punishable offence.⁵⁶⁹

544. Uganda's Operational Code of Conduct provides that "the offence of undermining relationship with the civilian population shall include . . . stealing civilian property or food".⁵⁷⁰ It further states that "the offence of personal interests endangering operational efficiency shall include . . . capturing from the enemy goods for personal use instead of capturing materials needed to help the war effort of the movement; failing to report and hand in goods captured from the enemy".⁵⁷¹

545. The UK Military Manual states that pillage is prohibited whether in the territory of the parties to a conflict or in occupied territory.⁵⁷² It also provides that "pillage of a town, even when it has been taken by assault, is forbidden".⁵⁷³

In connection with the requirements for the granting to irregular combatants of the rights of the armed forces, the manual stipulates that "irregular troops should have been warned against the employment of . . . pillage".⁵⁷⁴ The manual also considers that "in addition to the 'grave breaches' of the 1949 [Geneva] Conventions, . . . the following are examples of punishable violations of the laws of war, or war crimes: . . . pillage".⁵⁷⁵ In respect of enemy private property, the manual further provides that:

Private property must be respected. It must not be . . . pillaged, even if found in a captured town or other place. This prohibition embodied in the Hague Rules [1907 HR] did not constitute a new rule. However, it has for a long time past been embodied in the regulations of every civilised army, for nothing is more demoralising to troops or more subversive of discipline than plundering. Theft and robbery are as punishable in war as in peace, and the soldier in an enemy country must observe the same respect for property as in his garrison at home.⁵⁷⁶

546. The UK LOAC Manual provides that "it is forbidden . . . to commit pillage, even if the town or place concerned is taken by assault".⁵⁷⁷ The manual lists the "Rules for soldiers", including the following: "I must not – . . . take enemy property for my personal use."⁵⁷⁸ As a "rule for non-commissioned officers", looting is also prohibited.⁵⁷⁹

547. The US Field Manual provides that "the pillage of a town or place, even when taken by assault, is prohibited".⁵⁸⁰ Pillage is also prohibited in the

⁵⁶⁸ Togo, *Military Manual* (1996), Fascicule III, p. 12, see also Fascicule II, p. 19 and Fascicule III, p. 4.

⁵⁶⁹ Uganda, *Code of Conduct* (1986), § B(11).

⁵⁷⁰ Uganda, *Operational Code of Conduct* (1986), § 12(b).

⁵⁷¹ Uganda, *Operational Code of Conduct* (1986), § 18(c).

⁵⁷² UK, *Military Manual* (1958), § 42. ⁵⁷³ UK, *Military Manual* (1958), § 306.

⁵⁷⁴ UK, *Military Manual* (1958), § 95. ⁵⁷⁵ UK, *Military Manual* (1958), § 626(j).

⁵⁷⁶ UK, *Military Manual* (1958), § 589.

⁵⁷⁷ UK, *LOAC Manual* (1981), Section 4, p. 14, § 5(d).

⁵⁷⁸ UK, *LOAC Manual* (1981), Annex A, p. 44, § 6.

⁵⁷⁹ UK, *LOAC Manual* (1981), Annex A, p. 46, § 8. ⁵⁸⁰ US, *Field Manual* (1956), § 47.

territory of the parties to a conflict as well as in occupied territory.⁵⁸¹ The manual further states that “a member of the armed forces who before or in the presence of the enemy quits his place of duty to plunder or pillage is guilty of the offense of misbehavior before the enemy”.⁵⁸² It also provides that “in addition to the ‘grave breaches’ of the Geneva Conventions of 1949, the following acts are representative of violations of the law of war (‘war crimes’): . . . pillage”.⁵⁸³

548. The US Air Force Pamphlet, analysing the situations in both national and occupied territories, recalls that “Article 33 [GC IV] prohibits . . . pillage (also prohibited in Art. 47 [of the 1907] HR)”.⁵⁸⁴ It also provides that “in addition to the grave breaches of the Geneva Conventions of 1949, the following acts are representative of situations involving individual criminal responsibility: . . . Plunder or pillage of public or private property.”⁵⁸⁵

549. The US Soldier’s Manual states that:

When searching dwellings in enemy towns or villages, do not take nonmilitary items. Theft is a violation of the laws of war and US law. Stealing private property will make civilians more likely to fight you or to support the enemy forces. You do not want to have to fight both the enemy armed forces and civilians.⁵⁸⁶

550. Under the US Instructor’s Guide, pillage means “to loot, to deprive of money or property by violence”.⁵⁸⁷ It also states that “in addition to the grave breaches of the Geneva Conventions, the following acts are further examples of war crimes: . . . pillaging”.⁵⁸⁸

551. The US Rules of Engagement for Operation Desert Storm prohibits looting.⁵⁸⁹

552. The US Naval Handbook states that “the following acts are representative war crimes: . . . plunder and pillage of public or private property”.⁵⁹⁰

553. Under the YPA Military Manual of the SFRY (FRY), “it is prohibited to pillage enemy property under any circumstances”. The manual considers any unlawful appropriation of private property as pillage.⁵⁹¹

National Legislation

554. Albania’s Military Penal Code punishes “stealing on the battlefield”.⁵⁹²

555. Algeria’s Code of Military Justice punishes pillage and damage to commodities, goods or belongings committed by soldiers as a group.⁵⁹³

556. Argentina’s Draft Code of Military Justice punishes any soldier who “commits any . . . act of pillage”.⁵⁹⁴

⁵⁸¹ US, *Field Manual* (1956), § 272. ⁵⁸² US, *Field Manual* (1956), § 397.

⁵⁸³ US, *Field Manual* (1956), § 504(j). ⁵⁸⁴ US, *Air Force Pamphlet* (1976), § 14-4.

⁵⁸⁵ US, *Air Force Pamphlet* (1976), § 15-3(c)(8). ⁵⁸⁶ US, *Soldier’s Manual* (1984), p. 23.

⁵⁸⁷ US, *Instructor’s Guide* (1985), p. 28. ⁵⁸⁸ US, *Instructor’s Guide* (1985), p. 13.

⁵⁸⁹ US, *Rules of Engagement for Operation Desert Storm* (1991), § F.

⁵⁹⁰ US, *Naval Handbook* (1995), § 6.2.5(8).

⁵⁹¹ SFRY (FRY), *YPA Military Manual* (1988), § 92.

⁵⁹² Albania, *Military Penal Code* (1995), Article 92.

⁵⁹³ Algeria, *Code of Military Justice* (1971), Article 286.

⁵⁹⁴ Argentina, *Draft Code of Military Justice* (1998), Article 293, introducing a new Article 877(5) in the *Code of Military Justice as amended* (1951).

557. Australia's War Crimes Act considers "any war crime within the meaning of the instrument of appointment of the Board of Inquiry [set up to investigate war crimes committed by enemy subjects]" as a war crime, including pillage and wholesale looting.⁵⁹⁵

558. Australia's Defence Force Discipline Act, in an article on looting, punishes any

person, being a defence member or a defence civilian, who, in the course of operations against the enemy, . . . takes any property left exposed or unprotected in consequence of such operations . . . or . . . takes any vehicle, equipment or stores captured from or abandoned by the enemy in those operations.⁵⁹⁶

559. Australia's ICC (Consequential Amendments) Act incorporates in the Criminal Code the war crimes defined in the 1998 ICC Statute, including "pillaging" in international and non-international armed conflicts.⁵⁹⁷

560. Azerbaijan's Criminal Code (1960) prohibits pillage.⁵⁹⁸

561. Azerbaijan's Criminal Code (1999) prohibits robbery as a war crime.⁵⁹⁹

562. Bangladesh's International Crimes (Tribunal) Act provides that "plunder of public and private property" is a war crime. It adds that the "violation of any humanitarian rules applicable in armed conflicts laid down in the Geneva Conventions of 1949" is a crime.⁶⁰⁰

563. Under the Criminal Code of the Federation of Bosnia and Herzegovina, pillage is a war crime.⁶⁰¹ The Criminal Code of the Republika Srpska contains the same provision.⁶⁰²

564. Under Brazil's Military Penal Code, pillage committed during military operations or in occupied territory is a crime.⁶⁰³

565. Bulgaria's Penal Code as amended provides that any "person who robs, steals . . . property belonging to a population located in the region of military operations" commits a crime.⁶⁰⁴

566. Burkina Faso's Code of Military Justice punishes pillage or damage to commodities, goods or belongings committed by soldiers as a group.⁶⁰⁵

567. Under Burundi's Draft Law on Genocide, Crimes against Humanity and War Crimes, "the pillage of a town or a locality, even when taken by assault" constitutes a war crime in both international and non-international armed conflicts.⁶⁰⁶

⁵⁹⁵ Australia, *War Crimes Act* (1945), Section 3.

⁵⁹⁶ Australia, *Defence Force Discipline Act* (1982), Section 48(1).

⁵⁹⁷ Australia, *ICC (Consequential Amendments) Act* (2002), Schedule 1, §§ 268.54 and 268.81.

⁵⁹⁸ Azerbaijan, *Criminal Code* (1960), Article 261.

⁵⁹⁹ Azerbaijan, *Criminal Code* (1999), Article 116(11).

⁶⁰⁰ Bangladesh, *International Crimes (Tribunal) Act* (1973), Section 3(2)(d) and (e).

⁶⁰¹ Bosnia and Herzegovina, Federation, *Criminal Code* (1998), Article 154(1).

⁶⁰² Bosnia and Herzegovina, Republika Srpska, *Criminal Code* (2000), Article 433(1).

⁶⁰³ Brazil, *Military Penal Code* (1969), Article 406.

⁶⁰⁴ Bulgaria, *Penal Code as amended* (1968), Article 404.

⁶⁰⁵ Burkina Faso, *Code of Military Justice* (1994), Article 193.

⁶⁰⁶ Burundi, *Draft Law on Genocide, Crimes against Humanity and War Crimes* (2001), Article 4(B)(p) and (D)(e).

568. Cameroon's Code of Military Justice punishes pillage and damage to commodities, goods or belongings committed by soldiers as a group.⁶⁰⁷

569. Canada's National Defence Act punishes:

every person who...breaks into any house or other place in search of plunder...steals any money or property that has been left exposed or unprotected in consequence of warlike operations, or...takes otherwise than for the public service any money or property abandoned by the enemy.⁶⁰⁸

570. Canada's Crimes against Humanity and War Crimes Act provides that the war crimes defined in Article 8(2) of the 1998 ICC Statute are "crimes according to customary international law" and, as such, indictable offences under the Act.⁶⁰⁹

571. Chad's Code of Military Justice punishes pillage and damage to commodities, goods or belongings committed by soldiers as a group.⁶¹⁰

572. Chile's Code of Military Justice provides for a prison sentence for "military personnel who, failing the obedience they owe to their superiors, ... pillage the inhabitants of the territories where they are in service".⁶¹¹

573. China's Law Governing the Trial of War Criminals provides that "robbing" constitutes a war crime.⁶¹²

574. China's Criminal Code as amended provides that "during armed conflicts and in the area of military operations ... looting the property of innocent civilians" is a punishable offence.⁶¹³

575. Colombia's Military Penal Code provides for a prison sentence for "anyone who, in combat operation, appropriates movable property, without any justification, for his own profit or the profit of a third person".⁶¹⁴

576. Colombia's Penal Code imposes a criminal sanction on "anyone who, during an armed conflict, despoils ... a protected person".⁶¹⁵

577. Under the DRC Code of Military Justice as amended, pillage committed in time of war is a punishable offence.⁶¹⁶

578. Congo's Genocide, War Crimes and Crimes against Humanity Act defines war crimes with reference to the categories of crimes defined in Article 8 of the 1998 ICC Statute.⁶¹⁷

⁶⁰⁷ Cameroon, *Code of Military Justice* (1928), Article 221.

⁶⁰⁸ Canada, *National Defence Act* (1985), Section 77(e), (h) and (i).

⁶⁰⁹ Canada, *Crimes against Humanity and War Crimes Act* (2000), Section 4(1) and (4).

⁶¹⁰ Chad, *Code of Military Justice* (1962), Article 67.

⁶¹¹ Chile, *Code of Military Justice* (1925), Article 262.

⁶¹² China, *Law Governing the Trial of War Criminals* (1946), Article 3(24).

⁶¹³ China, *Criminal Code as amended* (1997), Article 446.

⁶¹⁴ Colombia, *Military Penal Code* (1999), Article 175.

⁶¹⁵ Colombia, *Penal Code* (2000), Article 151.

⁶¹⁶ DRC, *Code of Military Justice as amended* (1972), Article 436, see also Article 435.

⁶¹⁷ Congo, *Genocide, War Crimes and Crimes against Humanity Act* (1998), Article 4, see also Article 8.

579. Côte d'Ivoire's Penal Code as amended punishes pillage and damage to commodities, goods or belongings committed by soldiers as a group.⁶¹⁸

580. Croatia's Criminal Code considers "the looting of the population's property" as a war crime.⁶¹⁹

581. The Czech Republic's Criminal Code as amended punishes "whoever in a theatre of war, on the battlefield or in places affected by military operations . . . seizes another person's belongings, taking advantage of such person's distress".⁶²⁰

582. Ecuador's National Civil Police Penal Code punishes "members of the National Civil Police who . . . give a [surrendered] place . . . to plunder [or] pillage".⁶²¹

583. Under Egypt's Military Criminal Code, pillage of military property and attacks on a house for the purpose of pillaging it are prohibited.⁶²²

584. El Salvador's Code of Military Justice punishes any "soldier who, in time of international or civil war, . . . pillage the inhabitants".⁶²³

585. Under El Salvador's Penal Code, "plunder of private or public property" during an international or a civil war is a crime.⁶²⁴

586. Estonia's Criminal Code as amended provides for the punishment of pillage.⁶²⁵

587. Under Ethiopia's Penal Code, it is a punishable offence to organise, order or engage in "looting, . . . pillage, economic spoliation or the unlawful destruction or removal of property on pretext of military necessity".⁶²⁶

588. France's Code of Military Justice punishes pillage and damage to commodities, goods or belongings committed by soldiers as a group.⁶²⁷

589. Gambia's Armed Forces Act punishes:

every person subject to this Act who . . . breaks into any house or other place in search of plunder; . . . steals any money or property that has been left exposed or unprotected in consequence of war-like operations; or . . . takes otherwise than for the service of The Gambia, any money or property abandoned by the enemy.⁶²⁸

590. Under Georgia's Criminal Code, "pillage, *i.e.* seizure in a combat situation . . . of the private property of civilians left in the region of hostilities," in an international or a non-international armed conflict, is a crime.⁶²⁹

⁶¹⁸ Côte d'Ivoire, *Penal Code as amended* (1981), Article 464.

⁶¹⁹ Croatia, *Criminal Code* (1997), Article 158(1).

⁶²⁰ Czech Republic, *Criminal Code as amended* (1961), Article 264(a).

⁶²¹ Ecuador, *National Civil Police Penal Code* (1960), Article 117(1).

⁶²² Egypt, *Military Criminal Code* (1966), Articles 140 and 141.

⁶²³ El Salvador, *Code of Military Justice* (1934), Article 68.

⁶²⁴ El Salvador, *Penal Code* (1997), Article 362.

⁶²⁵ Estonia, *Criminal Code as amended* (1992), Section 61/2.

⁶²⁶ Ethiopia, *Penal Code* (1957), Article 285.

⁶²⁷ France, *Code of Military Justice* (1982), Article 427.

⁶²⁸ Gambia, *Armed Forces Act* (1985), Section 40(e), (h) and (i).

⁶²⁹ Georgia, *Criminal Code* (1999), Article 413(a).

591. Germany's Law Introducing the International Crimes Code punishes anyone who, in connection with an international or non-international armed conflict, "pillages . . . property of the adverse party".⁶³⁰

592. Ghana's Armed Forces Act punishes:

every person subject to the Code of Service Discipline who –

...

(e) breaks into any house or other place in search of plunder,

...

(h) steals any money or property that has been left exposed or unprotected in consequence of warlike operations, or

(i) takes otherwise than for the service of the Republic of Ghana any money or property abandoned by the enemy.⁶³¹

593. Guinea's Criminal Code punishes pillage and damage to commodities, goods or belongings committed by soldiers as a group.⁶³²

594. Under Hungary's Criminal Code as amended, "the person who loots civilian goods in an operational or occupied territory" is, upon conviction, guilty of a war crime.⁶³³

595. Under India's Army Act, "any person subject to this Act who . . . breaks into any house or other place in search of plunder . . . shall, on conviction by court-martial, [be punished]".⁶³⁴ The Act also criminalises offences against the property or person of any inhabitant of, or resident in, the country in which a soldier is serving.⁶³⁵

596. Under Indonesia's Penal Code, theft committed on the occasion of "riots, insurgencies or war" is a punishable offence.⁶³⁶

597. Indonesia's Military Penal Code punishes:

Anyone who commits theft by misusing his/her official position . . .

Any military personnel who commits theft in the area under his/her authority . . .

Any member of the armed forces who is being prepared for warfare and commits theft or threatens to abuse his/her authority or opportunity and official facilities . . .

Any person subject to military court authority who is being prepared for warfare, or who accompanying with the approval of the military authority, commits theft by abusing his/her authority, opportunity or official facilities.⁶³⁷

598. Iraq's Military Penal Code states that:

Every person who, taking advantage of war panic or misusing military prestige, takes possession of other persons' property without any justification, or seizes such

⁶³⁰ Germany, *Law Introducing the International Crimes Code* (2002), Article 1, § 9(1).

⁶³¹ Ghana, *Armed Forces Act* (1962), Section 18(e), (h) and (i).

⁶³² Guinea, *Criminal Code* (1998), Article 569.

⁶³³ Hungary, *Criminal Code as amended* (1978), Section 159(1).

⁶³⁴ India, *Army Act* (1950), Section 36.

⁶³⁵ India, *Army Act* (1950), Section 64.

⁶³⁶ Indonesia, *Penal Code* (1946), § 363.

⁶³⁷ Indonesia, *Military Penal Code* (1947), Articles 140–142(1).

property by force, collects money or goods without being duly authorised to do so, or misuses his official position in making military requisitions for his own benefit shall be considered looter and shall be punished.⁶³⁸

599. Ireland's Geneva Conventions Act as amended provides that any "minor breach" of the Geneva Conventions, including violations of Article 33 GC IV, as well as any "contravention" of AP II, including violations of Article 4(2)(g) AP II, are punishable offences.⁶³⁹

600. Israel's Nazis and Nazi Collaborators (Punishment) Law punishes persons who have committed war crimes, including "plunder of public or private property".⁶⁴⁰

601. Israel's Military Justice Law states that "a soldier who loots or breaks into a house or another place in order to loot is liable to imprisonment".⁶⁴¹

602. Italy's Law of War Decree states that "it is prohibited...to pillage a locality, even when taken by assault".⁶⁴²

603. Italy's Wartime Military Penal Code punishes anyone who commits "pillage in a town or any other place, even taken by assault".⁶⁴³

604. Jordan's Military Criminal Code states that pillage by a member of the armed forces is a punishable offence.⁶⁴⁴ This also applies to attacking a house with a view to pillaging it.⁶⁴⁵

605. Kazakhstan's Penal Code provides that "pillage of national property in occupied territories" is a crime against the peace and security of mankind.⁶⁴⁶

606. Kenya's Armed Forces Act punishes anyone who steals property left exposed or unprotected, or steals enemy equipment for personal use.⁶⁴⁷

607. Under South Korea's Military Criminal Code, "a person who...takes the goods and effects of the inhabitants in the combat or occupied area" commits a punishable offence.⁶⁴⁸

608. Under Latvia's Criminal Code, "robbery...of civilians...of the occupied territory" is a war crime.⁶⁴⁹

609. Under Luxembourg's Law on the Repression of War Crimes, pillage committed in time of war is a war crime.⁶⁵⁰

610. Malaysia's Armed Forces Act provides that:

⁶³⁸ Iraq, *Military Penal Code* (1940), Article 112(1).

⁶³⁹ Ireland, *Geneva Conventions Act as amended* (1962), Section 4(1) and (4).

⁶⁴⁰ Israel, *Nazis and Nazi Collaborators (Punishment) Law* (1950), Section 1.

⁶⁴¹ Israel, *Military Justice Law* (1955), Article 74.

⁶⁴² Italy, *Law of War Decree* (1938), Article 35(7).

⁶⁴³ Italy, *Wartime Military Penal Code* (1941), Article 186.

⁶⁴⁴ Jordan, *Military Criminal Code* (1952), Article 12(1).

⁶⁴⁵ Jordan, *Military Criminal Code* (1952), Article 13(1).

⁶⁴⁶ Kazakhstan, *Penal Code* (1997), Article 159(1).

⁶⁴⁷ Kenya, *Armed Forces Act* (1968), Section 23.

⁶⁴⁸ South Korea, *Military Criminal Code* (1962), Article 82.

⁶⁴⁹ Latvia, *Criminal Code* (1998), Section 74.

⁶⁵⁰ Luxembourg, *Law on the Repression of War Crimes* (1947), Article 2(6).

Every person subject to service law under this Act who –

- ...
 (b) breaks into any house or other place in search of plunder; or
 ...
 (d) steals any property which has been left exposed or unprotected in consequence of warlike operations; or
 (e) takes otherwise than for the public service any vehicle, equipment or stores abandoned by the enemy,
 shall be guilty of looting and liable on conviction by court-martial to imprisonment or any less punishment provided by this Act.⁶⁵¹

611. Mali's Code of Military Justice punishes pillage and damage to commodities, goods or belongings committed by soldiers as a group.⁶⁵²

612. Under Mali's Penal Code, "the pillage of a town or locality, even when taken by assault," is a war crime in international armed conflicts.⁶⁵³

613. Mexico's Code of Military Justice as amended punishes "anyone who, without being absolutely required by war operations, ... plunders towns and villages".⁶⁵⁴ It also punishes "anyone who, taking advantage of his position in the army or in the armed forces or of the fears created by war, and for the purpose of illegitimate appropriation, seizes objects belonging to the local population", as well as anyone who "operates forced requisitions to appropriate goods for oneself, on the pretext of public interest".⁶⁵⁵

614. Moldova's Penal Code punishes "robbery ... committed against the population of the area of military operations".⁶⁵⁶

615. Morocco's Code of Military Justice punishes pillage and damage to commodities, goods or belongings committed by soldiers as a group.⁶⁵⁷

616. Mozambique's Military Criminal Law provides that "anyone who, in time of war, pillages ... goods or any other objects" commits a punishable offence.⁶⁵⁸

617. Myanmar's Defence Service Act punishes any person who "breaks into any house or other place in search of plunder".⁶⁵⁹

618. The Definition of War Crimes Decree of the Netherlands includes "pillage" in its list of war crimes.⁶⁶⁰

619. Under the Military Criminal Code as amended of the Netherlands, the soldier "who abuses, in time of war, the power, opportunities or means given to him as a soldier for committing theft may be punished for pillage".⁶⁶¹

⁶⁵¹ Malaysia, *Armed Forces Act* (1972), Section 46(b), (d) and (e).

⁶⁵² Mali, *Code of Military Justice* (1995), Article 133.

⁶⁵³ Mali, *Penal Code* (2001), Article 31(i)(16).

⁶⁵⁴ Mexico, *Code of Military Justice as amended* (1933), Article 209, see also Article 334.

⁶⁵⁵ Mexico, *Code of Military Justice as amended* (1933), Articles 325 and 326.

⁶⁵⁶ Moldova, *Penal Code* (2002), Article 390.

⁶⁵⁷ Morocco, *Code of Military Justice* (1956), Article 169.

⁶⁵⁸ Mozambique, *Military Criminal Code* (1987), Article 88.

⁶⁵⁹ Myanmar, *Defence Service Act* (1959), Section 35(b).

⁶⁶⁰ Netherlands, *Definition of War Crimes Decree* (1946), Article 1.

⁶⁶¹ Netherlands, *Military Criminal Code as amended* (1964), Article 156.

620. Under the International Crimes Act of the Netherlands, “pillaging a town or place, even when taken by assault” is a crime, whether committed in an international or a non-international armed conflict.⁶⁶²

621. New Zealand’s Armed Forces Discipline Act provides that:

Every person subject to this Act commits the offence of looting, and is liable to imprisonment for life, who –

...

- (b) Steals any property which has been left unexposed or unprotected in consequence of any such war or operations as are mentioned in paragraph (a) of this section; or
- (c) Appropriates, otherwise than on behalf of Her Majesty the Queen in right of New Zealand, any supplies of any description whatsoever captured from or abandoned by the enemy.⁶⁶³

622. Under New Zealand’s International Crimes and ICC Act, war crimes include the crimes defined in Article 8(2)(b)(xvi) and (e)(v) of the 1998 ICC Statute.⁶⁶⁴

623. Nicaragua’s Military Penal Code punishes any “soldier who plunders the inhabitants of enemy towns and territories”.⁶⁶⁵ More generally, it punishes:

the soldier who, during an international or civil war, commits serious violations of international conventions ratified by Nicaragua concerning the use of warlike weapons, the conduct of hostilities, the protection of the wounded, sick and shipwrecked, the treatment of prisoners and other norms of war . . .⁶⁶⁶

624. Under Nigeria’s Armed Forces Decree 105 as amended, looting is a punishable offence. A person is guilty of looting who:

- (b) steals any property which has been left exposed or unprotected in consequence of the operations as are mentioned in paragraph (a) of this section [warlike operations]; or
- (c) takes, otherwise than for the public service, any vehicle, equipment or stores abandoned by the enemy.⁶⁶⁷

625. Under Norway’s Military Penal Code as amended, “anyone who contravenes or is accessory to the contravention of provisions relating to the protection of persons or property laid down in . . . the Geneva Conventions of 12 August 1949 . . . [and in] the two additional protocols to these Conventions . . . is liable to imprisonment”.⁶⁶⁸

⁶⁶² Netherlands, *International Crimes Act* (2003), Articles 5(5)(q) and 6(3)(e).

⁶⁶³ New Zealand, *Armed Forces Discipline Act* (1971), Section 31(b) and (c).

⁶⁶⁴ New Zealand, *International Crimes and ICC Act* (2000), Section 11(2).

⁶⁶⁵ Nicaragua, *Military Penal Code* (1996), Article 59.

⁶⁶⁶ Nicaragua, *Military Penal Code* (1996), Article 47.

⁶⁶⁷ Nigeria, *Armed Forces Decree 105 as amended* (1993), Section 51(b) and (c).

⁶⁶⁸ Norway, *Military Penal Code as amended* (1902), § 108.

626. Paraguay's Military Penal Code punishes plunder in time of war.⁶⁶⁹ It further provides that "the person guilty of pillage shall be punished by a prison sentence".⁶⁷⁰

627. Under Paraguay's Penal Code, "looting of private property", in time of war, armed conflict or military occupation, is a war crime.⁶⁷¹

628. Under Peru's Code of Military Justice, it is a punishable violation of international law "to plunder the inhabitants" in time of war.⁶⁷² The Code also punishes "the soldiers who, in time of war or of public calamity, of shipwreck or of aerial accident, commit acts of plunder or of pillage".⁶⁷³

629. Under the Articles of War of the Philippines, it is an offence to abandon one's post to plunder or pillage.⁶⁷⁴

630. Under the War Crimes Trial Executive Order of the Philippines, applicable to acts committed during the Second World War, "plunder of public and private property" is a war crime.⁶⁷⁵

631. Under Russia's Criminal Code, "plunder of the national property in occupied territory" is a crime against the peace and security of mankind.⁶⁷⁶

632. Senegal's Penal Code as amended punishes pillage and damage to commodities, goods or belongings committed by soldiers as a group.⁶⁷⁷

633. Singapore's Armed Forces Act as amended provides that:

Every person subject to military law who –

...

- (b) steals any property which has been left exposed or unprotected in consequence of any such operations as are mentioned in paragraph (a) [warlike operations]; or
- (c) takes, otherwise than for the purposes of the Singapore Armed Forces, any aircraft, vessel, arms, vehicle, equipment or stores abandoned by the enemy,

shall be guilty of looting and shall be liable on conviction by a subordinate military court to imprisonment...⁶⁷⁸

634. Slovakia's Criminal Code as amended punishes "whoever in a theatre of war, on the battlefield or in places affected by military operations... seizes another person's belongings, taking advantage of such person's distress".⁶⁷⁹

635. Under Slovenia's Penal Code, pillage of the civilian population is a war crime.⁶⁸⁰

⁶⁶⁹ Paraguay, *Military Penal Code* (1980), Article 292.

⁶⁷⁰ Paraguay, *Military Penal Code* (1980), Article 295.

⁶⁷¹ Paraguay, *Penal Code* (1997), Article 320(7).

⁶⁷² Peru, *Code of Military Justice* (1980), Article 95(4).

⁶⁷³ Peru, *Code of Military Justice* (1980), Article 138(2).

⁶⁷⁴ Philippines, *Articles of War* (1938), Article 76.

⁶⁷⁵ Philippines, *War Crimes Trial Executive Order* (1947), § II(b)(2).

⁶⁷⁶ Russia, *Criminal Code* (1996), Article 356(1).

⁶⁷⁷ Senegal, *Penal Code as amended* (1965), Article 412.

⁶⁷⁸ Singapore, *Armed Forces Act as amended* (1972), Section 18(b) and (c).

⁶⁷⁹ Slovakia, *Criminal Code as amended* (1961), Article 264(a).

⁶⁸⁰ Slovenia, *Penal Code* (1994), Article 374(1).

- 636.** Spain's Royal Ordinance for the Armed Forces instructs commanders not to permit plunder or pillage.⁶⁸¹
- 637.** Spain's Military Criminal Code punishes any soldier "who pillages the inhabitants of enemy towns".⁶⁸²
- 638.** Spain's Penal Code punishes "anyone who, during an armed conflict, . . . commits any . . . acts of pillage".⁶⁸³
- 639.** Sri Lanka's Army Act as amended punishes "every person subject to military law who . . . leaves the ranks or his post without the orders of his commanding officer in order to go in search of plunder, or . . . breaks into any house or other place in search of plunder".⁶⁸⁴
- 640.** Sri Lanka's Air Force Act as amended punishes "every person subject to this Act who . . . leaves the ranks or his post without the orders of his commanding officer in order to go in search of plunder, or . . . breaks into any house or other place in search of plunder".⁶⁸⁵
- 641.** Sri Lanka's Navy Act as amended punishes "every person subject to naval law who strips off the clothes of, or in any way pillages, . . . any person on board a vessel taken as prize".⁶⁸⁶
- 642.** Switzerland's Military Criminal Code as amended punishes "anyone who, in time of war or military service, commits an act of pillage". It is also a punishable offence to allow subordinates to pillage or not to intervene to stop acts of pillage.⁶⁸⁷
- 643.** Tajikistan's Criminal Code punishes "pillage, i.e. seizure in a combat situation . . . of the private property left in the region of hostilities".⁶⁸⁸
- 644.** Togo's Code of Military Justice prohibits pillage.⁶⁸⁹
- 645.** Trinidad and Tobago's Defence Act as amended provides that:

Any person subject to military law who –

...

- (b) steals any property which has been left exposed or unprotected in consequence of warlike operations; or
- (c) takes otherwise than for the public service any vehicles, equipment or stores abandoned by the enemy,

is guilty of looting and, on conviction by court-martial, liable to imprisonment or less punishment.⁶⁹⁰

⁶⁸¹ Spain, *Royal Ordinance for the Armed Forces* (1978), Article 139.

⁶⁸² Spain, *Military Criminal Code* (1985), Article 73.

⁶⁸³ Spain, *Penal Code* (1995), Article 613(1)(e).

⁶⁸⁴ Sri Lanka, *Army Act as amended* (1949), Section 97(2)(a) and (d).

⁶⁸⁵ Sri Lanka, *Air Force Act as amended* (1949), Section 97(2)(a) and (d).

⁶⁸⁶ Sri Lanka, *Navy Act as amended* (1950), Section 98.

⁶⁸⁷ Switzerland, *Military Criminal Code as amended* (1927), Article 139(1).

⁶⁸⁸ Tajikistan, *Criminal Code* (1998), Article 405.

⁶⁸⁹ Togo, *Code of Military Justice* (1981), Article 106.

⁶⁹⁰ Trinidad and Tobago, *Defence Act as amended* (1962), Section 40(b) and (c).

646. Under Trinidad and Tobago's Draft ICC Act, it is a punishable offence to commit a war crime as defined in Article 8(2)(b)(xvi) and (e)(v) of the 1998 ICC Statute.⁶⁹¹

647. Tunisia's Code of Military Justice as amended punishes pillage and damage to commodities, goods or belongings committed by soldiers as a group.⁶⁹²

648. Uganda's National Resistance Army Statute punishes any:

person subject to military law who –

...

(d) breaks into any house or other place in search of plunder; . . .

(g) steals any money or property which has been left exposed or unprotected in consequence of war-like operations; or

(h) takes otherwise than for the service of the Republic of Uganda any money or property abandoned by the enemy.⁶⁹³

649. Pursuant to Ukraine's Criminal Code, "pillage committed in respect of the local population in an operational zone" is a war crime.⁶⁹⁴

650. The UK Army Act as amended provides that:

Any person subject to military law who –

...

(b) steals any property which has been left exposed or unprotected in consequence of any such operations as are mentioned in paragraph (a) above [warlike operations], or

(c) takes otherwise than for the public service any vehicle, equipment or stores abandoned by the enemy,

shall be guilty of looting and liable, on conviction by court-martial, to imprisonment or any less punishment provided by this Act.⁶⁹⁵

651. The UK Air Force Act as amended states that:

Any person subject to air-force law who –

...

(b) steals any property which has been left exposed or unprotected in consequence of any such operations as are mentioned in paragraph (a) above [warlike operations], or

(c) takes otherwise than for the public service any vehicle, equipment or stores abandoned by the enemy,

shall be guilty of looting and liable, on conviction by court-martial, to imprisonment or any less punishment provided by this Act.⁶⁹⁶

⁶⁹¹ Trinidad and Tobago, *Draft ICC Act* (1999), Section 5(1)(a).

⁶⁹² Tunisia, *Code of Military Justice as amended* (1957), Article 103.

⁶⁹³ Uganda, *National Resistance Army Statute* (1992), Section 35(d), (g) and (h).

⁶⁹⁴ Ukraine, *Criminal Code* (2001), Article 433(2).

⁶⁹⁵ UK, *Army Act as amended* (1955), Section 30(b) and (c).

⁶⁹⁶ UK, *Air Force Act as amended* (1955), Section 30(b) and (c).

652. Under the UK ICC Act, it is a punishable offence to commit a war crime as defined in Article 8(2)(b)(xvi) and (e)(v) of the 1998 ICC Statute.⁶⁹⁷
653. The US Regulations Governing the Trials of Accused War Criminals in the Pacific Region I established military commissions which had jurisdiction over offences such as “plunder of public or private property”.⁶⁹⁸
654. The US Regulations Governing the Trials of Accused War Criminals in the Pacific Region II established military commissions which had jurisdiction over offences such as “plunder of public or private property”.⁶⁹⁹
655. Under the US Uniform Code of Military Justice, abandoning one’s place of duty to plunder or pillage and engaging in looting or pillaging are punishable offences.⁷⁰⁰
656. Under the US War Crimes Act as amended, violations of Article 28 of the 1907 HR are war crimes.⁷⁰¹
657. Uzbekistan’s Criminal Code punishes “the plundering of property”.⁷⁰²
658. Venezuela’s Code of Military Justice as amended punishes soldiers who “failing the obedience they owe to their superiors, . . . pillage the population of towns and villages”.⁷⁰³
659. Vietnam’s Penal Code punishes “anyone who, during combat or while cleaning up a battlefield, steals or destroys war booty”.⁷⁰⁴ It also punishes “anyone who, in time of war, . . . has pillaged property”.⁷⁰⁵
660. Under Yemen’s Military Criminal Code (1996), attacking houses or places with the intent to pillage is an offence. The provision is applicable at all times, whether during international or internal conflicts or in peacetime.⁷⁰⁶
661. Under Yemen’s Military Criminal Code (1998), “looting . . . of property” is a war crime.⁷⁰⁷
662. The Criminal Offences against the Nation and State Act of the SFRY (FRY) considers that, during war or enemy occupation, “any person who . . . ordered or committed . . . the looting of private or public property” committed a war crime.⁷⁰⁸

⁶⁹⁷ UK, *ICC Act* (2001), Sections 50(1) and 51(1) (England and Wales) and Section 58(1) (Northern Ireland).

⁶⁹⁸ US, *Regulations Governing the Trials of Accused War Criminals in the Pacific Region I* (1945), Regulation 5.

⁶⁹⁹ US, *Regulations Governing the Trials of Accused War Criminals in the Pacific Region II* (1945), Regulation 2(b).

⁷⁰⁰ US, *Uniform Code of Military Justice* (1950), Articles 99 and 103.

⁷⁰¹ US, *War Crimes Act as amended* (1996), Section 2441(c)(2).

⁷⁰² Uzbekistan, *Criminal Code* (1994), Article 152.

⁷⁰³ Venezuela, *Code of Military Justice as amended* (1998), Article 474(17), see also Article 474(2).

⁷⁰⁴ Vietnam, *Penal Code* (1990), Article 272(1).

⁷⁰⁵ Vietnam, *Penal Code* (1990), Article 279.

⁷⁰⁶ Yemen, *Military Criminal Code* (1996), Article 25.

⁷⁰⁷ Yemen, *Military Criminal Code* (1998), Article 21(6).

⁷⁰⁸ SFRY (FRY), *Criminal Offences against the Nation and State Act* (1945), Article 3(3).

663. Under the Penal Code as amended of the SFRY (FRY), “plunder of the population’s property” is a war crime against the civilian population.⁷⁰⁹

664. Zambia’s Defence Act as amended provides that:

Any person subject to military law under this Act who –

...

(b) steals any property which has been left exposed or unprotected in consequence of warlike operations; or

(c) takes otherwise than for the public service any vehicle, equipment or stores abandoned by the enemy;

shall be guilty of looting and liable, on conviction by court-martial, to imprisonment or any less punishment provided by this Act.⁷¹⁰

665. Zimbabwe’s Defence Act as amended provides that:

Any member [of the Defence Forces] who –

...

(b) steals any property which has been left exposed or unprotected in consequence of warlike operations; or

(c) takes otherwise than for the services of the Defence Forces or any other Military Forces any vehicle, equipment or stores abandoned by the enemy;

shall be guilty of the offence of looting and liable to imprisonment or any less punishment.⁷¹¹

National Case-law

666. In its judgement in the *Military Junta case* in 1985, Argentina’s National Court of Appeals applied the 1907 HR to acts of pillage committed in the context of internal violence. It resorted to the provisions of the Penal Code relating to theft to determine the sanction.⁷¹²

667. In the *Takashi Sakai case* in 1946, a Chinese Military Tribunal found the accused, a Japanese military commander in China during the Second World War, guilty, *inter alia*, of “inciting or permitting his subordinates to . . . plunder . . . civilians”, notably rice, poultry and other foods. The Tribunal said that, in so doing, “he had violated the [1907 HR] . . . These offences are war crimes and crimes against humanity.” It found that Articles 28 and 47 of the 1907 HR had been violated.⁷¹³

668. During the First World War, France adopted a law to extend its jurisdiction to offences committed in invaded territory. On this basis, some German officers and soldiers were convicted by courts-martial of acts of pillage.⁷¹⁴

⁷⁰⁹ SFRY (FRY), *Penal Code as amended* (1976), Article 142(1).

⁷¹⁰ Zambia, *Defence Act as amended* (1964), Section 35(b) and (c).

⁷¹¹ Zimbabwe, *Defence Act as amended* (1972), First Schedule, Section 11(b) and (c).

⁷¹² Argentina, National Court of Appeals, *Military Junta case*, Judgement, 9 December 1985.

⁷¹³ China, War Crimes Military Tribunal of the Ministry of National Defence at Nanking, *Takashi Sakai case*, Judgement, 29 August 1946.

⁷¹⁴ J. Rampon, *La justice militaire en France et le droit international humanitaire*, Mémoire de DEA, Faculté de Droit, Université de Montpellier I, 1997–1998, p. 30, referring to cases of the

669. In the *Szabados case* before a French Military Tribunal in 1946, the accused, a former German non-commissioned officer of the 19th Police Regiment stationed in occupied France, was charged with, and found guilty of, *inter alia*, the count of pillage in time of war. The Tribunal found the looting of personal belongings and other property of civilians evicted from their homes prior to their destruction to be a violation of Article 440 of the French Penal Code, which dealt with pillage.⁷¹⁵

670. In the *Holstein case* before a French Military Tribunal in 1947, some of the accused, members of various German units, were found guilty of war crimes for having committed acts of looting and pillage, prohibited under the French Code of Military Justice.⁷¹⁶

671. In the *Bauer case* before a French Military Tribunal in 1947, a German *gendarme* was found guilty of war crimes for having stolen a sewing machine and other objects, which he took to Germany during the retreat from France. He was also found guilty of war crimes for having received stolen goods, when removing and using furniture which his predecessor in the *gendarmerie* post had stolen from a French inhabitant to whom the accused knew it belonged.⁷¹⁷

672. In the *Buch case* before a French Military Tribunal in 1947, the accused, a paymaster during the occupation of France, was found guilty of a war crime for having received stolen goods. The German *Kommandantur* at Saint-Die had seized silverware which a French doctor had left behind in crates before leaving the locality. The goods were sold at an auction by the *Kommandantur* and part of it bought by the accused.⁷¹⁸

673. In the *Jorgić case* before Germany's Higher Regional Court at Düsseldorf in 1997, the accused was convicted of genocide committed in the context of the conflict in the former Yugoslavia. In 1999, the Federal Supreme Court confirmed the judgement of first instance in most parts. Both courts referred to acts of plunder as part of the general background in which the genocide took place.⁷¹⁹

674. The Report on the Practice of Israel states that any claim of looting would be immediately investigated and all necessary measures taken. The report refers to IDF military court-martial cases in which soldiers were convicted of looting.⁷²⁰

Conseil de Guerre de Rennes, 26 February 1915 and of the Conseil de Guerre de Toulouse, 16 July 1916.

⁷¹⁵ France, Permanent Military Tribunal at Clermont-Ferrand, *Szabados case*, Judgement, 23 June 1946.

⁷¹⁶ France, Permanent Military Tribunal at Dijon, *Holstein case*, Judgement, 3 February 1947.

⁷¹⁷ France, Permanent Military Tribunal at Metz, *Bauer case*, Judgement, 10 June 1947.

⁷¹⁸ France, Permanent Military Tribunal at Metz, *Buch case*, Judgement, 2 December 1947.

⁷¹⁹ Germany, Higher Regional Court at Düsseldorf, *Jorgić case*, Judgement, 26 September 1997; Federal Supreme Court, *Jorgić case*, Judgement, 30 April 1999.

⁷²⁰ Report on the Practice of Israel, 1997, Chapter 2.3, referring to Appeal 217/82, *The Chief Military Prosecutor v. Sergeant Ofer Perzig*; Appeal 290/82, *Kablan Valid v. The Chief Military Prosecutor*; Appeal 36/82, *Corporal Prosper Buhadana v. The Chief Military Prosecutor*.

675. In the *Esau case* in 1948, the Special Criminal Court at Hertogenbosch in the Netherlands acquitted the chief commissioner of Germany's high frequency research council of charges of plunder of public and private property for ordering the removal of scientific instruments and gold from factories in the Netherlands. The Court held that the accused had only ordered the removal of property which he considered would be of assistance to the German war effort, in accordance with Article 53 of the 1907 HR. On appeal by the prosecutor in 1949, the Special Court of Cassation of the Netherlands quashed the lower court's decision, holding that the relevant law of the Netherlands adopted the same definition of war crimes as Article 6(b) of the 1945 IMT Charter (Nuremberg) and included "plunder of public and private property, wanton destruction of cities... or devastation not justified by military necessity". According to the Court, the requirement that the acts not be justified by military necessity did not apply to plunder as this was prohibited by international law. Accordingly, the removal of the property in question was unlawful unless the property fell within one of the categories of goods which the occupant was exceptionally entitled to seize from private individuals by virtue of Article 53(2) of the 1907 HR. Considering the property in question, the Court concluded that, with the exception of the short wave transmitter, none of the goods could be deemed to be excepted from the general inviolability of private property in war.⁷²¹

676. In the *Fiebig case* before the Special Criminal Court at The Hague in the Netherlands in 1949, the accused, a delegate of the Minister of the Reich for Armaments and Munitions, was found guilty of war crimes for participating in the economic spoliation of the Netherlands and the removal of stocks of food. As to the contention of state of necessity raised by the accused, the Court held that, even if there was a so-called "war necessity" for Germany to plunder occupied countries, this was no excuse for a method of plunder which was contrary to the laws of war, in the very circumstances envisaged by the treaty which prohibited it. It also underlined that the fact that spoliation of occupied territory was a systematic government policy of Germany made it *a fortiori* a prohibited act and a war crime.⁷²²

677. In the *Pohl case* before the US Military Tribunal at Nuremberg in 1947, the accused, top ranking officials of the SS, were charged with taking part in the commission of plunder of public and private property. They were found guilty, *inter alia*, of the looting of property of Jewish civilians in eastern occupied territories.⁷²³

678. In the *Von Leeb (The High Command Trial) case* before the US Military Tribunal at Nuremberg in 1948, the accused, former high-ranking officers in the German army and navy, were charged, *inter alia*, with war crimes and crimes

⁷²¹ Netherlands, Special Criminal Court at Hertogenbosch, *Esau case*, Judgement, 27 April 1948; Special Court of Cassation, *Esau case*, Judgement, 21 February 1949.

⁷²² Netherlands, Special Criminal Court at The Hague, *Fiebig case*, Judgement, 28 June 1949.

⁷²³ US, Military Tribunal at Nuremberg, *Pohl case*, Judgement, 3 November 1947.

against humanity against civilians in that they participated in atrocities such as plunder of public and private property. The evidence showed that the looting and spoliation which had been carried out in the various occupied countries were not the acts of individuals, but were carried out by the German government and the Wehrmacht for the needs of both. It was carried out on a larger scale than was possible by the army, as shown by the evidence, and seemed to have been sometimes based upon the idea that in looting, the individual was not depriving the victim of the property, but was depriving the Reich and the Wehrmacht. However, the evidence failed to show any specific criminal responsibility on the part of the accused in connection with charges of plunder and spoliation. Furthermore, the Tribunal stated that "most of the prohibitions of both the Hague and Geneva Conventions, considered in substance, are clearly an expression of the accepted views of civilized nations". It notably mentioned Article 47 of the 1907 HR. The Tribunal added that military necessity "does [not] justify the seizure of property or goods beyond that which is necessary for the use of the army of occupation. Looting and spoliation are none the less criminal in that they were conducted, not by individuals, but by the army and the State."⁷²⁴

679. In its judgement in the *John Schultz case* in 1952, the US Court of Military Appeals listed robbery, larceny and burglary as crimes "universally recognized as properly punishable under the law of war".⁷²⁵

Other National Practice

680. In 1989, during a debate in the UN Security Council relating to alleged Pakistani aggression and interference in Afghanistan's affairs, the representative of Afghanistan mentioned an article in the *Wall Street Journal* revealing, *inter alia*, "the looting... and other grave crimes", which the representative alleged Pakistani officers had been involved in.⁷²⁶

681. According to the Report on the Practice of Algeria, pillage is prohibited under Islamic law. It adds that the first combatants to fight against French occupation in the 19th century followed Islamic teachings on this point.⁷²⁷

682. The Report on the Practice of Angola mentions several instances of pillage during the war of independence and during the ensuing internal conflict, in particular between 1992 and 1994. The report does not specify, however, who the perpetrators were (civilians, rebel movements or government troops).⁷²⁸

⁷²⁴ US, Military Tribunal at Nuremberg, *Von Leeb (The High Command Trial) case*, Judgement, 28 October 1948.

⁷²⁵ US, Court of Military Appeals, *John Schultz case*, Judgement, 5 August 1952.

⁷²⁶ Afghanistan, Statement before the UN Security Council, UN Doc. S/PV.2852, 11 April 1989, p. 8.

⁷²⁷ Report on the Practice of Algeria, 1997, Chapter 2.3.

⁷²⁸ Report on the Practice of Angola, 1998, Chapter 2.3, referring to Branko Lazitch, *Angola 1974-1978: un échec du communisme en Afrique, Est & Ouest*, Paris, 1988, p. 39.

683. In 1990, during a debate in the UN Security Council relating to the Iraqi invasion of Kuwait, Bahrain stated that it considered the pillage and plunder of private homes and businesses to be “completely at variance with the norms of international law and the Universal Declaration of Human Rights” and “at odds with the principles and precepts of the Islamic *Sharia*”. In the eyes of the *Sharia*, he said, the invasion was all the worse because it was accompanied, *inter alia*, by pillage and theft.⁷²⁹

684. In the context of the Sino-Japanese War (1937–1945), the Chinese Communist Party condemned looting by Japanese troops. According to the Report on the Practice of China, these acts of looting are considered as part of a deliberate “barbarous policy” of the Japanese authorities.⁷³⁰

685. The Report on the Practice of Colombia refers to a draft internal working paper of the Colombian government which stated that pillage and plunder are prohibited by IHL.⁷³¹

686. In 1990, during a debate in the UN Security Council relating to the Iraqi invasion of Kuwait, Finland condemned acts of pillage committed by Iraq.⁷³²

687. In 1999, during the conflict in Kosovo, the French President criticised acts of the Serbian authorities in Kosovo, including pillage, and demanded that these acts cease.⁷³³

688. In 1991, the majority of political parties in the German parliament vigorously condemned violations of human rights and “other crimes” committed during the civil war in Sudan. Pillage was among the “crimes” mentioned.⁷³⁴

689. In 1995, during a debate in the UN Security Council concerning the situation in the former Yugoslavia, the German representative expressed his concern about reports of looting in the Krajina region. He urged the Croatian government to do its utmost to stop these acts.⁷³⁵

⁷²⁹ Bahrain, Statement before the UN Security Council, UN Doc. S/PV.2960, 27 November 1990, pp. 21–23.

⁷³⁰ Report on the Practice of China, 1997, Chapter 2.3, referring to Mao Zedong, Talking with a journalist of the Xinhua News Agency on the new international situation, 1 September 1939, *Selected Works by Mao Zedong*, The People’s Press, Vol. 2, p. 586; see also Chapter 4.1, referring to Deng Xiaoping, The Economic Construction of the Area of Taihang Mountain, 2 July 1943, *Selected Works of Deng Xiaoping*, Vol. I, The People’s Press, p. 78, which describes the plunder by Japanese troops of basic necessities and foodstuffs.

⁷³¹ Report on the Practice of Colombia, 1998, Chapter 4.1, referring to Presidential Council, Proposal of the Government to the Coordinator Guerrillera Simón Bolívar to humanise war, Draft Internal Working Paper, Part entitled “El Derecho Internacional Humanitario”, § 2(m).

⁷³² Finland, Statement before the UN Security Council, UN Doc. S/PV.2960, 27 November 1990, p. 31.

⁷³³ France, Speech by the President, AFP, Paris, 21 April 1999.

⁷³⁴ Germany, Lower House of Parliament, Proposal by the CDU/CSU and FDP, Entwicklungspolitische Chancen in Umbruchsituationen nutzen – entwicklungspolitische Herausforderungen und den Beispielen Äthiopien einschließlich Eritrea, Somalia, Sudan und Angola, *BT-Drucksache* 12/1814, 11 December 1991, p. 4, § 3.1.

⁷³⁵ Germany, Statement before the UN Security Council, UN Doc. S/PV.3591, 9 November 1995, p. 3.

690. During the Iran–Iraq War, Iran claimed that inhabitants of the cities captured by Iraq were robbed. According to the Report on the Practice of Iran, only two Iraqi towns were taken by Iran during the conflict and there were no reports of pillage.⁷³⁶

691. In 1990, in a letter to the UN Secretary-General, Kuwait denounced “practices which are an affront to mankind and which violate all the values of Islam and of civilization, the principles of human rights and the relevant Geneva Conventions . . . [including] looting of all public and private facilities . . . [and] theft of public and private vehicles and their removal to Iraq”.⁷³⁷

692. In 1990, in a letter to the UN Secretary-General, Kuwait mentioned violations “of all international laws” by Iraq:

We wish to draw attention to a phenomenon which has no precedent in history, namely, the Iraqi occupation authorities’ organized operation for the purpose of looting and plundering Kuwait. It is impossible to compare this operation to any similar incidents or to provide an exact account thereof because it is in effect an operation designed to achieve nothing less than the complete removal of all Kuwait’s assets, including property belonging to the State, to public and private institutions and to individuals, as well as the contents of houses, factories, stores, hospitals, academic institutions and to universities.⁷³⁸

693. In 1990, following the Iraqi invasion of Kuwait, the Sheikh of Kuwait denounced in the UN General Assembly the “systematic armed looting and destruction of State assets and individual property”.⁷³⁹

694. In 1996, a newspaper reported the investigation by the Nigerian authorities of officers serving with ECOMOG who had allegedly brought back cars and building materials from Liberia. Preliminary investigation did not reveal the looting of property but the “authorities were concerned about the moral aspects of personnel buying items that might have been offered at very cheap prices by persons rattled or distressed by the effects of war”.⁷⁴⁰

695. In 1990, during a debate in the UN Security Council relating to the Iraqi invasion of Kuwait, Qatar condemned acts of pillage committed by Iraq.⁷⁴¹

696. In response to a report by the Memorial Human Rights Center documenting Russia’s operation in the Chechen village of Samashki in April 1995, which alleged that the Russian forces had looted homes and taken television sets, cattle and other private property from the village, members of the Russian

⁷³⁶ Report on the Practice of Iran, 1997, Chapter 2.3.

⁷³⁷ Kuwait, Letter dated 5 August 1990 to the UN Secretary-General, UN Doc. S/21439, 5 August 1990.

⁷³⁸ Kuwait, Letter dated 2 September 1990 to the UN Secretary-General, UN Doc. S/21694, 3 September 1990.

⁷³⁹ Kuwait, Statement before the UN General Assembly, UN Doc. A/45/PV.10, 3 October 1990, p. 191.

⁷⁴⁰ ECOMOG’s Code of Conduct for review, says Chijuka, *The Post Express*, 25 July 1996, p. 3.

⁷⁴¹ Qatar, Statement before the UN Security Council, UN Doc. S/PV.2960, 27 November 1990, p. 23.

forces who testified in open hearings before a Russian Parliamentary Committee in May 1995 “vigorously denied” these allegations.⁷⁴²

697. In 1995, during a debate in the UN Security Council concerning the situation in the former Yugoslavia, Russia declared that “the continuing large-scale violations of the rights of the Serbian population in the former Sectors West, North and South – including... the looting of homes... – are causing serious concern”.⁷⁴³

698. In 1993, reacting to the report of pillage of civilian property by combatants of the FPR, the Rwandan government asked the FPR to refrain from acts of pillage of civilian property.⁷⁴⁴

699. In 1992, in a note verbale addressed to the UN Secretary-General, Slovenia expressed its readiness to provide information concerning violations of IHL committed by members of the Yugoslav army during the 10-day conflict with Slovenia, including “looting”.⁷⁴⁵

700. In 1993, during a debate in the UN Security Council concerning the situation in Croatia, Spain referred to the conclusions of the Provisional Report of the Security Council’s Commission of Experts, according to which grave offences and other violations of IHL had been committed in the former Yugoslavia, including looting of civilian property.⁷⁴⁶

701. In 1990, during a debate in the UN Security Council relating to the Iraqi invasion of Kuwait, the UK condemned acts of pillage committed by Iraq.⁷⁴⁷

702. A training video on IHL produced by the UK Ministry of Defence states unequivocally that “pillage is forbidden”.⁷⁴⁸

703. The Report on UK Practice refers to a letter from a UK army lawyer which noted that:

The current view seems to be that units may lawfully seize enemy property *on the battlefield* and retain it as booty, but individuals doing the same run the risk of being charged with looting. Retention by units and formations of booty is subject

⁷⁴² Memorial Human Rights Center, *By All Available Means: the Russian Federation Ministry of Internal Affairs Operation in the Village of Samashki: April 7–8, 1995*, Moscow, 1996, § 13, reprinted in Marco Sassòli and Antoine A. Bouvier, *How Does Law Protect in War?*, ICRC, Geneva, 1999, p. 1416.

⁷⁴³ Russia, Statement before the UN Security Council, UN Doc. S/PV.3591, 9 November 1995, p. 8.

⁷⁴⁴ Rwanda, Déclaration du Gouvernement Rwandais relative au Rapport final de la Commission international d’enquête sur les violations des droits de l’homme au Rwanda, in *Rapport sur les droits de l’homme au Rwanda, octobre 1992–octobre 1993*, Association rwandaise pour la défense des droits de la personne et des libertés publiques, Kigali, December 1993, p. 73.

⁷⁴⁵ Slovenia, Note verbale dated 5 November 1992 to the UN Secretary-General, UN Doc. S/24789, 9 November 1992, p. 2.

⁷⁴⁶ Spain, Statement before the UN Security Council, UN Doc. S/PV.3175, 22 February 1993, p. 21.

⁷⁴⁷ UK, Statement before the UN Security Council, UN Doc. S/PV.2962, 28 November 1990, pp. 3–6.

⁷⁴⁸ UK, Ministry of Defence, Training Video: The Geneva Conventions, 1986, Report on UK Practice, 1997, Chapter 2.3.

to approval by Government whereas appropriation of property by individuals on the battlefield is strictly illegal.⁷⁴⁹ [emphasis in original]

704. In 1992, in its final report to Congress on the conduct of the Gulf War, the US Department of Defense condemned the following Iraqi war crimes: “looting of civilian property in violation of [the 1907 HR]”, “pillage, in violation of Article 47 [of the 1907 HR]” and “pillage of Kuwaiti civilian hospitals, in violation of Articles 55, 56, 57, and 147, GC [IV]”.⁷⁵⁰

705. Order No. 579 issued in 1991 by the YPA Chief of Staff of the SFRY (FRY) states that YPA units must “apply all means to prevent any attempt of pillage”.⁷⁵¹

706. According to the Report on the Practice of the SFRY (FRY), in the context of the conflict in Croatia, the local press regularly reported pillage of private property, which allegedly occurred on a massive scale and was perpetrated by regular and paramilitary forces of both sides – Croatian troops and the YPA.⁷⁵²

707. In 1991, the Medical Headquarters of a State denounced the theft, by the army of a State, of the property of its national food industries and the plunder of houses of its nationals and nationals of another State.⁷⁵³

708. In 1991, the ICRC noted systematic pillage by a State, which responded that the pillage arose from a lack of discipline rather than from a deliberate policy.⁷⁵⁴

709. In 1991, an official of a State rejected an ICRC request to protect the civilian population from pillage by government troops. He replied that as long as they provided a hiding place for rebels, the army would burn the fields if necessary. However, this behaviour was not representative of the general opinion of the military personnel met by the ICRC in this context.⁷⁵⁵

III. Practice of International Organisations and Conferences

United Nations

710. In a resolution on Rwanda adopted in 1994, the UN Security Council stated that it was “deeply concerned by . . . looting, banditry and the breakdown of law and order, particularly in Kigali”.⁷⁵⁶

711. In a resolution adopted in 1995 on violations of international humanitarian law in the former Yugoslavia, the UN Security Council stated that it was

⁷⁴⁹ Report on UK Practice, 1997, Letter from an army lawyer, 24 February 1998, Answers to additional questions on Chapter 2.3.

⁷⁵⁰ US, Department of Defense, Final Report to Congress on the Conduct of the Persian Gulf War, Appendix O, The Role of the Law of War, 10 April 1992, *ILM*, Vol. 31, 1992, pp. 632 and 635.

⁷⁵¹ SFRY (FRY), Chief of General Staff of the YPA, Political Department, Order No. 579, 14 October 1991, § 2.

⁷⁵² Report on the Practice of the SFRY (FRY), 1997, Chapter 2.3, referring to newspaper articles in *Politika* and *Borba*.

⁷⁵³ ICRC archive document.

⁷⁵⁴ ICRC archive documents.

⁷⁵⁵ ICRC archive document.

⁷⁵⁶ UN Security Council, Res. 912, 21 April 1994, § 4.

“deeply concerned at reports . . . of serious violations of international humanitarian law . . . including . . . looting of property”.⁷⁵⁷

712. In a resolution adopted in 1995 on violations of international humanitarian law and of human rights in the territory of the former Yugoslavia, the UN Security Council condemned “the widespread looting and destruction of houses and other property, in particular by HVO forces in the area of Mrkonjic Grad and šipovo” and demanded that “all sides immediately stop such action, investigate them and make sure that those who violated the law be held individually responsible in respect of such acts”.⁷⁵⁸

713. In 1995, in a statement by its President concerning the situation in Croatia, the UN Security Council stated that it was “concerned by the reports of human rights violations including . . . looting of property” and demanded that the government of Croatia “immediately investigate all such reports and take appropriate measures to put an end to such acts”.⁷⁵⁹

714. In January 1996, in a statement by its President concerning the situation in Croatia, the UN Security Council strongly condemned “the violations of international humanitarian law and human rights in the former sectors North and South in the Republic of Croatia . . . including systematic and widespread looting”. It stated that measures must be taken by the government of Croatia to stop all such acts and bring the perpetrators to trial.⁷⁶⁰

715. In December 1996, in a statement by its President concerning the situation in Croatia, the UN Security Council expressed “its concern at continued acts of . . . looting”.⁷⁶¹

716. In a resolution adopted in 1995 on the situation of human rights in Bosnia and Herzegovina, Croatia and the FRY, the UN General Assembly condemned “violations of human rights and international humanitarian law, including . . . the . . . looting of houses”.⁷⁶²

717. In a resolution adopted in 1994, the UN Commission on Human Rights expressed concern at pillage in Georgia, including Abkhazia, and condemned such acts committed by troops or armed groups.⁷⁶³

718. In a resolution adopted in 1996 on the situation of human rights in Bosnia and Herzegovina, Croatia and the FRY, the UN Commission on Human Rights condemned

in the strongest terms all violations of human rights and international humanitarian law during the conflict, in particular in areas which were under the control of the

⁷⁵⁷ UN Security Council, Res. 1019, 9 November 1995, preamble.

⁷⁵⁸ UN Security Council, Res. 1034, 21 December 1995, § 15.

⁷⁵⁹ UN Security Council, Statement by the President, UN Doc. S/PRST/1995/44, 7 September 1995, p. 1.

⁷⁶⁰ UN Security Council, Statement by the President, UN Doc. S/PRST/1996/2, 8 January 1996, p. 1.

⁷⁶¹ UN Security Council, Statement by the President, UN Doc. S/PRST/1996/48, 20 December 1996, p. 1.

⁷⁶² UN General Assembly, Res. 50/193, 22 December 1995, § 6.

⁷⁶³ UN Commission on Human Rights, Res. 1994/59, 4 March 1994, § 1.

self-proclaimed Bosnian and Croatian Serb authorities, in particular massive and systematic violations, including, *inter alia*, . . . looting of houses.

It reaffirmed that "all persons who plan, commit or authorize such acts will be held personally responsible and accountable".⁷⁶⁴

719. In a resolution adopted in 1997 on the situation of human rights in Bosnia and Herzegovina, Croatia and the FRY, the UN Commission on Human Rights called upon the government of Croatia "to prevent . . . looting . . . against Croatian Serbs".⁷⁶⁵

720. In 1995, in a report concerning the conflict in the former Yugoslavia, the UN Secretary-General reported that UNCRO continued to document serious violations of the human rights of the Croatian Serbs who had remained in the sectors reconquered by the Croatian army, including looting of property.⁷⁶⁶

721. In 1995, in a report on the situation in Tajikistan, the UN Secretary-General reported that, following the 1994 Agreement on a Temporary Cease-fire on the Tajik-Afghan Border, "UNMOT received reports that armed groups were robbing villagers of their food and livestock. UNMOT has not been able to determine who carried out these acts, which are banned by the Tehran Agreement."⁷⁶⁷

722. In 1996, in a report on UNAVEM III in Angola, the UN Secretary-General reported that "UNAVEM III CIVPOL teams and United Nations human rights experts, who are now deployed to all six regions, indicate that . . . looting, extortion . . . and other criminal acts continue unabated in many parts of the country".⁷⁶⁸

723. In 1996, in a report on the situation of human rights in Croatia, the UN Secretary-General reported that:

Since the end of November 1995, the incidence of human rights violations, including acts of . . . looting, committed in the former Sectors West, North and South has continued to decline . . . The vast scale of looting observed last summer and autumn has depleted the area of valuable personal property and thus the incidence of theft has greatly diminished . . . The Government of Croatia eventually responded with a series of measures intended to protect its citizens' human rights, and these initiatives seem to have begun to have a positive effect.⁷⁶⁹

According to the report, the Croatian government had provided figures concerning criminal proceedings undertaken against the authors of these acts, but "no

⁷⁶⁴ UN Commission on Human Rights, Res. 1996/71, 23 April 1996, § 1.

⁷⁶⁵ UN Commission on Human Rights, Res. 1997/57, 15 April 1997, § 27.

⁷⁶⁶ UN Secretary-General, Report pursuant to Security Council Resolutions 981 (1995), 982 (1995) and 983 (1995), UN Doc. S/1995/987, 23 November 1995, § 7.

⁷⁶⁷ UN Secretary-General, Report on the situation in Tajikistan, UN Doc. S/1995/1024, 8 December 1995, § 15.

⁷⁶⁸ UN Secretary-General, Report on UNAVEM III, UN Doc. S/1996/75, 31 January 1996, § 25, see also § 10.

⁷⁶⁹ UN Secretary-General, Further report on the situation of human rights in Croatia pursuant to Security Council Resolution 1019 (1995), UN Doc. S/1996/109, 14 February 1996, § 6.

information has been provided... on whether any convictions have resulted from criminal proceedings for looting, grand larceny or robbery".⁷⁷⁰

724. In 1998, in a report on the situation in Sierra Leone, the UN Secretary-General reported that:

From all parts of the country there are reports of... the looting... of residential and commercial premises and property. It will remain important to document these actions with a view to tackling issues of impunity and as an element in the process of promoting reconciliation and healing of society.⁷⁷¹

725. In 1992, in a report on the situation of human rights in Kuwait under Iraqi occupation, the Special Rapporteur of the UN Commission on Human Rights noted, in a section entitled "Prohibition of the destruction, dismantling and pillaging of infrastructure and private property", numerous cases of pillage of private property by Iraqi occupation forces. The legal framework which the Rapporteur considered applicable was Articles 16(2), 33(2) and (3) and 53 GC IV. He concluded that these acts "violated the guarantees of the Fourth Geneva Convention because they were not necessitated by military considerations nor were they otherwise admissible under international law".⁷⁷²

726. In 1993, in a report on the situation of human rights in Afghanistan, the Special Rapporteur of the UN Commission on Human Rights reported that he "was told... that looting is still taking place on a massive scale", especially in some areas of Kabul.⁷⁷³

727. In 1993, in a report on the situation of human rights in the territory of the former Yugoslavia, the Special Rapporteur of the UN Commission on Human Rights regarded the routine looting of the homes of Muslim families by Bosnian Croat and Bosnian Serb forces as violations of human rights.⁷⁷⁴

728. In 1994, in a report on the situation of human rights in Afghanistan, the Special Rapporteur of the UN Commission on Human Rights reported that "the money market located in the Saray Shah Zada area of the city [Kabul]... was... looted and set on fire".⁷⁷⁵

729. In 1994, in a report on the situation of human rights in the Sudan, the Special Rapporteur of the UN Commission on Human Rights reported that

⁷⁷⁰ UN Secretary-General, Further report on the situation of human rights in Croatia pursuant to Security Council Resolution 1019 (1995), UN Doc. S/1996/109, 14 February 1996, § 16.

⁷⁷¹ UN Secretary-General, Fifth report on the situation in Sierra Leone, UN Doc. S/1998/486, 9 June 1998, § 37.

⁷⁷² UN Commission on Human Rights, Special Rapporteur on the Situation of Human Rights in Kuwait under Iraqi Occupation, Report, UN Doc. E/CN.4/1992/26, 16 January 1992, §§ 224-235.

⁷⁷³ UN Commission on Human Rights, Special Rapporteur on the Situation of Human Rights in Afghanistan, Final report, UN Doc. E/CN.4/1993/42, 18 February 1993, §§ 19 and 27.

⁷⁷⁴ UN Commission on Human Rights, Special Rapporteur on the Situation of Human Rights in the Former Yugoslavia, Fifth periodic report, UN Doc. E/CN.4/1994/47, 17 November 1993, §§ 56, 82 and 147.

⁷⁷⁵ UN Commission on Human Rights, Special Rapporteur on the Situation of Human Rights in Afghanistan, Final report, UN Doc. E/CN.4/1994/53, 14 February 1994, § 17.

he had received numerous complaints of looting by members of the SPLA. He considered that the applicable legal framework was common Article 3 of the 1949 Geneva Conventions, the Additional Protocols and the customary law principle of civilian immunity expressly recognised by General Assembly Resolution 2444 (XXIII) of 19 December 1968.⁷⁷⁶ In 1995, following a description of several cases of looting committed by SPLA soldiers, the Special Rapporteur pointed out that the SPLA was responsible for violations of human rights committed by its local commanders. Although it was not proved that these actions were committed on orders, the Rapporteur maintained that the senior leadership should have taken the necessary measures to prevent future violations by investigating the cases brought to its attention and by holding the perpetrators responsible.⁷⁷⁷ In 1996, the Special Rapporteur listed as “grave violations of human rights” the indiscriminate killing of civilians during raids by the army and by the PDF, which were regularly accompanied by looting, for example of cattle.⁷⁷⁸ Later the same year, he again noted cases of looting of civilians by the SPLA and PDF, which he said had been constantly reported over the past years.⁷⁷⁹

730. In 1995, in a report on the situation of human rights in the region of Banja Luka in northern Bosnia and Herzegovina, the Special Rapporteur of the UN Commission on Human Rights described the systematic pillage of the Muslim population, as part of the policy of “ethnic cleansing”. The Special Rapporteur pointed out that many elements showed that *de facto* authorities were personally and directly responsible for the massive violations of human rights, for example, by the fact that the authorities had not taken the most elementary measures to protect the population.⁷⁸⁰

731. In 1995, in a report on the situation of human rights in the territory of the former Yugoslavia, the Special Rapporteur of the UN Commission on Human Rights reported that many acts of pillage had occurred while the Croatian army was advancing in western Slavonia. He concluded that the Croatian authorities were responsible for violations of human rights and IHL during and after the military operations.⁷⁸¹

732. In 1996, in a report on the situation of human rights in Somalia, the Independent Expert of the UN Commission on Human Rights described, in a

⁷⁷⁶ UN Commission on Human Rights, Special Rapporteur on the Situation of Human Rights in the Sudan, Interim report, UN Doc. A/49/539, 19 October 1994, §§ 43 and 59–60.

⁷⁷⁷ UN Commission on Human Rights, Special Rapporteur on the Situation of Human Rights in the Sudan, Interim report, UN Doc. A/50/569, 16 October 1995, §§ 65–67 and 73.

⁷⁷⁸ UN Commission on Human Rights, Special Rapporteur on the Situation of Human Rights in the Sudan, Interim report, UN Doc. E/CN.4/1996/62, 20 February 1996, § 96(a).

⁷⁷⁹ UN Commission on Human Rights, Special Rapporteur on the Situation of Human Rights in the Sudan, Interim report, UN Doc. A/51/490, 14 October 1996, § 10.

⁷⁸⁰ UN Commission on Human Rights, Special Rapporteur on the Situation of Human Rights in the Former Yugoslavia, Periodic report on the situation in the region of Banja Luka, northern Bosnia and Herzegovina, UN Doc. E/CN.4/1996/3, 21 April 1995, §§ 7–9 and 31.

⁷⁸¹ UN Commission on Human Rights, Special Rapporteur on the Situation of Human Rights in the Former Yugoslavia, Periodic report, UN Doc. E/CN.4/1996/6, 5 July 1995, §§ 17 and 51.

section entitled "Civil war and violations of human rights", the practices of the different Somali factions, including the fact that the winning faction would engage in looting.⁷⁸²

733. In 1997, in a report on the situation of human rights in Zaire (DRC), the Special Rapporteur of the UN Commission on Human Rights reported that before abandoning a town to the rebels, the FAZ engaged in looting. He noted that the new authorities in certain towns had punished abuses committed by members of the rebel forces against civilians.⁷⁸³

734. In 1994, in its final report on grave breaches of the Geneva Conventions and other violations of IHL committed in the former Yugoslavia, the UN Commission of Experts Established Pursuant to Security Council Resolution 780 (1992) placed "looting, theft and robbery of personal property" within the practices of "ethnic cleansing", as part of a systematic and planned general policy. It noted that acts of looting were committed by persons from all segments of the Serb population: soldiers, militias, special forces, police and civilians. These acts were described as violations of IHL and crimes against humanity.⁷⁸⁴

Other International Organisations

735. In 1995, in a statement concerning Chechnya delivered before the OSCE Permanent Council on behalf of the EU, France stated that "everything must be done to preserve houses in localities evacuated so that inhabitants would be in a position to return in safety when they wished to do so".⁷⁸⁵

736. In the Final Communiqué of its 13th Extraordinary Session in 1990, the GCC Ministerial Council stated that it "respectfully salutes the steadfast people of Kuwait who, in confronting the Iraqi occupation, defy all manner of . . . plundering of their property".⁷⁸⁶

International Conferences

737. In 1996, in a report submitted to the UN Security Council on the activities of the International Conference on the Former Yugoslavia, the Co-Chairmen of the Steering Committee stated with respect to the remaining Serb population in the Krajina that "human rights violations, including . . . looting of abandoned property . . . were brought to the attention of the Croatian Government at the

⁷⁸² UN Commission on Human Rights, Independent Expert on Assistance to Somalia in the Field of Human Rights, Report, UN Doc. E/CN.4/1996/14/Add.1, 10 April 1996, § 10.

⁷⁸³ UN Commission on Human Rights, Special Rapporteur on the Situation of Human Rights in Zaire, Report, UN Doc. E/CN.4/1997/6, 28 January 1997, §§ 186–187.

⁷⁸⁴ UN Commission of Experts Established pursuant to Security Council Resolution 780 (1992), Final report, UN Doc. S/1994/674, 27 May 1994, Annex, §§ 134, 142 and 180.

⁷⁸⁵ EU, Statement by France on behalf of the EU on the situation in Chechnya before the OSCE Permanent Council, 6 June 1995, *Politique étrangère de la France*, June 1995, p. 103.

⁷⁸⁶ GCC, Ministerial Council, 13th Extraordinary Session, Riyadh, 28–29 October 1990, Final Communiqué, annexed to Letter dated 30 October 1990 from Oman to the UN Secretary-General, UN Doc. A/45/694-S/21915, 30 October 1990, p. 3.

highest levels on a number of occasions, together with the serious criticism from the international community".⁷⁸⁷

738. The Plan of Action for the years 2000–2003 adopted in 1999 by the 27th International Conference of the Red Cross and Red Crescent proposed that all the parties to an armed conflict take effective measures to ensure that "strict orders are given to prevent all serious violations of international humanitarian law, including... looting... and threats to carry out such actions".⁷⁸⁸

IV. Practice of International Judicial and Quasi-judicial Bodies

739. In the *Nikolić case* before the ICTY in 1994, the accused was charged, *inter alia*, with violations of the laws and customs of war for having participated "during a period of armed conflict in the plunder of private property of persons detained at Sušica Camp".⁷⁸⁹ In the review of the indictment in 1995, the ICTY considered that the acts could also be regarded as characterising persecution on religious grounds. The Tribunal considered the conflict was international and that the victims were persons protected under the Geneva Conventions.⁷⁹⁰

740. In the *Jelisić case* before the ICTY in 1995, the accused was charged, *inter alia*, with violations of the laws and customs of war (plunder of private property) for having "participated in the plunder of money, watches and other valuable property belonging to persons detained at Luka camp".⁷⁹¹ In its judgement in 1999, the ICTY convicted the accused of the plunder of private property under Article 3(e) of the 1993 ICTY Statute. It found that plunder was the "fraudulent appropriation of public or private funds belonging to the enemy or the opposing party perpetrated during an armed conflict and related thereto". The Tribunal also held that "the individual acts of plunder perpetrated by people motivated by greed might entail individual criminal responsibility on the part of their perpetrators". The Tribunal confirmed the guilt of the accused on the charge of plunder.⁷⁹²

741. In the *Karadžić and Mladić case* before the ICTY in 1995, the accused were charged, *inter alia*, with violations of the laws or customs of war, for plunder of public or private property, in violation of Article 3(e) of the 1993 ICTY Statute. Allegedly, Bosnian Serb military and police personnel and other agents of the Bosnian Serb administration, under the direction and control of the accused "systematically... looted the real and personal property of Bosnian

⁷⁸⁷ International Conference on the Former Yugoslavia, Co-Chairmen of the Steering Committee, Final biannual report, UN Doc. S/1996/4, 2 January 1996, Annex, § 10.

⁷⁸⁸ 27th International Conference of the Red Cross and Red Crescent, Geneva, 31 October–6 November 1999, Res. I, Annex 2, Plan of Action for the years 2000–2003, Actions proposed for final goal 1.1, § 1(b).

⁷⁸⁹ ICTY, *Nikolić case*, Initial Indictment, 4 November 1994, § 21.2.

⁷⁹⁰ ICTY, *Nikolić case*, Review of the Indictment, 20 October 1995, §§ 22 and 30.

⁷⁹¹ ICTY, *Jelisić case*, Initial Indictment, 21 July 1995, § 42.

⁷⁹² ICTY, *Jelisić case*, Judgement, 14 December 1999, §§ 48–49 and Part VI (Disposition).

Muslim and Bosnian Croat civilians".⁷⁹³ In the review of the indictments in 1996, the ICTY considered that the conflict was international and that the victims were protected by the Geneva Conventions and confirmed the counts of the indictments.⁷⁹⁴

742. In the *Delalić case* before the ICTY in 1996, the accused were charged, *inter alia*, with violations of the laws and customs of war (plunder of private property) for having "participated in the plunder of money, watches and other valuable property belonging to persons detained at Čelebići camp".⁷⁹⁵ This count was eventually dismissed.⁷⁹⁶ However, in its judgement in 1998, the ICTY affirmed that it "is in no doubt that the prohibition on plunder is . . . firmly rooted in customary international law".⁷⁹⁷ It further stated that:

The prohibition against the unjustified appropriation of public and private enemy property is general in scope, and extends both to acts of looting committed by individual soldiers for their private gain, and to the organized seizure of property undertaken within the framework of a systematic economic exploitation of occupied territory. Contrary to the submissions of the Defence, the fact that it was acts of the latter category which were made the subject of prosecutions before the International Military Tribunal at Nürnberg and in the subsequent proceedings before the Nürnberg Military Tribunals does not demonstrate the absence of individual criminal liability under international law for individual acts of pillage committed by perpetrators motivated by personal greed. In contrast, when seen in a historical perspective, it is clear that the prohibition against pillage was directed precisely against violations of the latter kind. Consistent with this view, isolated instances of theft of personal property of modest value were treated as war crimes in a number of trials before French Military Tribunals following the Second World War.

...

In this context, it must be observed that the offence of the unlawful appropriation of public and private property in armed conflict has varyingly been termed "pillage", "plunder" and "spoliation" . . . [Plunder] should be understood to embrace all forms of unlawful appropriation of property in armed conflict for which individual criminal responsibility attaches under international law, including those acts traditionally described as "pillage".⁷⁹⁸

743. In the *Blaškić case* before the ICTY in 1997, the accused was charged, *inter alia*, on the count of violations of the laws and customs of war (plunder of public or private property) for having "planned, instigated, ordered or otherwise aided and abetted in the planning, preparation or execution of the . . . plunder of Bosnian Muslim dwellings, buildings, businesses, civilian personal property

⁷⁹³ ICTY, *Karadžić and Mladić case*, First Indictment, 24 July 1995, §§ 27–28 and 42–43.

⁷⁹⁴ ICTY, *Karadžić and Mladić case*, Review of the Indictments, 11 July 1996, §§ 1, 6, 87–89 and Disposition.

⁷⁹⁵ ICTY, *Delalić case*, Initial Indictment, 21 March 1996, § 37.

⁷⁹⁶ ICTY, *Delalić case*, Judgement, 16 November 1998, Part VI (Judgement).

⁷⁹⁷ ICTY, *Delalić case*, Judgement, 16 November 1998, § 315.

⁷⁹⁸ ICTY, *Delalić case*, Judgement, 16 November 1998, §§ 590 and 591.

and livestock".⁷⁹⁹ He was convicted by the Tribunal on this count. The Tribunal also stated that:

The prohibition on the wanton appropriation of enemy public or private property extends to both isolated acts of plunder for private interest and to the "organized seizure of property undertaken within the framework of a systematic economic exploitation of occupied territory". Plunder "should be understood to embrace all forms of unlawful appropriation of property in armed conflict for which individual criminal responsibility attaches under international law, including those acts traditionally described as 'pillage'".⁸⁰⁰

744. In the *Kordić and Čerkez case* before the ICTY in 1998, the accused were charged, *inter alia*, on the count of violation of the laws or customs of war for having "caused, planned, instigated, ordered or committed, or aided and abetted the planning, preparation or execution of, the...plunder of Bosnian Muslim dwellings, buildings, businesses, civilian personal property and livestock".⁸⁰¹ They were both found guilty on this count.⁸⁰² According to the Tribunal in its judgement in 2001, plundering had "already been criminalised under customary international law".⁸⁰³

745. In 1989, the IACiHR reported cases of looting and burning of rural communities in El Salvador. The Salvadoran government was found responsible for the violation of the provisions on the right to life and the right to humane treatment of the 1969 ACHR.⁸⁰⁴

746. The IACiHR reported the pillage and burning of all the homes of a village perpetrated in 1993 in Peru by forces of the Sendero Luminoso ("Shining Path") rebel movement. The Commission described these acts as "assaults and criminal activities".⁸⁰⁵

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

747. To fulfil its task of disseminating IHL, the ICRC has delegates around the world teaching armed and security forces that "pillage is prohibited".⁸⁰⁶

748. In 1995, the ICRC reported to the military authorities allegations of pillage by the government forces of a State.⁸⁰⁷

⁷⁹⁹ ICTY, *Blaškić case*, Second Amended Indictment, 25 April 1997, § 10.

⁸⁰⁰ ICTY, *Blaškić case*, Judgement, 3 March 2000, § 184 and Part VI (Disposition).

⁸⁰¹ ICTY, *Kordić and Čerkez case*, First Amended Indictment, 30 September 1998, §§ 55 and 56, see also §§ 34, 37 and 39 (count of persecution as a crime against humanity, *inter alia*, through the plundering of Bosnian Muslim civilian property); see further *Kordić and Čerkez case*, Initial Indictment, 10 November 1995, § 23 (count of persecution as a crime against humanity, *inter alia*, through the plundering of homes and personal property).

⁸⁰² ICTY, *Kordić and Čerkez case*, Judgement, 26 February 2001, Part V (Disposition).

⁸⁰³ ICTY, *Kordić and Čerkez case*, Judgement, 26 February 2001, § 205, see also § 351.

⁸⁰⁴ IACiHR, *Case 6718 (El Salvador)*, Report, 4 October 1983, §§ 1 and 2.

⁸⁰⁵ IACiHR, *Annual Report 1993*, Doc. OEA/Ser.L/V/II.85 Doc. 8 rev., 11 February 1994, p. 481.

⁸⁰⁶ Frédéric de Mulinen, *Handbook on the Law of War for Armed Forces*, ICRC, Geneva, 1987, § 205.

⁸⁰⁷ ICRC archive document.

749. In a working paper on war crimes submitted in 1997 to the Preparatory Committee for the Establishment of an International Criminal Court, the ICRC included pillage, when committed in an international or non-international armed conflict, in its list of war crimes to be subject to the jurisdiction of the Court.⁸⁰⁸

750. In 1997, the ICRC reported looting by the armed forces of a State in government-controlled areas. It stated that “pillage has become systematic and much more vicious. What is not pillaged is destroyed or burnt.”⁸⁰⁹

VI. Other Practice

751. The Declaration of Minimum Humanitarian Standards, adopted by an expert meeting convened by the Institute for Human Rights of Åbo Akademi University in Turku/Åbo, Finland in 1990, states that “the following acts are and shall remain prohibited: . . . e) pillage; . . . g) threats and incitement to commit any of the foregoing acts”.⁸¹⁰

752. According to an ICRC report, in 1992, officials of a separatist entity issued orders to their armed forces prohibiting pillage and setting fire to civilian homes, but these orders were not followed by their soldiers.⁸¹¹

753. In 1992, the Supreme Soviet of the Republic of Abkhazia denounced marauding and robbery by Georgian troops and considered Georgian leaders responsible for it. It further considered that Georgia was obliged to compensate the Republic of Abkhazia and each citizen in particular for the damage.⁸¹²

754. In 1993, officials of an entity involved in an armed conflict recognised that acts of pillage were committed on the territory under its control and considered that those responsible were criminals who should be prosecuted.⁸¹³

755. In 1993, the International Commission of Inquiry on Human Rights Violations in Rwanda, mandated by four non-governmental organisations, reported the pillage of civilian property by combatants of the FPR.⁸¹⁴

⁸⁰⁸ ICRC, Working paper on war crimes submitted to the Preparatory Committee for the Establishment of an International Criminal Court, New York, 14 February 1997, §§ 2(viii) and 3(xvi).

⁸⁰⁹ ICRC archive document.

⁸¹⁰ Declaration of Minimum Humanitarian Standards, adopted by an expert meeting convened by the Institute for Human Rights, Åbo Akademi University, Truku/Åbo, 30 November–2 December 1990, Article 3(2), *IRRC*, No. 282, 1991, p. 331.

⁸¹¹ ICRC archive document.

⁸¹² Appeal of the Press-Service of the Supreme Soviet of the Republic of Abkhazia to the International Organizations of Red Cross, International Organizations of Public Health Service and to the Medical Community of the States of CIS, No. 10–81, 19 August 1992; Supreme Council of Abkhazia, Statement of the Press-Service of the Supreme Soviet of Abkhazia, No. 10–86, August 1992.

⁸¹³ ICRC archive document.

⁸¹⁴ International Commission of Inquiry on Human Rights Violations in Rwanda, Rapport final de la Commission internationale d'enquête sur les violations des droits de l'homme au Rwanda depuis le 1er octobre 1990, in *Rapport sur les droits de l'homme au Rwanda, octobre 1992–octobre 1993*, Association rwandaise pour la défense des droits de la personne et des libertés publiques, Kigali, December 1993, p. 64.

756. Looting by members of the armed forces was reported by fact-finding missions undertaken by non-governmental organisations in the Philippines.⁸¹⁵

757. According to the Report on the Practice of the Republika Srpska, in the context of the conflict in Bosnia and Herzegovina, members of the Bosnian Serb Army were convicted of robbery by military courts. For example, four members of the Bosnian Serb Army were sentenced to imprisonment for breaking in and robbing non-Serb civilians by the Court of First Instance in Banja Luka in 1994. The report notes that the accused were charged with the offence of robbery, not looting, since looting was not a separate criminal offence under the applicable penal law.⁸¹⁶

758. The SPLM Human Rights Charter states that “all persons have the right to have property respected. Looted property shall be returned to its owners or compensation determined by a competent court shall be paid.”⁸¹⁷ However, according to the Report on SPLM/A Practice, although the SPLM/A proclaimed that it did not condone pillage, looting by its combatants has been widespread. The report notes that “the practice of the SPLM/A soldiers during combat since the beginning of the war has shown no discrimination between what are genuine war booties and personal properties of the defeated enemy”. It adds that many operations have failed because soldiers were engaging in pillage instead of first conquering the objective.⁸¹⁸

759. According to the Report on the Practice of the Philippines, the NPA (a Philippine insurgent group) adopted China’s PLA Rules of Discipline as its own rules. These state: “Do not take even a single needle or thread from the masses. Turn in everything captured.”⁸¹⁹

760. Pillage following attacks on villages by RENAMO in Mozambique was described by one author as systematic.⁸²⁰

Pillage committed by civilians

I. Treaties and Other Instruments

761. No practice was found.

⁸¹⁵ Philippine Alliance of Human Rights Advocates, Report on Human Rights in the Philippines to the 52nd Session of the UN Commission on Human Rights, 1996, p. 19; Aurora A. Parong, *Total War: A Threat to People’s Health and Lives*, Report of the Medical Action Group (MAG), 1989, pp. 2–3; E. Monde-Cruz, *The Human Cost of Armed Conflict: an account of international fact finding mission on internal refugees*, *Justice and Peace Review*, Special issue, 1990, p. 28.

⁸¹⁶ Report on the Practice of the Republika Srpska, 1997, Chapter 2.3.

⁸¹⁷ SPLM, Human Rights Charter, May 1996, § 7.

⁸¹⁸ Report on SPLM/A Practice, 1998, Chapter 2.3.

⁸¹⁹ Report on the Practice of the Philippines, 1997, Chapter 1.1, referring to *Basic Rules of the New People’s Army*, Principle 4, Point 3.

⁸²⁰ Robert Gersony, *Summary of Mozambican Refugee Accounts of Principally Conflict-Related Experience in Mozambique*, Consultant to the Bureau for Refugee Programs, US Department of State, Washington D.C., April 1988, pp. 29–32.

II. National Practice

Military Manuals

762. Uganda's Operational Code of Conduct provides that "stealing civilian property or food" is an "offence undermining relationship with the civilian population". According to the manual, although this offence may be committed by soldiers, "any civilian aiding and abetting any National Resistance Army member to commit any of the above offences [including stealing] will be charged with the same offences".⁸²¹

763. The UK Military Manual considers that:

A special class of war crime is that sometimes known as "marauding". This consists of ranging over battlefields and following advancing or retreating armies in quest of loot, robbing . . . stragglers and wounded and plundering the dead – all acts done not as a means of carrying on the war but for private gain. Nevertheless, such acts are treated as violations of the law of war. Those who commit them, whether civilians who have never been lawful combatants, or persons who have belonged to a military unit, an organised resistance movement or a *levée en masse*, and have deserted and so ceased to be lawful combatants, are liable to be punished as war criminals. They may be tried and sentenced by the courts of either belligerent.⁸²²

National Legislation

764. Under Algeria's Code of Military Justice, it is a punishable offence for a military or civilian person to steal from wounded, sick, shipwrecked or dead persons in the area of operation.⁸²³

765. Burkina Faso's Code of Military Justice provides that plunder of a wounded, sick, shipwrecked or dead person, in the area of military operations of military units, is a punishable offence that can be committed by "any individual, whether military or not".⁸²⁴

766. Chile's Code of Military Justice punishes any "civilian . . . who plunders dead soldiers or auxiliary personnel on the battlefield of their money, jewellery or other objects, in order to appropriate them".⁸²⁵

767. The Czech Republic's Criminal Code as amended, in an article entitled "Plunder in a Theatre of War", punishes:

Whoever in a theatre of war, on the battlefield or in places affected by military operations:

- (a) seizes another person's belongings, taking advantage of such person's distress;
- (b) arbitrarily destroys another person's property or takes it under the pretext of military necessity; or
- (c) robs the fallen.⁸²⁶ [emphasis added]

⁸²¹ Uganda, *Operational Code of Conduct* (1986), § 12(b) and (g).

⁸²² UK, *Military Manual* (1958), § 636.

⁸²³ Algeria, *Code of Military Justice* (1971), Article 287.

⁸²⁴ Burkina Faso, *Code of Military Justice* (1994), Article 194.

⁸²⁵ Chile, *Code of Military Justice* (1925), Article 365.

⁸²⁶ Czech Republic, *Criminal Code as amended* (1961), Article 264.

768. Under France's Ordinance on Repression of War Crimes, "the removal or export by any means from French territory of goods of any nature, including movable property and money" is likened to pillage. It is applicable to any perpetrator of the offence.⁸²⁷

769. France's Code of Military Justice punishes "any individual, military or not, who, in the area of operation of a force or a unit, . . . plunders a wounded, sick, shipwrecked or dead person".⁸²⁸

770. Under Germany's Penal Code, pillage by civilians would be covered under the provisions relative to theft.⁸²⁹

771. Under Indonesia's Penal Code, theft committed on the occasion of "riots, insurgencies or war" is a punishable offence.⁸³⁰

772. Israel's Military Justice Law, which prohibits looting, applies to soldiers but also to "a person employed in the service of the Army, or a person employed in an undertaking which serves the Army and which the Minister of Defence has defined, by order, as a military service, . . . a person employed on a mission on behalf of the Army", "even though they may not be soldiers".⁸³¹

773. Under Moldova's Penal Code, civilians may engage their criminal responsibility for having committed the crime of robbery of the population in the area of military operations.⁸³²

774. Under the International Crimes Act of the Netherlands, "anyone" who pillages a town or place, even when taken by assault, commits a crime, whether in time of international or non-international armed conflict.⁸³³

775. Under Rwanda's Penal Code, pillage by civilians is a punishable offence.⁸³⁴

776. Spain's Penal Code states that anyone who commits pillage is guilty of a punishable offence.⁸³⁵

777. Switzerland's Military Criminal Code as amended prohibits pillage and is applicable to civilians in time of war.⁸³⁶

778. The commentary on the Penal Code as amended of the SFRY (FRY) states that the act of unlawfully seizing belongings from the killed or the wounded in a theatre of war "can be committed . . . by *any* . . . person".⁸³⁷ (emphasis added)

National Case-law

779. In the *Bommer case* before a French Military Tribunal in 1947, the parents of a German family were charged with, and convicted of, theft and re-

⁸²⁷ France, *Ordinance on Repression of War Crimes* (1944), Article 2(8).

⁸²⁸ France, *Code of Military Justice* (1982), Article 428.

⁸²⁹ Germany, *Penal Code* (1998), Articles 242, 243 and 246.

⁸³⁰ Indonesia, *Penal Code* (1946), § 363.

⁸³¹ Israel, *Military Justice Law* (1955), Articles 8 and 74.

⁸³² Moldova, *Penal Code* (2002), Articles 390 and 393.

⁸³³ Netherlands, *International Crimes Act* (2003), Articles 5(5)(q) and 6(3)(e).

⁸³⁴ Rwanda, *Penal Code* (1977), Articles 168 and 170.

⁸³⁵ Spain, *Penal Code* (1995), Article 613.

⁸³⁶ Switzerland, *Military Criminal Code as amended* (1927), Articles 4(2) and 139.

⁸³⁷ SFRY (FRY), *Penal Code as amended* (1976), commentary on Article 147.

ceiving stolen goods belonging to French citizens. Two of the daughters were charged with, and convicted of, the second count of the indictment only. The Tribunal considered the offences of theft under Article 379 of the French Penal Code – referred to therein as “fraudulent removal of property” – and receiving stolen goods under Article 460 of the Code – referred to as “knowingly receiving things taken, misappropriated or obtained by means of a crime or delict” – as war crimes.⁸³⁸

780. In the *Lingenfelder case* before a French Military Tribunal in 1947, the accused, a German settler in France, was charged with pillage for the removal of horses and vehicles belonging to the owner of a French farm. Without giving reasons for such finding, the Tribunal came to the conclusion that it did not amount to pillage.⁸³⁹

781. In the *Baus case* before a French Military Tribunal in 1947, the accused, a land superintendent in occupied France, was found guilty of a war crime for theft under the terms of the French Penal Code and for pillage under the 1944 Ordinance on Repression of War Crimes. He took with him during the retreat to Germany the property of the owners of the farms that he was managing.⁸⁴⁰

782. In the *Benz case* before a French Military Tribunal in 1947, the accused, a couple of German settlers, were found guilty of theft and receiving stolen goods, which the Tribunal considered to be war crimes. On their return to Germany at the end of the Second World War, they took with them movable property belonging to French inhabitants.⁸⁴¹

783. In the *Neber case* before a French Military Tribunal in 1948, the accused, a German settler in France (Lorraine), was found guilty of a war crime for having received crockery stolen by her nephew from a French woman, which she took with her when returning to Germany towards the end of the war.⁸⁴²

784. In its judgement in the *Roechling case* in 1948, the General Tribunal at Rastadt of the Military Government for the French Zone of Occupation in Germany held that the accused, the proprietor of a German industrial trust and Reich Commissioner for the iron industry of the departments of Moselle and Meurthe-et-Moselle, was guilty of war crimes, *inter alia*, for participation in the economic pillage of occupied countries.⁸⁴³

785. In the *Greiser case* before Poland’s Supreme National Tribunal in 1946, the accused, a governor and *gauleiter* of the Nazi party for provinces incorporated in the German Reich, was charged with war crimes for having taken part in “widespread robberies and thefts . . . of the movables of Polish citizens, and of all public property”.⁸⁴⁴

⁸³⁸ France, Permanent Military Tribunal at Metz, *Bommer case*, Judgement, 19 February 1947.

⁸³⁹ France, Permanent Military Tribunal at Metz, *Lingenfelder case*, Judgement, 11 March 1947.

⁸⁴⁰ France, Permanent Military Tribunal at Metz, *Baus case*, Judgement, 21 August 1947.

⁸⁴¹ France, Permanent Military Tribunal at Metz, *Benz case*, Judgement, 4 November 1947.

⁸⁴² France, Permanent Military Tribunal at Metz, *Neber case*, Judgement, 6 April 1948.

⁸⁴³ France, General Tribunal at Rastadt of the Military Government for the French Zone of Occupation in Germany, *Roechling case*, Judgement, 30 June 1948.

⁸⁴⁴ Poland, Supreme National Tribunal, *Greiser case*, Judgement, 7 July 1946.

786. In the *Flick case* before the US Military Tribunal at Nuremberg in 1947, the accused, the principal proprietor of a large group of German industrial enterprises (and four officials of the same group), which included coal and iron mines and steel producing plants, was charged with war crimes, *inter alia*, for the plunder of public and private property, and spoliation, in the countries and territories occupied by Germany. Flick was found guilty of this count of indictment. The Tribunal stated that “no defendant is shown by the evidence to have been responsible for any act of pillage as that word is commonly understood”, but it, however, quoted Article 47 of the 1907 HR as one of the articles relevant *in casu*.⁸⁴⁵

787. In the *Krupp case* before the US Military Tribunal at Nuremberg in 1948, six of the accused, officials of the Krupp industrial enterprises occupying high positions in political, financial, industrial and economic circles in Germany, were found guilty of war crimes for, *inter alia*, the plunder and spoliation of public and private property in the territories occupied by Germany. The Tribunal quoted Article 47 of the 1907 HR as pertinent *in casu*. It also stated that it “fully concurs with the Judgement of the I.M.T. that the [1907 Hague Convention (IV)], to which Germany was a party, had by 1939 become customary law and was, therefore, binding on Germany not only as Treaty Law but also as Customary Law”. The Tribunal further stated that:

Spoliation of private property . . . is forbidden under two aspects; firstly, the individual private owner of property must not be deprived of it; secondly, the economic subsistence of the belligerently occupied territory must not be taken over by the occupant or put to the service of his war effort – always with the proviso that there are exemptions from this rule which are strictly limited to the needs of the army of occupation in so far as such needs do not exceed the economic strength of the occupied territory.⁸⁴⁶

788. In the *Krauch (I. G. Farben Trial) case* before the US Military Tribunal at Nuremberg in 1948, the accused, officials of I.G. Farben Industrie A.G., were charged, *inter alia*, with war crimes for unlawfully, wilfully and knowingly ordering, abetting and taking a consenting part in the plunder of public and private property, exploitation and spoliation of property in countries and territories which came under the belligerent occupation of Germany. The charges were regarded as violations of Articles 46 to 56 of the 1907 HR. Some of the accused were convicted on this count. The Tribunal held that “the offence of plunder of public and private property must be considered a well-recognised crime under international law”. It added that:

The Hague Regulations do not specifically employ the term “spoliation”, but we do not consider this matter to be one of legal significance. As employed in the Indictment, the term is used interchangeably with the words “plunder” and “exploitation”. It may therefore be properly considered that the term “spoliation”,

⁸⁴⁵ US, Military Tribunal at Nuremberg, *Flick case*, Judgement, 22 December 1947.

⁸⁴⁶ US, Military Tribunal at Nuremberg, *Krupp case*, Judgement, 30 June 1948.

which has been admittedly adopted as a term of convenience by the Prosecution, applies to the widespread and systematised acts of dispossession and acquisition of property in violation of the rights of the owners which took place in territories under the belligerent occupation or control of Nazi Germany during World War II. We consider that "spoliation" is synonymous with the word "plunder" as employed in Control Council Law No. 10, and that it embraces offences against property in violation of the laws and customs of war of the general type charged in the Indictment.

...

[I]t is illustrative of the view that offences against property of the character described in the [1943 Inter-Allied Declaration against Acts of Dispossession] were considered by the signatory powers to constitute action in violation of existing international law.

...

In our view, the offences against property defined in the Hague Regulations are broad in their phraseology and do not admit of any distinction between "plunder" in the restricted sense of acquisition of physical properties, which are the subject matter of the crime, the plunder or spoliation resulting from acquisition of intangible property such as is involved in the acquisition of stock ownership, or of acquisition of ownership or control through any other means, even though apparently legal in form.⁸⁴⁷

Other National Practice

789. According to the Report on the Practice of India, acts of pillage committed by a civilian in relation to a foreign national may amount to extortion or robbery and are, as such, "punishable under the law of the land".⁸⁴⁸

790. According to the Report on the Practice of Jordan, the prohibition of pillage is also applicable to civilians.⁸⁴⁹

III. Practice of International Organisations and Conferences

United Nations

791. In 1992, in a report on the situation of human rights in Kuwait under Iraqi occupation, the Special Rapporteur of the UN Commission on Human Rights, in a section entitled "Prohibition of the destruction, dismantling and pillaging of infrastructure and private property", reported cases of pillage of private property by the civilian population residing in Kuwait. The legal framework considered applicable by the Rapporteur included Article 33 GC IV.⁸⁵⁰

⁸⁴⁷ US, Military Tribunal in Nuremberg, *Krauch (I. G. Farben Trial) case*, Judgement, 29 July 1948.

⁸⁴⁸ Report on the Practice of India, 1997, Answers to additional questions on Chapter 2.3.

⁸⁴⁹ Report on the Practice of Jordan, 1997, Chapter 2.3.

⁸⁵⁰ UN Commission on Human Rights, Special Rapporteur on the Situation of Human Rights in Kuwait under Iraqi Occupation, Report, UN Doc. E/CN.4/1992/26, 16 January 1992, §§ 224–235.

792. In 1995, in a report on the situation of human rights in the territory of the former Yugoslavia, the Special Rapporteur of the UN Commission on Human Rights noted that, after the fall and evacuation of Srebrenica, “there were a number of reports of widespread looting of Muslim homes by Bosnian Serb forces and Serb civilians following the evacuation. People reportedly came from nearby towns and villages to take goods and livestock.”⁸⁵¹

793. In 1994, in its final report on grave breaches of the Geneva Conventions and other violations of IHL committed in the former Yugoslavia, the UN Commission of Experts Established pursuant to Security Council Resolution 780 (1992) placed “looting, theft and robbery of personal property” within the practices of “ethnic cleansing” and as part of a systematic and planned general policy. It noted that acts of pillage were committed by persons from all segments of the Serb population, including civilians.⁸⁵²

Other International Organisations

794. No practice was found.

International Conferences

795. No practice was found.

IV. Practice of International Judicial and Quasi-judicial Bodies

796. No practice was found.

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

797. No practice was found.

VI. Other Practice

798. In 1993, the International Commission of Inquiry on Human Rights Violations in Rwanda, mandated by four non-governmental organisations, reported that the Rwandan authorities had encouraged civilians to commit acts of pillage.⁸⁵³

⁸⁵¹ UN Commission on Human Rights, Special Rapporteur on the Situation of Human Rights in the Former Yugoslavia, Final periodic report, UN Doc. E/CN.4/1996/9, 22 August 1995, § 9.

⁸⁵² UN Commission of Experts Established pursuant to Security Council Resolution 780 (1992), Final report, UN Doc. S/1994/674, 27 May 1994, Annex, §§ 134 and 142, see also § 180.

⁸⁵³ International Commission of Inquiry on Human Rights Violations in Rwanda, Rapport final de la Commission internationale d'enquête sur les violations des droits de l'homme au Rwanda depuis le 1er octobre 1990, in *Rapport sur les droits de l'homme au Rwanda, octobre 1992–octobre 1993*, Association rwandaise pour la défense des droits de la personne et des libertés publiques, Kigali, December 1993, pp. 20–21.

799. In 1993, in meetings with the ICRC, officials of an entity involved in an armed conflict condemned acts of pillage committed by civilians, but justified them by the low number of soldiers available to secure the area and the State's inability to compensate them for the losses caused by similar acts by troops of the State. An official of the entity also stated that he had promoted the broadcasting of messages calling on civilians to refrain from acts of pillage on local television and radio.⁸⁵⁴

⁸⁵⁴ ICRC archive documents.

STARVATION AND ACCESS TO HUMANITARIAN RELIEF

A. Starvation as a Method of Warfare (practice relating to Rule 53)	§§ 1–187
General	§§ 1–129
Sieges that cause starvation	§§ 130–158
Blockades and embargoes that cause starvation	§§ 159–187
B. Attacks against Objects Indispensable to the Survival of the Civilian Population (practice relating to Rule 54)	§§ 188–360
General	§§ 188–307
Attacks against objects used to sustain or support the adverse party	§§ 308–332
Attacks in case of military necessity	§§ 333–360
C. Access for Humanitarian Relief to Civilians in Need (practice relating to Rule 55)	§§ 361–724
General	§§ 361–563
Impediment of humanitarian relief	§§ 564–655
Access for humanitarian relief via third States	§§ 656–677
Right of the civilian population in need to receive humanitarian relief	§§ 678–724
D. Freedom of Movement of Humanitarian Relief Personnel (practice relating to Rule 56)	§§ 725–778

A. Starvation as a Method of Warfare

Note: *For practice concerning the provision of basic necessities to persons deprived of their liberty, see Chapter 37, section A.*

General

I. Treaties and Other Instruments

Treaties

1. Article 54(1) AP I provides that “starvation of civilians as a method of warfare is prohibited”. Article 54 AP I was adopted by consensus.¹

¹ CDDH, *Official Records*, Vol. VI, CDDH/SR.42, 27 May 1977, p. 208.

2. Article 14 AP II provides that “starvation of civilians as a method of combat is prohibited”. Article 14 AP II was adopted by consensus.²
3. Pursuant to Article 8(2)(b)(xxv) of the 1998 ICC Statute, the following constitutes a war crime in international armed conflicts: “intentionally using starvation of civilians as a method of warfare by depriving them of objects indispensable to their survival, including wilfully impeding relief supplies as provided for under the Geneva Conventions”.

Other Instruments

4. Article 17 of the 1863 Lieber Code states that “it is lawful to starve the hostile belligerent, armed or unarmed, so that it leads to the speedier subjection of the enemy”.
5. Based on several documents supplying evidence of outrages committed during the First World War, the 1919 Report of the Commission on Responsibility lists violations of the laws and customs of war which should be subject to criminal prosecution, including “deliberate starvation of civilians”.
6. Paragraph 6 of the 1991 Memorandum of Understanding on the Application of IHL between Croatia and the SFRY requires that hostilities be conducted in accordance with Article 54(1) AP I.
7. Paragraph 2.5 of the 1992 Agreement on the Application of IHL between the Parties to the Conflict in Bosnia and Herzegovina requires that hostilities be conducted in accordance with Article 54(1) AP I.
8. The 2000 UNTAET Regulation No. 2000/15 establishes panels with exclusive jurisdiction over serious criminal offences, including war crimes. According to Section 6(1)(b)(xxv), the following constitutes a war crime in international armed conflicts: “intentionally using starvation of civilians as a method of warfare by depriving them of objects indispensable to their survival, including wilfully impeding relief supplies as provided for under the Geneva Conventions”.

II. National Practice

Military Manuals

9. Under Argentina’s Law of War Manual, it is “prohibited to starve the civilian population of the adversary”.³ In addition, starvation of civilians as a method of combat is specifically prohibited in non-international armed conflicts.⁴
10. Australia’s Commanders’ Guide notes that AP I “prohibits starvation of civilians as a method of warfare...Military operations involving collateral

² CDDH, *Official Records*, Vol. VII, CDDH/SR.52, 6 June 1977, p. 137.

³ Argentina, *Law of War Manual* (1989), § 4.03.

⁴ Argentina, *Law of War Manual* (1989), § 7.08.

deprivation are not unlawful as long as the object is not to starve the civilian population."⁵

11. Australia's Defence Force Manual states that "starvation of civilians as a method of warfare is prohibited . . . This includes starving civilians or causing them to move away."⁶

12. Belgium's Law of War Manual states that "starvation as a method of warfare against civilians" is prohibited.⁷

13. Under Benin's Military Manual, it is prohibited "to starve civilians as a method of warfare".⁸

14. Canada's LOAC Manual states that "starvation of civilians as a method of warfare is prohibited".⁹ It also states that "starvation of civilians as a method of combat is forbidden" in non-international armed conflicts.¹⁰

15. Colombia's Basic Military Manual states that it is prohibited to use starvation of the civilian population as a method of combat "in all armed conflicts".¹¹

16. Under Croatia's LOAC Compendium, starvation is a prohibited method of warfare.¹²

17. Under France's LOAC Summary Note, "it is prohibited to use starvation as a method of warfare against civilian persons".¹³

18. France's LOAC Manual states that "it is prohibited to use starvation against civilians as a method of warfare".¹⁴ It further states that the recourse to starvation as a method of warfare may constitute a war crime.¹⁵

19. Germany's Military Manual provides that "grave breaches of international humanitarian law are in particular: . . . starvation of civilians by destroying, removing or rendering useless objects indispensable to the survival of the civilian population".¹⁶

20. Under Hungary's Military Manual, starvation is a prohibited method of warfare.¹⁷

21. Indonesia's Military Manual notes that starvation of civilians as a method of warfare is prohibited.¹⁸

22. Israel's Manual on the Laws of War states that conducting a scorched earth policy "with a view to inflicting starvation or suffering on the civilian population . . . is forbidden".¹⁹

⁵ Australia, *Commanders' Guide* (1994), § 907.

⁶ Australia, *Defence Force Manual* (1994), § 709, see also §§ 533, 923(c) and 930.

⁷ Belgium, *Law of War Manual* (1983), p. 28.

⁸ Benin, *Military Manual* (1995), Fascicule III, p. 12.

⁹ Canada, *LOAC Manual* (1999), p. 6-4, § 41 (land warfare) and p. 7-3, § 25 (air warfare).

¹⁰ Canada, *LOAC Manual* (1999), p. 17-5, § 38.

¹¹ Colombia, *Basic Military Manual* (1995), p. 49.

¹² Croatia, *LOAC Compendium* (1991), p. 40.

¹³ France, *LOAC Summary Note* (1992), § 4.2.

¹⁴ France, *LOAC Manual* (2001), p. 30, see also p. 85.

¹⁵ France, *LOAC Manual* (2001), p. 85. ¹⁶ Germany, *Military Manual* (1992), § 1209.

¹⁷ Hungary, *Military Manual* (1992), p. 64.

¹⁸ Indonesia, *Military Manual* (1982), p. 56, § 127(c).

¹⁹ Israel, *Manual on the Laws of War* (1998), p. 35.

23. Under Kenya's LOAC Manual, "it is forbidden... to starve civilians as a method of warfare".²⁰
24. South Korea's Operational Law Manual prohibits the starvation of the civilian population.²¹
25. Under Madagascar's Military Manual, "it is prohibited to starve the civilian population of the adversary".²²
26. The Military Manual of the Netherlands provides that "starvation of civilians is prohibited", regardless of the motive.²³ In addition, starvation of civilians is specifically prohibited in non-international armed conflicts.²⁴
27. New Zealand's Military Manual provides that "starvation of civilians as a method of warfare is prohibited".²⁵ It also states that "AP I Art. 54 expands the customary protection as follows: 1. Starvation of civilians as a method of warfare is prohibited."²⁶ It further stresses that "AP II forbids starvation as a method of combat".²⁷
28. Under Nigeria's Military Manual, starvation of the civilian population is prohibited.²⁸
29. Under Russia's Military Manual, the "use of starvation among the civilian population" is a prohibited method of warfare.²⁹
30. Under Spain's LOAC Manual, "it is prohibited... to starve civilian persons as a method of warfare".³⁰
31. Sweden's IHL Manual considers that the "prohibition of starvation of the civilian population if the intention is to kill and not primarily to force a capitulation", as defined in Article 54 AP I, is part of customary international law.³¹ It adds that:

It is... established that, up to 1977, international law contained no express prohibition of starvation as a method of warfare. With this in mind, the new Article 54 of Additional Protocol I must be seen as an important milestone in the development of international humanitarian law. This Article provides an explicit prohibition against using starvation of civilian populations as a method of warfare.³²

32. Switzerland's Basic Military Manual states with regard to civilians who are in the power of the troops at the time of combat that "it is prohibited to starve the civilian population by removing or rendering supplies useless, or by impeding relief actions in favour of the population in need".³³

²⁰ Kenya, *LOAC Manual* (1997), Précis No. 4, p. 2.

²¹ South Korea, *Operational Law Manual* (1996), p. 42.

²² Madagascar, *Military Manual* (1994), Fiche No. 2-T, § 27.

²³ Netherlands, *Military Manual* (1993), p. V-7.

²⁴ Netherlands, *Military Manual* (1993), p. XI-6.

²⁵ New Zealand, *Military Manual* (1992), § 613(1).

²⁶ New Zealand, *Military Manual* (1992), § 504(2).

²⁷ New Zealand, *Military Manual* (1992), § 1820.

²⁸ Nigeria, *Military Manual* (1994), p. 42, § 11.

²⁹ Russia, *Military Manual* (1990), § 5(r).

³⁰ Spain, *LOAC Manual* (1996), Vol. I, § 3.3.b.(7).

³¹ Sweden, *IHL Manual* (1991), Section 2.2.3, p. 19.

³² Sweden, *IHL Manual* (1991), Section 3.2.1.5, p. 59.

³³ Switzerland, *Basic Military Manual* (1987), Article 147(b).

33. Under Togo's Military Manual, it is prohibited "to starve civilians as a method of warfare".³⁴
34. The UK LOAC Manual provides that "it is forbidden . . . to starve civilians as a method of warfare".³⁵
35. The Annotated Supplement to the US Naval Handbook states that "Art. 54(1) [AP I] would create a new prohibition on the starvation of civilians as a method of warfare . . . which the United States believes should be observed and in due course recognized as customary law".³⁶
36. The YPA Military Manual of the SFRY (FRY) prohibits the starvation of the civilian population as a method of warfare.³⁷

National Legislation

37. Australia's War Crimes Act considers "any war crime within the meaning of the instrument of appointment of the Board of Inquiry [set up to investigate war crimes committed by enemy subjects]" as a war crime, including deliberate starvation of civilians.³⁸
38. Australia's ICC (Consequential Amendments) Act incorporates in the Criminal Code the war crimes defined in the 1998 ICC Statute, including "starvation as a method of warfare" in international armed conflicts.³⁹
39. Azerbaijan's Criminal Code provides that "starvation of civilians as a method of warfare" constitutes a war crime in international and non-international armed conflicts.⁴⁰
40. The Criminal Code of Belarus provides that "the use of starvation among the civilian population as a method of warfare" is a war crime.⁴¹
41. Under the Criminal Code of the Federation of Bosnia and Herzegovina, "starvation of the population" is a war crime.⁴² The Criminal Code of the Republika Srpska contains the same provision.⁴³
42. Under Burundi's Draft Law on Genocide, Crimes against Humanity and War Crimes, "deliberately starving civilians as a method of warfare" constitutes a war crime in international armed conflicts.⁴⁴
43. Canada's Crimes against Humanity and War Crimes Act provides that the war crimes defined in Article 8(2) of the 1998 ICC Statute are "crimes according to customary international law" and, as such, indictable offences under the Act.⁴⁵

³⁴ Togo, *Military Manual* (1996), Fascicule III, p. 12.

³⁵ UK, *LOAC Manual* (1981), Section 4, p. 14, § 5(f).

³⁶ US, *Annotated Supplement to the Naval Handbook* (1997), § 8.1.2, footnote 15.

³⁷ SFRY (FRY), *YPA Military Manual* (1988), § 107.

³⁸ Australia, *War Crimes Act* (1945), Section 3.

³⁹ Australia, *ICC (Consequential Amendments) Act* (2002), Schedule 1, § 268.67.

⁴⁰ Azerbaijan, *Criminal Code* (1999), Article 116(4).

⁴¹ Belarus, *Criminal Code* (1999), Article 136(4).

⁴² Bosnia and Herzegovina, Federation, *Criminal Code* (1998), Article 154(1).

⁴³ Bosnia and Herzegovina, Republika Srpska, *Criminal Code* (2000), Article 433(1).

⁴⁴ Burundi, *Draft Law on Genocide, Crimes against Humanity and War Crimes* (2001), Article 4(B)(x).

⁴⁵ Canada, *Crimes against Humanity and War Crimes Act* (2000), Section 4(1) and (4).

44. China's Law Governing the Trial of War Criminals provides that "malicious killing of non-combatants by starvation" constitutes a war crime.⁴⁶
45. Congo's Genocide, War Crimes and Crimes against Humanity Act defines war crimes with reference to the categories of crimes defined in Article 8 of the 1998 ICC Statute.⁴⁷
46. Under Côte d'Ivoire's Penal Code as amended, organising, ordering or carrying out, in time of war or occupation, the "intentional reduction to starvation, destitution or ruination" of the civilian population constitutes a "crime against the civilian population".⁴⁸
47. Under Croatia's Criminal Code, the imposition of "starvation of the population" is a war crime.⁴⁹
48. Under Ethiopia's Penal Code, it is a war crime to organise, order or engage in "wilful reduction to starvation" of the civilian population, in time of war, armed conflict or occupation.⁵⁰
49. Under Georgia's Criminal Code, any war crime provided for by the 1998 ICC Statute, which is not explicitly mentioned in the Code, such as "intentionally using starvation of civilians as a method of warfare" in international armed conflicts, is a crime.⁵¹
50. Germany's Law Introducing the International Crimes Code punishes anyone who, in connection with an international or non-international armed conflict, "uses starvation of civilians as a method of warfare".⁵²
51. Ireland's Geneva Conventions Act as amended provides that any "minor breach" of AP I, including violations of Article 54(1) AP I, as well as any "contravention" of AP II, including violations of Article 14 AP II, are punishable offences.⁵³
52. Under Lithuania's Criminal Code as amended, "causing the threat of death from famine" in time of war, armed conflict or occupation is a war crime.⁵⁴
53. Under Mali's Penal Code, "deliberately starving civilians as a method of warfare" is a war crime in international armed conflicts.⁵⁵
54. The Definition of War Crimes Decree of the Netherlands includes "deliberate starvation of civilians" in its list of war crimes.⁵⁶
55. Under the International Crimes Act of the Netherlands, "intentionally using starvation of civilians as a method of warfare" is a crime, when committed in an international armed conflict.⁵⁷

⁴⁶ China, *Law Governing the Trial of War Criminals* (1946), Article 3(3).

⁴⁷ Congo, *Genocide, War Crimes and Crimes against Humanity Act* (1998), Article 4.

⁴⁸ Côte d'Ivoire, *Penal Code as amended* (1981), Article 138(2).

⁴⁹ Croatia, *Criminal Code* (1997), Article 158(1).

⁵⁰ Ethiopia, *Penal Code* (1957), Article 282(b).

⁵¹ Georgia, *Criminal Code* (1999), Article 413(d).

⁵² Germany, *Law Introducing the International Crimes Code* (2002), Article 1, § 11(1)(5).

⁵³ Ireland, *Geneva Conventions Act as amended* (1962), Section 4(1) and (4).

⁵⁴ Lithuania, *Criminal Code as amended* (1961), Article 336.

⁵⁵ Mali, *Penal Code* (2001), Article 31(i)(25).

⁵⁶ Netherlands, *Definition of War Crimes Decree* (1946), Article 1.

⁵⁷ Netherlands, *International Crimes Act* (2003), Article 5(5)(1).

56. Under New Zealand's International Crimes and ICC Act, war crimes include the crime defined in Article 8(2)(b)(xxv) of the 1998 ICC Statute.⁵⁸

57. Under Norway's Military Penal Code as amended, "anyone who contravenes or is accessory to the contravention of provisions relating to the protection of persons or property laid down in . . . the two additional protocols to [the Geneva] Conventions . . . is liable to imprisonment".⁵⁹

58. Under Slovenia's Penal Code, "exposure to starvation" is a war crime against the civilian population.⁶⁰

59. Under Trinidad and Tobago's Draft ICC Act, it is a punishable offence to commit a war crime as defined in Article 8(2)(b)(xxv) of the 1998 ICC Statute.⁶¹

60. Under the UK ICC Act, it is a punishable offence to commit a war crime as defined in Article 8(2)(b)(xxv) of the 1998 ICC Statute.⁶²

61. The Criminal Offences against the Nation and State Act of the SFRY (FRY) considers that, during war or enemy occupation, "any person who caused the intentional starvation of the population" committed a war crime.⁶³

62. Under the Penal Code as amended of the SFRY (FRY), "starvation of the population" is a war crime against the civilian population.⁶⁴

National Case-law

63. In the *Perišić and Others case* before a Croatian district court in 1997, after a trial *in absentia*, several persons were convicted of ordering the shelling of the city of Zadar and its surroundings. The judgement was based, *inter alia*, on Article 14 AP II, as incorporated in Article 120(1) of Croatia's Criminal Code of 1993.⁶⁵

64. In its judgement in the *Eichmann case* in 1961, the District Court of Jerusalem held that starvation caused serious bodily or mental harm and, therefore, amounted to a violation of Israel's Crime of Genocide (Prevention and Punishment) Law.⁶⁶

Other National Practice

65. The Report on the Practice of Angola, with reference to a Human Rights Watch report, notes that starvation was used by both the governmental forces and UNITA as a method of warfare during the conflict in Angola.⁶⁷

⁵⁸ New Zealand, *International Crimes and ICC Act* (2000), Section 11(2).

⁵⁹ Norway, *Military Penal Code as amended* (1902), § 108(b).

⁶⁰ Slovenia, *Penal Code* (1994), Article 374(1).

⁶¹ Trinidad and Tobago, *Draft ICC Act* (1999), Section 5(1)(a).

⁶² UK, *ICC Act* (2001), Sections 50(1) and 51(1) (England and Wales) and Section 58(1) (Northern Ireland).

⁶³ SFRY (FRY), *Criminal Offences against the Nation and State Act* (1945), Article 3(3).

⁶⁴ SFRY (FRY), *Penal Code as amended* (1976), Article 142(1).

⁶⁵ Croatia, District Court of Zadar, *Perišić and Others case*, Judgement, 24 April 1997.

⁶⁶ Israel, District Court of Jerusalem, *Eichmann case*, Judgement, 12 December 1961.

⁶⁷ Report on the Practice of Angola, 1998, Chapter 4.1, referring to Human Rights Watch, *Angola: Arms Trade and Violations of the Laws of War since the 1992 Elections*, New York, November 1994, pp. 74–76.

66. In 1992, during a debate in the UN Security Council, Austria condemned the use of starvation in the conflict in the former Yugoslavia, stating that “the most dreadful violations of human rights are being perpetrated . . . and people are continuing to starve”.⁶⁸

67. In 1969, in a statement before the UN General Assembly, the Belgian Minister of Foreign Affairs condemned methods of warfare that led to the starvation of civilians in the context of the Nigerian civil war.⁶⁹

68. At the CDDH, Belgium qualified draft Article 48 AP I (now Article 54) as “a step forward in the development of humanitarian law”.⁷⁰

69. The Report on the Practice of Belgium states that Belgium demonstrated support for the prohibition of starvation in international and non-international armed conflicts even before the adoption of the Additional Protocols in 1977.⁷¹

70. In 1990, in the UN Sanctions Committee on Iraq, China declared that “everyone agreed” that the inhabitants of Iraq and Kuwait “must not be left to starve”.⁷²

71. The Report on the Practice of China states that the “Chinese Government supports the protection of the civilian population against starvation” both in international and non-international armed conflicts.⁷³

72. In 1994, in reply to a questionnaire from the House of Representatives, Colombia’s Ministry of Foreign Affairs quoted Article 14 AP II. It added that “what this Article prohibits is the starvation of civilians”.⁷⁴

73. The Report on the Practice of Colombia refers to a draft internal working paper in which the Colombian government stated that it was prohibited “to make the civilian population suffer from hunger or thirst”.⁷⁵

74. In 1990, in the UN Sanctions Committee on Iraq, Côte d’Ivoire stated that “no one wanted a famine in the area. Citizens should not be made to pay for the misdeeds of their Governments.”⁷⁶

75. In 1990, in the UN Sanctions Committee on Iraq, Cuba stressed that its government “could never accept any definition which would allow the supply

⁶⁸ Austria, Statement before the UN Security Council, UN Doc. S/PV.3134, 13 November 1992, pp. 44–45.

⁶⁹ Belgium, Statement by the Minister of Foreign Affairs before the UN General Assembly, UN Doc. A/PV.1765, 25 September 1969, §§ 132–133.

⁷⁰ Belgium, Statement at the CDDH, *Official Records*, Vol. XIV, CDDH/III/SR.31, 14 March 1975, p. 307, § 53.

⁷¹ Report on the Practice of Belgium, 1997, Chapter 4.1.

⁷² China, Statement before the UN Security Council Committee Established by Resolution 661 (1990) concerning the Situation between Iraq and Kuwait, UN Doc. S/AC.25/SR.5, 12 September 1990, p. 5.

⁷³ Report on the Practice of China, 1997, Chapter 4.1.

⁷⁴ Colombia, Presidency of the Republic, Office of the High Commissioner for Peace, National Plan for the Dissemination of IHL, Reply of the Ministry of Foreign Affairs to Questionnaire No. 012 of Commission II of the House of Representatives, 7 October 1994, p. 6.

⁷⁵ Report on the Practice of Colombia, 1998, Chapter 4.1, referring to Presidential Council, Proposal of the Government to the Coordinator Guerrillera Simón Bolívar to humanise war, Draft Internal Working Paper, Part entitled “El Derecho Internacional Humanitario”, § 2(h).

⁷⁶ Côte d’Ivoire, Statement before the UN Security Council Committee Established by Resolution 661 (1990) concerning the Situation between Iraq and Kuwait, UN Doc. S/AC.25/SR.5, 12 September 1990, p. 5.

of foodstuffs only to avert famine. Such an approach would be in direct violation of the international instruments which prohibited the use of hunger as a means of warfare."⁷⁷

76. In 1992, in a letter addressed to the President of the UN Security Council, Egypt, Iran, Pakistan, Saudi Arabia, Senegal and Turkey deplored "a situation where perhaps one tenth of the population of Bosnia and Herzegovina will perish as a result of starvation, exposure and disease".⁷⁸

77. In 1990, in the UN Sanctions Committee on Iraq, Finland stated that Security Council Resolution 661 "must not be interpreted so strictly that famine would result. The shipment of foodstuffs must be resumed when humanitarian circumstances require."⁷⁹

78. At the CDDH, the representative of France stated that "all Article 27 [now Article 14 AP II] contained was a purely humanitarian provision, which no one should oppose . . . His delegation would vote for the article, whose importance was borne out by many examples in history."⁸⁰

79. In 1991, during a debate in the German parliament on the situation in Sudan, several speakers from various parties condemned the use of starvation.⁸¹

80. In 1993, during a parliamentary debate, the German Minister for Economic Cooperation and Development denounced the use of starvation by the parties to the conflict in Sudan.⁸²

81. In 1993, during a parliamentary debate on the situation in Bosnia and Herzegovina, a member of the German parliament, supported by a Minister of State, qualified the starvation of a part of the population of Srebrenica as a "genocidal act".⁸³

82. In 1993, the German Chancellor expressed the view that the use of starvation in armed conflict was "a violation of human dignity".⁸⁴

83. At the 26th International Conference of the Red Cross and Red Crescent in 1995, Germany stated that the "deliberate and systematic starvation of the civilian population has been used repeatedly and has to be condemned".⁸⁵

⁷⁷ Cuba, Statement before the UN Security Council Committee Established by Resolution 661 (1990) concerning the Situation between Iraq and Kuwait, UN Doc. S/AC.25/SR.2, 22 August 1990, p. 6.

⁷⁸ Egypt, Iran, Pakistan, Saudi Arabia, Senegal and Turkey, Letter dated 5 October 1992 to the President of the UN Security Council, UN Doc. S/24620, 6 October 1992.

⁷⁹ Finland, Statement before the UN Security Council Committee Established by Resolution 661 (1990) concerning the Situation between Iraq and Kuwait, UN Doc. S/AC.25/SR.5, 12 September 1990, p. 4.

⁸⁰ France, Statement at the CDDH, *Official Records*, Vol. VII, CDDH/SR.52, 6 June 1977, p. 137, § 86.

⁸¹ Germany, Parliamentary debate, 21 June 1991, *Plenarprotokoll* 12/35, pp. 2963, 2965, 2966 and 2973.

⁸² Germany, Lower House of Parliament, Statement by the Minister for Economic Cooperation and Development, 14 January 1993, *Plenarprotokoll* 12/131, p. 11315.

⁸³ Germany, Lower House of Parliament, Statement by a Member of Parliament, 22 April 1993, *Plenarprotokoll* 12/152, p. 13075.

⁸⁴ Germany, Statement by the Chancellor, Helmut Kohl, Berlin, 24 May 1993, *Bulletin*, No. 45, Presse- und Informationsamt der Bundesregierung, Bonn, 29 May 1993, p. 488.

⁸⁵ Germany, Statement at the 26th International Conference of the Red Cross and Red Crescent, Geneva, 3–7 December 1995.

84. At the Moscow Conference on Global Humanitarian Challenges in 1997, the German Minister of Interior Affairs held the use of starvation as a weapon to be “a breach of international law”.⁸⁶

85. In 1997, during an open debate in the UN Security Council, Germany expressed concern about behaviour the consequences of which ranged “from brutal death by starvation... to massive displacements of whole populations striving for survival”.⁸⁷

86. At the CDDH, in response to Pakistan’s proposed amendment to delete Article 27 of draft AP II (now Article 14), the representative of the Holy See declared that:

He was watching with increasing concern the dismantling, article by article, of draft Protocol II... It was all the more serious in that the deleted articles were perhaps among the most significant and valuable from the standpoint of humanitarian law... Now that the Conference was being called on to decide whether or not to delete Article 27 [now Article 14], which was essentially concerned with food and water supplies for the civilian population, the delegation of the Holy See, as well as others, had to face a problem of conscience, for the protection of the civilian population was one of the aims, possibly even the main aim, of the two Additional Protocols. Since, as had often been stated, the civilian population was the main victim in modern conflicts, how could Article 27, which was indispensable to its survival, be light-heartedly deleted?

The Holy See called upon Pakistan to withdraw its amendment and suggested in the alternative a roll-call vote on Article 27.⁸⁸

87. At the CDDH, Iraq stated that Article 27 of draft AP II (now Article 14) “was of great humanitarian value, and there was certainly a place for it in Protocol II”.⁸⁹

88. According to the Report on the Practice of Israel, “the IDF does not condone or practice starvation of the civilian population as a method of warfare”.⁹⁰

89. According to the Report on the Practice of Jordan, “Islamic law proscribes starvation as a method of warfare”.⁹¹

90. The Report on the Practice of South Korea states that the “protection of [the] civilian population against starvation can be regarded as an established rule of customary international law in [the] Republic of Korea”.⁹²

91. The Report on the Practice of Kuwait explains that it is the *opinio juris* of Kuwait that, during an armed conflict, the civilian population be

⁸⁶ Germany, Statement by the Minister of Interior Affairs on the occasion of the CEP-Symposium, Moscow Conference on Global Humanitarian Challenges, April 1997, § 4.

⁸⁷ Germany, Statement before the UN Security Council, UN Doc. S/PV.3778 (Resumption 1), 21 May 1997, p. 18.

⁸⁸ Holy See, Statement at the CDDH, *Official Records*, Vol. VII, CDDH/SR.52, 6 June 1977, pp. 135–136, §§ 79 and 83.

⁸⁹ Iraq, Statement at the CDDH, *Official Records*, Vol. VII, CDDH/SR.52, 6 June 1977, p. 137, § 88.

⁹⁰ Report on the Practice of Israel, 1997, Chapter 4.1.

⁹¹ Report on the Practice of Jordan, 1997, Chapter 4.1.

⁹² Report on the Practice of South Korea, 1997, Chapter 4.1.

able to maintain its “normal life” or at least “a minimum of normal life” and this includes the prohibition of the use of starvation as a method of warfare.⁹³

92. In 1990, in the UN Sanctions Committee on Iraq, Malaysia stated that “famine must not be used as a weapon to implement” Security Council Resolution 661 (1990).⁹⁴

93. According to the Report on the Practice of Malaysia, “starvation was never employed as a method of warfare” by Malaysia’s armed forces during the conflict against the communist opposition.⁹⁵

94. According to the Report on the Practice of Nigeria, the government was accused of using starvation as a method of warfare during the Nigerian civil war (1966–1970).⁹⁶ The government denied the allegations.⁹⁷ According to the report, this denial confirms that Nigerian practice recognises the protection of the civilian population against starvation. The report considers that Nigeria’s *opinio juris* is that the protection of the civilian population against starvation is part of customary international law.⁹⁸

95. At the CDDH, Pakistan proposed deleting Article 27 of draft AP II (now Article 14) because the prohibition of starvation of civilians as a method of warfare should not be included in a protocol for non-international armed conflicts.⁹⁹

96. In 1991, a circular from the Office of the President of the Philippines stipulated that “only in cases of tactical operations may control of the movement of non-combatants and the delivery of goods and services be imposed for safety reasons, provided that in no case should such control lead to the starvation of civilians”.¹⁰⁰

97. On the basis of the replies by Rwandan army officers to a questionnaire, the Report on the Practice of Rwanda emphasises that the use of starvation as a method of warfare is regarded as a war crime in Rwanda.¹⁰¹ The report concludes that the prohibition on using starvation as a method of warfare is regarded by Rwanda as part of customary international law.¹⁰²

⁹³ Report on the Practice of Kuwait, 1997, Chapter 4.1.

⁹⁴ Malaysia, Statement before the UN Security Council Committee Established by Resolution 661 (1990) concerning the Situation between Iraq and Kuwait, UN Doc. S/AC.25/SR.5, 12 September 1990, p. 6.

⁹⁵ Report on the Practice of Malaysia, 1997, Chapter 4.1.

⁹⁶ Report on the Practice of Nigeria, 1997, Chapter 4.1, referring to *The Observer*, Biafra offers truce to help peace talks, 4 August 1968.

⁹⁷ Report on the Practice of Nigeria, 1997, Chapter 4.1, referring to Press Release of the Federal Ministry of Information, Lagos, 11 July 1968.

⁹⁸ Report on the Practice of Nigeria, 1997, Chapter 4.1.

⁹⁹ Pakistan, Statement at the CDDH, *Official Records*, Vol. IV, CDDH/427, 31 May 1975, p. 87, § 78.

¹⁰⁰ Philippines, Office of the President, Memorandum Circular No. 139 Prescribing the Guidelines for the Implementation of Memorandum Order No. 398, 26 September 1991, § 3.

¹⁰¹ Report on the Practice of Rwanda, 1997, Replies from Rwandan army officers to a questionnaire, Chapter 4.1.

¹⁰² Report on the Practice of Rwanda, 1997, Chapter 4.1.

98. At the CDDH, the Swedish delegate appealed “urgently to all delegations, particularly those of the Western and Others Group, to consider [Article 27 of draft AP II (now Article 14)] carefully and to adopt it”.¹⁰³

99. In 1990, in the UN Sanctions Committee on Iraq, the UK considered that “no one favoured allowing the inhabitants of Kuwait and Iraq to starve”.¹⁰⁴

100. According to the Report on UK Practice, the UK supports the protection of civilians against starvation and the condemnation of starvation of civilians as a tactic in armed conflict.¹⁰⁵

101. In 1987, the Deputy Legal Adviser of the US Department of State affirmed that “we support the principle that starvation of civilians not be used as a method of warfare”.¹⁰⁶

102. In 1987, the Legal Adviser of the US Department of State, referring, *inter alia*, to the protection of the civilian population against deliberate starvation as contained in AP II, stated that “for the most part, the obligations contained in Protocol II are no more than a restatement of the rules of conduct with which the United States military forces would almost certainly comply as a matter of national policy, constitutional and legal protections, and common decency”.¹⁰⁷

103. In 1991, in response to an ICRC memorandum on the applicability of IHL in the Gulf region, the US Department of the Army stated that “U.S. practice does not involve methods of warfare that have as their intention the starvation of the enemy civilian population”.¹⁰⁸

104. According to the Report on US Practice, it is the *opinio juris* of the US that the starvation of civilians as a method of warfare is prohibited.¹⁰⁹

105. At the CDDH, the representative of the USSR declared that he “wholeheartedly supported” the Holy See’s position not to delete Article 27 of draft AP II (now Article 14), “for it was one of the most humane provisions in the entire field of humanitarian law”.¹¹⁰

¹⁰³ Sweden, Statement at the CDDH, *Official Records*, Vol. VII, CDDH/SR.52, 6 June 1977, p. 137, § 85.

¹⁰⁴ UK, Statement before the UN Security Council Committee Established by Resolution 661 (1990) concerning the Situation between Iraq and Kuwait, UN Doc. S/AC.25/SR.5, 12 September 1990, p. 5.

¹⁰⁵ Report on UK Practice, 1997, Chapter 4.1.

¹⁰⁶ US, Remarks of Michael J. Matheson, Deputy Legal Adviser, US Department of State, The Sixth Annual American Red Cross-Washington College of Law Conference on International Humanitarian Law: A Workshop on Customary International Law and the 1977 Protocols Additional to the 1949 Geneva Conventions, *American University Journal of International Law and Policy*, Vol. 2, 1987, p. 426.

¹⁰⁷ US, Remarks of Judge Abraham Sofaer, Legal Adviser, US Department of State, The Sixth Annual American Red Cross-Washington College of Law Conference on International Humanitarian Law: A Workshop on Customary International Law and the 1977 Protocols Additional to the 1949 Geneva Conventions, *American University Journal of International Law and Policy*, Vol. 2, 1987, pp. 461 and 462.

¹⁰⁸ US, Letter from the Department of the Army to the legal adviser of the US Army forces deployed in the Gulf region, 11 January 1991, § 8(O), Report on US Practice, 1997, Chapter 4.1.

¹⁰⁹ Report on US Practice, 1997, Chapter 4.1.

¹¹⁰ USSR, Statement at the CDDH, *Official Records*, Vol. VII, CDDH/SR.52, 6 June 1977, p. 136, § 84.

106. In 1990, in the UN Sanctions Committee on Iraq, the USSR stated that “foodstuffs should be supplied to Iraq on the basis of humanitarian considerations, without waiting for a disaster to occur”.¹¹¹

107. In 1990, in the UN Sanctions Committee on Iraq, Yemen declared that “hunger . . . must be prevented on humanitarian grounds”.¹¹² It added that “on humanitarian grounds the Iraqi and Kuwaiti peoples must not be allowed to face the prospect of famine. They must be able to obtain the necessary foodstuffs, such as cereals, cooking oil and milk for children.”¹¹³

108. In 1974, in a communication to the ICRC, the President of a State accused the army of another State of having confiscated food and water destined for the civilian population, thereby causing starvation.¹¹⁴

109. In 1980, a State’s ambassador to the UN informed the ICRC that another State had used starvation as a method of warfare against it.¹¹⁵

110. In 1990, in a meeting with the ICRC, the President of a State confirmed the acceptance of his government that in principle humanitarian aid should be distributed to the civilian population in all parts of the country, including in territories not under its control. It thus relinquished the use of starvation as a possible weapon in situations of dispute.¹¹⁶

III. Practice of International Organisations and Conferences

United Nations

111. In 2001, in a report on the protection of civilians in armed conflict, the UN Secretary-General took “the deliberate starvation of the civilian population in Somalia” as an example of how “in modern warfare, particularly internal conflicts, civilians are often targeted as part of a political strategy”.¹¹⁷

112. In 1995, a report on the situation of human rights in the territory of the former Yugoslavia, the Special Rapporteur of the UN Commission on Human Rights stressed that “Sarajevo has been the scene of some of the gravest violations of human rights in the course of this conflict . . . The humanitarian situation has also been extremely serious, with acute food shortages and problems with utilities which have frequently been used as a weapon of war”.¹¹⁸

¹¹¹ USSR, Statement before the UN Security Council Committee Established by Resolution 661 (1990) concerning the Situation between Iraq and Kuwait, UN Doc. S/AC.25/SR.5, 12 September 1990, p. 4.

¹¹² Yemen, Statement before the UN Security Council Committee Established by Resolution 661 (1990) concerning the Situation between Iraq and Kuwait, UN Doc. S/AC.25/SR.2, 22 August 1990, p. 6.

¹¹³ Yemen, Statement before the UN Security Council Committee Established by Resolution 661 (1990) concerning the Situation between Iraq and Kuwait, UN Doc. S/AC.25/SR.5, 12 September 1990, p. 3, see also p. 6.

¹¹⁴ ICRC archive document. ¹¹⁵ ICRC archive document. ¹¹⁶ ICRC archive document.

¹¹⁷ UN Secretary-General, Report on the protection of civilians in armed conflict, UN Doc. S/2001/331, 30 March 2001, § 14.

¹¹⁸ UN Commission on Human Rights, Special Rapporteur on the Situation of Human Rights in the Former Yugoslavia, Periodic report, UN Doc. S/1995/933-A/50/727, 7 November 1995, § 54.

113. In 1994, in its interim report on grave violations of IHL in Rwanda, the UN Commission of Experts Established pursuant to Paragraph 1 of Security Council Resolution 935 (1994) determined that massive and systematic violations of several provisions of AP II had been perpetrated, including violations of Article 14 AP II.¹¹⁹

Other International Organisations

114. In a resolution on health and war adopted in 1995, the OAU Conference of African Ministers of Health called upon member States to “ban . . . the use of famine as a method of war against civilians”.¹²⁰

115. In 1998, in a statement before the Sixth Committee of the UN General Assembly, South Africa declared on behalf of the SADC that the 1998 ICC Statute “would also serve as a reminder that even during armed conflict the rule of law must be upheld. For example, it was unlawful . . . for the starvation of civilians to be intentionally used as a method of warfare. [This act was] a war crime and would be punished.”¹²¹

International Conferences

116. The report of the CDDH Working Group responsible for the elaboration of draft Article 48 AP I (now Article 54) stated that draft Article 48 “reflected the almost unanimous view of the Working Group, which considered it one of the most important articles of humanitarian law relating to the protection of the civilian population”.¹²²

117. In the Final Declaration of the International Conference for the Protection of War Victims in 1993, the participants declared that they refused to accept that “civilians [are] starved as a method of warfare”.¹²³

118. In 1995, the 26th International Conference of the Red Cross and Red Crescent adopted a resolution on the protection of the civilian population in period of armed conflict in which it strongly condemned “attempts to starve civilian populations in armed conflicts” and stressed “the prohibition on using starvation of civilians as a method of warfare”.¹²⁴

119. The Plan of Action for the years 2000–2003 adopted in 1999 by the 27th International Conference of the Red Cross and Red Crescent proposed that “States stress the provisions of international humanitarian law prohibiting the use of starvation of civilians as a method of warfare”.¹²⁵

¹¹⁹ UN Commission of Experts Established pursuant to Paragraph 1 of Security Council Resolution 935 (1994), Interim report, UN Doc. S/1994/1125, 4 October 1994, Annex, § 107.

¹²⁰ OAU, Conference of African Ministers of Health, 26–28 April 1995, Res. 14 (V), § 5(b).

¹²¹ SADC, Statement by South Africa on behalf of the SADC before the Sixth Committee of the UN General Assembly, UN Doc. A/C.6/53/SR.9, 21 October 1998, § 13.

¹²² CDDH, *Official Records*, Vol. XIV, CDDH/III/SR.31, 14 March 1975, p. 300, § 8.

¹²³ International Conference for the Protection of War Victims, Geneva, 30 August–1 September 1993, Final Declaration, § I(1), *ILM*, Vol. 33, 1994, p. 298.

¹²⁴ 26th International Conference of the Red Cross and Red Crescent, Geneva, 3–7 December 1995, Res. II, § E(a) and (b).

¹²⁵ 27th International Conference of the Red Cross and Red Crescent, Geneva, 31 October–6 November 1999, Res. I, Annex 2, Plan of Action for the years 2000–2003, Actions proposed for final goal 1.1, § 2.

IV. *Practice of International Judicial and Quasi-judicial Bodies*

120. In the *Application of Genocide Convention case (Provisional Measures)* before the ICJ in 1993, the government of Bosnia and Herzegovina requested that “Yugoslavia (Serbia and Montenegro) and its agents... desist immediately... from the starvation of the civilian population in Bosnia and Herzegovina”.¹²⁶

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

121. The ICRC Commentary on the Additional Protocols emphasises that the statement of the general principle not to use starvation as a method of warfare “is innovative and a significant progress of the law”.¹²⁷

122. To fulfil its task of disseminating IHL, the ICRC has delegates around the world teaching armed and security forces that “starvation as a method of warfare against civilian persons is prohibited”.¹²⁸

123. At its Budapest Session in 1991, the Council of Delegates adopted a resolution on humanitarian assistance in situations of armed conflict in which it called upon all parties to armed conflicts and, where applicable, any High Contracting Party “to respect and ensure respect for the rules of international humanitarian law... that prohibit the use of starvation of civilians as a method of combat”.¹²⁹

124. At its Budapest Session in 1991, the Council of Delegates adopted a resolution on the protection of the civilian population against famine in situations of armed conflict in which it reminded “the authorities concerned and the armed forces under their command of their obligation to apply international humanitarian law, in particular... the prohibition of starvation of civilians as a method of combat”.¹³⁰

125. In a communication to the press issued in 1993 in the context of the conflict in Liberia, the ICRC expressed concern about “over 110,000 people living in the area between Kakata and Totota, in central Liberia, [who] are threatened by starvation”.¹³¹

126. In a working paper on war crimes submitted in 1997 to the Preparatory Committee for the Establishment of an International Criminal Court, the ICRC included “starvation of civilians”, when committed in an international or a

¹²⁶ ICJ, *Application of Genocide Convention case (Provisional Measures)*, 8 April 1993, § 2(q).

¹²⁷ Yves Sandoz *et al.* (eds.), *Commentary on the Additional Protocols*, ICRC, Geneva, 1987, § 2091.

¹²⁸ Frédéric de Mulinen, *Handbook on the Law of War for Armed Forces*, ICRC, Geneva, 1987, § 396.

¹²⁹ International Red Cross and Red Crescent Movement, Council of Delegates, Budapest Session, 28–30 November 1991, Res. 12, § a.

¹³⁰ International Red Cross and Red Crescent Movement, Council of Delegates, Budapest Session, 2830 November 1991, Res. 13, § 1.

¹³¹ ICRC, Communication to the Press No. 93/22, Liberia: ICRC Concerned about 110,000 People Facing Starvation, 22 July 1993.

non-international armed conflict, in its list of war crimes to be subject to the jurisdiction of the Court.¹³²

VI. *Other Practice*

127. In their commentary on the 1977 Additional Protocols, Bothe, Partsch and Solf state that, “by prohibiting starvation of civilians as a method of warfare, Art. 54 [AP I] establishes a substantial new principle of international law applicable in armed conflict”.¹³³

128. In an article in 1986, Ambassador Aldrich, head of the US delegation to the CDDH, stated that Article 54 AP I ranked among those provisions “most warmly welcomed by the United States in 1977”.¹³⁴

129. The SPLM/A Penal and Disciplinary Laws provide that members of the SPLM/A “shall ensure that citizens [under their control] . . . produce sufficient food for themselves”. In addition, it severely punishes “any member of the [SPLA] or affiliated organizations who compels citizens to surrender food materials”.¹³⁵ According to the Report on SPLM/A Practice, there have been several incidents in which the SPLM/A has nevertheless used starvation as a method of warfare. The SPLM/A diverted UN food supplies destined for the civilian population in southern Sudan. It also drove away virtually all livestock from some communities in southern Sudan (Gajack Nuer in 1984, Murle in 1985 and Bar Dinka in 1991), thus causing widespread starvation among those tribes or ethnic groups.¹³⁶

Sieges that cause starvation

I. Treaties and Other Instruments

Treaties

130. Article 32 GC IV provides that:

Each High Contracting Party shall allow the free passage of all consignments of medical and hospital stores and objects necessary for religious worship intended only for civilians of another High Contracting Party, even if the latter is its adversary. It shall likewise permit the free passage of all consignments of essential foodstuffs, clothing and tonics intended for children under fifteen, expectant mothers and maternity cases.

¹³² ICRC, Working paper on war crimes submitted to the Preparatory Committee for the Establishment of an International Criminal Court, New York, 14 February 1997, §§ 2(iv) and 3(xi).

¹³³ Michael Bothe, Karl Joseph Partsch, Waldemar A. Solf (eds.), *New Rules for Victims of Armed Conflict*, Martinus Nijhoff, The Hague, 1982, p. 336.

¹³⁴ George H. Aldrich, “Progressive Development of the Laws of War: A Reply to Criticisms of the 1977 Geneva Protocol I”, *Virginia Journal of International Law*, 1986, Vol. 26, p. 699.

¹³⁵ SPLM/A, Penal and Disciplinary Laws, 4 July 1984, §§ 54(3) and 68, Report on SPLM/A Practice, 1998, Chapter 4.1.

¹³⁶ Report on SPLM/A Practice, 1998, Chapter 4.1.

The obligation of High Contracting Party to allow the free passage of the consignments indicated in the preceding paragraph is subject to the condition that this Party is satisfied that there are no serious reasons for fearing:

- (a) that the consignments may be diverted from their destination,
- (b) that the control may not be effective, or
- (c) that a definite advantage may accrue to the military efforts or economy of the enemy through the substitution of the above-mentioned consignments for goods which would otherwise be provided or produced by the enemy or through the release of such material, services or facilities as would otherwise be required for the production of such goods.

The Power which allows the passage of the consignments indicated in the first paragraph of this Article may make such permission conditional on the distribution to the persons benefited thereby being made under the local supervision of the Protecting Powers.

Such consignments shall be forwarded as rapidly as possible, and the Power which permits their free passage shall have the right to prescribe the technical arrangements under which such passage is allowed.

Other Instruments

131. Article 18 of the 1863 Lieber Code provides that “when a commander of a besieged place expels the noncombatants, in order to lessen the number of those who consume his stock of provisions, it is lawful, though an extreme measure, to drive them back, so as to hasten on the surrender”.

II. National Practice

Military Manuals

132. Argentina’s Law of War Manual, in a chapter dealing, *inter alia*, with siege warfare, provides that “belligerent forces must to try and conclude agreements which facilitate . . . the free passage of . . . essential foodstuffs and clothing”.¹³⁷

133. Australia’s Commanders’ Guide, in a section on siege warfare, provides that, in such a situation, “provision is . . . made for the passage . . . of essential foodstuffs, clothing, tonics intended for children under 15, expectant mothers and maternity cases”.¹³⁸

134. Australia’s Defence Force Manual, in a section on siege warfare, states that “the opposing parties are required to try and conclude local agreements . . . for the passage . . . of essential foodstuffs, clothing and tonics intended for children under 15, expectant mothers and maternity cases”.¹³⁹

135. Canada’s LOAC Manual, in a section on siege warfare, stresses that “if circumstances permit, . . . the parties should . . . permit passage to these [besieged]

¹³⁷ Argentina, *Law of War Manual* (1969), § 1.014.

¹³⁸ Australia, *Commanders’ Guide* (1994), § 926.

¹³⁹ Australia, *Defence Force Manual* (1994), § 735.

areas of . . . essential foodstuffs, clothing, and tonics intended for children under the age of 15, expectant mothers, and maternity cases".¹⁴⁰

136. France's LOAC Manual, under the definition of siege, states that "the starvation of civilian populations as a method of warfare is prohibited".¹⁴¹

137. Israel's Manual on the Laws of War states that:

Siege as a method of warfare vis-a-vis a military objective is an absolutely legal method even if it involves the starvation of the besieged or preventing the transfer of medications in order to achieve surrender.

A question arises in the case of a military siege of an inhabited city. Until recently there were no rules relating to this method of warfare, and it was allowed to exploit the suffering of the local population in order to subdue the enemy. Following the Second World War, a provision was set in the Additional Protocols of 1977, forbidding the starvation of a civilian population in war. This provision clearly implies that the city's inhabitants must be allowed to leave the city during a siege.¹⁴²

138. New Zealand's Military Manual notes that siege is not prohibited "even if it causes some collateral deprivation to the civilian population, so long as starvation is not the specific purpose".¹⁴³ In a section on siege warfare, the manual further provides that, in such a situation, "provision is . . . made in [Article 23 GC IV] for the passage . . . of essential foodstuffs, clothing, and tonics intended for children under 15, expectant mothers and maternity cases".¹⁴⁴

139. The US Field Manual, in a chapter dealing, *inter alia*, with siege warfare, states that, in such a situation, "provision is . . . made in Article 23 [GC IV] for the passage . . . of essential foodstuffs, clothing, and tonics intended for children under 15, expectant mothers, and maternity cases".¹⁴⁵

National Legislation

140. No practice was found.

National Case-law

141. No practice was found.

Other National Practice

142. In 1992, during a debate in the UN Security Council on the situation in Bosnia and Herzegovina, Albania stated that:

¹⁴⁰ Canada, *LOAC Manual* (1999), p. 6-4, § 35(e).

¹⁴¹ France, *LOAC Manual* (2001), p. 117.

¹⁴² Israel, *Manual on the Laws of War* (1998), p. 59.

¹⁴³ New Zealand, *Military Manual* (1992), § 504(2), footnote 9.

¹⁴⁴ New Zealand, *Military Manual* (1992), § 508(3). ¹⁴⁵ US, *Field Manual* (1956), § 44.

Many cities in Bosnia and Herzegovina have been besieged for several months, and their population is under constant artillery fire and left without food, electricity, water supply and medicine. All this will certainly leave a scar on the population for several generations, and the evil is beyond remedy.¹⁴⁶

143. In 1995, in a statement before the UN General Assembly on Germany's appreciation of UN achievements, the German Foreign Minister praised the efforts of peacekeepers "who keep the beleaguered people from starving".¹⁴⁷

144. In 1993, during a debate in the UN Security Council on the establishment of a no-fly zone in Bosnia and Herzegovina, Pakistan declared that "we have witnessed with mounting horror and revulsion... the use of siege and the cutting off of supplies of food and other essentials to civilian population centres".¹⁴⁸

III. Practice of International Organisations and Conferences

United Nations

145. In a resolution adopted in June 1992 on deployment of additional elements of UNPROFOR in Bosnia and Herzegovina, the UN Security Council underlined "the urgency of quick delivery of humanitarian assistance to [besieged] Sarajevo and its environs".¹⁴⁹

146. In a resolution adopted in July 1992 on deployment of additional elements of UNPROFOR in Bosnia and Herzegovina, the UN Security Council stated that it was "deeply disturbed by the situation which now prevails in [besieged] Sarajevo" and deplored the continuation of the fighting "which is rendering difficult the provision of humanitarian aid in Sarajevo".¹⁵⁰

147. In a resolution adopted in 1993 on a comprehensive political settlement of the situation in Bosnia and Herzegovina, the UN Security Council expressed its "concern" about the continuing siege of Sarajevo and strongly condemned "the disruption of public utilities (including water, electricity, fuel and communications)".¹⁵¹

148. In 1994, in a statement by its President, the UN Security Council strongly criticised the situation of the besieged town of Maglaj in Bosnia and Herzegovina, stating that it:

¹⁴⁶ Albania, Statement before the UN Security Council, UN Doc. S/PV.3136, 16 November 1992, § 50.

¹⁴⁷ Germany, Statement before the UN General Assembly, UN Doc. A/50/PV.8, 27 September 1995, pp. 4 and 5.

¹⁴⁸ Pakistan, Statement before the UN Security Council, UN Doc. S/PV.3191, 31 March 1993, § 30.

¹⁴⁹ UN Security Council, Res. 761, 29 June 1992, preamble.

¹⁵⁰ UN Security Council, Res. 764, 13 July 1992, preamble.

¹⁵¹ UN Security Council, Res. 859, 24 August 1993, preamble.

deplores the rapidly deteriorating situation in the Maglaj area and the threat it poses to the survival of the remaining civilian population. It notes that this intolerable situation has been perpetuated by the intensity of the nine-month siege of the town.

...

The Council also demands that the siege of Maglaj be ended immediately.¹⁵²

149. In a resolution adopted in 1993 on the situation in Bosnia and Herzegovina, the UN General Assembly expressed its concern about "the continuing siege of Sarajevo and other Bosnian cities and of 'safe areas' which endangers the well-being and safety of their inhabitants". It demanded that "the Bosnian Serb party lift forthwith the siege of Sarajevo and other 'safe areas', as well as other besieged Bosnian towns".¹⁵³ The call upon the Bosnian Serb party to lift the siege of Sarajevo was repeated in a resolution on the same topic adopted in 1994.¹⁵⁴ The siege of Sarajevo and other Bosnian towns was condemned again a few weeks later.¹⁵⁵

150. In a resolution adopted in 1994 on the situation of human rights in the territory of the former Yugoslavia, the UN Commission on Human Rights demanded "immediate, firm and resolute action by the international community to stop all human rights violations, including... strangulation of cities in Bosnia".¹⁵⁶

151. In 1995, in a report on the situation of human rights in the territory of the former Yugoslavia, the Special Rapporteur of the UN Commission on Human Rights stressed that "Sarajevo has been the scene of some of the gravest violations of human rights in the course of this conflict... The humanitarian situation has also been extremely serious, with acute food shortages and problems with utilities which have frequently been used as a weapon of war."¹⁵⁷

Other International Organisations

152. In 1992, in a report on the crisis in the former Yugoslavia, the rapporteur of the Parliamentary Assembly of the Council of Europe declared that "the siege and the systematic shelling of Sarajevo... are actions unanimously condemned by the international community".¹⁵⁸

¹⁵² UN Security Council, Statement by the President, UN Doc. S/PRST/1994/11, 14 March 1994, p. 1.

¹⁵³ UN General Assembly, Res. 48/88, 20 December 1993, § 6.

¹⁵⁴ UN General Assembly, Res. 49/10, 3 November 1994, § 4.

¹⁵⁵ UN General Assembly, Res. 49/196, 23 December 1994, § 7.

¹⁵⁶ UN Commission on Human Rights, Res. 1994/72, 9 March 1994, § 5.

¹⁵⁷ UN Commission on Human Rights, Special Rapporteur on the Situation of Human Rights in the Former Yugoslavia, Periodic report, UN Doc. S/1995/933-A/50/727, 7 November 1995, Annex, § 54.

¹⁵⁸ Council of Europe, Parliamentary Assembly, Report on the crisis in the former Yugoslavia, Doc. 6639, 29 June 1992, § II 9.

153. In 1994, in a plenary session of the UN General Assembly on the situation in Bosnia and Herzegovina, the EU expressed its concern about “the situation in Sarajevo and the danger of its strangulation”.¹⁵⁹

154. In 1994, the Presidential Committee of the WEU adopted a declaration on the situation in the former Yugoslavia and called for an immediate end to the siege of Sarajevo.¹⁶⁰

International Conferences

155. In a Special Declaration on Bosnia and Herzegovina, the World Conference on Human Rights in 1993 urged the world community and all international bodies, in particular the UN Security Council, “to take forceful and decisive steps for effective measures of peace-making in the Republic of Bosnia and Herzegovina with a view to . . . extending immediate humanitarian help for the relief of persons in besieged towns and cities as well as other victims”.¹⁶¹

IV. Practice of International Judicial and Quasi-judicial Bodies

156. No practice was found.

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

157. No practice was found.

VI. Other Practice

158. According to the Report on SPLM/A Practice, one of the popular practices employed by the SPLM/A against the Sudanese government is to besiege garrison towns held by the Sudanese army. The report points out that the main strategy is to force the government army of the garrison to surrender, but that the civilian population living in these garrisons and towns is also greatly affected.¹⁶²

Blockades and embargoes that cause starvation

I. Treaties and Other Instruments

Treaties

159. No practice was found.

¹⁵⁹ EU, Statement by Germany on behalf of the EU before the UN General Assembly, UN Doc. A/49/PV.50, 3 November 1994, p. 19.

¹⁶⁰ WEU, Presidential Committee, Declaration on the situation in the former Yugoslavia, PRCO Doc 1413, 26 April 1994.

¹⁶¹ World Conference on Human Rights, Vienna, 14–25 June 1993, Special Declaration on Bosnia and Herzegovina, § 7, UN Doc. A/CONF.157/24 (Part I), 13 October 1993, Chapter IV.B, § 47.

¹⁶² Report on SPLM/A Practice, 1998, Chapter 4.1.

Other Instruments

160. The 1994 San Remo Manual states that:

102. The declaration or establishment of a blockade is prohibited if:

- a) it has the sole purpose of starving the civilian population or denying it other objects essential for its survival.

...

103. If the civilian population of the blockaded territory is inadequately provided with food and other objects essential for its survival, the blockading party must provide for free passage of such foodstuffs and other essential supplies.

*II. National Practice**Military Manuals*

161. Australia's Commanders' Guide provides that "in so far as the purpose of a blockade is to deprive the enemy population of foodstuffs, so as to starve them in the hope that they would apply pressure to their government to seek peace, it would now appear to be illegal in accordance with Article 54(1) [AP I]".¹⁶³

162. Australia's Defence Force Manual states that:

The declaration or establishment of a blockade is prohibited if:

- a. it has the sole purpose of starving the civilian population or denying it other objects indispensable for its survival.

...

If the civilian population of the blockaded territory is inadequately provided with food and other objects essential for its survival, the blockading party must provide for free passage of such foodstuffs and other essential supplies ...¹⁶⁴

163. Canada's LOAC Manual provides that:

The declaration or establishment of a blockade is prohibited if:

- a. it has the sole purpose of starving the civilian population or denying it other objects essential for its survival;

...

If the civilian population of the blockaded territory is inadequately provided with food and other objects essential for its survival, the blockading party must provide for free passage of such foodstuffs and other essential supplies ...¹⁶⁵

164. Ecuador's Naval Manual states that "neutral vessels and aircraft engaged in the carriage of qualifying relief supplies for the civilian population ... should be authorized to pass through the blockade cordon".¹⁶⁶

¹⁶³ Australia, *Commanders' Guide* (1994), § 850, footnote 5.

¹⁶⁴ Australia, *Defence Force Manual* (1994), §§ 665 and 666.

¹⁶⁵ Canada, *LOAC Manual* (1999), p. 8-9, §§ 67 and 68.

¹⁶⁶ Ecuador, *Naval Manual* (1989), § 7.7.3.

165. France's LOAC Manual states that when carrying out a blockade, there is an obligation "to allow free passage for relief indispensable to the survival of the civilian population".¹⁶⁷

166. Germany's Military Manual, in a section on blockades, states that "starvation of the civilian population as a method of warfare is prohibited".¹⁶⁸

167. New Zealand's Military Manual states that blockade is not prohibited "even if it causes some collateral deprivation to the civilian population, so long as starvation is not the specific purpose".¹⁶⁹

168. Sweden's IHL Manual states that:

Certain states have maintained that the prohibition against starvation shall apply without exception which would also mean its application against blockade in naval warfare. Other states have claimed that this method of warfare is the province of the international law of naval warfare, which, according to Article 49:3, shall not be affected by the new rules of Additional Protocol I. There is thus no consensus that the prohibition of starvation shall be considered to include maritime blockade.¹⁷⁰

169. The US Naval Handbook states that "neutral vessels and aircraft engaged in the carriage of qualifying relief supplies for the civilian population . . . should be authorized to pass through the blockade cordon".¹⁷¹

National Legislation

170. No practice was found.

National Case-law

171. No practice was found.

Other National Practice

172. According to the Report on the Practice of Iraq, refraining from the use of embargoes on food and medicine as a weapon by one of the conflicting parties is a fixed and established principle which has been applied by the Iraqi armed forces in armed conflicts.¹⁷²

173. In 1973, a Deputy Legal Adviser of the US Department of State expressed the hope that:

new rules can . . . be developed to reduce or eliminate the possibility that starvation will result from blockade, perhaps by requiring the passage of food supplies provided only that distribution is made solely to civilians and is supervised by the ICRC or some other appropriate external body.¹⁷³

¹⁶⁷ France, *LOAC Manual* (2001), p. 33.

¹⁶⁸ Germany, *Military Manual* (1992), § 1051.

¹⁶⁹ New Zealand, *Military Manual* (1992), § 504(2), footnote 9.

¹⁷⁰ Sweden, *IHL Manual* (1991), Section 3.2.1.5, pp. 59 and 60.

¹⁷¹ US, *Naval Handbook* (1995), § 7.7.3.

¹⁷² Report on the Practice of Iraq, 1998, Chapter 4.1.

¹⁷³ US, Address by George H. Aldrich, Deputy Legal Adviser of the Department of State, 13 April 1973, reprinted in Arthur W. Rovine, *Digest of United States Practice in International Law*, 1973, Department of State Publication 8756, Washington, D.C., 1974, pp. 503–504.

III. Practice of International Organisations and Conferences

United Nations

174. In 1996, in a statement by its President concerning the conflict in Afghanistan, the UN Security Council declared that it was particularly concerned about “the blockade of [Kabul], which has prevented the delivery of foodstuffs, fuel and other humanitarian items to its population”.¹⁷⁴

175. In 1998, in a statement by its President concerning the conflict in Afghanistan, the UN Security Council stated that:

The Security Council is also concerned with the sharp deterioration of the humanitarian situation in several areas in Central and Northern Afghanistan, which is caused by the Taliban-imposed blockade of the Bamyan region remaining in place despite appeals by the United Nations and several of its Member States to lift it, as well as by the lack of supplies coming in from the northern route owing to insecurity and looting.¹⁷⁵

176. In resolutions adopted in 1994 and 1995 on the situation of human rights in Iraq, the UN Commission on Human Rights expressed its “special alarm at all internal embargoes which permit essentially no exceptions for humanitarian needs and which prevent the equitable enjoyment of basic foodstuffs and medical supplies, and calls upon Iraq, which has the sole responsibility in this regard, to remove them”.¹⁷⁶

177. In a resolution adopted in 1995 on the situation of human rights in Iraq, the UN Sub-Commission on Human Rights expressed its concern about “the serious deterioration of the health and nutritional situation from which the majority of citizens with limited income suffer as victims of the international embargo”. The Sub-Commission was also deeply concerned by “the internal embargo maintained by the Government against the Kurdish population in the north of Iraq and the Arab Shiah population in the southern marshlands”. It called upon the government “to cease its internal embargo . . . and to re-establish the electricity supply to both regions”.¹⁷⁷

178. In a resolution adopted in 1996 on the situation of human rights in Iraq, the UN Sub-Commission on Human Rights expressed its concern about “the serious deterioration of the health and nutritional situation from which the majority of citizens with limited income suffer as victims of the international embargo”. The Sub-Commission further called upon the Iraqi government “to cease its internal embargo against the north and the Shiah populations in the south, areas which are both still under siege, and to re-establish the electricity supply to both regions”.¹⁷⁸

¹⁷⁴ UN Security Council, Statement by the President, UN Doc. S/PRST/1996/6, 15 February 1996, p. 1.

¹⁷⁵ UN Security Council, Statement by the President, UN Doc. S/PRST/1998/9, 6 April 1998, p. 2.

¹⁷⁶ UN Commission on Human Rights, Res. 1994/74, 9 March 1994, § 9; Res. 1995/76, 8 March 1995, § 10.

¹⁷⁷ UN Sub-Commission on Human Rights, Res. 1995/3, 18 August 1995, preamble and § 6.

¹⁷⁸ UN Sub-Commission on Human Rights, Res. 1996/5, 19 August 1996, preamble and § 4.

179. In 1993, in a report on the situation of human rights in the territory of the former Yugoslavia, the Special Rapporteur of the UN Commission on Human Rights included in the recommendations that “blockades of cities and enclaves should be ended immediately and humanitarian corridors opened”.¹⁷⁹

180. In 1996, in a report on extrajudicial, summary or arbitrary executions, the Special Rapporteur of the UN Commission on Human Rights included a section on violations of the right to life during armed conflicts. In the report, he expressed his alarm that “many thousands of people not participating in armed confrontations have lost their lives as direct victims of conflicts . . . or indirectly as a consequence of blocking of the flow of water, food and medical supplies”.¹⁸⁰

Other International Organisations

181. In a resolution adopted in 1994 on the humanitarian situation and needs of the displaced Iraqi Kurdish population, the Parliamentary Assembly of the Council of Europe called upon the Iraqi government to “put an immediate end to . . . its embargo on the supplies to the region”.¹⁸¹

182. In 1990, ECOWAS sent a peacekeeping contingent, ECOMOG, to Liberia. The NPFL fought against ECOMOG and controlled a considerable part of Liberia. In order to compel the NPFL to surrender, ECOWAS imposed a blockade on all parts of Liberia under the control of the NPFL.¹⁸² It cut off food supplies to the NPFL, arguing that relief convoys were used by the NPFL to smuggle arms and ammunition into Liberia.¹⁸³ Although this allegation was denied and the blockade was claimed to have caused considerable deprivation and hardship to the civilian population, ECOWAS maintained this siege until the Cotonou Agreement on Liberia was concluded in 1993.¹⁸⁴

183. In a resolution adopted in 1994 on the Palestinian cause and the Arab-Israeli conflict, the OIC Conference of Ministers of Foreign Affairs strongly condemned Israeli practices in the occupied territories. Among the practices condemned was the blockade of Al-Qods Al-Sharif.¹⁸⁵

International Conferences

184. No practice was found.

¹⁷⁹ UN Commission on Human Rights, Special Rapporteur on the Situation of Human Rights in the Former Yugoslavia, Fifth periodic report, UN Doc. E/CN.4/1994/47, 17 November 1993, § 94(b).

¹⁸⁰ UN Commission on Human Rights, Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions, Report, UN Doc. E/CN.4/1997/60, 24 December 1996, § 40.

¹⁸¹ Council of Europe, Parliamentary Assembly, Res. 1022, 27 January 1994, § 6.

¹⁸² Kofi Oteng Kufuor, “Starvation as a method of warfare in the Liberian conflict”, *NILR*, Vol. 41, 1994, p. 317.

¹⁸³ ECOWAS, Comments reported in *Africa Research Bulletin* (Political Series), Vol. 30, No. 5, 1993, p. 11015.

¹⁸⁴ Kofi Oteng Kufuor, “Starvation as a method of warfare in the Liberian conflict”, *NILR*, Vol. 41, 1994, p. 317.

¹⁸⁵ OIC, Conference of Ministers of Foreign Affairs, Res. 1/7-P (IS), 13–15 December 1994.

IV. Practice of International Judicial and Quasi-judicial Bodies

185. No practice was found.

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

186. No practice was found.

VI. Other Practice

187. No practice was found.

B. Attacks against Objects Indispensable to the Survival of the Civilian Population

General

*I. Treaties and Other Instruments**Treaties*

188. Article 54(2) AP I provides that:

It is prohibited to attack, destroy, remove, or render useless objects indispensable to the survival of the civilian population, such as foodstuffs, agricultural areas for the production of foodstuffs, crops, livestock, drinking water installations and supplies and irrigation works, for the specific purpose of denying them for their sustenance value to the civilian population or to the adverse Party, whatever the motive, whether in order to starve out civilians, to cause them to move away, or for any other motive.

Article 54 AP I was adopted by consensus.¹⁸⁶

189. Upon ratification of AP I, France stated that it:

considers that paragraph 2, Article 54 does not prohibit attacks carried out for a specific purpose, with the exception of those which aim at depriving the civilian population of objects indispensable to its survival and of those targeting objects which, although used by the adverse party, are not used solely for the sustenance of members of the armed forces.¹⁸⁷

190. Upon ratification of AP I, the UK stated that it “understands that paragraph 2 [of Article 54] has no application to attacks that are carried out for a specific purpose other than denying sustenance to the civilian population or the adverse party”.¹⁸⁸

¹⁸⁶ CDDH, *Official Records*, Vol. VI, CDDH/SR.42, 27 May 1977, p. 208.

¹⁸⁷ France, Reservations and declarations made upon ratification of AP I, 11 April 2001, § 14.

¹⁸⁸ UK, Reservations and declarations made upon ratification of AP I, 28 January 1998, § 1.

191. Article 14 AP II provides that it is

prohibited to attack, destroy, remove or render useless, for that purpose [starvation of civilians], objects indispensable to the survival of the civilian population, such as foodstuffs, agricultural areas for the production of foodstuffs, crops, livestock, drinking water installations and supplies and irrigation works.

Article 14 AP II was adopted by consensus.¹⁸⁹

192. Article 8(2)(b)(xxv) of the 1998 ICC Statute provides that “intentionally using starvation of civilians as a method of warfare by depriving them of objects indispensable to their survival” is a war crime in international armed conflicts.

Other Instruments

193. Article 3(b) of the 1990 Cairo Declaration on Human Rights in Islam deals with the protection of civilians in times of armed conflict and provides that “it is prohibited to fell trees, to damage crops or livestock, and to destroy the enemy’s civilian buildings and installations by shelling, blasting or any other means”.

194. Paragraph 6 of the 1991 Memorandum of Understanding on the Application of IHL between Croatia and the SFRY requires that hostilities be conducted in accordance with Article 54(2) AP I.

195. Paragraph 2.5 of the 1992 Agreement on the Application of IHL between the Parties to the Conflict in Bosnia and Herzegovina requires that hostilities be conducted in accordance with Article 54(2) AP I.

196. Section 6.7 of the 1999 UN Secretary-General’s Bulletin provides that “the United Nations force is prohibited from attacking, destroying, removing or rendering useless objects indispensable to the survival of the civilian population, such as foodstuff, crops, livestock and drinking-water installations and supplies”.

197. The 2000 UNTAET Regulation No. 2000/15 establishes panels with exclusive jurisdiction over serious criminal offences, including war crimes. According to Section 6(1)(b)(xxv), “intentionally using starvation of civilians as a method of warfare by depriving them of objects indispensable to their survival” is a war crime in international armed conflicts.

II. National Practice

Military Manuals

198. Argentina’s Law of War Manual states that, in the course of armed conflicts not of an international character, “objects indispensable to the survival of the civilian population enjoy special protection”.¹⁹⁰

¹⁸⁹ CDDH, *Official Records*, Vol. VII, CDDH/SR.52, 6 June 1977, p. 137.

¹⁹⁰ Argentina, *Law of War Manual* (1989), § 7.09.

199. Australia's Commanders' Guide states that:

It is prohibited to destroy, remove or render useless objects indispensable to the survival of the civilian population, such as foodstuffs, agricultural areas for the production of foodstuffs, crops, livestock, drinking water installations and supplies and irrigation works. Military operations involving collateral deprivation are not unlawful as long as the object is not to starve the civilian population.¹⁹¹

200. Australia's Defence Force Manual provides that:

Objects indispensable to the survival of the civilian population cannot be attacked, destroyed, removed or rendered useless for the specific purpose of denying them for their sustenance value to the civilian population, such as foodstuffs, agricultural areas for the production of foodstuffs, crops, livestock, drinking water installations and supplies and irrigation works. This includes starving civilians or causing them to move away.¹⁹²

The manual adds that the destruction of such objects is prohibited, "whatever the motive of such destruction".¹⁹³ It further stresses that the prohibition of attacking objects indispensable to the survival of the civilian population "relates to attacks made for the specific purpose of denying these items to the civilian population. Collateral damage to foodstuffs is not a violation of these rules as long as the intention was to gain a military advantage by attacking a military objective."¹⁹⁴

201. Under Belgium's Law of War Manual, it is prohibited to attack, destroy or render useless objects indispensable to the survival of the civilian population, such as foodstuffs, agricultural areas for the production of foodstuffs, drinking water and drinking water installations.¹⁹⁵

202. Benin's Military Manual provides that "the following prohibitions shall be respected: . . . to direct attacks at objects indispensable to the survival of the civilian population, such as: foodstuffs, crops, livestock and reserves of drinking water".¹⁹⁶

203. Canada's LOAC Manual provides that:

It is prohibited to attack, destroy, remove or render useless objects indispensable to the survival of the civilian population whatever the motive.

...

The following are examples of "objects indispensable to the survival of the civilian population":

- a. foodstuffs;
- b. agricultural areas for the production of foodstuffs;
- c. crops;

¹⁹¹ Australia, *Commanders' Guide* (1994), § 907, see also § 410.

¹⁹² Australia, *Defence Force Manual* (1994), § 709, see also § 533, 929 and 930.

¹⁹³ Australia, *Defence Force Manual* (1994), § 930.

¹⁹⁴ Australia, *Defence Force Manual* (1994), § 533.

¹⁹⁵ Belgium, *Law of War Manual* (1983), p. 28.

¹⁹⁶ Benin, *Military Manual* (1995), Fascicule III, p. 12.

- d. livestock;
- e. drinking water installations and supplies; and
- f. irrigation works.¹⁹⁷

With regard to methods prohibited in non-international armed conflicts, the manual also stipulates that “it is prohibited to attack, destroy, remove or render useless objects indispensable to the survival of the civilian population whatever the motive”.¹⁹⁸

204. Colombia’s Basic Military Manual provides that the parties to a conflict must “abstain from attacking those objects and installations that . . . are indispensable for the well-being and survival [of the civilian population]”.¹⁹⁹ It also states that objects indispensable to the survival of the civilian population, such as crops and the areas where they are produced, livestock, drinking water installations and irrigation works, are protected objects.²⁰⁰ In a chapter entitled “Provisions of IHL applicable in Colombia”, the manual states that “in all armed conflicts”, it is prohibited to attack objects indispensable to the survival of the civilian population as a method of combat.²⁰¹

205. Ecuador’s Naval Manual prohibits the “intentional destruction of food, crops, livestock, drinking water and other objects indispensable to the survival of the civilian population, for the specific purpose of denying the civilian population of their use”.²⁰²

206. France’s LOAC Summary Note provides that “it is prohibited . . . to attack, destroy, remove or render useless objects indispensable to the survival of the population (foodstuffs, livestock, crops, drinking water, etc.)”.²⁰³

207. France’s LOAC Teaching Note states that “objects indispensable to the survival of the population must absolutely be preserved (crops, livestock, foodstuffs, drinking water . . .)”.²⁰⁴

208. France’s LOAC Manual incorporates the content of Article 54(2) AP I.²⁰⁵

209. Germany’s Soldiers’ Manual provides that “the objects indispensable to the survival of the civilian population (e.g. drinking water installations) may not be destroyed”.²⁰⁶

210. Germany’s Military Manual provides that “it is . . . prohibited to attack . . . objects indispensable to the civilian population, e.g. production of foodstuffs, clothing, drinking water installations, with the aim to prevent the civilian

¹⁹⁷ Canada, *LOAC Manual* (1999), p. 4-8, §§ 78 and 79, see also p. 6-4, § 41 (land warfare) and p. 7-3, § 25 (air warfare).

¹⁹⁸ Canada, *LOAC Manual* (1999), p. 17-5, § 38.

¹⁹⁹ Colombia, *Basic Military Manual* (1995), p. 22, see also p. 29.

²⁰⁰ Colombia, *Basic Military Manual* (1995), p. 25.

²⁰¹ Colombia, *Basic Military Manual* (1995), p. 49.

²⁰² Ecuador, *Naval Manual* (1989), § 8.1.2.

²⁰³ France, *LOAC Summary Note* (1992), § 4.2.

²⁰⁴ France, *LOAC Teaching Note* (2000), p. 6.

²⁰⁵ France, *LOAC Manual* (2001), pp. 30 and 31.

²⁰⁶ Germany, *Soldiers’ Manual* (1991), p. 4.

population from being supplied".²⁰⁷ The manual further states that "grave breaches of international humanitarian law are in particular: . . . starvation of civilians by destroying, removing or rendering useless objects indispensable to the survival of the civilian population (e.g. foodstuffs, means for the production of foodstuffs, drinking water installations and supplies, irrigation works)".²⁰⁸

211. India's Police Manual provides that "the Central or State Government may, if satisfied with respect to any person that with a view to preventing him from acting in any manner prejudicial to . . . *the maintenance of supplies and services essential to the community* it is necessary so to do, make an order directing that such person be detained".²⁰⁹ (emphasis in original)

212. Indonesia's Military Manual states that it is prohibited to attack foodstuffs, agricultural areas, crops, livestock, drinking water installations and supplies, including irrigation works.²¹⁰

213. Israel's Manual on the Laws of War states that "it is prohibited to attack targets essential to the continued survival of the civilian population".²¹¹

214. Kenya's LOAC Manual provides that "it is forbidden . . . to direct attacks at objects indispensable for the survival of the civilian population such as foodstuff, crops, livestock and drinking water".²¹²

215. Under Madagascar's Military Manual, it is prohibited to destroy objects indispensable to the survival of the civilian population.²¹³

216. Under the Military Manual of the Netherlands, it is prohibited to attack, destroy, remove or render useless objects indispensable to the survival of the civilian population whatever the motive. It includes in the category of objects indispensable to the survival of the civilian population, foodstuffs, agricultural areas, crops, drinking water installations, irrigation works and other supplies.²¹⁴ In addition, the manual specifically prohibits "attack, destruction, removal and rendering useless of objects indispensable to the survival of the civilian population, such as foodstuffs, agricultural areas, crops, livestock, drinking water installations and irrigation works" in non-international armed conflicts.²¹⁵

217. Under the Military Handbook of Netherlands, it is prohibited to attack, destroy, remove or render useless objects indispensable to the survival of the civilian population. It includes in the category of objects indispensable to the survival of the civilian population, foodstuffs, agricultural areas, crops, drinking water installations, irrigation works and other supplies.²¹⁶

²⁰⁷ Germany, *Military Manual* (1992), § 463.

²⁰⁸ Germany, *Military Manual* (1992), § 1209.

²⁰⁹ India, *Police Manual* (1986), p. 24.

²¹⁰ Indonesia, *Military Manual* (1982), p. 56, § 127(c).

²¹¹ Israel, *Manual on the Laws of War* (1998), p. 35.

²¹² Kenya, *LOAC Manual* (1997), Précis No. 4, pp. 2 and 3.

²¹³ Madagascar, *Military Manual* (1994), Fiche No. 2-T, § 27.

²¹⁴ Netherlands, *Military Manual* (1993), p. V-7.

²¹⁵ Netherlands, *Military Manual* (1993), p. XI-6.

²¹⁶ Netherlands, *Military Handbook* (1995), p. 7-44.

218. New Zealand's Military Manual states that:

AP I Art. 54 expands the customary protection as follows: . . .

It is prohibited to attack, destroy, remove or render useless objects indispensable to the survival of the civilian population, such as foodstuffs, agricultural areas for the production of foodstuffs, crops, livestock, drinking water installations and supplies and irrigation works, for the specific purpose of denying them for their sustenance value to the civilian population or to the adverse Party, whatever the motive, whether in order to starve out civilians, to cause them to move away, or for any other motive.

...

This prohibition does not, however, extend to attacks carried out for *some specific purpose other than* that of denying sustenance to the civilian population.²¹⁷ [emphasis in original]

The manual also states that:

AP II forbids starvation as a method of combat: it is prohibited for that purpose to attack, destroy, remove or render useless for that purpose objects considered indispensable to the survival of the civilian population, such as foodstuffs, agricultural areas, livestock, drinking water installations, irrigation works, and the like.

...

In other words, deprivation of food and other materials necessary to sustain the population cannot be used by a government as a method of pressure against civilians supporting rebels.²¹⁸

219. Nigeria's Military Manual provides that "attack, destruction, removal of objects indispensable to the survival of the civilian population is prohibited".²¹⁹

220. South Africa's LOAC Manual provides that "objects which are essential to the survival of the civilian population (such as livestock, irrigation works and water supply) must not be attacked".²²⁰

221. Spain's LOAC Manual states that it is prohibited to attack, destroy, remove or render useless objects indispensable to the survival of the civilian population "with the intent to starve the civilian population".²²¹ It also gives as examples of such objects, foodstuffs, agricultural areas for the production of foodstuffs, crops, livestock, drinking water installations and reserves, irrigation works, etc.²²²

222. Sweden's IHL Manual states that:

Article 54:2 [AP I] . . . prohibits attack on such property as is essential for the survival of a civilian population for the purpose of depriving the civilian population

²¹⁷ New Zealand, *Military Manual* (1992), § 504(2) (land warfare), including footnote 9, see also § 613(2) (air warfare).

²¹⁸ New Zealand, *Military Manual* (1992), § 1820, including footnote 75.

²¹⁹ Nigeria, *Military Manual* (1994), p. 42, § 11.

²²⁰ South Africa, *LOAC Manual* (1996), § 28(c).

²²¹ Spain, *LOAC Manual* (1996), Vol. I, § 3.3.c.(4), see also § 4.5.b.(2).

²²² Spain, *LOAC Manual* (1996), Vol. I, § 4.5.b.(2), see also §§ 1.3.d.(3) and 3.3.c.(4).

or the adversary of vital necessities, in order to starve them out or compel them to leave an area, or for any other reason. It is equally forbidden to remove such property or render it useless. The property which shall receive protection in the first instance is foodstuffs and agricultural areas, crops, cattle, plant and reservoirs for drinking water and irrigation works. This list is incomplete, and further objects could be added. It may be pertinent to list also civilian dwellings in cold areas, which considerably increase the scope of the article. Yet it is less probable that such an extension would gain general approval. Moreover, civilian dwellings have protection in Article 52, even though this is far from sufficient.

The prohibition in Article 54:2 [AP I] applies only to attack, removal or incapacitation performed for the purpose given – thus the article offers no protection against unintentional injury or losses arising from an attack that has other purposes. Attack on a hostile force deployed in the neighbourhood of a community may thus for example lead to damage to a nearby grain store without these secondary effects involving a breach of Article 54.²²³

223. Switzerland's Basic Military Manual states that "objects vital to the civilian population, such as drinking water, foodstuffs, crops and livestock as well as agricultural areas, must not be rendered useless".²²⁴

224. Togo's Military Manual provides that "the following prohibitions shall be respected: . . . to direct attacks at objects indispensable to the survival of the civilian population, such as: foodstuffs, crops, livestock and reserves of drinking water".²²⁵

225. The UK LOAC Manual provides that "it is forbidden . . . to direct attacks at objects indispensable to the survival of the civilian population such as foodstuffs, crops, livestock and drinking water".²²⁶

226. The US Naval Handbook prohibits the "intentional destruction of food, crops, livestock, drinking water and other objects indispensable to the survival of the civilian population, for the specific purpose of denying the civilian population of their use".²²⁷

227. The Annotated Supplement to the US Naval Handbook provides that the rule prohibiting the intentional destruction of objects indispensable to the survival of the civilian population for the specific purpose of denying the civilian population of their use is a "customary rule . . . accepted by the United States . . . and is codified in [AP I], art. 54(2)".²²⁸

228. Under the YPA Military Manual of the SFRY (FRY), it is prohibited to attack, destroy, remove or render useless objects indispensable to the survival of the civilian population, with the intent to deprive the population of those objects, regardless of the motive (in order to starve the population, to force it to move or for any other motive). The manual gives the following examples

²²³ Sweden, *IHL Manual* (1991), Section 3.2.1.5, p. 60.

²²⁴ Switzerland, *Basic Military Manual* (1987), Article 35.

²²⁵ Togo, *Military Manual* (1996), Fascicule III, p. 12.

²²⁶ UK, *LOAC Manual* (1981), Section 4, p. 14, § 5(g).

²²⁷ US, *Naval Handbook* (1995), § 8.1.2.

²²⁸ US, *Annotated Supplement to the Naval Handbook* (1997), § 8.1.2, footnote 15.

of objects indispensable to the survival of the civilian population: agricultural areas, places of food production, crops, livestock, drinking water installations, reservoirs for drinking water and irrigation works.²²⁹

National Legislation

229. Argentina's Draft Code of Military Justice punishes any soldier who "attacks, destroys, removes or renders useless objects indispensable to the survival of the civilian population".²³⁰ It also considers as a punishable offence the fact of depriving protected persons of indispensable food or necessary medical assistance.²³¹

230. Australia's ICC (Consequential Amendments) Act incorporates in the Criminal Code the war crimes defined in the 1998 ICC Statute, including "any intentional deprivation of civilians of objects indispensable to their survival" in international armed conflicts.²³²

231. Under Burundi's Draft Law on Genocide, Crimes against Humanity and War Crimes, "the fact of deliberately starving civilians as a method of warfare, by depriving them of objects indispensable to their survival" constitutes a war crime in international armed conflicts.²³³

232. Canada's Crimes against Humanity and War Crimes Act provides that the war crimes defined in Article 8(2) of the 1998 ICC Statute are "crimes according to customary international law" and, as such, indictable offences under the Act.²³⁴

233. Colombia's Penal Code imposes a criminal sanction on "anyone who, during an armed conflict, attacks, renders useless, damages, removes or appropriates objects or elements indispensable to the survival of the civilian population".²³⁵

234. Congo's Genocide, War Crimes and Crimes against Humanity Act defines war crimes with reference to the categories of crimes defined in Article 8 of the 1998 ICC Statute.²³⁶

235. The Czech Republic's Criminal Code as amended punishes any "person who in wartime . . . destroys or seriously disrupts a source of the necessities of life for civilians in an occupied area or contact zone".²³⁷

236. The Draft Amendments to the Penal Code of El Salvador provide for a prison sentence for "anyone who, during an international or non-international

²²⁹ SFRY (FRY), *YPA Military Manual* (1988), § 74.

²³⁰ Argentina, *Draft Code of Military Justice* (1998), Article 293, introducing a new Article 877(3) in the *Code of Military Justice as amended* (1951).

²³¹ Argentina, *Draft Code of Military Justice* (1998), Article 292, introducing a new Article 876(4) in the *Code of Military Justice as amended* (1951).

²³² Australia, *ICC (Consequential Amendments) Act* (2002), Schedule 1, § 268.67(1)(a)(i).

²³³ Burundi, *Draft Law on Genocide, Crimes against Humanity and War Crimes* (2001), Article 4(B)(x).

²³⁴ Canada, *Crimes against Humanity and War Crimes Act* (2000), Section 4(1) and (4).

²³⁵ Colombia, *Penal Code* (2000), Article 160, see also Article 154.

²³⁶ Congo, *Genocide, War Crimes and Crimes against Humanity Act* (1998), Article 4.

²³⁷ Czech Republic, *Criminal Code as amended* (1961), Article 263a(2)(a).

armed conflict, attacks . . . objects indispensable to the survival of the civilian population".²³⁸

237. Under Estonia's Penal Code, "a person who . . . destroys or renders useless food or water supplies, sown crops or domestic animals indispensable to the survival of the civilian population" commits a war crime.²³⁹

238. Under Georgia's Criminal Code, any war crime provided for by the 1998 ICC Statute, which is not explicitly mentioned in the Code, such as "intentionally using starvation of civilians as a method of warfare by depriving them of objects indispensable to their survival" in international armed conflicts, is a crime.²⁴⁰

239. Germany's Law Introducing the International Crimes Code punishes anyone who, in connection with an international or a non-international armed conflict, "uses starvation of civilians as a method of warfare by depriving them of objects indispensable to their survival".²⁴¹

240. Iraq's Military Penal Code punishes anyone who destroys or wrecks, without necessity, "moveable or immovable property, cuts down trees, destroys agricultural crops or orders to commit such acts".²⁴²

241. Ireland's Geneva Conventions Act as amended provides that any "minor breach" of AP I, including violations of Article 54(2) AP I, as well as any "contravention" of AP II, including violations of Article 14 AP II, are punishable offences.²⁴³

242. Under Mali's Penal Code, "deliberately starving civilians as a method of warfare, by depriving them of objects indispensable to their survival" is a war crime in international armed conflicts.²⁴⁴

243. Mexico's Code of Military Justice as amended punishes anyone who "makes requisition of foodstuffs".²⁴⁵ It also punishes "anyone who, taking advantage of his own authority or the authority of the armed forces, maliciously and arbitrarily destroys foodstuffs, when it is not required by military operations".²⁴⁶

244. The Definition of War Crimes Decree of the Netherlands considers as a war crime the "intentional withholding of medical supplies from civilians".²⁴⁷

245. Under the International Crimes Act of the Netherlands, "intentionally using starvation of civilians as a method of warfare by depriving them of objects indispensable to their survival" is a crime, when committed in an international armed conflict.²⁴⁸

²³⁸ El Salvador, *Draft Amendments to the Penal Code* (1998), Article entitled "Ataque a bienes protegidos".

²³⁹ Estonia, *Penal Code* (2001), § 95.

²⁴⁰ Georgia, *Criminal Code* (1999), Article 413(d).

²⁴¹ Germany, *Law Introducing the International Crimes Code* (2002), Article 1, § 11(1)(5).

²⁴² Iraq, *Military Penal Code* (1940), Article 113.

²⁴³ Ireland, *Geneva Conventions Act as amended* (1962), Section 4(1) and (4).

²⁴⁴ Mali, *Penal Code* (2001), Article 31(i)(25).

²⁴⁵ Mexico, *Code of Military Justice as amended* (1933), Article 215.

²⁴⁶ Mexico, *Code of Military Justice as amended* (1933), Article 334.

²⁴⁷ Netherlands, *Definition of War Crimes Decree* (1946), Article 1.

²⁴⁸ Netherlands, *International Crimes Act* (2003), Article 5(5)(l).

246. Under New Zealand's International Crimes and ICC Act, war crimes include the crime defined in Article 8(2)(b)(xxv) of the 1998 ICC Statute.²⁴⁹
247. Nicaragua's Draft Penal Code punishes "anyone who, during an international or internal armed conflict, attacks... objects indispensable to the survival of the civilian population".²⁵⁰
248. Under Norway's Military Penal Code as amended, "anyone who contravenes or is accessory to the contravention of provisions relating to the protection of persons or property laid down in... the two additional protocols to [the Geneva] Conventions... is liable to imprisonment".²⁵¹
249. Peru's Code of Military Justice imposes penalties on members of the armed forces who destroy or endanger public services vital to the survival of the population, such as water supplies.²⁵²
250. Slovakia's Criminal Code as amended punishes any "person who in wartime... destroys or seriously disrupts a source of the necessities of life for civilians in an occupied area or contact zone".²⁵³
251. Spain's Penal Code punishes "anyone who, during an armed conflict,... attacks, destroys, removes or renders useless objects indispensable to the survival of the civilian population".²⁵⁴
252. Under Trinidad and Tobago's Draft ICC Act, it is a punishable offence to commit a war crime as defined in Article 8(2)(b)(xxv) of the 1998 ICC Statute.²⁵⁵
253. Under the UK ICC Act, it is a punishable offence to commit a war crime as defined in Article 8(2)(b)(xxv) of the 1998 ICC Statute.²⁵⁶
254. Vietnam's Penal Code punishes "anyone who, in time of peace or in time of war,... destroys vital resources".²⁵⁷

National Case-law

255. In the *Perišić and Others case* before a Croatian district court in 1997, after a trial *in absentia*, several persons were convicted of ordering the shelling of the city of Zadar and its surroundings, *inter alia*, on the basis of Article 14 AP II, as incorporated in Article 120(1) of Croatia's Criminal Code of 1993.²⁵⁸

Other National Practice

256. In its oral pleadings before the ICJ in the *Nuclear Weapons case* in 1995, Australia declared that:

²⁴⁹ New Zealand, *International Crimes and ICC Act* (2000), Section 11(2).

²⁵⁰ Nicaragua, *Draft Penal Code* (1999), Article 464.

²⁵¹ Norway, *Military Penal Code as amended* (1902), § 108(b).

²⁵² Peru, *Code of Military Justice* (1980), Article 95(3).

²⁵³ Slovakia, *Criminal Code as amended* (1961), Article 263a(2)(a).

²⁵⁴ Spain, *Penal Code* (1995), Article 613(1)(c), see also Article 612(3).

²⁵⁵ Trinidad and Tobago, *Draft ICC Act* (1999), Section 5(1)(a).

²⁵⁶ UK, *ICC Act* (2001), Sections 50(1) and 51(1) (England and Wales) and Section 58(1) (Northern Ireland).

²⁵⁷ Vietnam, *Penal Code* (1990), Article 278.

²⁵⁸ Croatia, District Court of Zadar, *Perišić and Others case*, Judgement, 24 April 1997.

Another area of the law in which there have been significant recent developments is that of the protection of the civilian population in times of armed conflict. A significant step further was taken as recently as 1977, with the adoption of the Additional Protocol I to the Geneva Conventions. Australia, together with the bulk of the international community, believes that the essential terms of the Protocol should be regarded as reflecting customary international law . . .

Article 54, paragraph 2, provides that a Party may not

“attack, destroy, remove or render useless objects indispensable to the survival of the civilian population, such as foodstuffs, agricultural areas for the production of foodstuffs, crops, livestock, drinking water installations and supplies and irrigation works, for the specific purpose of denying them for their sustenance value to the civilian population or to the adverse Party”.²⁵⁹

257. In 1992, during a debate in the UN Security Council on the situation in Bosnia and Herzegovina, Austria declared that the “withholding of food and essential humanitarian goods is a central element in the policy of ‘ethnic cleansing’ against the non-Serbian population”.²⁶⁰

258. At the CDDH, Belgium sponsored a draft article on the prohibition of starvation which contained the rule that it is “forbidden to attack, destroy, remove or render useless, crops, drinking water supplies, irrigation works, livestock, foodstuffs or food producing areas for the purpose of denying them to the enemy or the civilian population”.²⁶¹

259. In 1994, in reply to a questionnaire from the House of Representatives, Colombia’s Ministry of Foreign Affairs quoted Article 14 AP II.²⁶²

260. The Report on the Practice of Colombia refers to a draft internal working paper in which the Colombian government stated that it was prohibited “to make the civilian population suffer from hunger or thirst and to attack, destroy, remove or render useless objects for this purpose”.²⁶³

261. According to the Report on the Practice of Egypt, “attacks against . . . objects indispensable to the survival of the civilian population are . . . prohibited” in Egypt.²⁶⁴

262. At the 26th International Conference of the Red Cross and Red Crescent in 1995, Germany stated that “the deprivation of resources necessary for survival, such as water, [has] been used repeatedly and [has] to be condemned”.²⁶⁵

²⁵⁹ Australia, Oral pleadings before the ICJ, *Nuclear Weapons case*, 30 October 1995, Verbatim Record CR 95/22, p. 46.

²⁶⁰ Austria, Statement before the UN Security Council, UN Doc. S/PV. 3114, 14 September 1992, p. 109.

²⁶¹ Belgium, Proposal of amendment to Article 48 of draft AP I submitted to the CDDH, *Official Records*, Vol. III, CDDH/III/67, 19 March 1974, p. 218.

²⁶² Colombia, Presidency of the Republic, Office of the High Commissioner for Peace, National Plan for the Dissemination of IHL, Reply of the Ministry of Foreign Affairs to Questionnaire No. 012 of Commission II of the House of Representatives, 7 October 1994, p. 6.

²⁶³ Report on the Practice of Colombia, 1998, Chapter 4.1, referring to Presidential Council, Proposal of the Government to the Coordinator Guerrillera Simón Bolívar to humanise war, Draft Internal Working Paper, Part entitled “El Derecho Internacional Humanitario”, § 2(h).

²⁶⁴ Report on the Practice of Egypt, 1997, Chapter 4.1.

²⁶⁵ Germany, Statement at the 26th International Conference of the Red Cross and Red Crescent, Geneva, 3–7 December 1995.

263. According to the Report on the Practice of Israel, "the IDF does not practice or condone the attack, destruction, removal or the rendering useless of objects indispensable to the survival of the civilian population of the enemy, for the specific purpose of denying them for their sustenance value to the enemy or its civilian population".²⁶⁶

264. According to the Report on the Practice of Jordan, "Islamic law proscribes...the attack on objects that are indispensable to the survival of the civilian population".²⁶⁷

265. In 1990, in a letter addressed to the UN Secretary-General, Kuwait denounced Iraqi "practices, which are an affront to mankind and which violate all the values of Islam and of civilization, the principles of human rights and the relevant Geneva Conventions...[including] [c]learing of warehouses and co-operative societies of foodstuffs with a view to causing starvation among citizens".²⁶⁸

266. The Report on the Practice of Malaysia states that Malaysia's security forces, during the conflict against the communist opposition, left unharmed objects indispensable to the survival of the civilian population, such as cattle and water sources or supply.²⁶⁹

267. The Guidelines on Evacuations adopted in 1991 by the Presidential Human Rights Committee of the Philippines provides that:

The military is prohibited to attack, destroy, remove or render useless objects indispensable for the survival of the civilian population, such as foodstuffs, agricultural means for the production of foodstuffs, crops, livestock, drinking water installations and supplies and irrigation works (Protocol II, Art. 14).²⁷⁰

268. On the basis of replies by army officers to a questionnaire, the Report on the Practice of Rwanda notes that it is a crime to attack objects indispensable to the survival of the civilian population, stating that it violates the principle of distinction between civilian objects and military objectives.²⁷¹

269. At the CDDH, the UK sponsored a draft article on the prohibition of starvation which contained the rule that it is "forbidden to attack, destroy, remove or render useless, crops, drinking water supplies, irrigation works, livestock, foodstuffs or food producing areas for the purpose of denying them to the enemy or the civilian population".²⁷² The UK favoured an exhaustive list of objects

²⁶⁶ Report on the Practice of Israel, 1997, Chapter 4.1.

²⁶⁷ Report on the Practice of Jordan, 1997, Chapter 4.1.

²⁶⁸ Kuwait, Letter dated 5 August 1990 to the UN Secretary-General, UN Doc. S/21439, 5 August 1990.

²⁶⁹ Report on the Practice of Malaysia, 1997, Chapter 4.1.

²⁷⁰ Philippines, Presidential Human Rights Committee, Resolution No. 91-001 Providing for Guidelines on Evacuations, Manila, 26 March 1991, § 2.

²⁷¹ Report on the Practice of Rwanda, 1997, Replies by army officers to a questionnaire, Chapter 4.1.

²⁷² UK, Proposal of amendment to Article 48 of draft AP I submitted to the CDDH, *Official Records*, Vol. III, CDDH/III/67, 19 March 1974, p. 218, § 2.

considered indispensable to the survival of the civilian population instead of an illustrative list "to achieve greater clarity".²⁷³

270. During the Korean War, the Commanding General of the US Far East Air Force refused to bomb dams in North Korea since he was "concerned over the political impact of destroying food crops" which would have resulted from such attacks.²⁷⁴

271. In 1992, during a debated in the UN Security Council on the situation in Bosnia and Herzegovina, Venezuela declared that:

Nor must we forget that the United Nations Convention on the Prevention and Punishment of the Crime of Genocide clearly states that genocide means inflicting on a group of human beings conditions of life calculated to bring about its physical destruction in whole or in part. Article 54 of the 1977 Additional Protocol I to the Geneva Conventions also prohibits the destruction of infrastructure basic to life, such as electricity, drinking water, sewage and other public services. Such are the acts today being perpetrated in the Republic of Bosnia and Herzegovina.²⁷⁵

272. In 1991, a State denounced the destruction of waterways and electrical transmission as violations of international law.²⁷⁶

273. In a letter to the ICRC in 1991, a State strongly criticised the intention of another State to destroy vital facilities in a third State.²⁷⁷

III. Practice of International Organisations and Conferences

United Nations

274. In 1993, in a statement by its President regarding the situation in Sarajevo, the UN Security Council stated that "it demands an end to the disruption of public utilities (including water, electricity, fuel and communications) by the Bosnian Serb party".²⁷⁸

275. In 1998, in a statement by its President regarding the situation in the DRC, the UN Security Council recalled "the unacceptability of the destruction or rendering useless of objects indispensable to the survival of the civilian population, and in particular of using cuts in the electricity and water supply as a weapon against the population".²⁷⁹

276. In a resolution adopted in 1990, the UN Commission on Human Rights expressed its "deepest concern at the worsening of the armed conflict in El

²⁷³ UK, Statement at the CDDH, *Official Records*, Vol. XIV, CDDH/III/SR.16, 19 March 1974, p. 139, § 56, see also Statement at the CDDH, *Official Records*, Vol. IV, CDDH/III/SR.17, 19 March 1974, p. 148, § 31.

²⁷⁴ Robert F. Futrell, *The United States Air Force in Korea 1950–1953*, Office of Air Force History, US Air Force, Washington, D.C., Revised edition, 1983, p. 667.

²⁷⁵ Venezuela, Statement before the UN Security Council, UN Doc. S/PV. 3119, 6 October 1992, p. 9.

²⁷⁶ ICRC archive document.

²⁷⁷ ICRC archive document.

²⁷⁸ UN Security Council, Statement by the President, UN Doc. S/26134, 22 July 1993, p. 1.

²⁷⁹ UN Security Council, Statement by the President, UN Doc. S/PRST/1998/26, 31 August 1998, p. 1.

Salvador". It also expressed its "serious concern at the systematic attacks on the economic infrastructure which severely impaired the present and future enjoyment of important economic, social and cultural rights by the Salvadorian people" and requested that the parties to the conflict "guarantee respect for humanitarian standards applicable to non-international armed conflicts such as that in El Salvador".²⁸⁰

277. In a resolution adopted in 1993 on the situation of human rights in Iraq, the UN Sub-Commission on Human Rights expressed its deep concern about "the programme undertaken by the Iraqi Government to drain the southern marshlands". It also called upon the Iraqi government to stop "all draining schemes and destruction of the marshes" in southern Iraq.²⁸¹

278. In a resolution adopted in 1995 on the situation of human rights in Iraq, the UN Sub-Commission on Human Rights expressed its concern about "economic policy decisions depriving part of the national territory of supplies of medicines and foodstuffs", as well as about "information that the population continues to flee the marshlands region . . . because of . . . the programme conducted by the Iraqi Government to drain the southern marshlands, which ha[s] led to a mass exodus". The Sub-Commission called upon the Iraqi government immediately "to cease all draining schemes and destruction of the marshes".²⁸²

279. In a resolution adopted in 1996 on the situation of human rights in Iraq, the UN Sub-Commission on Human Rights expressed its concern about "economic policy decisions depriving part of the national territory of supplies of medicines and foodstuffs".²⁸³

280. In 1993, in a report on the situation of human rights in the territory of the former Yugoslavia, the Special Rapporteur of the UN Commission on Human Rights denounced the destruction of water-treatment stations in Bosnia and Herzegovina, which had exposed the civilian population to dehydration and disease.²⁸⁴

281. In 1998, the UN High Commissioner for Human Rights and the UN Under-Secretary-General for Humanitarian Affairs issued a joint statement on the situation in the DRC in which they expressed their concern that:

The humanitarian situation on the ground is steadily deteriorating, in particular in Kinshasa where electricity and water supplies have been disrupted sporadically over recent days . . . The United Nations and its agencies call on those who instigated these acts to immediately restore all vital basic services, in particular power supply and drinking-water to the capital, and to refrain from wilfully endangering the lives of thousands of innocent men, women and children.²⁸⁵

²⁸⁰ UN Commission on Human Rights, Res. 1990/77, 7 March 1990, §§ 4 and 10.

²⁸¹ UN Sub-Commission on Human Rights, Res. 1993/20, 20 August 1993, preamble and § 2.

²⁸² UN Sub-Commission on Human Rights, Res. 1995/3, 18 August 1995, preamble and § 2.

²⁸³ UN Sub-Commission on Human Rights, Res. 1996/5, 19 August 1996, preamble.

²⁸⁴ UN Commission on Human Rights, Special Rapporteur on the Situation of Human Rights in the Former Yugoslavia, Press Release HR/3462, 30 July 1993, § 6.

²⁸⁵ UN High Commissioner for Human Rights and UN Under-Secretary-General for Humanitarian Affairs, Press Release on the situation in the Democratic Republic of the Congo, 21 August 1998, §§ 4 and 5.

282. In 1994, in its interim report on grave violations of IHL in Rwanda, the UN Commission of Experts Established pursuant to Paragraph 1 of Security Council Resolution 935 (1994) determined that certain provisions of AP II, including Article 14, were violated in Rwanda “on a systematic, widespread and flagrant basis”.²⁸⁶

Other International Organisations

283. In a press statement issued in 1998 on the situation in the DRC, the EU Presidency condemned “acts of violence against civilians and any actions having a direct impact on the population, like . . . activities causing unnecessary suffering, as for instance the interruption of the provision of electricity that has severe humanitarian . . . consequences”.²⁸⁷

284. In a resolution on health and war adopted in 1995, the OAU Conference of African Ministers of Health called upon member States to ban “the destruction or putting out of use the indispensable goods for the survival of the civilian population, such as food, livestock, drinking water installations and reservoirs and irrigation infrastructures”.²⁸⁸

285. In 1991, the observers of an organisation qualified the systematic destruction of villages and hospitals by the armed forces of a separatist entity as contraventions of Article 14 AP II.²⁸⁹

International Conferences

286. The 26th International Conference of the Red Cross and Red Crescent in 1995 adopted a resolution on the protection of the civilian population in period of armed conflict in which it stressed “the prohibition on attacking, destroying, removing or rendering useless any objects indispensable to the survival of the civilian population” and further stressed that “water is a vital resource for victims of armed conflict and the civilian population and is indispensable to their survival”.²⁹⁰

287. The Plan of Action for the years 2000–2003 adopted in 1999 by the 27th International Conference of the Red Cross and Red Crescent proposed that “States stress the provisions of international humanitarian law . . . on attacking, destroying, removing or rendering useless, for that purpose, objects indispensable to the survival of the civilian population”.²⁹¹

²⁸⁶ UN Commission of Experts Established pursuant to Paragraph 1 of Security Council Resolution 935 (1994), Interim report, UN Doc. S/1994/1125, 4 October 1994, Annex, § 107.

²⁸⁷ EU, Press Statement by the Presidency on the situation in the Democratic Republic of the Congo, 27 August 1998.

²⁸⁸ OAU, Conference of African Ministers of Health, 26–28 April 1995, Res. 14(V), § 5(b).

²⁸⁹ ICRC archive document.

²⁹⁰ 26th International Conference of the Red Cross and Red Crescent, Geneva, 3–7 December 1995, Res. II, §§ E(b) and F(a).

²⁹¹ 27th International Conference of the Red Cross and Red Crescent, Geneva, 31 October–6 November 1999, Res. I, Annex 2, Plan of Action for the years 2000–2003, Actions proposed for final goal 1.1, § 2.

IV. Practice of International Judicial and Quasi-judicial Bodies

288. No practice was found.

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

289. To fulfil its task of disseminating IHL, the ICRC has delegates around the world teaching armed and security forces that:

It is prohibited to attack, destroy, remove or render useless objects indispensable to the survival of the civilian population (e.g. foodstuffs, agricultural areas producing foodstuffs, crops, livestock, drinking water installations and supplies, irrigation works) for the specific purpose of starvation.²⁹²

290. In an appeal issued in 1979 with respect to the conflict in Rhodesia/Zimbabwe, the ICRC specifically requested the Transitional Government in Salisbury to “stop the destruction and confiscation by its armed forces of goods (food stocks, cattle) that are essential for the survival of the civilian population in the war-affected areas”.²⁹³

291. In a Memorandum on the Applicability of International Humanitarian Law sent in 1990 to all States party to the Geneva Conventions in the context of the Gulf War, the ICRC stated that:

The ICRC invites States which are not party to 1977 Protocol I to respect, in the event of armed conflict, the following articles of the Protocol, which stem from the basic principle of civilian immunity from attack:

- Article 54: protection of objects indispensable to the survival of the civilian population.²⁹⁴

292. In an appeal issued in 1991, the Croatian Red Cross and other Croatian organisations qualified the destruction of waterways and electrical transmission during the conflict in the former Yugoslavia as violations of the Geneva Conventions.²⁹⁵

293. In an appeal issued in 1991, the ICRC enjoined the parties to the conflict in Yugoslavia “not to attack, destroy, remove or render useless objects indispensable to the survival of the civilian population”.²⁹⁶

²⁹² Frédéric de Mulinen, *Handbook on the Law of War for Armed Forces*, ICRC, Geneva, 1987, § 396.

²⁹³ ICRC, Conflict in Southern Africa: ICRC appeal, 19 March 1979, § 6, *IRRC*, No. 209, 1979, p. 88.

²⁹⁴ ICRC, Memorandum on the Applicability of International Humanitarian Law, 14 December 1990, § II, *IRRC*, No. 280, 1991, p. 25.

²⁹⁵ Croatian Red Cross, Bishop's conference Caritas, Medical section of the “Matica hrvatska” central national cultural association, Almae matris Croaticae alumni and the Croatian society for victimology, Appeal to all international health and humanitarian organisations, S.O.S. for people oppressed in Croatia, 18 July 1991.

²⁹⁶ ICRC, Appeal in behalf of civilians in Yugoslavia, Geneva, 4 October 1991.

294. In an appeal issued in 1991, a Red Cross Society denounced the destruction of the only bakery in a town affected by a conflict.²⁹⁷

295. At its Budapest Session in 1991, the Council of Delegates adopted a resolution on the protection of the civilian population against famine in situations of armed conflict. In it, it reminded the authorities concerned and the armed forces under their command of their "obligation to apply international humanitarian law, in particular the following humanitarian principles . . . the prohibition on attacking, destroying, removing or rendering useless objects indispensable to the survival of the civilian population".²⁹⁸

296. In a press release issued in 1992, the ICRC enjoined the parties to the conflict in Bosnia and Herzegovina "not to attack, destroy, remove or render useless objects indispensable to the survival of the civilian population".²⁹⁹

297. In two press releases issued in 1992, the ICRC enjoined the parties to the conflict in Afghanistan not to attack, destroy, remove or render useless objects indispensable to the survival of the civilian population.³⁰⁰

298. In 1994, in a Memorandum on Respect for International Humanitarian Law in Angola, the ICRC stated that "it is prohibited to attack, destroy or render useless objects indispensable to the survival of the civilian population, such as foodstuffs, crops, livestock, drinking water installations and supplies".³⁰¹

299. In 1994, in a Memorandum on Compliance with International Humanitarian Law by the Forces Participating in Opération Turquoise in the Great Lakes region, the ICRC stated that "objects indispensable to the survival of the civilian population, such as foodstuffs, crops, livestock and drinking water installations and supplies, must not be attacked, destroyed or rendered useless".³⁰²

VI. *Other Practice*

300. In a resolution adopted during its Edinburgh Session in 1969, the Institute of International Law stated that "neither the civilian population nor any of the objects expressly protected by conventions or agreements can be considered

²⁹⁷ ICRC archive document.

²⁹⁸ International Red Cross and Red Crescent Movement, Council of Delegates, Budapest Session, 28–30 November 1991, Res. 13, § 1.

²⁹⁹ ICRC, Press Release No. 1705, Bosnia and Herzegovina: ICRC calls for protection of civilians, 10 April 1992.

³⁰⁰ ICRC, Press Release No. 1712, Afghanistan: ICRC appeals for compliance with humanitarian rules, 5 May 1992; Press Release No. 1726, Afghanistan: New ICRC appeal for compliance with humanitarian rules, 14 August 1992.

³⁰¹ ICRC, Memorandum on Respect for International Humanitarian Law in Angola, 8 June 1994, § II, *IRRC*, No. 320, 1997, p. 504.

³⁰² ICRC, Memorandum on Compliance with International Humanitarian Law by the Forces Participating in Opération Turquoise, 23 June 1994, § II, reprinted in Marco Sassòli and Antoine A. Bouvier, *How Does Law Protect in War?*, ICRC, Geneva, 1999, p. 1309.

as military objectives, nor yet . . . under whatsoever circumstances the means indispensable for the survival of the civilian population".³⁰³

301. In 1979, an armed group wrote to the ICRC to confirm its commitment to IHL and to denounce the extermination and destruction of numerous cattle and farms in the course of a conflict.³⁰⁴

302. The Declaration of Minimum Humanitarian Standards, adopted by an expert meeting convened by the Institute for Human Rights of Åbo Akademi University in Turku/Åbo, Finland in 1990, states that "deliberate deprivation of access to necessary food, drinking water and medicine" is prohibited.³⁰⁵

303. Rule A7 of the Rules of International Humanitarian Law Governing the Conduct of Hostilities in Non-international Armed Conflicts, adopted in 1990 by the Council of the IHL, provides that "the general rule prohibiting attacks against the civilian population implies, as a corollary, the prohibition to attack, destroy, remove or render useless objects indispensable to the survival of the civilian population".³⁰⁶

304. In 1995, a separatist entity denounced to a UN force the destruction of inhabited places, industrial facilities, food and water stocks in the course of a conflict as a method of warfare against civilians.³⁰⁷

305. In 1995, the IHL stated that any declaration on minimum humanitarian standards should be based on "principles . . . of *jus cogens*, expressing basic humanitarian consideration[s] which are recognized to be universally binding". According to the IHL, this includes the principle that "it is prohibited to attack, destroy, remove or render useless objects indispensable for the survival of the civilian population".³⁰⁸

306. In 1996, an armed opposition group denounced to the ICRC the driving away of cattle and removal of food supplies by the governmental forces.³⁰⁹

307. The Report on SPLM/A Practice notes that the SPLM/A, when attacking government garrisons and other positions, does not spare objects indispensable to the survival of the civilian population. The report cites examples such as the indiscriminate bombing of Juba and other towns in southern Sudan.³¹⁰

³⁰³ Institute of International Law, Edinburgh Session, Resolution on the Distinction between Military Objectives and Non-military Objectives in General and Particularly the Problems Associated with Weapons of Mass Destruction, 9 September 1969, § 3.

³⁰⁴ ICRC archive document.

³⁰⁵ Declaration of Minimum Humanitarian Standards, adopted by an expert meeting convened by the Institute for Human Rights, Åbo Akademi University, Turku/Åbo, 30 November–2 December 1990, Article 3(2)(f), *IRRC*, No. 282, 1991, p. 331.

³⁰⁶ IHL, Rules of International Humanitarian Law Governing the Conduct of Hostilities in Non-international Armed Conflicts, Rule A7, *IRRC*, No. 278, 1990, p. 393.

³⁰⁷ ICRC archive document.

³⁰⁸ IHL, Comments on the Declaration of Minimum Humanitarian Standards submitted to the UN Secretary-General, §§ 1 and 15, reprinted in the Report of the Secretary-General prepared pursuant to UN Commission on Human Rights resolution 1995/29, UN Doc. E/CN.4/1996/80, 28 November 1995, pp. 8 and 10.

³⁰⁹ ICRC archive document.

³¹⁰ Report on SPLM/A Practice, 1998, Chapter 4.1.

Attacks against objects used to sustain or support the adverse party

I. Treaties and Other Instruments

Treaties

308. Article 54(3) AP I provides that the prohibition contained in Article 54(2) AP I to attack, destroy, remove, or render useless objects indispensable to the survival of the civilian population does not apply if the objects indispensable to the survival of the civilian population are used by an adverse party:

- a) as sustenance solely for the members of its armed forces; or
- b) if not as sustenance, then in direct support of military action, provided, however, that in no event shall actions against these objects be taken which may be expected to leave the civilian population with such inadequate food or water as to cause its starvation or force its movement.

Article 54 AP I was adopted by consensus.³¹¹

309. In its reservation made upon ratification of the 1996 Amended Protocol II to the CCW, the US stated that “the United States reserves the right to use other devices . . . to destroy any stock of food or drink that is judged likely to be used by an enemy military force, if due precautions are taken for the safety of the civilian population”.³¹²

Other Instruments

310. Article 15 of the 1863 Lieber Code states that “military necessity . . . allows . . . of all withholding of sustenance or means of life from the enemy; of the appropriation of whatever an enemy’s country affords necessary for the subsistence and safety of the army”.

311. Paragraph 6 of the 1991 Memorandum of Understanding on the Application of IHL between Croatia and the SFRY requires that hostilities be conducted in accordance with Article 54(3) AP I.

312. Paragraph 2.5 of the 1992 Agreement on the Application of IHL between the Parties to the Conflict in Bosnia and Herzegovina requires that hostilities be conducted in accordance with Article 54(3) AP I.

II. National Practice

Military Manuals

313. Australia’s Defence Force Manual states that:

Foodstuffs and agricultural areas producing them, crops, livestock and supplies of drinking water intended for the sole use of the armed forces may be attacked and destroyed. Extreme care will need to be exercised when making some objectives a

³¹¹ CDDH, *Official Records*, Vol. VI, CDDH/SR.42, 27 May 1977, p. 208.

³¹² US, Reservation made upon acceptance of Amended Protocol II to the CCW, 24 May 1999, § I.

military target, eg drinking water installations, as such objects are hardly likely to be used solely for the benefit of armed forces.

When objects are used for a purpose other than sustenance of members of the armed forces and such use is in direct support of military action, attack on such objects is lawful unless that action can be expected to leave the civilian population with such inadequate food or water as to cause its starvation or force its movement.³¹³

314. Belgium's Law of War Manual states that there is a prohibition to attack, destroy or render useless objects indispensable to the survival of the civilian population, "except if these objects are used by the adversary solely for the sustenance of its armed forces, or if that is not the case, if they serve nonetheless in direct support of military action".³¹⁴

315. Canada's LOAC Manual states that:

Objects indispensable to the survival of the civilian population may be attacked if they are used by an adverse party:

- a. as sustenance solely for the member[s] of its armed forces; or
- b. in direct support of military action, provided that actions against these objects do not leave the civilian population with such inadequate food or water so as to cause its starvation or force its movement.³¹⁵

316. Israel's Manual on the Laws of War states that "it is allowed, of course, to attack the enemy army's means of support or targets forming the foundation for the direct support of the enemy army, provided that the attack does not leave the civilian population with insufficient means to ward off its starvation".³¹⁶

317. The Military Manual of the Netherlands provides that objects indispensable to the survival of the civilian population are not protected if these objects are used as sustenance only for the members of the opposing armed forces or, if not as sustenance, then in direct support of military action of the adverse party.³¹⁷

318. New Zealand's Military Manual provides that the prohibition to attack, destroy, remove or render useless objects indispensable to the survival of the civilian population

shall not apply to such of the objects covered by it as are used by an adverse Party:

- a. as sustenance solely for the members of its armed forces; or
- b. if not as sustenance, then in direct support of military action, provided, however, that in no event shall actions against these objects be taken which may be expected to leave the civilian population with such inadequate food or water as to cause its starvation or force its movement.³¹⁸

³¹³ Australia, *Defence Force Manual* (1994), §§ 710 and 711, see also § 931.

³¹⁴ Belgium, *Law of War Manual* (1983), p. 28.

³¹⁵ Canada, *LOAC Manual* (1999), p. 4-8, § 80.

³¹⁶ Israel, *Manual on the Laws of War* (1998), p. 35.

³¹⁷ Netherlands, *Military Manual* (1993), p. V-8.

³¹⁸ New Zealand, *Military Manual* (1992), §§ 504(3) (land warfare) and 613(3) (air warfare).

319. Spain's LOAC Manual provides that the prohibition of attacks against objects indispensable to the survival of the civilian population does not apply if the adverse party uses such objects as sustenance solely for the members of its armed forces or in direct support of military action. However, any attack against such objects must not leave the civilian population without adequate food or water such as would cause it to starve or force it to move.³¹⁹

320. Sweden's IHL Manual states that:

It is permitted to attack stocks of foodstuffs, water reservoirs, etc. which are *in the hands of the adversary's armed forces*. In practice, however, it would probably be very hard to determine whether a food transport or store was intended *only* for the armed forces or also for the civilian population. Also, military food transports may in some cases be intended for protected groups such as prisoners-of-war or civilians in the hands of one of the belligerents.

... Attacks may also be made on *objects being used by the adverse party in direct support of his military operations*. This exception may apply mainly when enemy units are for example using a cornfield for advance, or some other object for concealing military units.

The text uses the expression "military action" as opposed to the often-used expression "military operations" which is a broader concept. Thus the exception applies only if the attack entails a *direct* advantage in a given tactical situation. As against this, it is not permitted to attack an irrigation works, for example, with the excuse that this may be an advantage in a future operation, i.e. an indirect advantage.³²⁰ [emphasis in original]

321. The YPA Military Manual of the SFRY (FRY) provides that objects used solely by the armed forces or for immediate assistance to military operations are not included in the protection of objects indispensable to the survival of the civilian population.³²¹

National Legislation

322. Argentina's Draft Code of Military Justice punishes any soldier who "attacks, destroys, removes or renders useless objects indispensable to the survival of the civilian population, unless the adverse party uses such objects in direct support of military action or as means of sustenance exclusively for members of the armed forces".³²²

323. Spain's Penal Code punishes "anyone who, during an armed conflict, ... attacks, destroys, removes or renders useless objects indispensable to the survival of the civilian population, unless the adverse Party uses the said objects in direct support of military action or as means of sustenance exclusively for members of its Armed Forces".³²³

³¹⁹ Spain, *LOAC Manual* (1996), Vol. I, §§ 3.3.c.(4) and 4.5.b.(2)b).

³²⁰ Sweden, *IHL Manual* (1991), Section 3.2.1.5, pp. 60-61.

³²¹ SFRY (FRY), *YPA Military Manual* (1988), § 74.

³²² Argentina, *Draft Code of Military Justice* (1998), Article 293, introducing a new Article 877(3) in the *Code of Military Justice as amended* (1951).

³²³ Spain, *Penal Code* (1995), Article 613(1)(c).

National Case-law

324. No practice was found.

Other National Practice

325. In 1994, in reply to a questionnaire from the House of Representatives, Colombia's Ministry of Foreign Affairs quoted Article 14 AP II. It added that:

What this article prohibits is the starvation of civilians. Therefore if one of the parties considers that an agricultural area with its crops, its livestock and its supply of clean water is supporting the military effort of the adverse party, or if it simply serves to feed the civilian population which is suspected of collaborating with the adverse party, that party can claim that it is meeting the objective of Article 14, that is, not starving the population, by moving the population concerned to another place.³²⁴

326. The Report on the Practice of Malaysia mentions the destruction by Malaysian forces of food supplies belonging to the enemy during the conflict against the communist opposition. These methods did not, according to the report, cause starvation of the civilian population.³²⁵

327. In 1973, a Deputy Legal Adviser of the US Department of State declared that "the generally accepted rule today is that crops and food supplies may be destroyed if they are intended solely for the use of armed forces".³²⁶

328. According to the Report on US Practice, it is the *opinio juris* of the US that foodstuffs and crops may be destroyed if it can be determined that they are destined for enemy armed forces.³²⁷

III. Practice of International Organisations and Conferences

329. No practice was found.

IV. Practice of International Judicial and Quasi-judicial Bodies

330. No practice was found.

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

331. To fulfil its task of disseminating IHL, the ICRC has delegates around the world teaching armed and security forces that:

³²⁴ Colombia, Presidency of the Republic, Office of the High Commissioner for Peace, National Plan for the Dissemination of IHL, Reply of the Ministry of Foreign Affairs to Questionnaire No. 012 of Commission II of the House of Representatives, 7 October 1994, p. 6.

³²⁵ Report on the Practice of Malaysia, 1997, Chapter 4.1.

³²⁶ US, Address by George H. Aldrich, Deputy Legal Adviser of the Department of State, 13 April 1973, reprinted in Arthur W. Rovine, *Digest of United States Practice in International Law, 1973*, Department of State Publication 8756, Washington, D.C., 1974, pp. 503–504.

³²⁷ Report on US Practice, 1997, Chapter 4.1.

Objects indispensable to the survival of the civilian population are excluded from protection, if: a) they are used solely for sustenance of the armed forces; or b) they are used in direct support of military action (but the civilian population may not be thus reduced to starvation or forced to move).³²⁸

VI. *Other Practice*

332. No practice was found.

Attacks in case of military necessity

I. Treaties and Other Instruments

Treaties

333. Article 54(5) AP I provides that:

In recognition of the vital requirements of any Party to the conflict in the defence of its national territory against invasion, derogation from the prohibitions contained in paragraph 2 [to attack, destroy, remove or render useless objects indispensable to the survival of the civilian population] may be made by a Party to the conflict within such territory under its own control where required by imperative military necessity.

Article 54 AP I was adopted by consensus.³²⁹

Other Instruments

334. Paragraph 6 of the 1991 Memorandum of Understanding on the Application of IHL between Croatia and the SFRY requires that hostilities be conducted in accordance with Article 54(5) AP I.

335. Paragraph 2.5 of the 1992 Agreement on the Application of IHL between the Parties to the Conflict in Bosnia and Herzegovina requires that hostilities be conducted in accordance with Article 54(5) AP I.

II. National Practice

Military Manuals

336. Australia's *Commanders' Guide* provides that "the ADF may not embark on a scorched earth policy within Australia or its territories unless under their control at the time of devastation and driven by imperative military necessity. It is still permitted, for example, to destroy a wheat-field to deny concealment to enemy forces."³³⁰

³²⁸ Frédéric de Mulinen, *Handbook on the Law of War for Armed Forces*, ICRC, Geneva, 1987, § 397.

³²⁹ CDDH, *Official Records*, Vol. VI, CDDH/SR.42, 27 May 1977, p. 208.

³³⁰ Australia, *Commanders' Guide* (1994), § 908.

337. Australia's Defence Force Manual states that:

It is permissible to destroy objects which are indispensable to the survival of the civilian population in the course of ordinary military operations only if it is militarily imperative to do so, for example to destroy a wheat field to deny concealment to enemy forces, because this is a tactical measure and does not amount to a scorched earth policy. The ADF may embark on a scorched earth policy in territory under Australian control where imperative military necessity requires it to do so to protect Australian national territory from invasion.³³¹

338. Canada's LOAC Manual states that:

Where a party to a conflict is defending its national territory against invasion, it may destroy objects indispensable to the survival of the civilian population with intent to deny their use by the enemy if:

- a. the objects are within national territory of and under the control of the party; and
- b. their destruction is required by imperative military necessity.

...
Where such an extreme measure is taken, the destruction of objects indispensable to the survival of the civilian population should not leave the civilian population with such inadequate food or water as to cause its starvation or force its movement.³³²

339. Colombia's Basic Military Manual, in a chapter entitled "Provisions of IHL applicable in Colombia", states that "in all armed conflicts" it is prohibited to order a scorched earth policy as a method of combat.³³³

340. Germany's Military Manual provides that "any deviations from this prohibition [attacking objects indispensable for the survival of the civilian population] shall be permissible only on friendly territory if required by imperative military necessity".³³⁴

341. Israel's Manual on the Laws of War states that:

Conducting a war by the "scorched earth" method, meaning the deliberate destruction of food products, agricultural areas, sanitation facilities, etc. with a view to inflicting starvation or suffering on the civilian population – is forbidden . . .

An exception to the "scorched earth" prohibition is the implementation of such a policy on one's own territory, as opposed to enemy territory. On the nation's sovereign territory, the local army is allowed to retreat leaving behind "scorched earth", so as not to provide sustenance for the advancing enemy forces, even at the cost of hurting the population identifying with it.³³⁵

342. The Military Manual of the Netherlands provides that, for any party to the conflict defending its national territory, the destruction of or the fact of rendering useless objects indispensable to the survival of the civilian population "may be made . . . within such territory under its own control where required by

³³¹ Australia, *Defence Force Manual* (1994), § 712, see also § 931(c).

³³² Canada, *LOAC Manual* (1999), pp. 6-4 and 6-5, §§ 42 and 43, see also p. 4-8, § 82.

³³³ Colombia, *Basic Military Manual* (1995), p. 49.

³³⁴ Germany, *Military Manual* (1992), § 463.

³³⁵ Israel, *Manual on the Laws of War* (1998), p. 35.

imperative military necessity". It adds that the flooding of parts of one's own territory is not forbidden by the rules prohibiting the destruction of objects indispensable to the survival of the civilian population.³³⁶

343. New Zealand's Military Manual states that:

In recognition of the vital requirements of any Party to the conflict in the defence of its national territory against invasion, derogation from the prohibitions contained in paragraph 2 [prohibition to attack, destroy, remove or render useless objects indispensable to the survival of the civilian population] may be made by a Party to the conflict within such territory under its own control where required by imperative military necessity.

...

As a result of this provision, Parties may no longer embark on a scorched earth policy with the intention of starving civilians, even in their national territory, unless that part of the territory is under their control at the time of devastation: scorched earth is no longer available as an offensive policy. It is still permissible to destroy objects indispensable to the survival of the civilian population in the course of ordinary operations if it is militarily necessary for other reasons, for example, to destroy a wheat field to deny concealment to enemy forces.³³⁷

344. Spain's LOAC Manual provides that the prohibition of attacks against objects indispensable to the survival of the civilian population does not apply where derogation of the prohibition is required by imperative military necessity.³³⁸ It allows one derogation from the prohibition of attacks against objects indispensable to the survival of the civilian population if the defence of the national territory against the danger of an invasion imperatively so demands.³³⁹

345. Sweden's IHL Manual states that:

Another question addressed in Article 54 [AP I] is the possibility for one party faced with an approaching hostile attack to resort to widespread destruction within a given area – the method usually termed "burnt earth tactics". Such steps are permitted under 54:5 where they are required by overriding military necessity and concern only *one party's national territory*. However, this latter addition implies important limitations. Thus it is not allowed to attack, for example by aerial bombardment, an area occupied by the adversary if the purpose is to impede the civilian population's supply of indispensable necessities.³⁴⁰ [emphasis in original]

346. Switzerland's Basic Military Manual states that "it is prohibited to employ scorched earth tactics".³⁴¹

347. The YPA Military Manual of the SFRY (FRY) provides an exception to the prohibition of attacks against objects indispensable to the survival of the

³³⁶ Netherlands, *Military Manual* (1993), p. V-8.

³³⁷ New Zealand, *Military Manual* (1992), § 504(5), including footnote 10.

³³⁸ Spain, *LOAC Manual* (1996), Vol. I, § 4.5.b.(2).b).

³³⁹ Spain, *LOAC Manual* (1996), Vol. I, § 3.3.c.(4).

³⁴⁰ Sweden, *IHL Manual* (1991), Section 3.2.1.5, p. 61.

³⁴¹ Switzerland, *Basic Military Manual* (1987), Article 35, commentary.

civilian population in times of enemy invasion of the national territory, if required by reason of military necessity.³⁴²

National Legislation

348. No practice was found.

National Case-law

349. No practice was found.

Other National Practice

350. At the CDDH, Sweden remarked, with reference to the possible exceptions to the prohibition of attacks against objects indispensable to the survival of the civilian population, that it considered a scorched earth policy used to stop an enemy invasion on a party's own territory to be permissible. The Swedish delegate described this strategy as "a deep-rooted practice which should be taken into account".³⁴³

351. In 1973, a Deputy Legal Adviser of the US Department of State declared that "the generally accepted rule today is that crops and food supplies may be destroyed . . . if their destruction is required by military necessity and is not disproportionate to the military advantage gained".³⁴⁴

352. According to the Report on US Practice, the *opinio juris* of the US recognises the legality of attacks against objects indispensable to the survival of the civilian population when required by military necessity.³⁴⁵

III. Practice of International Organisations and Conferences

United Nations

353. In 1996, the Independent Expert of the UN Commission on Human Rights for Somalia described the practices of the different factions, such as the practice of a faction on the verge of losing control of a territory of operating a "scorched earth" policy.³⁴⁶

Other International Organisations

354. No practice was found.

³⁴² SFRY (FRY), *YPA Military Manual* (1988), § 74.

³⁴³ Sweden, Statement at the CDDH, *Official Records*, Vol. XIV, CDDH/III/SR.17, 11 February 1975, p. 145, § 19.

³⁴⁴ US, Address by George H. Aldrich, Deputy Legal Adviser of the Department of State, 13 April 1973, reprinted in Arthur W. Rovine, *Digest of United States Practice in International Law*, 1973, Department of State Publication 8756, Washington, D.C., 1974, pp. 503–504.

³⁴⁵ Report on US Practice, 1997, Chapter 4.1.

³⁴⁶ UN Commission on Human Rights, Independent Expert on Assistance to Somalia in the Field of Human Rights, Report, UN Doc. E/CN.4/1996/14/Add.1, 10 April 1996, § 10.

International Conferences

355. No practice was found.

IV. Practice of International Judicial and Quasi-judicial Bodies

356. No practice was found.

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

357. To fulfil its task of disseminating IHL, the ICRC has delegates around the world teaching armed and security forces that “objects indispensable to the survival of the civilian population are excluded from protection, if: . . . c) the military defence of the national territory against invasion imperatively so requires”.³⁴⁷

VI. Other Practice

358. In 1983, an official of an entity denounced to the ICRC the use of a scorched earth policy by a State.³⁴⁸

359. In 1995, in its comments on the Declaration of Minimum Humanitarian Standards, the IIHL stated that the scorched earth policy was a “practice which causes great suffering to the population . . . affecting both individuals and the basic rights of groups”.³⁴⁹

360. In 1997, the ICRC reported the scorched earth policy applied by the armed forces of a State in government-controlled areas.³⁵⁰

C. Access for Humanitarian Relief to Civilians in Need**General**

Note: For practice concerning the provision of basic necessities to displaced persons, see Chapter 38, section C.

*I. Treaties and Other Instruments**Treaties*

361. Article 23 GC IV provides that:

³⁴⁷ Frédéric de Mulinen, *Handbook on the Law of War for Armed Forces*, ICRC, Geneva, 1987, § 397.

³⁴⁸ ICRC archive document.

³⁴⁹ IIHL, Comments on the Declaration of Minimum Humanitarian Standards submitted to the UN Secretary-General, §§ 1 and 15, reprinted in the Report of the Secretary-General prepared pursuant to UN Commission on Human Rights resolution 1995/29, UN Doc. E/CN.4/1996/80, 28 November 1995, p. 10.

³⁵⁰ ICRC archive document.

Each High Contracting Party shall allow the free passage of all consignments of medical and hospital stores...intended only for civilians of another High Contracting Party, even if the latter is its adversary. It shall likewise permit the free passage of all consignments of essential foodstuffs, clothing and tonics intended for children under fifteen, expectant mothers and maternity cases.

The obligation of a High Contracting Party to allow the free passage of the consignments indicated in the previous paragraph is subject to the condition that this Party is satisfied that there are no serious reasons for fearing:

- (a) that the consignments may be diverted from their destination,
- (b) that the control may not be effective, or
- (c) that a definite advantage may accrue to the military efforts or economy of the enemy through the substitution of the above-mentioned consignments for goods which would otherwise be provided or produced by the enemy or through the release of such material, services or facilities as would otherwise be required for the production of such goods.

The Power which allows the passage of the consignments indicated in the first paragraph of this Article may make such permission conditional on the distribution to the persons benefited thereby being made under the local supervision of the Protecting Powers.

362. Article 70 AP I provides that:

- (2) The Parties to the conflict and each High Contracting Party shall allow and facilitate rapid and unimpeded passage of all relief consignments, equipment and personnel provided in accordance with this Section, even if such assistance is destined for the civilian population of the adverse Party.
- (3) The Parties to the conflict and each High Contracting Party which allows the passage of relief consignments, equipment and personnel in accordance with paragraph 2:
 - (a) shall have the right to prescribe the technical arrangements, including search, under which such passage is permitted;
 - (b) may make such permission conditional on the distribution of this assistance being made under the local supervision of a Protecting Power;
 - (c) shall, in no way whatsoever, divert relief consignments from the purpose for which they are intended nor delay their forwarding, except in cases of urgent necessity in the interest of the civilian population concerned.

Article 70 AP I was adopted by consensus.³⁵¹

363. Article 33 of draft AP II submitted by the ICRC to the CDDH, provided that:

1. If the civilian population is inadequately supplied, in particular, with foodstuffs, clothing, medical and hospital stores and means of shelter, the parties to the conflict shall agree to and facilitate, to the fullest possible extent, those relief actions which are exclusively humanitarian and impartial in character and conducted without any adverse distinction ...

³⁵¹ CDDH, *Official Records*, Vol. VI, CDDH/SR.43, 27 May 1977, p. 245.

2. The parties to the conflict and any High Contracting Party through whose territory supplies must pass shall grant free passage when relief actions are carried out in accordance with the conditions stated in paragraph 1.
3. When prescribing the technical methods relating to assistance or transit, the parties to the conflict and any High Contracting Party shall endeavour to facilitate and accelerate the entry, transport, distribution, or passage of relief.
4. The parties and any High Contracting Party may set as condition that the entry, transport, distribution, or passage of relief be executed under the supervision of an impartial humanitarian body.
5. The parties to the conflict and any High Contracting Party shall in no way whatsoever divert relief consignments from the purpose for which they are intended or delay the forwarding of such consignments.³⁵²

This proposal was amended and adopted by consensus in Committee II of the CDDH.³⁵³ The relevant part of the approved text provided that:

3. The Parties to the conflict and each High Contracting Party through whose territory these relief supplies will pass shall facilitate rapid and unimpeded passage of all relief consignments provided in accordance with the conditions stated in paragraph 2.
4. The Parties to the conflict and each High Contracting Party which allows the passage of relief consignments in accordance with paragraph 3:
 - (a) shall have the right to prescribe the technical arrangements including the right of search under which such passage is allowed;
 - (b) may make such permission conditional on the satisfactory assurance that such relief consignments will be used for the purpose for which they are intended;
 - (c) shall in no way whatsoever divert relief consignments from the purpose for which they are intended or delay their forwarding, except in cases of urgent necessity, in the interest of the civilian population concerned.³⁵⁴

Eventually, however, this paragraph was not included in the final draft article that was voted upon in the plenary session.

364. Paragraph 4 of the 1995 Agreement between the Government of Croatia and UNCRO stipulates that:

Full access by UNCRO and by humanitarian organizations, particularly UNHCR and the ICRC, to the civilian population, for the purpose of providing for the humanitarian needs of the civilian population, will be assured by the authorities of Croatia, to the extent allowed by objective security considerations.

365. Pursuant to Article 7(1)(b) of the 1998 ICC Statute, “extermination” constitutes a crime against humanity “when committed as part of a widespread or systematic attack directed against any civilian population”. Article 7(2)(b) defines extermination as including “the intentional infliction of conditions of

³⁵² CDDH, *Official Records*, Vol. I, Part Three, Draft Additional Protocols, June 1973, p. 43.

³⁵³ CDDH, *Official Records*, Vol. XIII, CDDH/406/Rev.1, 17 March–10 June 1977, p. 385, § 96.

³⁵⁴ CDDH, *Official Records*, Vol. XIII, CDDH/406/Rev.1, 17 March–10 June 1977, p. 424.

life, *inter alia*, the deprivation of access to food and medicine, calculated to bring about the destruction of part of a population”.

366. Under Article 2(b) of the 2002 Statute of the Special Court for Sierra Leone, extermination “as part of a widespread or systematic attack against any civilian population” constitutes a crime against humanity.

Other Instruments

367. In the 1991 Hague Statement on Respect for Humanitarian Principles, the Presidents of the six republics of the former Yugoslavia reminded all fighting units of their obligation to provide “unconditional support for the action of the ICRC in favour of the victims”.

368. Paragraph 9 of the 1991 Memorandum of Understanding on the Application of IHL between Croatia and the SFRY provides that:

The Parties shall allow the free passage of all consignments of medicines and medical supplies, essential foodstuffs and clothing which are destined exclusively for the other party’s civilian population . . .

The Parties shall consent and cooperate with operations to provide the civilian population with exclusively humanitarian, impartial and non-discriminatory assistance. All facilities will be given in particular to the ICRC.

369. Paragraph 2.6 of the 1992 Agreement on the Application of IHL between the Parties to the Conflict in Bosnia and Herzegovina states that:

The Parties shall allow the free passage of all consignments of medicines and medical supplies, essential foodstuffs and clothing which are destined exclusively to the civilian population.

They shall consent to and cooperate with operations to provide the civilian population with exclusively humanitarian, impartial and non-discriminatory assistance. All facilities will be given in particular to the ICRC.

370. In paragraph 2 of the 1992 Bahir Dar Agreement, several parties to the conflict in Somalia agreed to cooperate in creating an atmosphere of peace for the free distribution of relief supplies to reach all needy people throughout the country and “to ensure that all ports, airports and land routes and distribution centres be open for the movement and distribution of relief supplies”.

371. Paragraph I of the 1992 Agreement No. 3 on the ICRC Plan of Action between the Parties to the Conflict in Bosnia and Herzegovina considered that “failure to give the ICRC access to certain areas where humanitarian needs have been identified and to besieged towns” was an illustration of the insecurity reigning in this country.

372. Paragraph 103 of the 1994 San Remo Manual states that “if the civilian population of the blockaded territory is inadequately provided with food and other objects essential for its survival, the blockading party must provide for free passage of such foodstuffs and other essential supplies”.

373. Paragraph 3 of the 1994 Agreement on a Cease-fire in the Republic of Yemen states that “the International Committee of Red Cross and other humanitarian organizations will be granted a possibility to unimpededly deliver humanitarian relief, primarily medicine, water and food supplies to the areas affected as a result of the conflict”.

374. Pursuant to Article 18(b) of the 1996 ILC Draft Code of Crimes against the Peace and Security of Mankind, extermination, “when committed in a systematic manner or on a large scale and instigated or directed by a Government or by any organization or group”, constitutes a crime against humanity.

375. According to Principle 25 of the 1998 Guiding Principles on Internal Displacement, while the primary duty and responsibility for providing humanitarian assistance to IDPs rests with national authorities:

international humanitarian organisations and other appropriate actors have the right to offer their services in support of the internally displaced. Consent thereto shall not be arbitrarily withheld, particularly when authorities concerned are unable or unwilling to provide the required humanitarian assistance . . .

The authorities concerned shall grant and facilitate the free passage of humanitarian assistance and grant persons engaged in the provision of such assistance rapid and unimpeded access to the internally displaced.

376. Section 9.9 of the 1999 UN Secretary-General’s Bulletin states that “the United Nations force shall facilitate the work of relief operations which are humanitarian and impartial in character”.

377. In paragraph 1 of the 1999 Agreement on the Protection and Provision of Humanitarian Assistance in the Sudan, the parties agreed that:

All humanitarian agencies accredited by the United Nations for humanitarian work in the Sudan shall have free and unimpeded access to all war-affected populations in need of assistance and to all war-affected populations for the purposes of assessing whether or not they are in need of humanitarian assistance.

The parties further bound themselves to facilitate, “to the best of their abilities”, access for all humanitarian agencies accredited by the UN for humanitarian work in the Sudan. In paragraph 2, the parties agreed:

to guarantee that all humanitarian assistance targeted and intended for beneficiaries in areas under their respective control will be delivered to those beneficiaries and will not be taxed, diverted or in any other way removed from the intended recipient or given to any other persons or groups.

378. In the 2000 Cairo Plan of Action, the heads of government of African States and the EU urged States, during armed conflicts, to “secure rapid and unimpeded access to the civilian population”.

379. The 2000 UNTAET Regulation No. 2000/15 establishes panels with exclusive jurisdiction over serious criminal offences, including crimes against humanity. According to Section 5(1)(b), “extermination” constitutes a crime

against humanity “when committed as part of a widespread or systematic attack directed against any civilian population”. Section 5(2)(a) defines extermination as including “the intentional infliction of conditions of life, *inter alia*, the deprivation of access to food and medicine, calculated to bring about the destruction of part of a population”.

II. National Practice

Military Manuals

380. Argentina’s Law of War Manual (1969) provides that:

Each High Contracting Party shall allow the free passage of all consignments of medical and hospital stores . . . intended only for civilians of another High Contracting Party, even if the latter is its adversary. It shall likewise permit the free passage of all consignments of essential foodstuffs, clothing and tonics intended for children under fifteen, expectant mothers and maternity cases.

The obligation of a High Contracting Party to allow the free passage of the consignments indicated in the previous paragraph is subject to the condition that this Party is satisfied that there are no serious reasons for fearing:

- (a) that the consignments may be diverted from their destination,
- (b) that the control may not be effective, or
- (c) that a definite advantage may accrue to the military efforts or economy of the enemy through the substitution of the above-mentioned consignments for goods which would otherwise be provided or produced by the enemy or through the release of such material, services or facilities as would otherwise be required for the production of such goods.

The Power which allows the passage of the consignments indicated in the first paragraph of this Article may make such permission conditional on the distribution to the persons benefited thereby being made under the local supervision of the Protecting Powers.³⁵⁵

381. Argentina’s Law of War Manual (1989) stipulates that the parties shall allow the free passage of all consignments of medical and hospital stores and objects necessary for religious worship intended only for civilians of another contracting party, even if the latter is its adversary. It also provides for the obligation to permit the free passage of all consignments of essential foodstuffs, clothing and tonics intended for children under 15, expectant mothers and maternity cases.³⁵⁶

382. Australia’s Commanders’ Guide states in relation to blockades that “there is a duty to consider, in good faith, requests for relief operations, but no duty to agree thereto. Any obligation upon a Party to permit a relief operation is dependent on the agreement of the State in control, given at an appropriate time.”³⁵⁷

³⁵⁵ Argentina, *Law of War Manual* (1969), § 4.006(3).

³⁵⁶ Argentina, *Law of War Manual* (1989), § 4.11.

³⁵⁷ Australia, *Commanders’ Guide* (1994), § 850, footnote 6.

383. Australia's Defence Force Manual provides that "the free passage of medical and hospital stores, essential foodstuffs, clothing, bedding... which are intended for civilians, including those of an enemy, must be allowed".³⁵⁸ In situations of occupation, the manual states that:

The occupying power is under an obligation to allow free passage of all consignments of medical and hospital stores... as well as of essential foodstuffs, clothing and medical supplies intended for children under 15 years of age, expectant mothers and maternity cases, although it may require that distribution of such supplies be under the supervision of the Protecting Power.³⁵⁹

Regarding a situation of blockade, the manual states that:

If the civilian population of the blockaded territory is inadequately provided with food and other objects essential for its survival, the blockading party must provide for free passage of such foodstuffs and other essential supplies, subject to:

- a. the right to prescribe the technical arrangements, including search, under which such passage is permitted; and
- b. the condition that the distribution of such supplies shall be made under the local supervision of a Protecting Power or a humanitarian organisation which offers guarantees of impartiality.³⁶⁰

384. Canada's LOAC Manual states that, in case of siege warfare, "the parties to a conflict are obliged to facilitate rapid and unimpeded passage of all relief consignments, equipment and personnel".³⁶¹ The manual also provides that:

Belligerents must allow the free passage of all consignments of medical and hospital stores and articles necessary for religious worship intended for civilians, including those of an opposing belligerent. This includes all consignments of essential foodstuffs, clothing and tonics intended for children under 15, and expectant and nursing mothers. This obligation is subject to the condition that the belligerent concerned is satisfied that there are no serious grounds for fearing: that the consignments may be diverted from their destination, that control may not be effective, or that the consignments may be of definite advantage to the military effort or economy of the enemy by permitting him to substitute them for goods which he would otherwise have to provide or produce himself.³⁶²

According to the manual, the same obligation to allow free passage of relief consignments intended for civilians in occupied territories applies to the occupying power.³⁶³ It also states that, "within the limits of military or security

³⁵⁸ Australia, *Defence Force Manual* (1994), § 948.

³⁵⁹ Australia, *Defence Force Manual* (1994), § 1216.

³⁶⁰ Australia, *Defence Force Manual* (1994), § 666.

³⁶¹ Canada, *LOAC Manual* (1999), p. 6-4, § 36.

³⁶² Canada, *LOAC Manual* (1999), p. 11-3, § 23, see also p. 8-9, § 68 (obligation to allow free access to objects indispensable to the survival of the civilian population in case the population of a blockaded territory is inadequately supplied therewith).

³⁶³ Canada, *LOAC Manual* (1999), p. 12-4, § 32.

considerations, the belligerents must provide [the ICRC, the local National Red Cross (or equivalent) Society or any other organization that may assist protected persons] with all necessary facilities for giving assistance".³⁶⁴

385. Colombia's Basic Military Manual states the duty to allow relief organisations, such as the Red Cross, to perform humanitarian activities in favour of non-combatants and civilians.³⁶⁵

386. Germany's Military Manual provides that:

If the civilian population of a party to the conflict is inadequately supplied with indispensable goods, relief actions by neutral States or humanitarian organisations shall be permitted. Every State and in particular the adversary, is obliged to grant such relief actions free transit, subject to its right of control.³⁶⁶

It further states that "the occupying power shall agree to relief actions conducted by other States or by humanitarian organisations".³⁶⁷

387. Italy's IHL Manual states that an occupying power has the obligation to accept the despatch of relief materials (foodstuffs, medicines, clothing) by other States or impartial humanitarian organisations, especially if the occupied population is inadequately supplied.³⁶⁸

388. Kenya's LOAC Manual states that:

Parties to the conflict shall allow and facilitate rapid and unimpeded passage of all relief consignments and equipment meant for the civilian population, and the personnel accompanying such relief supplies, even if such assistance is for the civilians of the adverse Party. The parties shall have the right to prescribe the technical arrangements, including search, under which such passage is permitted.

The Parties to the conflict shall protect relief consignments and facilitate their rapid distribution.³⁶⁹

389. The Military Manual of the Netherlands provides that "the parties to the conflict have to give free passage to relief personnel and facilitate the provision of relief. The State giving free passage to relief personnel can make conditions regarding the implementation of the relief action."³⁷⁰

390. New Zealand's Military Manual provides that:

Belligerents must allow the free passage of all consignments of medical and hospital stores and articles necessary for religious worship intended for civilians, including those of an opposing belligerent and all consignments of essential foodstuffs, clothing and tonics intended for children under 15, and expectant and nursing mothers. This obligation is subject to the condition that the belligerent concerned is satisfied that there are no serious grounds for fearing that:

³⁶⁴ Canada, *LOAC Manual* (1999), p. 11-4, § 31.

³⁶⁵ Colombia, *Basic Military Manual* (1995), pp. 21, 22, 30 and 42.

³⁶⁶ Germany, *Military Manual* (1992), § 503.

³⁶⁷ Germany, *Military Manual* (1992), § 569.

³⁶⁸ Italy, *IHL Manual* (1991), Vol. I, § 48(15).

³⁶⁹ Kenya, *LOAC Manual* (1997), Précis No. 4, p. 5.

³⁷⁰ Netherlands, *Military Manual* (1993), p. VIII-4.

- a. the consignments may be diverted from their destination;
- b. control may not be effective; or
- c. the consignments may be of definite advantage to the military effort or economy of the enemy by permitting him to substitute them for goods which he would otherwise have to provide or produce himself.³⁷¹

According to the manual, the occupying power is under the same obligation to allow free passage of relief consignments intended for civilians in occupied territories.³⁷² It also states that, "within the limits of military or security considerations [the ICRC, the local national Red Cross (or equivalent) society or any other organisation that may assist protected persons] must be granted by belligerents all necessary facilities for giving assistance".³⁷³

391. Russia's Military Manual states that the military commander must "give all facilities to the International Committee of the Red Cross and the National Society of Red Cross (Red Crescent) in order for them to carry out their functions on behalf of the victims of armed conflicts".³⁷⁴

392. Sweden's IHL Manual states that:

According to Article 70 of Additional Protocol I to the 1949 Geneva Conventions, relief actions of a humanitarian and impartial character, which do not subject one party or the other to discriminatory treatment, shall "be undertaken, subject to the agreement of the Parties concerned in such relief actions". It is also stated that such offers of relief "shall not be regarded as interference in the armed conflict or as unfriendly acts". No objections can be raised to such relief actions from the point of view of neutrality law.³⁷⁵

393. Switzerland's Basic Military Manual states that "the personnel of accepted humanitarian organisations, relief consignments and equipment must benefit from all necessary facilities, notably free passage," in order to assist civilians who are in a territory temporarily occupied by foreign troops.³⁷⁶

394. The UK Military Manual provides that:

Belligerents must allow the free passage of all consignments of medical and hospital stores and articles necessary for religious worship intended for civilians, including those of an opposing belligerent, and all consignments of essential foodstuffs, clothing and tonics intended for children under 15, and expectant and nursing mothers. This obligation is subject to the condition that the belligerent concerned is satisfied that there are no serious grounds for fearing: that the consignments may be diverted from their destination, that control may not be effective, or that the consignments may be of definite advantage to the military effort or economy of the enemy by permitting him to substitute them for goods which he would otherwise have to provide or produce himself.³⁷⁷

³⁷¹ New Zealand, *Military Manual* (1992), § 1111(1).

³⁷² New Zealand, *Military Manual* (1992), § 1318.

³⁷³ New Zealand, *Military Manual* (1992), § 1115.

³⁷⁴ Russia, *Military Manual* (1990), § 14(b).

³⁷⁵ Sweden, *IHL Manual* (1991), Section 5.7, p. 114.

³⁷⁶ Switzerland, *Basic Military Manual* (1987), Article 155(2).

³⁷⁷ UK, *Military Manual* (1958), § 35.

The manual further states that “if the whole or part of the population of occupied territory suffers from shortage of supplies, the Occupant must agree to relief schemes by all the means at his disposal. The schemes in question will consist in particular of the provision of consignments of foodstuffs, medical supplies and clothing”.³⁷⁸ The manual also stipulates that “within the limits of military or security considerations these organisations [the ICRC, the local national Red Cross (or equivalent) society or any other organization that may assist protected persons] must be granted by the belligerent all necessary facilities for giving assistance”.³⁷⁹

395. The UK LOAC Manual states, with regard to civilians in enemy hands, that “the free passage of medical and hospital stores . . . is guaranteed as well as essential food and clothes for children, expectant mothers and maternity cases”.³⁸⁰

396. The US Field Manual provides that:

Each High Contracting Party shall allow the free passage of all consignments of medical and hospital stores and objects necessary for religious worship intended only for civilians of another High Contracting Party, even if the latter is its adversary. It shall likewise permit the free passage of all consignments of essential foodstuffs, clothing and tonics intended for children under fifteen, expectant mothers and maternity cases.

The obligation of a High Contracting Party to allow the free passage of the consignments indicated in the preceding paragraph is subject to the condition that this Party is satisfied that there are no serious reasons for fearing:

- (a) that the consignments may be diverted from their destination,
- (b) that the control may not be effective, or
- (c) that a definite advantage may accrue to the military efforts or economy of the enemy through the substitution of the above-mentioned consignments for goods which would otherwise be provided by the enemy or through the release of such material, services or facilities as would otherwise be required for the production of such goods.³⁸¹

With regard to occupying powers, the manual states that:

If the whole or part of an occupied territory is inadequately supplied, the Occupying Power shall agree to relief schemes on behalf of the . . . population, and shall facilitate them by all the means at its disposal.

Such schemes . . . shall consist, in particular, of the provision of the consignments of foodstuffs, medical supplies and clothing.³⁸²

The manual also provides that the ICRC, the National Red Cross (or equivalent) Society or any other organization that may assist protected persons “shall be granted all facilities for [assisting protected persons] by the authorities, within the bounds set by military or security considerations”.³⁸³

³⁷⁸ UK, *Military Manual* (1958), § 541. ³⁷⁹ UK, *Military Manual* (1958), § 40.

³⁸⁰ UK, *LOAC Manual* (1981), Section 9, p. 34, § 5. ³⁸¹ US, *Field Manual* (1956), § 262.

³⁸² US, *Field Manual* (1956), § 388. ³⁸³ US, *Field Manual* (1956), § 269.

National Legislation

397. Australia's ICC (Consequential Amendments) Act incorporates in the Criminal Code the crimes against humanity defined in the 1998 ICC Statute, including "intentionally inflicting conditions of life (such as the deprivation of access to food or medicine) intended to bring about the destruction of part of a population".³⁸⁴

398. Azerbaijan's Criminal Code provides that "extermination of the population, in whole or in part", constitutes a crime against humanity.³⁸⁵

399. Bangladesh's International Crimes (Tribunal) Act states that the "violation of any humanitarian rules applicable in armed conflicts laid down in the Geneva Conventions of 1949" is a crime.³⁸⁶

400. Belgium's Law concerning the Repression of Grave Breaches of the Geneva Conventions and their Additional Protocols as amended provides that, in accordance with the 1998 ICC Statute, extermination constitutes a crime against humanity and a crime under international law.³⁸⁷

401. Under Burundi's Draft Law on Genocide, Crimes against Humanity and War Crimes, extermination constitutes a crime against humanity, when committed as part of a widespread or systematic attack directed against any civilian population.³⁸⁸

402. Cambodia's Law on the Khmer Rouge Trial provides that "the Extraordinary Chambers shall have the power to bring to trial all suspects who committed crimes against humanity during the period from 17 April 1975 to 6 January 1979", including extermination "committed as part of a widespread or systematic attack directed against any civilian population, on national, political, ethnical, racial or religious grounds".³⁸⁹

403. Canada's Crimes against Humanity and War Crimes Act provides that the crimes against humanity defined in Article 7 of the 1998 ICC Statute are "crimes according to customary international law" and, as such, indictable offences under the Act.³⁹⁰

404. In accordance with Article 7 of the 1998 ICC Statute, Congo's Genocide, War Crimes and Crimes against Humanity Act defines "extermination" as a crime against humanity, "when committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack".³⁹¹

³⁸⁴ Australia, *ICC (Consequential Amendments) Act* (2002), Schedule 1, § 268.9(2).

³⁸⁵ Azerbaijan, *Criminal Code* (1999), Article 105.

³⁸⁶ Bangladesh, *International Crimes (Tribunal) Act* (1973), Section 3(2)(e).

³⁸⁷ Belgium, *Law concerning the Repression of Grave Breaches of the Geneva Conventions and their Additional Protocols as amended* (1993), Article 1(2)(2).

³⁸⁸ Burundi, *Draft Law on Genocide, Crimes against Humanity and War Crimes* (2001), Article 3(b).

³⁸⁹ Cambodia, *Law on the Khmer Rouge Trial* (2001), Article 5.

³⁹⁰ Canada, *Crimes against Humanity and War Crimes Act* (2000), Section 4(1) and (4).

³⁹¹ Congo, *Genocide, War Crimes and Crimes against Humanity Act* (1998), Article 6(b).

405. The Czech Republic's Criminal Code as amended punishes any "person who in wartime . . . wilfully fails to provide the necessary assistance" to the survival of the population.³⁹²

406. Under Ethiopia's Penal Code, it is a punishable offence to organise, order or engage in "measures to prevent the . . . continued survival" of the members of a national, ethnic, racial, religious or political group, or its progeny.³⁹³

407. Germany's Law Introducing the International Crimes Code punishes anyone who, as part of a widespread or systematic attack directed against any civilian population, "inflicts, with the intent of destroying a population in whole or in part, conditions of life on that population or on parts thereof, being conditions calculated to bring about its physical destruction in whole or in part".³⁹⁴

408. Ireland's Geneva Conventions Act as amended provides that any "minor breach" of the Geneva Conventions, including violations of Article 23 GC IV, and of API, including violations of Article 70(2) API, are punishable offences.³⁹⁵

409. Israel's Nazis and Nazi Collaborators (Punishment) Law punishes persons who have committed a crime against humanity, including "extermination [of] . . . any civilian population".³⁹⁶

410. Under Mali's Penal Code, extermination is a crime against humanity, "when committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack".³⁹⁷

411. Under New Zealand's International Crimes and ICC Act, crimes against humanity include the crimes defined in Article 7(1)(b) and (2)(b) of the 1998 ICC Statute.³⁹⁸

412. Under Norway's Military Penal Code as amended, "anyone who contravenes or is accessory to the contravention of provisions relating to the protection of persons or property laid down in . . . the Geneva Conventions of 12 August 1949 . . . [and in] the two additional protocols to these Conventions . . . is liable to imprisonment".³⁹⁹

413. Slovakia's Criminal Code as amended punishes any "person who in wartime . . . wilfully fails to provide the necessary assistance" to the survival of the population.⁴⁰⁰

414. Under Trinidad and Tobago's Draft ICC Act, it is a punishable offence to commit a crime against humanity as defined in Article 7(1)(b) and (2)(b) of the 1998 ICC Statute.⁴⁰¹

³⁹² Czech Republic, *Criminal Code as amended* (1961), Article 263a(2)(a).

³⁹³ Ethiopia, *Penal Code* (1957), Article 281(b).

³⁹⁴ Germany, *Law Introducing the International Crimes Code* (2002), Article 1, § 7(1)(2).

³⁹⁵ Ireland, *Geneva Conventions Act as amended* (1962), Section 4(1) and (4).

³⁹⁶ Israel, *Nazis and Nazi Collaborators (Punishment) Law* (1950), Section 1.

³⁹⁷ Mali, *Penal Code* (2001), Article 29(b).

³⁹⁸ New Zealand, *International Crimes and ICC Act* (2000), Section 10(2).

³⁹⁹ Norway, *Military Penal Code as amended* (1902), § 108.

⁴⁰⁰ Slovakia, *Criminal Code as amended* (1961), Article 263a(2)(a).

⁴⁰¹ Trinidad and Tobago, *Draft ICC Act* (1999), Section 5(1)(a).

415. Under the UK ICC Act, it is a punishable offence to commit a crime against humanity as defined in Article 7(1)(b) and (2)(b) of the 1998 ICC Statute.⁴⁰²

416. The US Regulations Governing the Trials of Accused War Criminals in the Pacific Region I established military commissions which had jurisdiction over offences such as “extermination . . . committed against any civilian population”.⁴⁰³

417. The US Regulations Governing the Trials of Accused War Criminals in the Pacific Region II established military commissions which had jurisdiction over offences such as “extermination . . . committed against any civilian population”.⁴⁰⁴

418. Vietnam’s Penal Code punishes “anyone who, in time of peace or in time of war, commits acts resulting in mass extermination of the population of an area”.⁴⁰⁵

National Case-law

419. No practice was found.

Other National Practice

420. In an appeal in 1992, the Presidency of the Republika Srpska of Bosnia and Herzegovina declared that “we shall make efforts to provide, as soon as possible, conditions for operations of the Red Cross and of other humanitarian organizations”.⁴⁰⁶

421. The Report on the Practice of Colombia refers to a draft internal working paper in which the Colombian government stated that “the accomplishment of the functions of humanitarian organisations shall be facilitated”.⁴⁰⁷

422. In the context of the conflict in Ethiopia, it has been reported that food was used as a weapon:

[At the time of the 1984–1985 famine in northern Ethiopia, and] to make matters worse, Mengistu refused to allow food to be distributed in areas where inhabitants were sympathetic to the EPLF, TPLF, or other antigovernment groups, a strategy that resulted in the deaths of tens of thousands. When a new famine emerged in late 1989, threatening the lives of 2 million to 5 million people, Mengistu again used food as a weapon by banning the movement of relief supplies along the main road north

⁴⁰² UK, *ICC Act* (2001), Sections 50(1) and 51(1) (England and Wales) and Section 58(1) (Northern Ireland).

⁴⁰³ US, *Regulations Governing the Trials of Accused War Criminals in the Pacific Region I* (1945), Regulation 5.

⁴⁰⁴ US, *Regulations Governing the Trials of Accused War Criminals in the Pacific Region II* (1945), Regulation 2(b).

⁴⁰⁵ Vietnam, *Penal Code* (1990), Article 278.

⁴⁰⁶ Bosnia and Herzegovina, Republika Srpska, Appeal of the Presidency concerning the International Committee of the Red Cross Operations, Pale, 7 June 1992.

⁴⁰⁷ Report on the Practice of Colombia, 1998, Chapter 4.1, referring to Presidential Council, Proposal of the Government to the Coordinator Guerrillera Simón Bolívar to humanise war, Draft Internal Working Paper, Part entitled “El Derecho Internacional Humanitario”, § 8.

from Addis Ababa to Tigray and also along the road from Mitsiwa into Eritrea and south into Tigray. As a result, food relief vehicles had to travel overland from Port Sudan, the major Red Sea port of Sudan, through guerrilla territory into northern Ethiopia. After an international outcry against his policy, Mengistu reversed his decision, but international relief agencies were unable to move significant amounts of food aid into Eritrea and Tigray via Ethiopian ports.⁴⁰⁸

It was further reported that “to combat new famine threats, in early 1991 the EPLF and the Ethiopian Government agreed on a joint and equal distribution of UN famine relief supplies”.⁴⁰⁹ According to the Report on the Practice of Ethiopia, “this and similar practices tend to indicate that, however recent, the right to humanitarian relief is gaining respect” in Ethiopia.⁴¹⁰

423. In April 1999, the German Minister of Foreign Affairs called upon the President of the FRY to guarantee that humanitarian assistance could reach Kosovo and those who were on the verge of starvation.⁴¹¹

424. According to the Report on the Practice of Israel, it is the policy of Israel “to cooperate with all international humanitarian agencies and organisations, both in time of peace and in time of war”.⁴¹²

425. The Report on the Practice of Jordan refers to an order issued in 1970 by the General Military Commander of the Jordanian armed forces which “accepted the international relief operations for population under opposition control”.⁴¹³ The report adds that free passage of essential goods intended for the civilian population of the adverse party was also allowed.⁴¹⁴

426. According to the Report on the Practice of Kuwait, it is the *opinio juris* of Kuwait that a State that is unable to guarantee the protection of the civilian population against starvation has to facilitate the distribution of external humanitarian aid.⁴¹⁵

427. In an explanatory memorandum submitted to parliament in the context of the ratification procedure of the Additional Protocols, the government of the Netherlands, commenting on Article 70 AP I, regretted that “it did not seem possible to oblige parties to the conflict to allow aid for the civilian population through without the parties explicit consent”.⁴¹⁶

428. In a letter to the lower house of parliament concerning the crisis in the Great Lakes region in 1996, the Minister for Development Cooperation of the

⁴⁰⁸ Thomas P. Ofcansky and LaVerle Berry (eds.), *Ethiopia: A Country Study*, Government Printing Office, Washington D.C., Fourth edition, 1993, p. 328, see also p. 305.

⁴⁰⁹ Amnesty International, *Ethiopia: End of an Era of Brutal Repression*, London, May 1991, p. 43.

⁴¹⁰ Report on the Practice of Ethiopia, 1998, Chapter 4.1.

⁴¹¹ Germany, Federal Foreign Office, Press Release, Statement by the Minister of Foreign Affairs on humanitarian assistance to Kosovo, 6 April 1999, *YIHL*, Vol. 2, 1999, p. 366.

⁴¹² Report on the Practice of Israel, 1997, Chapter 4.2.

⁴¹³ Report on the Practice of Jordan, 1997, Chapter 4.1, referring to Military Order issued by the General Military Commander of the Jordanian armed forces, September 1970.

⁴¹⁴ Report on the Practice of Jordan, 1997, Chapter 4.1.

⁴¹⁵ Report on the Practice of Kuwait, 1997, Chapter 4.1.

⁴¹⁶ Netherlands, Lower House of Parliament, Explanatory memorandum on the ratification of the Additional Protocols, 1983–1984 Session, Doc. 18 277 (R 1247), No. 3, p. 35.

Netherlands argued in favour of the establishment of humanitarian corridors in Kivu in order to facilitate the distribution of food.⁴¹⁷

429. In 1968, during the conflict in Biafra, the Nigerian Commissioner for Information and Labour insisted that Nigeria “would continue to stand by its promise to the International Committee of the Red Cross to keep some ‘corridors of mercy’ safe from military activities so that relief supplies could at any time be channelled through these corridors”.⁴¹⁸

430. In 2000, during a debate in the UN Security Council on the protection of humanitarian personnel in conflict areas, Norway stated that it welcomed the call of the Security Council for safe and unhindered access for humanitarian personnel to civilians in armed conflict.⁴¹⁹

431. The Guidelines on Evacuations adopted in 1991 by the Presidential Human Rights Committee of the Philippines provided that “medicines and relief goods, whether coming from the government or non-government organizations, shall be given to the evacuees without delay”.⁴²⁰

432. A circular from the Office of the President of the Philippines issued in 1991 stipulates that “only in cases of tactical operations may control of the movement of non-combatants and the delivery of goods and services be imposed for safety reasons, provided that in no case should such control lead to the starvation of civilians”.⁴²¹

433. On the basis of an interview with an army officer, the Report on the Practice of Rwanda emphasises that humanitarian corridors are places used by humanitarian personnel, *inter alia*, to ensure access to the victims of hostilities so as to provide them with relief.⁴²²

434. In submitting AP II to the Senate for advice and consent to ratification, the US President, commenting on Article 18 AP II, stated that “the parties to a conflict have a duty not to refuse passage of relief supplies for arbitrary reasons”.⁴²³

435. In 1987, the Deputy Legal Adviser of the US Department of State stated that:

We support the principle... subject to the requirements of imperative military necessity, that impartial relief actions necessary for the survival of the civilian population be permitted and encouraged ...

⁴¹⁷ Netherlands, Lower House of Parliament, Letter from the Minister for Development Cooperation on the crisis in the Great Lakes region, 1996–1997 Session, Doc. 25 098, No. 2.

⁴¹⁸ Nigeria, Federal Ministry of Information, Press Release No. F 1290, Lagos, 11 July 1968, Report on the Practice of Nigeria, 1997, Chapter 4.2.

⁴¹⁹ Norway, Statement before the UN Security Council, UN Doc. S/PV/4110, 9 February 2000, p. 10.

⁴²⁰ Philippines, Presidential Human Rights Committee, Resolution No. 91-001 Providing for Guidelines on Evacuations, Manila, 26 March 1991, § 6.

⁴²¹ Philippines, Office of the President, Memorandum Circular No. 139 Prescribing the Guidelines for the Implementation of Memorandum Order No. 398, 26 September 1991, § 3.

⁴²² Report on the Practice of Rwanda, 1997, Interview with an army officer, Chapter 1.8.

⁴²³ US, Message from the US President Transmitting AP II to the Senate for advice and consent to ratification, Treaty Doc. 100-2, 29 January 1987, Comment on Article 18.

We support the principle... that the ICRC and the relevant Red Cross or Red Crescent organizations be granted all necessary facilities and access to enable them to carry out their humanitarian functions.⁴²⁴

436. According to the Report on US Practice, it is the *opinio juris* of the US that:

Special agreements are necessary in order for relief personnel and vehicles to pass through military lines or receive special protection. It is a violation of international humanitarian law to deny conclusion of such agreements for arbitrary reasons...

Some conditions which the US government would not regard as arbitrary may be inferred from legislation dealing with relief shipments from the United States to regions of conflict. These include adequate procedures to ensure that the relief actually reaches the persons for whom it is intended, and any condition necessary to ensure the safety of the armed forces in combat.⁴²⁵

437. In 1991, in a "Statement regarding the need for the respect of the norms of international humanitarian law in the armed conflicts in Yugoslavia", the Federal Executive Council of the SFRY (FRY) requested that all the parties "extend full support and assistance to the humanitarian relief operations of the Red Cross and particularly the International Red Cross Committee".⁴²⁶

438. In 1992, the Ministry of Defence of the SFRY (FRY) issued a special order to its armed forces to signify their "duty to enable ICRC delegates to carry out their humanitarian functions, ... in accordance with the Geneva Conventions". The order added that the armed forces must provide "the conditions for undisturbed performing of ICRC humanitarian functions".⁴²⁷

439. In 1992, a State "offered to allow passage, if need be, through all its territory to permit the distribution of humanitarian aid" to another State.⁴²⁸

III. Practice of International Organisations and Conferences

United Nations

440. In a resolution adopted in 1991 on repression of the Iraqi civilian population, including Kurds in Iraq, the UN Security Council insisted that "Iraq allow immediate access by international humanitarian organisations to all those in need of assistance in all parts of Iraq and make available all necessary facilities for their operations".⁴²⁹

⁴²⁴ US, Remarks of Michael J. Matheson, Deputy Legal Adviser, US Department of State, The Sixth Annual American Red Cross-Washington College of Law Conference on International Humanitarian Law: A Workshop on Customary International Law and the 1977 Protocols Additional to the 1949 Geneva Conventions, *American University Journal of International Law and Policy*, Vol. 2, 1987, pp. 426 and 428.

⁴²⁵ Report on US Practice, 1997, Chapter 4.2.

⁴²⁶ SFRY (FRY), Federal Executive Council, Statement regarding the need for the respect of the norms of international humanitarian law in the armed conflicts in Yugoslavia, Belgrade, 31 October 1991.

⁴²⁷ SFRY (FRY), Federal Ministry of Defence, Department for Civil Defence, Order (International Committee of the Red Cross – Mission in Belgrade), 20 January 1992, §§ 1 and 9.

⁴²⁸ ICRC archive document. ⁴²⁹ UN Security Council, Res. 688, 5 April 1991, § 1.

441. In a resolution adopted in 1991 on the import of petroleum and petroleum products originating in Iraq, the UN Security Council reaffirmed “the importance which the Council attaches to Iraq’s allowing unhindered access by international humanitarian organizations to all those in need of assistance in all parts of Iraq and making available all necessary facilities for their operation”.⁴³⁰

442. In a resolution on Bosnia and Herzegovina adopted in 1992, the UN Security Council called upon all parties to the conflict “to ensure that conditions are established for the effective and unhindered delivery of humanitarian assistance”.⁴³¹

443. In a resolution on Bosnia and Herzegovina adopted in 1992, the UN Security Council, “dismayed that conditions have not yet been established for the effective and unhindered delivery of humanitarian assistance”, demanded that “all parties and others concerned create immediately the necessary conditions for unimpeded delivery of humanitarian supplies to Sarajevo and other destinations in Bosnia and Herzegovina”.⁴³²

444. In a resolution on Somalia adopted in 1992, the UN Security Council demanded that all parties, movements and factions in Somalia “take all measures necessary to facilitate the efforts of the United Nations, its specialized agencies and humanitarian organizations to provide urgent humanitarian assistance to the affected population in Somalia”.⁴³³

445. In a resolution adopted in 1993 on the conflict between Armenia and Azerbaijan, the UN Security Council called for “unimpeded access for international humanitarian relief efforts in the region, in particular in all areas affected by the conflict, in order to alleviate the increased suffering of the civilian population”.⁴³⁴

446. In a resolution adopted in 1993 on the treatment of certain towns and surroundings in Bosnia and Herzegovina as safe areas, the UN Security Council declared that “full respect by all parties of the rights of the United Nations Protection Force (UNPROFOR) and the international humanitarian agencies to free and unimpeded access to all safe areas in the Republic of Bosnia and Herzegovina” should be observed.⁴³⁵

447. In a resolution on Angola adopted in 1993, the UN Security Council declared that it had taken note of statements by UNITA that it would “cooperate in ensuring the unimpeded delivery of humanitarian assistance to all Angolans” and demanded that UNITA act accordingly.⁴³⁶

448. In a resolution adopted in 1993 concerning the conflict between Armenia and Azerbaijan, the UN Security Council called for “unimpeded access for international humanitarian relief efforts in the region, in particular in all areas

⁴³⁰ UN Security Council, Res. 706, 15 August 1991, preamble.

⁴³¹ UN Security Council, Res. 752, 15 May 1992, § 8.

⁴³² UN Security Council, Res. 757, 30 May 1992, preamble and § 17.

⁴³³ UN Security Council, Res. 794, 3 December 1992, § 2.

⁴³⁴ UN Security Council, Res. 822, 30 April 1993, § 3.

⁴³⁵ UN Security Council, Res. 824, 6 May 1993, § 4(b).

⁴³⁶ UN Security Council, Res. 851, 15 July 1993, § 15.

affected by the conflict, in order to alleviate the increased suffering of the civilian population".⁴³⁷

449. In a resolution adopted in 1993 concerning the conflict between Armenia and Azerbaijan, the UN Security Council called for "unimpeded access for international humanitarian relief efforts in all areas affected by the conflict".⁴³⁸

450. In a resolution adopted in 1993 concerning the conflict in Georgia, the UN Security Council called for "unimpeded access for international humanitarian assistance in the region".⁴³⁹

451. In a resolution adopted in 1994 on extension of the mandate and increase of the personnel of the UN Protection Force, the UN Security Council demanded that "the Bosnian Serb party . . . remove all obstacles to free access [to besieged Maglaj]", condemned all such obstacles and called upon all parties to show restraint.⁴⁴⁰

452. In a resolution adopted in 1994 on an immediate and durable cease-fire in Yemen, the UN Security Council expressed its deep concern about the humanitarian situation in Yemen and urged all concerned "to provide humanitarian access and facilitate the distribution of relief supplies to those in need".⁴⁴¹

453. In a resolution on Bosnia and Herzegovina adopted in 1995, the UN Security Council demanded that "all parties allow unimpeded access for humanitarian assistance to all parts of the Republic of Bosnia and Herzegovina and, in particular, to the safe areas".⁴⁴²

454. In a resolution on Bosnia and Herzegovina adopted in 1995, the UN Security Council demanded that:

all parties allow unimpeded access for the United Nations High Commissioner for Refugees and other international humanitarian agencies to the safe area of Srebrenica in order to alleviate the plight of the civilian population, and in particular that they cooperate on the restoration of utilities.⁴⁴³

455. In a resolution adopted in 1995 in the context of the conflict in Croatia, the UN Security Council requested that the Croatian government "in conformity with internationally recognised standards . . . allow access to [the local Serb] population by international humanitarian organisations".⁴⁴⁴

456. In a resolution adopted in 1995 in the context of the conflict in former Yugoslavia, the UN Security Council reiterated "its strong support for the efforts of the International Committee of the Red Cross (ICRC) in seeking access to displaced persons . . . and [condemned] in the strongest possible terms the failure of the Bosnian Serb party to comply with their commitments in respect of such access". It reaffirmed its demand that "the Bosnian Serb party

⁴³⁷ UN Security Council, Res. 853, 29 July 1993, § 11.

⁴³⁸ UN Security Council, Res. 874, 14 October 1993, § 9.

⁴³⁹ UN Security Council, Res. 876, 19 October 1993, § 7.

⁴⁴⁰ UN Security Council, Res. 908, 31 March 1994, § 22.

⁴⁴¹ UN Security Council, Res. 931, 29 June 1994, § 7.

⁴⁴² UN Security Council, Res. 998, 16 June 1995, § 4.

⁴⁴³ UN Security Council, Res. 1004, 12 July 1995, § 5.

⁴⁴⁴ UN Security Council, Res. 1009, 10 August 1995, § 2.

give immediate and unimpeded access to representatives of the United Nations High Commissioner for Refugees, the ICRC and other international agencies to persons displaced . . .".⁴⁴⁵

457. In a resolution on UNOMIL adopted in 1996, the UN Security Council demanded that the factions in the conflict in Liberia facilitate the delivery of humanitarian assistance.⁴⁴⁶ This demand was reiterated in a subsequent resolution later that year.⁴⁴⁷

458. In a resolution adopted in 1996 on the situation in the Great Lakes region, the UN Security Council called upon all those concerned in the region "to facilitate the delivery of international humanitarian assistance to those in need".⁴⁴⁸

459. In a resolution adopted in 1996 on the situation in Liberia, the UN Security Council demanded that the factions "facilitate . . . the safe delivery of humanitarian assistance".⁴⁴⁹

460. In a resolution adopted in 1998 on the imposition of an arms embargo against Yugoslavia, the UN Security Council underlined the necessity for the government of the FRY to allow "access to Kosovo by humanitarian organizations".⁴⁵⁰

461. In a resolution adopted in 1998 on the situation in Kosovo, the UN Security Council demanded that the FRY "allow free and unimpeded access for humanitarian organizations and supplies to Kosovo". It also noted the commitment of the President of the FRY "to ensure full and unimpeded access for humanitarian organizations, the ICRC and the UNHCR, and delivery of humanitarian supplies".⁴⁵¹

462. In a resolution adopted in 1998, the UN Security Council called on the government of Angola and in particular UNITA "to cooperate fully with international humanitarian organizations in the delivery of emergency relief assistance to affected populations".⁴⁵²

463. In a resolution adopted in 1999 on relief assistance in the territory of the FRY, the UN Security Council called for "access for United Nations and all other humanitarian personnel operating in Kosovo and other parts of the Federal Republic of Yugoslavia".⁴⁵³

464. In a resolution adopted in 1999 on children in armed conflicts, the UN Security Council called upon all parties to armed conflicts "to ensure the full, safe and unhindered access of humanitarian personnel and the delivery of humanitarian assistance to all children affected by armed conflict".⁴⁵⁴

⁴⁴⁵ UN Security Council, Res. 1019, 9 November 1995, preamble and § 2.

⁴⁴⁶ UN Security Council, Res. 1059, 31 May 1996, § 7.

⁴⁴⁷ UN Security Council, Res. 1071, 30 August 1996, § 10.

⁴⁴⁸ UN Security Council, Res. 1078, 9 November 1996, § A-5.

⁴⁴⁹ UN Security Council, Res. 1083, 27 November 1996, § 8.

⁴⁵⁰ UN Security Council, Res. 1160, 31 March 1998, § 16(c).

⁴⁵¹ UN Security Council, Res. 1199, 23 September 1998, §§ 4(c) and 5(d).

⁴⁵² UN Security Council, Res. 1213, 3 December 1998, § 7.

⁴⁵³ UN Security Council, Res. 1239, 14 May 1999, § 3.

⁴⁵⁴ UN Security Council, Res. 1261, 25 August 1999, § 11.

465. In a resolution adopted in 1999 on the establishment of a multinational peace force in East Timor, the UN Security Council emphasised “the importance of allowing full, safe and unimpeded access by humanitarian organizations” and called upon all parties “to ensure . . . the effective delivery of humanitarian aid”.⁴⁵⁵

466. In a resolution adopted in 1999 on protection of civilians in armed conflicts, the UN Security Council expressed its concern “at the denial of safe and unimpeded access to people in need” and underlined “the importance of safe and unhindered access of humanitarian personnel to civilians in armed conflict”.⁴⁵⁶

467. In a resolution on East Timor adopted in 1999, the UN Security Council called upon all parties “to ensure . . . the effective delivery of humanitarian aid”.⁴⁵⁷

468. In a resolution on the DRC adopted in 2000, the UN Security Council expressed “its deep concern at the limited access of humanitarian workers to refugees and internally displaced persons in some areas”. It also called on all parties “to ensure the safe and unhindered access of relief personnel to all those in need” and “to cooperate with the International Committee of the Red Cross to enable it to carry out its mandate”.⁴⁵⁸

469. In a resolution adopted in 2000 on protection of civilians in armed conflicts, the UN Security Council underlined “the importance of safe and unimpeded access of humanitarian personnel to civilians in armed conflicts” and called upon “all parties concerned . . . to cooperate fully with the United Nations Humanitarian Coordinator and United Nations agencies in providing such access”.⁴⁵⁹

470. In a resolution adopted in 2000 on the protection of children in situations of armed conflict, the UN Security Council called upon all parties to armed conflict “to ensure the full, safe and unhindered access of humanitarian personnel and the delivery of humanitarian assistance to all children affected by armed conflict”.⁴⁶⁰

471. In a resolution adopted in 2000 on measures against the Taliban in Afghanistan, the UN Security Council reaffirmed “the necessity for sanctions to . . . be structured in a way that will not impede, thwart or delay the work of international humanitarian organizations or governmental relief agencies providing humanitarian assistance to the civilian population in the country”. It also called upon the Taliban “to ensure the safe and unhindered access of relief personnel and aid to all those in need in the territory under their control”.⁴⁶¹

⁴⁵⁵ UN Security Council, Res. 1264, 15 September 1999, § 2.

⁴⁵⁶ UN Security Council, Res. 1265, 17 September 1999, preamble and § 7.

⁴⁵⁷ UN Security Council, Res. 1272, 25 October 1999, § 10.

⁴⁵⁸ UN Security Council, Res. 1291, 24 February 2000, preamble and §§ 12 and 13.

⁴⁵⁹ UN Security Council, Res. 1296, 19 April 2000, § 8, see also § 15.

⁴⁶⁰ UN Security Council, Res. 1314, 11 August 2000, § 7.

⁴⁶¹ UN Security Council, Res. 1333, 19 December 2000, preamble and § 13.

472. In 1993, in a statement by its President regarding the conflict in Bosnia and Herzegovina, the UN Security Council reiterated "its demand that the parties and all others concerned allow immediate and unimpeded access to humanitarian relief supplies".⁴⁶²

473. In 1993, in a statement by its President regarding the situation in Bosnia and Herzegovina, the UN Security Council reiterated "its demand that the Bosnian parties grant immediate and unimpeded access for humanitarian convoys and fully comply with the Security Council's decisions in this regard".⁴⁶³

474. In 1993, in a statement by its President, the UN Security Council demanded that "all concerned allow the unimpeded access of humanitarian relief supplies throughout the Republic of Bosnia and Herzegovina, especially humanitarian access to the besieged cities of eastern Bosnia".⁴⁶⁴

475. In 1993, in a statement by its President regarding the situation in Bosnia and Herzegovina, the UN Security Council stated that:

Recognising the imperative need to alleviate, with the utmost urgency, the sufferings of the population in and around Srebrenica, who are in desperate need of food, medicine, clothes and shelter, the Council demands that the Bosnian Serb party... allow all such [humanitarian] convoys unhindered access to the town of Srebrenica and other parts in the Republic of Bosnia and Herzegovina.⁴⁶⁵

476. In 1993, in a statement by its President issued following accounts of "an attack to which an humanitarian convoy under the protection of UNPROFOR was subjected on 25 October 1993 in central Bosnia", the UN Security Council called upon all parties to the conflict in the former Yugoslavia "to guarantee the unimpeded access of humanitarian assistance".⁴⁶⁶

477. In 1993, in a statement by its President in connection with the situation in Bosnia and Herzegovina, the UN Security Council reiterated "its demand to all parties and others concerned to guarantee unimpeded access for humanitarian assistance".⁴⁶⁷

478. In 1994, in a statement by its President regarding the situation in Bosnia and Herzegovina, the UN Security Council reiterated "its demand that there be unimpeded access of humanitarian relief assistance to their intended destinations". It further reiterated "the demand that all parties ensure... unimpeded access [by UN and NGO personnel] throughout the Republic of Bosnia and Herzegovina".⁴⁶⁸

479. In 1994, in a statement by its President regarding the situation in Bosnia and Herzegovina, the UN Security Council demanded that "the Bosnian Serb

⁴⁶² UN Security Council, Statement by the President, UN Doc. S/25302, 17 February 1993, p. 1.

⁴⁶³ UN Security Council, Statement by the President, UN Doc. S/25334, 25 February 1993, p. 2.

⁴⁶⁴ UN Security Council, Statement by the President, UN Doc. S/25361, 3 March 1993, pp. 1 and 2.

⁴⁶⁵ UN Security Council, Statement by the President, UN Doc. S/25520, 3 April 1993, p. 1.

⁴⁶⁶ UN Security Council, Statement by the President, UN Doc. S/26661, 28 October 1993, p. 1.

⁴⁶⁷ UN Security Council, Statement by the President, UN Doc. S/26716, 9 November 1993, p. 1.

⁴⁶⁸ UN Security Council, Statement by the President, UN Doc. S/PRST/1994/1, 7 January 1994, pp. 1 and 2.

party and the Bosnian Croat party allow forthwith and without conditions passage to all humanitarian convoys [to the besieged town of Maglaj]".⁴⁶⁹

480. In 1995, in a statement by its President, the UN Security Council called on the parties to the conflict in Croatia "to cooperate fully with UNCRO, the United Nations High Commissioner for Refugees and the International Committee of the Red Cross in ensuring access and protection to the local civilian population as appropriate".⁴⁷⁰

481. In 1996, in a statement by its President regarding the situation in the Great Lakes region, the UN Security Council called on all parties in the region "to allow humanitarian agencies and non-governmental organizations to deliver humanitarian assistance to those in need".⁴⁷¹

482. In 1997, in a statement by its President regarding the situation in the Great Lakes region, the UN Security Council urged all parties "to allow humanitarian agencies and organizations access to deliver humanitarian assistance to those in need".⁴⁷²

483. In 1997, in a statement by its President the UN Security Council called upon the factions in Somalia "to facilitate the delivery of humanitarian relief to the Somali people, including through the opening of the airport and harbour of Mogadishu".⁴⁷³

484. In 1997, in a statement by its President regarding the situation in the Great Lakes region, the UN Security Council strongly urged the parties, and in particular the ADFL, "to ensure unrestricted and safe access by United Nations agencies and other humanitarian organizations to guarantee the provision of humanitarian assistance to, and the safety of, all refugees, displaced persons and other affected civilian inhabitants".⁴⁷⁴

485. In 1997, in a statement by its President regarding the situation in the Great Lakes region, the UN Security Council expressed its dismay at "the continued lack of access being afforded by the Alliance of Democratic Forces for the Liberation of Congo/Zaire (ADFL) to United Nations and other humanitarian relief agencies". It further called in the strongest terms upon the ADFL "to ensure unrestricted and safe access by all humanitarian relief agencies so as to allow the immediate provision of humanitarian aid to those affected".⁴⁷⁵

⁴⁶⁹ UN Security Council, Statement by the President, UN Doc. S/PRST/1994/11, 14 March 1994, p. 1.

⁴⁷⁰ UN Security Council, Statement by the President, UN Doc. S/PRST/1995/38, 4 August 1995, p. 1.

⁴⁷¹ UN Security Council, Statement by the President, UN Doc. S/PRST/1996/44, 1 November 1996, p. 1.

⁴⁷² UN Security Council, Statement by the President, UN Doc. S/PRST/1997/5, 7 February 1997, p. 1.

⁴⁷³ UN Security Council, Statement by the President, UN Doc. S/PRST/1997/8, 27 February 1997, p. 2.

⁴⁷⁴ UN Security Council, Statement by the President, UN Doc. S/PRST/1997/19, 4 April 1997.

⁴⁷⁵ UN Security Council, Statement by the President, UN Doc. S/PRST/1997/22, 24 April 1997, p. 1.

486. In 1997, in a statement by its President regarding the situation in the Great Lakes region, the UN Security Council noted “the commitment by the leader of the ADFL to allow United Nations and other humanitarian agencies access to refugees in eastern Zaire [DRC] in order to provide humanitarian assistance”.⁴⁷⁶

487. In 1997, in a statement by its President in the context of the conflict in the DRC, the UN Security Council called for “access . . . for humanitarian relief workers”.⁴⁷⁷

488. In 1997, in a statement by its President following a debate on the protection of humanitarian assistance to refugees and others in conflict situations, the UN Security Council called upon all parties concerned “to guarantee the unimpeded and safe access of United Nations and other humanitarian personnel to those in need”.⁴⁷⁸

489. In 1997, in a statement by its President in the context of the situation in Afghanistan, the UN Security Council expressed serious concern over “deliberate restrictions placed on the access of humanitarian organizations to some parts of the country and on other humanitarian operations” and urged all parties “to prevent their recurrence”.⁴⁷⁹

490. In 1998, in a statement by its President regarding the situation in Afghanistan, the UN Security Council strongly urged the Taliban “to let humanitarian agencies attend to the needs of the population”.⁴⁸⁰

491. In 1998, in a statement by its President, the UN Security Council called for “safe and unhindered access for humanitarian agencies to all those in need in the Democratic Republic of the Congo”.⁴⁸¹

492. In 1999, in a statement by its President, the UN Security Council called upon all parties involved in armed conflict “to guarantee the unimpeded and safe access of United Nations and other humanitarian personnel to those in need”.⁴⁸²

493. In 2000, in a statement by its President in connection with the question of the protection of UN, associated and humanitarian personnel in conflict zones, the UN Security Council underlined “the importance of unhindered access to populations in need” and declared that it would “continue to stress in its

⁴⁷⁶ UN Security Council, Statement by the President, UN Doc. S/PRST/1997/24, 30 April 1997, p. 1.

⁴⁷⁷ UN Security Council, Statement by the President, UN Doc. S/PRST/1997/31, 29 May 1997, p. 2.

⁴⁷⁸ UN Security Council, Statement by the President, UN Doc. S/PRST/1997/34, 19 June 1997, p. 1.

⁴⁷⁹ UN Security Council, Statement by the President, UN Doc. S/PRST/1997/55, 16 December 1997, p. 2.

⁴⁸⁰ UN Security Council, Statement by the President, UN Doc. S/PRST/1998/9, 6 April 1998, p. 2.

⁴⁸¹ UN Security Council, Statement by the President, UN Doc. S/PRST/1998/26, 31 August 1998, p. 2.

⁴⁸² UN Security Council, Statement by the President, UN Doc. S/PRST/1999/6, 12 February 1999, p. 1.

resolutions the imperative for humanitarian assistance missions and personnel to have safe and unimpeded access to civilian populations".⁴⁸³

494. In 2000, in a statement by its President, the UN Security Council reiterated its call to all parties to a conflict to "ensure safe and unimpeded access in accordance with international law by humanitarian personnel to [war-affected] civilians".⁴⁸⁴

495. In 2001, in a statement by its President regarding the situation in Burundi, the UN Security Council stressed "the importance of providing urgent humanitarian assistance to civilians displaced by the hostilities" and called upon "all parties to guarantee safe and unhindered access by humanitarian personnel to those in need".⁴⁸⁵

496. In a resolution adopted in 1990 on the situation of human rights in occupied Kuwait, the UN General Assembly demanded that Iraq give "access to Kuwait to representatives of humanitarian organisations, especially the ICRC . . . to alleviate the suffering of the civilian population".⁴⁸⁶

497. In 1991, the UN General Assembly adopted a resolution on the strengthening of the coordination of humanitarian emergency assistance of the United Nations. A list of guiding principles annexed to the resolution provides that "States whose populations are in need of humanitarian assistance are called upon to facilitate the work of these organizations in implementing humanitarian assistance, in particular the supply of food, medicines, shelter and health care, for which access to victims is essential".⁴⁸⁷

498. In a resolution adopted in 1993 on the situation in Bosnia and Herzegovina, the UN General Assembly demanded that all parties concerned "facilitate the unhindered flow of humanitarian assistance, including the provision of water, electricity, fuel and communication . . . particularly to the safe areas".⁴⁸⁸

499. In a resolution adopted in 1994 on the situation of human rights in the former Yugoslavia, the UN General Assembly noted that many of the past recommendations of the Special Rapporteur had not been fully implemented and urged the parties, all States and relevant organisations to give immediate consideration to them, including "the opening of humanitarian relief corridors to prevent the death and deprivation of the civilian population and to open Tuzla airport to relief deliveries".⁴⁸⁹

500. In a resolution adopted in 1994 on the situation of human rights in the Sudan, the UN General Assembly expressed its concern that "access by

⁴⁸³ UN Security Council, Statement by the President, UN Doc. S/PRST/2000/4, 11 February 2000, p. 2.

⁴⁸⁴ UN Security Council, Statement by the President, UN Doc. S/PRST/2000/7, 13 March 2000, p. 2.

⁴⁸⁵ UN Security Council, Statement by the President, UN Doc. S/PRST/2001/6, 2 March 2001, p. 1.

⁴⁸⁶ UN General Assembly, Res. 45/170, 18 December 1990, § 5.

⁴⁸⁷ UN General Assembly, Res. 46/182, 19 December 1991, Annex, § 6.

⁴⁸⁸ UN General Assembly, Res. 48/88, 20 December 1993, § 12.

⁴⁸⁹ UN General Assembly, Res. 49/196, 23 December 1994, § 30(a).

the civilian population to humanitarian assistance continues to be impeded, which represents a threat to human life and constitutes an offence to human dignity".⁴⁹⁰

501. In a resolution adopted in 1998 on the situation of human rights in Kosovo, the UN General Assembly called upon all parties in Kosovo to "ensure . . . unrestricted access within Kosovo of . . . personnel [belonging to the OSCE Kosovo Verification Mission]". It strongly condemned the denial of appropriate access by NGOs to Kosovo and called upon the FRY authorities "to take all measures necessary to eliminate these unacceptable practices forthwith" and recalled "the commitment to allow unhindered access to humanitarian organizations". The General Assembly further called upon the FRY authorities "to grant access to . . . Kosovo for all humanitarian aid workers". Lastly, it called upon the government of the FRY and all others concerned "to guarantee the unrestricted access of humanitarian organizations and the United Nations High Commissioner for Human Rights to Kosovo, and to allow the unhindered delivery of relief items".⁴⁹¹

502. In a resolution adopted in 1999 on the safety and security of humanitarian personnel and protection of United Nations personnel, the UN General Assembly called upon:

all Governments and parties in complex humanitarian emergencies, in particular in armed conflicts and in post-conflicts situations, in countries where humanitarian personnel are operating, in conformity with the relevant provisions of international law and national laws, to cooperate fully with the United Nations and other humanitarian agencies and organizations and to ensure the safe and unhindered access of humanitarian personnel in order to allow them to perform efficiently their tasks of assisting the affected civilian population, including refugees and internally displaced persons.⁴⁹²

503. In a resolution adopted in 2000 on a new international humanitarian order, the UN General Assembly called upon "all Governments and parties involved in complex humanitarian emergencies to ensure the safe and unhindered access of humanitarian personnel so as to allow them to perform efficiently their task of assisting the affected civilian populations".⁴⁹³

504. In a resolution adopted in 2000, the UN General Assembly urged all parties to the continuing conflict in the Sudan "to grant full, safe and unhindered access to international agencies and humanitarian organizations so as to facilitate by all means possible the delivery of humanitarian assistance, in conformity with international humanitarian law, to all civilians in need of protection and assistance".⁴⁹⁴

⁴⁹⁰ UN General Assembly, Res. 49/198, 23 December 1994, preamble.

⁴⁹¹ UN General Assembly, Res. 53/164, 9 December 1998, §§ 3, 10, 17 and 24.

⁴⁹² UN General Assembly, Res. 54/192, 17 December 1999, § 3.

⁴⁹³ UN General Assembly, Res. 55/73, 4 December 2000, § 4.

⁴⁹⁴ UN General Assembly, Res. 55/116, 4 December 2000, § 3(f).

505. In a resolution adopted in 1992 on the situation of human rights in the territory of the former Yugoslavia, the UN Commission on Human Rights welcomed the proposal of its Special Rapporteur to open humanitarian relief corridors in order to prevent the imminent deaths of tens of thousands of people in the besieged cities.⁴⁹⁵

506. In a resolution adopted in 1993 on the situation of human rights in the territory of the former Yugoslavia, the UN Commission on Human Rights urged all States and relevant organizations immediately to give serious consideration to “the call for the opening of humanitarian relief corridors to prevent the imminent death of tens of thousands of persons in besieged cities”.⁴⁹⁶

507. In a resolution adopted in 1994 on the situation of human rights in the territory of the former Yugoslavia, the UN Commission on Human Rights urged all States and relevant organisations to give immediate consideration to the Special Rapporteur’s call “for the opening of humanitarian relief corridors to prevent death and deprivation of the civilian population, and to open Tuzla airport to relief deliveries”.⁴⁹⁷

508. In a resolution adopted in 1995 on the situation of human rights in the Sudan, the UN Commission called upon the government of Sudan and all parties to the conflict

to permit international agencies, humanitarian organizations and donor governments to deliver humanitarian assistance to the civilian population and to cooperate with initiatives of the Department of Humanitarian affairs of the United Nations Secretariat and Operation Lifeline Sudan to deliver humanitarian assistance to all persons in need.⁴⁹⁸

509. In two resolutions adopted in 1997 and 1998 on the situation of human rights in the Sudan, the UN Commission on Human Rights called upon the government of Sudan and all parties to the conflict “to permit international agencies, humanitarian organizations and donor Governments to deliver humanitarian assistance to all war affected civilians”.⁴⁹⁹

510. In a resolution adopted in 1999 on the situation of human rights in East Timor, the UN Commission on Human Rights called upon the government of Indonesia “to ensure immediate access by humanitarian agencies to displaced persons, both in East Timor as well as West Timor and other parts of the Indonesian territory, and . . . to continue to allow the deployment of emergency humanitarian assistance”.⁵⁰⁰

⁴⁹⁵ UN Commission on Human Rights, Res. 1992/S-2/1, 1 December 1992, § 15.

⁴⁹⁶ UN Commission on Human Rights, Res. 1993/7, 23 February 1993, § 31(a).

⁴⁹⁷ UN Commission on Human Rights, Res. 1994/72, 9 March 1994, § 35(a).

⁴⁹⁸ UN Commission on Human Rights, Res. 1995/77, 8 March 1995, § 3.

⁴⁹⁹ UN Commission on Human Rights, Res. 1997/59, 15 April 1997, § 18; Res. 1998/67, 21 April 1998, § 3.

⁵⁰⁰ UN Commission on Human Rights, Res. 1999/S-4/1, 27 September 1999, § 5(e) and (f).

511. In a resolution adopted in 2000 on the situation in the Republic of Chechnya, the UN Commission on Human Rights urged the government of the Russian Federation:

to allow international humanitarian organizations, notably the Office of the United Nations High Commissioner for Refugees and the International Committee of the Red Cross, free and secure access to areas of internally displaced and war affected populations in the Republic of Chechnya and neighbouring republics, in accordance with international humanitarian law, to facilitate . . . the delivery of humanitarian aid to the victims in the region.⁵⁰¹

512. In a resolution adopted in 1995 on the situation of human rights in Iraq, the UN Sub-Commission on Human Rights appealed "to the international community, to the organizations of the United Nations system and to the Government of Iraq to facilitate the delivery and distribution of medicines and foodstuffs to the population of the various parts of the country".⁵⁰²

513. In a resolution adopted in 1996 on the situation of human rights in Iraq, the UN Sub-Commission on Human Rights demanded that "the Government of Iraq immediately withdraw its military forces surrounding the marshlands regions in the south to allow access for the distribution by the United Nations of humanitarian supplies in this region".⁵⁰³

514. In 1992, in a report on the situation in Somalia, the UN Secretary-General noted that the two main factions of the United Somali Congress had agreed that a number of sites in Mogadishu, namely the port, airports, hospitals, NGO locations and routes to and from food and non-food distribution points be declared "corridors and zones of peace". Furthermore, he stated that "'corridors of peace' for the safe passage of relief workers and supplies and 'zones of peace' to enable target groups to receive assistance are of paramount importance".⁵⁰⁴

515. In 1998, in a report on protection for humanitarian assistance to refugees and others in conflict situations, the UN Secretary-General stated that:

States have primary responsibility for ensuring that refugees, displaced persons and other vulnerable populations in conflict situations benefit from the necessary assistance and protection and that United Nations and other humanitarian organizations have safe and unimpeded access to these groups. However, States themselves often deny humanitarian access and defend their actions by appealing to the principle of national sovereignty in matters deemed essentially within their domestic jurisdiction. While full respect must be shown for the sovereignty, independence and territorial integrity of the States concerned, where States are unable or unwilling to meet their responsibilities towards refugees and others in conflict situations, the international community should ensure that victims receive the assistance and protection they need to safeguard their lives. Such action should not be regarded as

⁵⁰¹ UN Commission on Human Rights, Res. 2000/58, 25 April 2000, § 9.

⁵⁰² UN Sub-Commission on Human Rights, Res. 1995/3, 18 August 1995, § 4.

⁵⁰³ UN Sub-Commission on Human Rights, Res. 1996/5, 19 August 1996, § 3.

⁵⁰⁴ UN Secretary-General, Report on the situation in Somalia, Addendum: Consolidated Inter-Agency 90-day Plan of Action for Emergency Humanitarian Assistance to Somalia, UN Doc. S/23829/Add.1, 21 April 1992, §§ 59 and 96.

interference in the armed conflict or as an unfriendly act so long as it is undertaken in an impartial and non-coercive manner.⁵⁰⁵

516. In 1999, in a report on the protection of civilians in armed conflict, the UN Secretary-General stated that:

It is the obligation of States to ensure that affected populations have access to the assistance they require for their survival. If a State is unable to fulfil its obligation, the international community has a responsibility to ensure that humanitarian aid is provided. The rapid deployment of humanitarian assistance operations is critical when responding to the needs of civilians affected by armed conflict. Effective and timely humanitarian action requires unhindered access to those in need. Thus, humanitarian organizations are involved on a daily basis in negotiations with the parties to conflicts to obtain and maintain safe access to civilians in need, as well as guarantees of security for humanitarian personnel. In order to fulfil this task, humanitarian actors must be able to maintain a dialogue with relevant non-state actors without thereby lending them any political legitimacy.⁵⁰⁶

517. In 2001, in a report on the protection of civilians in armed conflict, the UN Secretary-General stated that:

In many conflicts, safe and unhindered access to vulnerable civilian populations is granted only sporadically, and is often subject to conditions, delayed, or even bluntly denied. The consequences for those populations are often devastating: entire communities are deprived of even basic assistance and protection.

...

Where Governments are prevented from reaching civilians because they are under the control of armed groups, they must allow impartial actors to carry out their humanitarian task.

In the report, the Secretary-General urged "the [Security] Council to actively engage the parties to each conflict in a dialogue aimed at sustaining safe access for humanitarian operations, and to demonstrate its willingness to act where such access is denied".⁵⁰⁷

518. In 1993, in a report on the situation of human rights in the territory of the former Yugoslavia, the Special Rapporteur of the UN Commission on Human Rights noted that "humanitarian organizations are providing aid under very difficult conditions. The problem of access is particularly acute. Some places have been inaccessible to aid convoys owing to snow or bad roads; others have been made inaccessible by the refusal of the parties to the conflict to allow convoys to pass."⁵⁰⁸

519. In 1997, in a report on a mission to the area occupied by rebels in eastern Zaire, the Special Rapporteur of the UN Commission on Human Rights

⁵⁰⁵ UN Secretary-General, Report on protection for humanitarian assistance to refugees and others in conflict situations, UN Doc. S/1998/883, 22 September 1998, § 16.

⁵⁰⁶ UN Secretary-General, Report on the protection of civilians in armed conflict, UN Doc. S/1999/957, 8 September 1999, § 51.

⁵⁰⁷ UN Secretary-General, Report on the protection of civilians in armed conflict, UN Doc. S/2001/331, 30 March 2001, §§ 14 and 20 and Recommendation 4.

⁵⁰⁸ UN Commission on Human Rights, Special Rapporteur on the Situation of Human Rights in the Former Yugoslavia, Report, UN Doc. E/CN.4/1993/50, 10 February 1993, § 114.

denounced the fact that “UNHCR was unable to reach the [Lula refugee] camp because the [ADFL] refused to grant it access, on the usual grounds that it was a military threat”.⁵⁰⁹

520. In 1999, in a report on the human rights situation in East Timor, the UN High Commissioner for Human Rights held that “the Indonesian authorities must facilitate the immediate access of aid agencies to those in need... Air-drops must be deployed to assist the displaced.”⁵¹⁰

521. The Principles of Engagement for Emergency Humanitarian Assistance in the Democratic Republic of the Congo, annexed to the 2000 United Nations Inter-Agency Consolidated Appeal for the Democratic Republic of the Congo, while referring explicitly to the Code of Conduct of the Red Cross and Red Crescent Movement and NGOs in Disaster Relief, consider unimpeded access to affected populations to be of fundamental importance in order to ensure humanitarian assistance. The Principles, which are addressed to the international humanitarian community as well as to the political and military authorities, state that “Parties to the conflict should ensure unimpeded access for assessment, delivery and monitoring of humanitarian aid to potential beneficiaries. The assistance to affected areas should be provided in the most efficient manner and by the most accessible routes.”⁵¹¹

Other International Organisations

522. In a resolution on Sudan adopted in 1997, the APC-EU Joint Assembly condemned “the obstruction of humanitarian assistance to the people of Nuba Mountains and other areas by the Government of Sudan” and requested that the United Nations “challenge the Government of Sudan to ensure immediate and free access for humanitarian organizations and Operation Lifeline Sudan”.⁵¹²

523. In 1994, during a debate in the UN General Assembly on the situation in Bosnia and Herzegovina, the EU requested “free and unimpeded delivery of humanitarian supplies and the re-opening of Tuzla airport”.⁵¹³

524. In a Common Position adopted in 1998, the Council of the EU stated that the authorities of the FRY must grant access in Kosovo to the ICRC and other humanitarian organisations.⁵¹⁴

⁵⁰⁹ UN Commission on Human Rights, Special Rapporteur on the Situation of Human Rights in Zaire, Report on the mission carried out at the request of the High Commissioner for Human Rights between 25 and 29 March 1997 to the area occupied by rebels in eastern Zaire, UN Doc. E/CN.4/1997/6/Add.2, 2 April 1997, § 36.

⁵¹⁰ UN High Commissioner for Human Rights, Report on the human rights situation in East Timor, UN Doc. E/CN.4/S-4/CRP.1, 17 September 1999, § 51.

⁵¹¹ UN Office for the Coordination of Humanitarian Affairs, United Nations Inter-Agency Consolidated Appeal for the Democratic Republic of Congo (January–December 2000), November 1999, Annex II, Principles of Engagement for Emergency Humanitarian Assistance in the Democratic Republic of the Congo, p. 67, §§ 1 and 2.

⁵¹² APC-EU, Joint Assembly, Resolution on Sudan, 20 March 1997, § 3.

⁵¹³ EU, Statement of Germany on behalf of the EU before the UN General Assembly, UN Doc. A/49/PV.50, 3 November 1994, p. 19.

⁵¹⁴ EU, Council of the EU, Common Position, 19 March 1998, preamble.

525. In a declaration on Kosovo in 1998, the Council of the EU called upon the FRY President “to facilitate . . . unimpeded access for humanitarian organisations”.⁵¹⁵

526. In a resolution on Kosovo adopted in 1998, the European Parliament emphasised “the need for free and unrestricted access for international humanitarian organisations, such as the UNHCR and ICRC” to Kosovo.⁵¹⁶

527. In a resolution on Chechnya adopted in 1995, the Permanent Council of the OSCE called upon all parties to the conflict to ensure “full respect for international humanitarian law in the region of the Chechen crisis” and “free access to all areas of the region of the Chechen crisis for ICRC and UNHCR and all other humanitarian organisations active in the region”.⁵¹⁷

International Conferences

528. The 24th International Conference of the Red Cross in 1981 adopted a resolution on respect for international humanitarian law and humanitarian principles and support for the activities of the International Committee of the Red Cross in which it made a solemn appeal for “the ICRC be granted all the facilities necessary to discharge the humanitarian mandate confided to it by the international community”.⁵¹⁸

529. In 1992, at the Helsinki Summit of Heads of State or Government, CSCE participating States reaffirmed their commitment to “exhort all efforts to ensure access to the areas concerned” for the ICRC, Red Cross and Red Crescent Societies and UN organisations.⁵¹⁹

530. In a resolution on Bosnia and Herzegovina adopted in 1992, the 88th Inter-Parliamentary Conference in Stockholm insisted that “access be ensured for humanitarian assistance to all those in need”.⁵²⁰

531. In the Final Declaration of the International Conference for the Protection of War Victims in 1993, the participants urged all States to make every effort:

to provide the necessary support to the humanitarian organizations entrusted with granting protection and assistance to the victims of armed conflicts and . . . facilitate speedy and effective relief operations by granting to those humanitarian organizations access to the affected areas . . . in conformity with applicable rules of international humanitarian law.⁵²¹

⁵¹⁵ EU, Council of the EU, Declaration on Kosovo, 15 June 1998.

⁵¹⁶ European Parliament, Resolution on Kosovo, 16 July 1998, preamble, § I; Resolution on the situation in Kosovo, 8 October 1998, preamble, § K.

⁵¹⁷ OSCE, Permanent Council, Resolution on Chechnya, 3 February 1995, §§ 6 and 10.

⁵¹⁸ 24th International Conference of the Red Cross, Manila, 7–14 November 1981, Res. VI.

⁵¹⁹ CSCE, Helsinki Summit of Heads of State or Government, 9–10 July 1992, Helsinki Document 1992: The Challenges of Change, Decisions, Chapter VI: The Human Dimension, § 51.

⁵²⁰ 88th Inter-Parliamentary Conference, Stockholm, 7–12 September 1992, Resolution on support to the recent international initiatives to halt the violence and put an end to the violations of human rights in Bosnia and Herzegovina, § 4.

⁵²¹ International Conference for the Protection of War Victims, Geneva, 30 August–1 September 1993, Final Declaration, § II(8), *ILM*, Vol. 33, 1994, p. 301.

532. In a resolution adopted in 1993 on respect for international humanitarian law and support for humanitarian action in armed conflicts, the 90th Inter-Parliamentary Conference in Canberra welcomed “the fact that the United Nations has recently reaffirmed the concept of humanitarian assistance, including relief for civilian populations and the idea of establishing security corridors to ensure the free access of this relief to the victims”. It also called on “all States to understand the meaning of humanitarian action so as to avoid hindering it, to ensure rapid and effective relief operations by guaranteeing safe access to the regions affected”.⁵²²

533. The 26th International Conference of the Red Cross and Red Crescent in 1995 adopted a resolution on protection of the civilian population in period of armed conflict in which it emphasised “the importance for humanitarian organisations to have unimpeded access in times of armed conflict to civilian populations in need, in accordance with the applicable rules of international humanitarian law”. The Conference further stressed the obligation of all parties to a conflict “to accept, under the conditions prescribed by international humanitarian law, impartial humanitarian relief operations for the civilian population when it lacks supplies essential to its survival”.⁵²³

534. The 26th International Conference of the Red Cross and Red Crescent in 1995 adopted a resolution on the principles and action in international humanitarian assistance and protection in which it called upon States “to permit relief operations of a strictly humanitarian character for the benefit of the most vulnerable groups within the civilian population, when required by international humanitarian law” in situations where economic sanctions were imposed.⁵²⁴

535. In a meeting in 1999, the Foreign Ministers of the G-8 adopted, as a general principle on the political solution of the Kosovo crisis, the “unimpeded access to Kosovo by humanitarian aid organizations”.⁵²⁵

536. The Plan of Action for the years 2000–2003 adopted in 1999 by the 27th International Conference of the Red Cross and Red Crescent proposed that all the parties to an armed conflict take effective measures to ensure that:

every possible effort is made to provide the civilian population with all essential goods and services for its survival; [and that] rapid and unimpeded access to the civilian population is given to impartial humanitarian organizations in accordance with international humanitarian law in order that they can provide assistance and protection to the population.

⁵²² 90th Inter-Parliamentary Conference, Canberra, 13–18 September 1993, Resolution on respect for international humanitarian law and support for humanitarian action in armed conflicts, preamble and § 2(i).

⁵²³ 26th International Conference of the Red Cross and Red Crescent, Geneva, 3–7 December 1995, Res. II, §§ A(i) and E(b).

⁵²⁴ 26th International Conference of the Red Cross and Red Crescent, Geneva, 3–7 December 1995, Res. IV, § F(2).

⁵²⁵ G-8, Statement by the Chairman on the conclusion of the meeting of the Foreign Ministers, Petersburg Centre, 6 May 1999, annexed to UN Security Council, Res. 1244, 10 June 1999, Annex 1.

It further proposed that:

conditions of security are guaranteed in order that the ICRC, in accordance with international humanitarian law, has access to, and can remain present in, all situations of armed conflict to protect the victims thereof and, in cooperation with National Societies and the International Federation, to provide them with the necessary assistance.⁵²⁶

537. The Final Declaration adopted in 2002 by the African Parliamentary Conference on International Humanitarian Law for the Protection of Civilians during Armed Conflict stressed that “we...undertake to act in order to offer humanitarian organizations unimpeded access in time of armed conflict to civilian populations in need and to facilitate the free flow of relief materials”.⁵²⁷

IV. Practice of International Judicial and Quasi-judicial Bodies

538. No practice was found.

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

539. The ICRC Commentary on the Additional Protocols, in analysing Article 18(2) AP II, notes that:

The fact that consent is required does not mean that the decision is left to the discretion of the parties. If the survival of the population is threatened and a humanitarian organization fulfilling the required conditions of impartiality and non-discrimination is able to remedy this situation, relief actions must take place. In fact, they are the only way of combating starvation when local resources have been exhausted. The authorities responsible for safeguarding the population in the whole of the territory of the State cannot refuse such relief without good grounds. Such a refusal would be equivalent to a violation of the rule prohibiting the use of starvation as a method of combat as the population would be left deliberately to die of hunger without any measures being taken.⁵²⁸

540. In an appeal issued in 1979 with respect to the conflict in Rhodesia/Zimbabwe, the ICRC specifically requested that the Transitional Government of Salisbury “permit continued material and medical relief assistance, by the ICRC and other humanitarian organizations, to the civilian population in need as a consequence of the hostilities, and allow the ICRC to resume its

⁵²⁶ 27th International Conference of the Red Cross and Red Crescent, Geneva, 31 October–6 November 1999, Res. I, Annex 2, Plan of Action for the years 2000–2003, Actions proposed for final goal 1.1, §§ 1(g) and 4.

⁵²⁷ African Parliamentary Conference on International Humanitarian Law for the Protection of Civilians during Armed Conflict, Niamey, 18–20 February 2002, Final Declaration, § 14.

⁵²⁸ Yves Sandoz *et al.* (eds.), *Commentary on the Additional Protocols*, ICRC, Geneva, 1987, § 4885.

relief distribution in those areas where they have been forbidden by the security forces".⁵²⁹

541. In a press release issued in 1984 concerning the victims of the Afghan conflict, the ICRC stated that:

In spite of repeated offers of services to the Afghan government and representations to the government of the USSR, the ICRC has only on two occasions – during brief missions in 1980 and 1982 – been authorized to act inside Afghanistan. Consequently, the ICRC has to date been able to carry out very few of the assistance and protection activities urgently needed by the numerous victims of the conflict on Afghan territory.⁵³⁰

542. The ICRC Annual Report for 1986 details the difficulties faced by the organisation in its operations in southern Sudan. The report recounts how "time and again, assistance operations ready to be implemented had to be cancelled at the last minute, on account of opposition to ICRC intervention expressed by one or other of the parties to the conflict".⁵³¹

543. At its Budapest Session in 1991, the Council of Delegates adopted a resolution on humanitarian assistance in situations of armed conflict in which it called upon all parties to armed conflicts and, where applicable, any High Contracting Party

to allow free passage of medicines and medical equipment, foodstuffs, clothing and other supplies essential to the survival of the civilian population of another Contracting Party, even if the latter is its adversary, it being understood that they are entitled to ensure that the consignments are not diverted from their destination.⁵³²

544. At its Budapest Session in 1991, the Council of Delegates adopted a resolution on the protection of the civilian population against famine in situations of armed conflict, in which it reminded the authorities concerned and the armed forces under their command of "their obligation to apply international humanitarian law, in particular . . . the obligation to allow humanitarian and impartial relief operations for the civilian population when supplies essential for its survival are lacking".⁵³³

545. In a press release issued in 1992, the ICRC appealed to all the parties to the conflict in Bosnia and Herzegovina "to allow the safe and secure passage of humanitarian aid".⁵³⁴

⁵²⁹ ICRC, Conflict in Southern Africa: ICRC appeal, 19 March 1979, § 6, *IRRC*, No. 209, 1979, p. 89.

⁵³⁰ ICRC, Press Release No. 1488, Victims of the Afghan conflict: Position of the ICRC, 20 May 1984.

⁵³¹ ICRC, *Annual Report 1986*, Geneva, 1987, pp. 24–27.

⁵³² International Red Cross and Red Crescent Movement, Council of Delegates, Budapest Session, 28–30 November 1991, Res. 12, § b.

⁵³³ International Red Cross and Red Crescent Movement, Council of Delegates, Budapest Session, 28–30 November 1991, Res. 13, § 1.

⁵³⁴ ICRC, Press Release, ICRC denies allegations, ICRC Belgrade, 22 May 1992.

546. In a press release issued in 1992, the ICRC urgently called on all the parties involved in the conflict in Tajikistan “to facilitate the work of its delegates [on] behalf of all the victims to the conflict”.⁵³⁵

547. In a press release issued in 1993 on the situation in eastern Bosnia and Herzegovina, the ICRC called on all parties “to facilitate ICRC access to all the victims”.⁵³⁶

548. In an appeal issued in 1993 on the situation in central Bosnia and Herzegovina, the ICRC stated that it trusted the parties to “continue to grant its representatives free access to the civilian population in order to assist all victims affected by the fightings throughout Central Bosnia”.⁵³⁷

549. In a communication to the press in 1993, the ICRC enjoined the parties to the conflict in Somalia “to facilitate relief operations for . . . the civilian population”.⁵³⁸

550. In a communication to the press issued in 1993 concerning the situation in Liberia, the ICRC stated that “the announcement made during the peace negotiations in Geneva that the parties agreed to let humanitarian aid reach all those in need is encouraging for the ICRC, which insists on immediate implementation of the agreement”.⁵³⁹

551. At its Birmingham Session in 1993, the Council of Delegates adopted a resolution on principles of humanitarian assistance in which it noted that States had

the duty – which is in the first instance theirs – to assist people who are placed *de jure* or *de facto* under their authority and, should they fail to discharge this duty, the obligation to authorize humanitarian organizations to provide such assistance, to grant such organizations access to the victims and to protect their action.⁵⁴⁰

552. In 1994, in the context of an internal conflict, the ICRC urged the creation of a neutral humanitarian area through which it could reach all needy persons in combat zones.⁵⁴¹

553. In 1994, in a Memorandum on Respect for International Humanitarian Law in Angola, the ICRC stated that:

The parties to the conflict have a duty to ensure the provision of supplies essential to the survival of the civilian population in the territory under their

⁵³⁵ ICRC, Press Release, Tajikistan: ICRC urges respect for humanitarian rules, ICRC Dushanbe, 23 November 1992.

⁵³⁶ ICRC, Press Release No. 1744, Eastern Bosnia: ICRC unable to assist conflict victims, 17 April 1993.

⁵³⁷ ICRC, Press Release, ICRC Appeal for respect for international humanitarian law in central Bosnia, ICRC Zagreb, 20 April 1993.

⁵³⁸ ICRC, Communication to the Press No. 93/17, Somalia: ICRC appeals for compliance with international humanitarian law, 17 June 1993.

⁵³⁹ ICRC, Communication to the Press No. 93/22, Liberia: ICRC Concerned about 110,000 People Facing Starvation, 22 July 1993.

⁵⁴⁰ International Red Cross and Red Crescent Movement, Council of Delegates, Birmingham Session, 29–30 October 1993, Res. 11, § 1(b).

⁵⁴¹ ICRC archive document.

control... [I]f the civilian population is not adequately provided for, relief actions which are exclusively humanitarian and impartial in character and conducted without any adverse distinction, such as those undertaken by the ICRC, shall be authorized, facilitated and respected.⁵⁴²

554. In 1994, in a Memorandum on Compliance with International Humanitarian Law by the Forces Participating in Opération Turquoise in the Great Lakes region, the ICRC stated that “relief operations aimed at the civilian population which are exclusively humanitarian, impartial and non-discriminatory shall be facilitated and respected”.⁵⁴³

555. In a press release issued in 1994, the ICRC urgently called on all the parties involved in the conflict in Chechnya “to facilitate its delegates’ humanitarian work”.⁵⁴⁴

556. In a communication to the press issued in 1997 in connection with the conflict in Zaire (DRC), the ICRC requested that the ADFL grant its delegates unrestricted access to victims of the armed conflict. It further demanded that all concerned provide “immediate access to these people in desperate need of help”.⁵⁴⁵

557. In a communication to the press issued in 2001 on the situation in Afghanistan, the ICRC stated that:

The warring parties have the duty to ensure that the basic needs of the civilian population in the territory under their control are met as far as possible and to allow the passage of essential relief supplies intended for civilians. They must authorize and facilitate impartial humanitarian relief operations.⁵⁴⁶

VI. *Other Practice*

558. In a resolution adopted at its Wiesbaden Session in 1975, the Institute of International Law stated that “in cases where the territory controlled by one party can be reached only by crossing the territory controlled by the other party... free passage over such territory should be granted to any relief consignment, at least insofar as is provided for in Article 23 [GC IV]”.⁵⁴⁷

⁵⁴² ICRC, Memorandum on Respect for International Humanitarian Law in Angola, 8 June 1994, § IV, *IRRC*, No. 320, 1997, p. 505.

⁵⁴³ ICRC, Memorandum on Compliance with International Humanitarian Law by the Forces Participating in Opération Turquoise, Geneva, 23 June 1994, § IV, reprinted in Marco Sassòli and Antoine A. Bouvier, *How Does Law Protect in War?*, ICRC, Geneva, 1999, p. 1309.

⁵⁴⁴ ICRC, Press Release No. 1793, Chechnya: ICRC urges respect for humanitarian rules, 28 November 1994.

⁵⁴⁵ ICRC, Communication to the Press No. 97/08, Zaire: ICRC demands access to conflict victims, 2 April 1997.

⁵⁴⁶ ICRC, Communication to the Press No. 01/47, Afghanistan: ICRC calls on all parties to conflict to respect international humanitarian law, 24 October 2001.

⁵⁴⁷ Institute of International Law, Wiesbaden Session, Resolution III, The Principle of Non-Intervention in Civil Wars, 14 August 1975, Article 4.2.

559. In a resolution adopted at its Santiago de Compostela Session in 1989, the International Law Institute stated that “States should not arbitrarily reject assistance”.⁵⁴⁸

560. Principles 5, 6 and 12 of the Guiding Principles on the Right to Humanitarian Assistance, adopted by the Council of the IHL in 1993, state that:

National authorities, national and international organizations whose statutory mandates provide for the possibility of rendering humanitarian assistance, such as the ICRC, UNHCR, other organizations of the UN system, and professional humanitarian organizations, have the right to offer such assistance when the conditions laid down in the present Principles are fulfilled. This offer should not be regarded as an unfriendly act or as interference in a State’s internal affairs. The authorities of the States concerned, in the exercise of their sovereign right, should extend their cooperation concerning the offer of humanitarian assistance to their populations.

...

For the implementation of the right to humanitarian assistance it is essential to ensure the access of victims to potential donors, and access of qualified national and international organizations, States and other donors to the victims when their offer of humanitarian assistance is accepted.

...

In order to verify whether the relief operation or assistance rendered is in conformity with the relevant rules and declared objectives, the authorities concerned may exercise the necessary control, on condition that such control does not unduly delay the providing of humanitarian assistance.⁵⁴⁹

561. In 1994, in a meeting with the ICRC, the leader of an armed opposition group agreed to allow the ICRC “continued access even when it restricted it to any government personnel be they military or civilian”.⁵⁵⁰

562. A report by the Memorial Human Rights Center documenting Russia’s operation in the Chechen village of Samashki in April 1995 alleged that the Russian forces had impeded access by humanitarian aid personnel to the village, thereby depriving the wounded of essential medical care. The report stated that:

Over the course of several days, the ICRC (which was based in Nazran) attempted to drive to the village, but Russian troops did not allow them to pass . . . ITAR-TASS reported that an EMERCOM convoy from Ingushetia with volunteer doctors was stopped at the checkpoint near Samashki and not allowed to pass through to the village. Médecins sans Frontières representatives were also not allowed through during that time.⁵⁵¹

⁵⁴⁸ Institute of International Law, Santiago de Compostela Session, Resolution III, The Protection of Human Rights and the Principle of Non-intervention in Internal Affairs of States, 13 September 1989, Article 5.

⁵⁴⁹ IHL, Guiding Principles on the Right to Humanitarian Assistance, Principles 5, 6 and 12, *IRRC*, No. 297, 1993, pp. 522–523 and 525.

⁵⁵⁰ ICRC archive document.

⁵⁵¹ Memorial Human Rights Center, *By All Available Means: the Russian Federation Ministry of Internal Affairs Operation in the Village of Samashki: April 7–8, 1995*, Moscow, 1996, § 10, reprinted in Marco Sassòli and Antoine A. Bouvier, *How Does Law Protect in War?*, ICRC, Geneva, 1999, p. 1415.

563. In 1996, in a statement on the humanitarian situation in Angola, UNITA stated that “all of the UNITA political, military and administrative authorities, and its militants, in areas under its control, have been directed to provide full cooperation and facilities to humanitarian organizations . . . in order to best carry out their activities”.⁵⁵²

Impediment of humanitarian relief

I. Treaties and Other Instruments

Treaties

564. Pursuant to Article 8(2)(b)(xxv) of the 1998 ICC Statute, the following constitutes a war crime in international armed conflicts: “intentionally using starvation of civilians as a method of warfare by depriving them of objects indispensable to their survival, including wilfully impeding relief supplies as provided for under the Geneva Conventions”.

Other Instruments

565. The 2000 UNTAET Regulation No. 2000/15 establishes panels with exclusive jurisdiction over serious criminal offences, including war crimes. According to Section 6(1)(b)(xxv), the following constitutes a war crime in international armed conflicts: “intentionally using starvation of civilians as a method of warfare by depriving them of objects indispensable to their survival, including wilfully impeding relief supplies as provided for under the Geneva Conventions”.

II. National Practice

Military Manuals

566. Germany’s Military Manual states that, in the case of blockade, “it is . . . prohibited to hinder relief shipments for the civilian population”.⁵⁵³

567. Switzerland’s Basic Military Manual states that “it is prohibited to starve the civilian population . . . by impeding relief actions in favour of the population in need”.⁵⁵⁴

568. The UK Military Manual provides that:

The Occupant must not in any way whatsoever divert relief consignments from their intended purpose except in cases of urgent necessity and then only in the interest of the population of the occupied territory as a whole and with the consent

⁵⁵² UNITA, General Secretariat & General Staff, Statement on the Humanitarian Situation in Angola, Bailundo, 1 January 1996, § 5.

⁵⁵³ Germany, *Military Manual* (1992), § 1051.

⁵⁵⁴ Switzerland, *Basic Military Manual* (1987), Article 147(b).

of the Protecting Power . . . The Occupant must facilitate the rapid distribution of these consignments.⁵⁵⁵

National Legislation

569. Australia's ICC (Consequential Amendments) Act incorporates in the Criminal Code the war crimes defined in the 1998 ICC Statute, including "the wilful impeding of relief supplies for civilians" in international armed conflicts.⁵⁵⁶

570. Bangladesh's International Crimes (Tribunal) Act states that the "violation of any humanitarian rules applicable in armed conflicts laid down in the Geneva Conventions of 1949" is a crime.⁵⁵⁷

571. Under Burundi's Draft Law on Genocide, Crimes against Humanity and War Crimes, "deliberately starving civilians as a method of warfare . . . by intentionally impeding the sending of relief provided for in the Geneva Conventions" constitutes a war crime in international armed conflicts.⁵⁵⁸

572. Canada's Crimes against Humanity and War Crimes Act provides that the war crimes defined in Article 8(2) of the 1998 ICC Statute are "crimes according to customary international law" and, as such, indictable offences under the Act.⁵⁵⁹

573. Colombia's Penal Code imposes a criminal sanction on "anyone who, during an armed conflict, obstructs or impedes . . . the realisation of medical and humanitarian tasks which, according to the rules of international humanitarian law, can and must take place".⁵⁶⁰

574. Congo's Genocide, War Crimes and Crimes against Humanity Act defines war crimes with reference to the categories of crimes defined in Article 8 of the 1998 ICC Statute.⁵⁶¹

575. Under the Draft Amendments to the Penal Code of El Salvador, a prison sentence may be imposed on "anyone who [during an international or internal armed conflict] obstructs or impedes the medical, sanitary or relief personnel . . . in the realisation of their . . . humanitarian tasks which, in accordance with the rules of international humanitarian law, may or shall be conducted".⁵⁶²

576. Under Georgia's Criminal Code, any war crime provided for by the 1998 ICC Statute, which is not explicitly mentioned in the Code, is a crime,

⁵⁵⁵ UK, *Military Manual* (1958), § 541.

⁵⁵⁶ Australia, *ICC (Consequential Amendments) Act* (2002), Schedule 1, § 268.67(1)(a)(ii).

⁵⁵⁷ Bangladesh, *International Crimes (Tribunal) Act* (1973), Section 3(2)(e).

⁵⁵⁸ Burundi, *Draft Law on Genocide, Crimes against Humanity and War Crimes* (2001), Article 4(B)(x).

⁵⁵⁹ Canada, *Crimes against Humanity and War Crimes Act* (2000), Section 4(1) and (4).

⁵⁶⁰ Colombia, *Penal Code* (2000), Article 153.

⁵⁶¹ Congo, *Genocide, War Crimes and Crimes against Humanity Act* (1998), Article 4.

⁵⁶² El Salvador, *Draft Amendments to the Penal Code* (1998), Article entitled "Omission y obstaculización de medidas de socorro y asistencia humanitaria".

including “intentionally using starvation of civilians as a method of warfare by depriving them of objects indispensable to their survival, including wilfully impeding relief supplies as provided for under the Geneva Conventions” in international armed conflicts.⁵⁶³

577. Germany’s Law Introducing the International Crimes Code punishes anyone who, in connection with an international or a non-international armed conflict, “impedes relief supplies, in contravention of international humanitarian law”.⁵⁶⁴

578. Ireland’s Geneva Conventions Act as amended provides that any “minor breach” of the Geneva Conventions, including violations of Article 23 GC IV, and of AP I, including violations of Article 70(3) AP I, is a punishable offence.⁵⁶⁵

579. Under Mali’s Penal Code, “deliberately starving civilians as a method of warfare, by depriving them of objects indispensable to their survival, including wilfully impeding relief supplies as provided for under the Geneva Conventions” is a war crime in international armed conflicts.⁵⁶⁶

580. Under the International Crimes Act of the Netherlands, “intentionally using starvation of civilians as a method of warfare by depriving them of objects indispensable to their survival, including wilfully impeding relief supplies as provided for under the Geneva Conventions” is a crime, when committed in an international armed conflict.⁵⁶⁷

581. Under New Zealand’s International Crimes and ICC Act, war crimes include the crime defined in Article 8(2)(b)(xxv) of the 1998 ICC Statute.⁵⁶⁸

582. Nicaragua’s Draft Penal Code punishes “anyone who [during an international or internal armed conflict] obstructs or impedes the medical, sanitary or relief personnel . . . in the realisation of their . . . humanitarian tasks which, in accordance with the rules of international humanitarian law, may or shall be conducted”.⁵⁶⁹

583. Under Norway’s Military Penal Code as amended, “anyone who contravenes or is accessory to the contravention of provisions relating to the protection of persons or property laid down in . . . the Geneva Conventions of 12 August 1949 . . . [and in] the two additional protocols to these Conventions . . . is liable to imprisonment”.⁵⁷⁰

584. The Act on Child Protection of the Philippines contains an article on “children in situations of armed conflicts” which states that “delivery of basic social services such as . . . emergency relief services shall be kept unhampered”.⁵⁷¹

⁵⁶³ Georgia, *Criminal Code* (1999), Article 413(d).

⁵⁶⁴ Germany, *Law Introducing the International Crimes Code* (2002), Article 1, § 11(1)(5).

⁵⁶⁵ Ireland, *Geneva Conventions Act as amended* (1962), Section 4(1) and (4).

⁵⁶⁶ Mali, *Penal Code* (2001), Article 31(i)(25).

⁵⁶⁷ Netherlands, *International Crimes Act* (2003), Article 5(5)(l).

⁵⁶⁸ New Zealand, *International Crimes and ICC Act* (2000), Section 11(2).

⁵⁶⁹ Nicaragua, *Draft Penal Code* (1999), Article 463.

⁵⁷⁰ Norway, *Military Penal Code as amended* (1902), § 108.

⁵⁷¹ Philippines, *Act on Child Protection* (1992), Article X, Section 22(c).

585. Under Trinidad and Tobago's Draft ICC Act, it is a punishable offence to commit a war crime as defined in Article 8(2)(b)(xxv) of the 1998 ICC Statute.⁵⁷²

586. Under the UK ICC Act, it is a punishable offence to commit a war crime as defined in Article 8(2)(b)(xxv) of the 1998 ICC Statute.⁵⁷³

National Case-law

587. No practice was found.

Other National Practice

588. In the *Application of Genocide Convention case (Provisional Measures)* in 1993, Bosnia and Herzegovina requested that the ICJ indicate provisional measures against the FRY, stating that:

Yugoslavia (Serbia and Montenegro) and its agents and surrogates are under an obligation to cease and desist immediately from its breaches of the foregoing legal obligations, and is under a particular duty to cease and desist immediately: . . .

- from the interruption of, interference with, or harassment of humanitarian relief supplies to the citizens of Bosnia and Herzegovina by the international community.⁵⁷⁴

589. In 1992, during a debate in the UN Security Council, China condemned the hampering of the delivery of humanitarian aid in Bosnia and Herzegovina and declared that it was "deeply concerned with and disturbed by such a situation".⁵⁷⁵

590. In 1992, in a letter addressed to the President of the UN Security Council, Egypt, Iran, Pakistan, Saudi Arabia, Senegal and Turkey stated that "the unhindered delivery of humanitarian relief to all parts of Bosnia and Herzegovina, including the population of Sarajevo, should get under way immediately. To this end . . . effective measures must be taken to stop anyone from hindering the delivery of humanitarian assistance."⁵⁷⁶

591. In 1994, in a statement in the lower house of parliament, a German Minister of State, in line with the other members of the EU, condemned the hampering of humanitarian aid in Sudan.⁵⁷⁷

592. In 1996, during a debate in the UN General Assembly, Germany called upon all parties to the conflict in Afghanistan not to hamper humanitarian aid.⁵⁷⁸

⁵⁷² Trinidad and Tobago, *Draft ICC Act (1999)*, Section 5(1)(a).

⁵⁷³ UK, *ICC Act (2001)*, Sections 50(1) and 51(1) (England and Wales) and Section 58(1) (Northern Ireland).

⁵⁷⁴ ICJ, *Application of Genocide Convention case (Provisional Measures)*, 8 April 1993, § 2(q).

⁵⁷⁵ China, Statement before the UN Security Council, UN Doc. S/PV.3082, 30 May 1992, p. 8.

⁵⁷⁶ Egypt, Iran, Pakistan, Saudi Arabia, Senegal and Turkey, Letter dated 5 October 1992 to the President of the UN Security Council, UN Doc. S/24620, 6 October 1992, § (a).

⁵⁷⁷ Germany, Lower House of Parliament, Statement by a Minister of State, 3 March 1994, *Plenarprotokoll* 12/213, p. 18469.

⁵⁷⁸ Germany, Statement before the UN General Assembly, UN Doc. A/51/PV.84, 13 December 1996, p. 7.

593. In 1993, during a debate in the UN Security Council, the UK representative stated that “the United Kingdom Government has been horrified at the continued evidence of massive breaches of international humanitarian law and human rights in the former Yugoslavia . . . [including] the deliberate obstruction of humanitarian relief convoys”.⁵⁷⁹

III. Practice of International Organisations and Conferences

United Nations

594. In a resolution on Bosnia and Herzegovina adopted in 1992, the UN Security Council demanded that “all parties and others concerned create immediately the necessary conditions for unimpeded delivery of humanitarian supplies to Sarajevo and other destinations in Bosnia and Herzegovina”.⁵⁸⁰

595. In a resolution on Bosnia and Herzegovina adopted in 1992, the UN Security Council underlined “the urgency of quick delivery of humanitarian assistance to Sarajevo and its environs”. It further stressed that, if the delivery of humanitarian assistance was hampered, it did not “exclude other measures to deliver humanitarian aid to Sarajevo and its environs”.⁵⁸¹

596. In a resolution adopted in 1992 on humanitarian assistance to Sarajevo and other parts of Bosnia and Herzegovina, the UN Security Council expressed its dismay at the “continuation of conditions that impede the delivery of humanitarian supplies to destinations within Bosnia and Herzegovina and the consequent suffering of the people of that country”.⁵⁸²

597. In a resolution adopted in 1992, the UN Security Council expressed “grave alarm at continuing reports of widespread violations of international humanitarian law occurring within the territory of the former Yugoslavia including . . . impeding the delivery of food and medical supplies to the civilian population”.⁵⁸³

598. In a resolution adopted in 1992, the UN Security Council condemned “all violations of international humanitarian law, including . . . the deliberate impeding of the delivery of food and medical supplies to the civilian population of the Republic of Bosnia and Herzegovina” and reaffirmed that “those that commit or order the commission of such acts will be held individually responsible in respect of such acts”.⁵⁸⁴

599. In a resolution adopted in 1992, the UN Security Council determined that “the magnitude of the human tragedy caused by the conflict in Somalia, further exacerbated by the obstacles being created to the distribution of humanitarian assistance, constitutes a threat to international peace and security”. It also strongly condemned “all violations of international humanitarian law

⁵⁷⁹ UK, Statement before the UN Security Council, UN Doc. S/PV.3217, 25 May 1993, p. 17.

⁵⁸⁰ UN Security Council, Res. 758, 8 June 1992, § 8.

⁵⁸¹ UN Security Council, Res. 761, 29 June 1992, preamble and § 4.

⁵⁸² UN Security Council, Res. 770, 13 August 1992, preamble.

⁵⁸³ UN Security Council, Res. 771, 13 August 1992, preamble.

⁵⁸⁴ UN Security Council, Res. 787, 16 November 1992, § 7.

occurring in Somalia, including in particular the deliberate impeding of the delivery of food and medical supplies essential for the survival of the civilian population" and affirmed that "those who commit or order the commission of such acts will be held individually responsible in respect of such acts".⁵⁸⁵

600. In a resolution adopted in 1993 regarding the situation in Bosnia and Herzegovina, the UN Security Council reiterated its condemnation of "the obstruction, primarily by the Bosnian Serb party, of the delivery of humanitarian assistance".⁵⁸⁶

601. In a resolution adopted in 1994 in the context of the conflict in Angola, the UN Security Council condemned "any action, including laying of landmines, which threatens the unimpeded delivery of humanitarian assistance to all in need in Angola".⁵⁸⁷ This condemnation was reiterated in a subsequent resolution.⁵⁸⁸

602. In a resolution on Bosnia and Herzegovina adopted in 1995, the UN Security Council declared itself "gravely concerned that the regular obstruction of deliveries of humanitarian assistance, and the denial of the use of Sarajevo airport, by the Bosnian Serb side threaten the ability of the United Nations in Bosnia and Herzegovina to carry out its mandate".⁵⁸⁹

603. In a resolution on Sierra Leone adopted in 1997, the UN Security Council called upon the junta "to cease all interference with the delivery of humanitarian assistance to the people of Sierra Leone".⁵⁹⁰

604. In a resolution adopted in 1998 on the situation in Afghanistan, the UN Security Council urged all Afghan factions and, in particular the Taliban, "to facilitate the work of the international humanitarian organizations and to ensure unimpeded access and adequate conditions for the delivery of aid by such organizations to all in need of it".⁵⁹¹

605. In 1992, in a statement by its President in the context of the conflict in Bosnia and Herzegovina, the UN Security Council demanded "the immediate cessation of attacks and all actions aimed at impeding the distribution of humanitarian assistance and at forcing the inhabitants of Sarajevo to leave the city".⁵⁹²

606. In January 1993, in a statement by its President regarding the situation in Bosnia and Herzegovina, the UN Security Council reaffirmed:

its demand that all parties and others concerned, in particular Serb paramilitary units, cease and desist forthwith from all violations of international humanitarian law being committed in the territory of Bosnia and Herzegovina, including in particular the deliberate interference with humanitarian convoys. The Council warns the

⁵⁸⁵ UN Security Council, Res. 794, 3 December 1992, preamble and § 5.

⁵⁸⁶ UN Security Council, Res. 836, 4 June 1993, preamble.

⁵⁸⁷ UN Security Council, Res. 945, 29 September 1994, § 10.

⁵⁸⁸ UN Security Council, Res. 952, 27 October 1994, § 7.

⁵⁸⁹ UN Security Council, Res. 998, 16 June 1995, preamble.

⁵⁹⁰ UN Security Council, Res. 1132, 8 October 1997, § 2.

⁵⁹¹ UN Security Council, Res. 1193, 28 August 1998, § 9.

⁵⁹² UN Security Council, Statement by the President, UN Doc. S/24932, 9 December 1992.

parties concerned of serious consequences, in accordance with relevant resolutions of the Security Council, if they continue to impede the delivery of humanitarian relief assistance.⁵⁹³

607. In February 1993, in a statement by its President regarding the conflict in Bosnia and Herzegovina, the UN Security Council noted with deep concern that, "notwithstanding the Council's demand in that statement [of 25 January 1993], relief efforts continue to be impeded". It further condemned "the blocking of humanitarian convoys and the impeding of relief supplies, which place at risk the civilian population of the Republic of Bosnia and Herzegovina".⁵⁹⁴

608. In February 1993, in a statement by its President regarding the situation in Bosnia and Herzegovina, the UN Security Council expressed its concern that:

in spite of its repeated demands, relief efforts continue to be impeded by Serb paramilitary units, especially in the eastern part of the country, namely in the enclaves of Srebrenica, Cerska, Goražde and Žepa . . .

It regards the blockade of relief efforts as a serious impediment to a negotiated settlement . . .

The deliberate impeding of the delivery of food and humanitarian relief essential for the survival of the civilian population in Bosnia and Herzegovina constitutes a violation of the Geneva Conventions of 1949 and the Council is committed to ensuring that individuals responsible for such acts are brought to justice.

The Security Council added that it strongly condemned "once again the blocking of humanitarian convoys that has impeded the delivery of humanitarian supplies".⁵⁹⁵

609. In April 1993, in a statement by its President regarding the situation in Bosnia and Herzegovina, the UN Security Council stated that it was:

shocked by and extremely alarmed at the dire and worsening humanitarian situation which has developed in Srebrenica . . . following the unacceptable decision of the Bosnian Serb party not to permit any further humanitarian aid to be delivered to that town . . .

Recognizing the imperative need to alleviate, with the utmost urgency, the sufferings of the population in and around Srebrenica, who are in desperate need of food, medicine, clothes and shelter, the Council demands that the Bosnian Serb party cease and desist forthwith from all violations of international humanitarian law, including in particular the deliberate interference with humanitarian convoys.

The Council added that the blocking of UN humanitarian relief efforts was directly related to the practice of "ethnic cleansing".⁵⁹⁶

610. In July 1993, in a statement by its President regarding the situation in Sarajevo in Bosnia and Herzegovina, the UN Security Council demanded "an

⁵⁹³ UN Security Council, Statement by the President, UN Doc. S/25162, 25 January 1993, p. 1.

⁵⁹⁴ UN Security Council, Statement by the President, UN Doc. S/25302, 17 February 1993, p. 1.

⁵⁹⁵ UN Security Council, Statement by the President, UN Doc. S/25334, 25 February 1993, pp. 1 and 2.

⁵⁹⁶ UN Security Council, Statement by the President, UN Doc. S/25520, 3 April 1993, p. 1.

end... to the blocking of, and interference with, the delivery of humanitarian relief by both the Bosnian Serb and the Bosnian Croat parties".⁵⁹⁷

611. In 1994, in a statement by its President regarding the situation in Bosnia and Herzegovina, the UN Security Council deplored "the failure of the parties to honour the agreements they have signed... to permit the delivery of humanitarian assistance". It also strongly deplored "the abhorrent practice of deliberate obstruction of humanitarian relief convoys by any party". The Council demanded that "all parties fully abide by their commitments in this regard and facilitate timely delivery of humanitarian aid".⁵⁹⁸

612. In 1994, in a statement by its President regarding the situation in Haiti, the UN Security Council stated that it:

attaches great importance to humanitarian assistance in Haiti, including the unimpeded delivery and distribution of fuel used for humanitarian purposes. It will hold responsible any authorities and individuals in Haiti who might in any way interfere with the delivery and distribution of humanitarian assistance under the overall responsibility of PAHO or who fail in their responsibility to ensure that this delivery and distribution benefits the intended recipients: those in need of humanitarian assistance.⁵⁹⁹

613. In 1994, in a statement by its President regarding the situation in Bosnia and Herzegovina, the UN Security Council noted with particular concern "reports of the recurrent obstruction and looting of humanitarian aid convoys destined for the civilian population of Maglaj, including the most recent incident which took place on 10 March 1994, in which six trucks were prevented from reaching the town".⁶⁰⁰

614. In 1994, in a statement by its President regarding the situation in Rwanda, the UN Security Council condemned:

the ongoing interference by [the former Rwandan leaders and former government forces and militias] and individuals in the provision of humanitarian relief, and is deeply concerned that this interference has already led to the withdrawal of some non-governmental agencies responsible for the distribution of relief supplies within the [refugee] camps.⁶⁰¹

615. In 1996, in a statement by its President in the context of the conflict in Somalia, the UN Security Council considered:

the uninterrupted delivery of humanitarian assistance to be a crucial factor in the overall security and stability of Somalia. In this respect, the closure of Mogadishu

⁵⁹⁷ UN Security Council, Statement by the President, UN Doc. S/26134, 22 July 1993, p. 1.

⁵⁹⁸ UN Security Council, Statement by the President, UN Doc. S/PRST/1994/1, 7 January 1994, p. 1.

⁵⁹⁹ UN Security Council, Statement by the President, UN Doc. S/PRST/1994/2, 10 January 1994, p. 1.

⁶⁰⁰ UN Security Council, Statement by the President, UN Doc. S/PRST/1994/11, 14 March 1994, p. 1.

⁶⁰¹ UN Security Council, Statement by the President, UN Doc. S/PRST/1994/75, 30 November 1994, p. 1.

main seaport and other transportation facilities severely aggravates the present situation and poses a potential major impediment to future emergency deliveries. The Council calls upon the Somali parties and factions to open those facilities unconditionally.⁶⁰²

616. In 1996, in a statement by its President regarding the situation in Afghanistan, the UN Security Council called on the parties involved “to end the hostilities forthwith and not to obstruct the delivery of humanitarian aid and other needed supplies to the innocent civilians of the city”.⁶⁰³

617. In 1997, in a statement by its President regarding the situation in the Great Lakes region, the UN Security Council expressed its dismay at “acts of violence which have hampered the delivery of humanitarian assistance”.⁶⁰⁴

618. In 1997, in a statement by its President regarding the situation in the Great Lakes region, the UN Security Council expressed “concern at reports of obstruction of humanitarian assistance efforts”, but noted that “humanitarian access has improved recently”.⁶⁰⁵

619. In 1997, in a statement by its President regarding the situation in Sierra Leone, the UN Security Council called upon the military junta “to cease all interference with the delivery of humanitarian assistance to the people of Sierra Leone”.⁶⁰⁶

620. In July 1998, in a statement by its President regarding the situation in Afghanistan, the UN Security Council called upon all Afghan factions “to lift unconditionally any blockade of humanitarian relief supplies”.⁶⁰⁷

621. In August 1998, in a statement by its President regarding the situation in Afghanistan, the UN Security Council called upon all Afghan parties and, in particular, the Taliban, “to take the necessary steps to secure the uninterrupted supply of humanitarian aid to all in need of it and in this connection not to create impediments to the activities of the United Nations humanitarian agencies and international humanitarian organizations”.⁶⁰⁸

622. In a resolution adopted in 1992 on the situation in Bosnia and Herzegovina, the UN General Assembly expressed “grave alarm at continuing reports of widespread violations of international humanitarian law...including...

⁶⁰² UN Security Council, Statement by the President, UN Doc. S/PRST/1996/4, 24 January 1996, p. 2.

⁶⁰³ UN Security Council, Statement by the President, UN Doc. S/PRST/1996/6, 15 February 1996, p. 1.

⁶⁰⁴ UN Security Council, Statement by the President, UN Doc. S/PRST/1997/22, 24 April 1997, p. 1.

⁶⁰⁵ UN Security Council, Statement by the President, UN Doc. S/PRST/1997/24, 30 April 1997, p. 1.

⁶⁰⁶ UN Security Council, Statement by the President, UN Doc. S/PRST/1997/42, 6 August 1997, p. 2.

⁶⁰⁷ UN Security Council, Statement by the President, UN Doc. S/PRST/1998/22, 14 July 1998, p. 2.

⁶⁰⁸ UN Security Council, Statement by the President, UN Doc. S/PRST/1998/24, 6 August 1998, p. 2.

impeding the delivery of food and medical supplies to the civilian population".⁶⁰⁹

623. In a resolution adopted in 1994 on the situation of human rights in the former Yugoslavia, the UN General Assembly condemned "all deliberate impedance of the delivery of food, medical and other supplies essential for the civilian population, which constitutes a serious violation of international humanitarian law and international human rights law" and demanded that "all parties ensure that all persons under their control cease such acts".⁶¹⁰ This condemnation and demand were repeated in a subsequent resolution in 1995.⁶¹¹

624. In a resolution adopted in 1997 on the situation of human rights in the Sudan, the UN General Assembly expressed "its outrage at the use by all parties to the conflict of military force to disrupt . . . relief efforts" and called for "those responsible for such actions to be brought to justice".⁶¹²

625. In a resolution adopted in 1997 on the situation of human rights in Afghanistan, the UN General Assembly requested "all the parties in Afghanistan to lift the restrictions imposed on the international aid community and allow the free transit of food and medical supplies to all populations of the country".⁶¹³

626. In a resolution adopted in 1983, the UN Commission on Human Rights called upon all parties to the conflict in El Salvador "to co-operate fully and not to interfere with the activities of humanitarian organisations dedicated to alleviating the suffering of the civilian population wherever these organisations operate in El Salvador".⁶¹⁴

627. In a resolution adopted in 1994 on the situation of human rights in the territory of the former Yugoslavia, the UN Commission on Human Rights stated that it considered that "the deliberate impeding of delivery of food, medical and other supplies essential for the civilian population could constitute a serious violation of international humanitarian law".⁶¹⁵

628. In a resolution adopted in 1994 on the situation of human rights in Bosnia and Herzegovina, the UN Commission on Human Rights strongly condemned "the strategy of strangulation of populations by obstructing food supplies and other essentials to the civilian populations".⁶¹⁶

629. In a resolution adopted in 1995 on the situation of human rights in the Sudan, the UN Commission on Human Rights expressed "its outrage at the use of military force by all parties to the conflict to disrupt . . . relief efforts aimed

⁶⁰⁹ UN General Assembly, Res. 46/242, 25 August 1992, § 9.

⁶¹⁰ UN General Assembly, Res. 49/196, 23 December 1994, § 14.

⁶¹¹ UN General Assembly, Res. 50/193, 22 December 1995, § 13.

⁶¹² UN General Assembly, Res. 52/140, 12 December 1997, § 2.

⁶¹³ UN General Assembly, Res. 52/145, 12 December 1997, § 16.

⁶¹⁴ UN Commission on Human Rights, Res. 1983/29, 8 March 1983 § 10.

⁶¹⁵ UN Commission on Human Rights, Res. 1994/72, 9 March 1994, § 11.

⁶¹⁶ UN Commission on Human Rights, Res. 1994/75, 9 March 1994, § 1.

at assisting civilian populations" and called for "an end to such practices and for those responsible for such actions to be brought to justice".⁶¹⁷

630. In a resolution adopted in 1995 on the situation of human rights in Bosnia and Herzegovina, Croatia and the FRY, the UN Commission on Human Rights condemned "all deliberate and arbitrary impeding of the delivery of food, medical and other supplies essential for the civilian population . . . which can constitute a serious violation of international humanitarian law".⁶¹⁸

631. In a resolution adopted in 1996 on the situation of human rights in the Sudan, the UN Commission on Human Rights expressed deep concern that "access of international relief organizations to civilian populations critically at risk . . . continues to be severely impeded, violating international humanitarian law . . . and representing a threat to human life that constitutes an offence to human dignity".⁶¹⁹

632. In a resolution adopted in 1998 on the situation of human rights in the Sudan, the UN Commission on Human Rights expressed "its outrage at the use by all parties to the conflict of military force to disrupt . . . relief efforts".⁶²⁰

633. In 2001, in a report on the protection of civilians in armed conflict, the UN Secretary-General complained about the "failure of warring parties to admit the delivery of certain food items because they are perceived as jeopardizing the objectives of their war effort". He also noted that "in times of conflict, many Governments often constitute the major impediment to any meaningful humanitarian assistance and protection".⁶²¹

634. In 1998, in an analytical report on "Minimum standards of humanity", the UN Secretary-General drew attention to the fact that civilians "die from starvation or disease, when relief supplies are arbitrarily withheld from them".⁶²²

635. In 1993, in a report on the situation of human rights in the territory of the former Yugoslavia, the Special Rapporteur of the UN Commission on Human Rights noted that "the humanitarian nature of aid convoys is being respected less and less and all parties to the conflict are creating obstacles to the delivery of humanitarian aid to those in need".⁶²³

636. In 1997, in a report on the situation of human rights in Zaire (DRC), the Special Rapporteur of the UN Commission on Human Rights denounced the fact that:

Humanitarian assistance has been impeded by all parties to the conflict. In the area controlled by AFDL [ADFL], ICRC complained on 10 December of encountering

⁶¹⁷ UN Commission on Human Rights, Res. 1995/77, 8 March 1995, § 18.

⁶¹⁸ UN Commission on Human Rights, Res. 1995/89, 8 March 1995, § 17.

⁶¹⁹ UN Commission on Human Rights, Res. 1996/73, 23 April 1996, preamble.

⁶²⁰ UN Commission on Human Rights, Res. 1998/67, 21 April 1998, § 3.

⁶²¹ UN Secretary-General, Report on the protection of civilians in armed conflict, UN Doc. S/2001/331, 30 March 2001, §§ 17 and 47.

⁶²² UN Secretary-General, Analytical report submitted pursuant to UN Commission on Human Rights resolution 1997/21, UN Doc. E/CN.4/1998/87, 5 January 1998, § 27.

⁶²³ UN Commission on Human Rights, Special Rapporteur on the Situation of Human Rights in the Former Yugoslavia, Report, UN Doc. E/CN.4/1993/50, 10 February 1993, § 117.

difficulties when entering the [refugee] camps, a complaint echoed by humanitarian NGOs. In the areas controlled by the Zairian Government, humanitarian action was generally accepted, although under the constant threat of closing the camps and expelling the refugees. Since the Air Liberia aircraft accident in July, however, access has become more difficult . . . IOM . . . was prevented from acting in Zaire on 27 September; all agencies came under suspicion.⁶²⁴

The Rapporteur added that “while it is not true to say that the agencies are permanently and systematically prevented from entering the refugee camps, it is often difficult for them to do so, leading to delays, which are extremely costly in terms of human lives”.⁶²⁵

637. The Principles of Engagement for Emergency Humanitarian Assistance in the Democratic Republic of the Congo, annexed to the 2000 United Nations Inter-Agency Consolidated Appeal for the Democratic Republic of the Congo, while referring explicitly to the Code of Conduct of the Red Cross and Red Crescent Movement and NGOs in Disaster Relief, consider unimpeded access to affected populations to be of fundamental importance in order to ensure humanitarian assistance. The Principles, which are addressed to the international humanitarian community as well as to the political and military authorities, state that “Parties to the conflict should ensure unimpeded access for assessment, delivery and monitoring of humanitarian aid to potential beneficiaries. The assistance to affected areas should be provided in the most efficient manner and by the most accessible routes.”⁶²⁶

Other International Organisations

638. In a resolution on Sudan adopted in 1997, the APC-EU Joint Assembly condemned “the obstruction of humanitarian assistance to the people of Nuba Mountains and other areas by the Government of Sudan”. It requested “the United Nations to challenge the Government of Sudan to ensure immediate and free access for humanitarian organizations and Operation Lifeline Sudan”.⁶²⁷

639. In a resolution on the former Yugoslavia adopted in 1994, the Parliamentary Assembly of the Council of Europe condemned the impediment of the delivery of humanitarian aid in Bosnia and Herzegovina. It considered any such impediment of humanitarian convoys by the parties to the conflict to be a “barbaric disregard for international humanitarian law”. The Assembly further

⁶²⁴ UN Commission on Human Rights, Special Rapporteur on the Situation of Human Rights in Zaire, Report, UN Doc. E/CN.4/1997/6, 28 January 1997, § 209.

⁶²⁵ UN Commission on Human Rights, Special Rapporteur on the Situation of Human Rights in Zaire, Report on the mission carried out at the request of the High Commissioner for Human Rights between 25 and 29 March 1997 to the area occupied by rebels in eastern Zaire, UN Doc. E/CN.4/1997/6/Add.2, 2 April 1997, § 35.

⁶²⁶ UN Office for the Coordination of Humanitarian Affairs, United Nations Inter-Agency Consolidated Appeal for the Democratic Republic of Congo (January–December 2000), November 1999, Annex II, Principles of Engagement for Emergency Humanitarian Assistance in the Democratic Republic of the Congo, §§ 1 and 2, p. 67.

⁶²⁷ APC-EU, Joint Assembly, Resolution on Sudan, 20 March 1997, § 3.

demanded that “all parties to the conflict in the area of the former Yugoslavia allow the unimpeded delivery of humanitarian aid, in accordance with their own past commitments and the requirements of international humanitarian law”.⁶²⁸

640. In a declaration on Bosnia and Herzegovina adopted in 1994, the Committee of Ministers of the Council of Europe requested “all parties involved in the conflict to allow unimpeded delivery of humanitarian aid”.⁶²⁹

641. In a declaration before the Permanent Council of the OSCE in 1995, the Presidency of the EU insisted that all facilities be given so as to allow the unimpeded and rapid delivery of medical and humanitarian aid in Chechnya.⁶³⁰

642. In a resolution adopted in 1995 on human rights in Chechnya, the European Parliament insisted that “humanitarian aid dispatched to relieve the people concerned must be allowed to reach them as fast as possible without being diverted . . . and that there should be no obstacle to distribution by non-governmental organizations”.⁶³¹

643. In 1998, in a declaration on the situation in Afghanistan, the Presidency of the EU described the food blockade on central Afghanistan as “a matter of grief”.⁶³²

644. In a declaration on the situation in Angola adopted in 1993, the OAU Assembly of Heads of State and Government urged UNITA “not to impede or hinder the delivery of humanitarian assistance to the civilian population affected by the war”.⁶³³

645. In a resolution adopted in 1992 on the situation in Bosnia and Herzegovina, the OIC Conference of Ministers of Foreign Affairs held the Serb leaders, those in Belgrade, as well as those in the Republic of Bosnia and Herzegovina responsible for the refusal to allow the delivery of assistance and supplies to populations affected by famine which it considered constituted a serious violation of IHL.⁶³⁴

646. In a resolution adopted in 1995, the Permanent Council of the OSCE called for the unhindered delivery of humanitarian aid to all groups of the civilian population affected by conflict in Chechnya.⁶³⁵

647. In 1993, the Parliamentary Assembly of the WEU debated the WEU mission to the Adriatic Sea to observe the implementation of the sanctions imposed on Serbia and Montenegro. The Rapporteur on the situation in the former

⁶²⁸ Council of Europe, Parliamentary Assembly, Res. 1019, 25 January 1994, §§ 4 and 9(v).

⁶²⁹ Council of Europe, Committee of Ministers, Declaration on Bosnia and Herzegovina, 14 February 1994, § 6.

⁶³⁰ EU, Statement by the Presidency of the EU before the Permanent Council of the OSCE, 2 February 1995, § 2.

⁶³¹ European Parliament, Resolution on human rights in Chechnya, 16 March 1995, § 4.

⁶³² EU, Presidency, Declaration on behalf of the EU on the situation in Afghanistan, 16 April 1998.

⁶³³ OAU, Assembly of Heads of State and Government, Declaration 2 [XXIX], 28-30 June 1993, § 9.

⁶³⁴ OIC, Conference of Ministers of Foreign Affairs, 17-18 June 1992, Res. 1/5-EX, § 15.

⁶³⁵ OSCE, Permanent Council, Resolution on Chechnya, 3 February 1995.

Yugoslavia denounced the enormous suffering of the civilian population caused by the conflict. He particularly criticised the Bosnian Croats for blocking humanitarian convoys destined for Sarajevo.⁶³⁶

International Conferences

648. At its meeting in Stockholm in 1992, the CSCE Ministerial Council adopted a decision on regional issues, notably the former Yugoslavia, in which it emphasised that “interference in humanitarian relief missions is an international crime for which the individuals responsible will be held personally accountable”.⁶³⁷

649. In a resolution adopted in 1993, the 90th Inter-Parliamentary Conference in Canberra expressed regret that “the international relief and protection effort during armed conflicts . . . is encountering serious difficulties and dangers, including . . . the blockade of humanitarian action, . . . the refusal of parties to the conflict to transport food supplies to the victims or to allow the relief organizations access to prisoners of war and imprisoned civilians”.⁶³⁸

IV. Practice of International Judicial and Quasi-judicial Bodies

650. No practice was found.

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

651. In 1994, in a Memorandum on Respect for International Humanitarian Law in Angola, the ICRC stated that “the parties to the conflict have a duty to ensure the provision of supplies essential to the survival of the civilian population in the territory under their control and to allow unimpeded passage of assistance for the civilian population in territories under the control of the adverse party”.⁶³⁹

VI. Other Practice

652. In 1992, in a meeting with the ICRC, a representative of a separatist entity stated that the army of the State had systematically blocked food supplies.⁶⁴⁰

⁶³⁶ WEU, Parliamentary Assembly, Report and debate on the mission to the Adriatic Sea, Statement of the Rapporteur, *BT-Drucksache* 12/6737, 2 February 1994, p. 35.

⁶³⁷ CSCE, Ministerial Council, Third Meeting, Stockholm, 14–15 December 1992, Decisions: 1. Regional Issues (Former Yugoslavia), § 18.

⁶³⁸ 90th Inter-Parliamentary Conference, Canberra, 13–18 September 1993, Respect for international humanitarian law and support for humanitarian action in armed conflicts, preamble.

⁶³⁹ ICRC, Memorandum on Respect for International Humanitarian Law in Angola, 8 June 1994, § IV, *IRRC*, No. 320, 1997, p. 505.

⁶⁴⁰ ICRC archive document.

653. In 1994, during the conflict in Afghanistan, according to a press agency, the Hezb-i-Islami faction blocked all humanitarian convoys heading for enemy-controlled territory. The Hezb-i-Islami justified these actions based on allegations that previous convoys had benefited the opposing military factions. Furthermore, it insisted that it had opened three markets in areas under its control to ensure the sustenance of the civilian population.⁶⁴¹

654. In 1996, in a communication to the ICRC, officials of an entity involved in a non-international armed conflict accused the government of a State of having blocked humanitarian aid in the course of the conflict.⁶⁴²

655. In 1997, the Washington Post reported that rebel forces from Zaire (DRC) were preventing humanitarian assistance from reaching tens of thousands of Rwandan refugees near the northern town of Kisangani. The report stated that “at one point, rebels requisitioned 60,000 liters of fuel from the aid agencies that was to be used to help transport the refugees. The rebels generally say the war effort warrants such actions.”⁶⁴³

Access for humanitarian relief via third States

I. Treaties and Other Instruments

Treaties

656. Article 70(2) AP I provides that:

The Parties to the conflict *and each High Contracting Party* shall allow and facilitate rapid and unimpeded passage of all relief consignments, equipment and personnel provided in accordance with this Section, even if such assistance is destined for the civilian population of the adverse Party”. [emphasis added]

Article 70 AP I was adopted by consensus.⁶⁴⁴

657. Article 33(2) of draft AP II submitted by the ICRC to the CDDH provided that “the parties to the conflict *and any High Contracting Party* through whose territory supplies must pass shall grant free passage when relief actions are carried out in accordance with the conditions stated in paragraph 1”.⁶⁴⁵ (emphasis added) This proposal was amended and adopted by consensus in Committee II of the CDDH.⁶⁴⁶ The approved text provided that “the Parties to the conflict *and each High Contracting Party* through whose territory these relief supplies will pass shall facilitate rapid and unimpeded passage of all relief consignments provided in accordance with the conditions stated in paragraph 2”.⁶⁴⁷ (emphasis

⁶⁴¹ AFP, Press information, Islamabad, 15 February 1994. ⁶⁴² ICRC archive document.

⁶⁴³ Cindy Shiner, Rebels Prevent Relief Workers From Aiding Rwandan Refugees, Ethnic Tensions, Resentment Flaring Into Violence, *The Washington Post*, 23 April 1997.

⁶⁴⁴ CDDH, *Official Records*, Vol. VI, CDDH/SR.43, 27 May 1977, p. 245.

⁶⁴⁵ CDDH, *Official Records*, Vol. I, Part Three, Draft Additional Protocols, June 1973, p. 43.

⁶⁴⁶ CDDH, *Official Records*, Vol. XIII, CDDH/406/Rev.1, 17 March–10 June 1977, p. 385, § 96.

⁶⁴⁷ CDDH, *Official Records*, Vol. XIII, CDDH/406/Rev.1, 17 March–10 June 1977, p. 424.

added) Eventually, however, this paragraph was not included in the final draft article that was voted upon in the plenary session.

Other Instruments

658. No practice was found.

II. National Practice

Military Manuals

659. Sweden's IHL Manual states that:

During armed conflicts between states, other states, including neutrals, sometimes provide an affected civilian population with humanitarian aid. Depending upon the nature or development of the conflict, this aid may be channelled to the civilian population of one party only, where acute need of civilian relief has arisen.⁶⁴⁸

660. The UK Military Manual states that:

If the whole or part of the population of occupied territory suffers from shortage of supplies, the Occupant must agree to relief schemes being instituted on their behalf and must facilitate such schemes by all the means at his disposal. The schemes in question will consist in particular of the provision of the consignments of foodstuffs, medical supplies and clothing . . . All parties to [GC IV] must permit the free passage of such consignments and must guarantee their protection.⁶⁴⁹

661. The US Field Manual provides that:

If the whole or part of the population of an occupied territory is inadequately supplied, the Occupying Power shall agree to relief schemes on behalf of the said population, and shall facilitate them by all the means at its disposal.

Such schemes, which may be undertaken . . . by States shall consist, in particular, of the provision of consignments of foodstuffs, medical supplies and clothing.

All Contracting Parties shall permit the free passage of these consignments and shall guarantee their protection.⁶⁵⁰

National Legislation

662. Under Ireland's Geneva Conventions Act as amended, any "minor breach" of AP I, including violations of Article 70(2) AP I, is a punishable offence.⁶⁵¹

663. Under Norway's Military Penal Code as amended, "anyone who contravenes or is accessory to the contravention of provisions relating to the protection of persons or property laid down in . . . the two additional protocols to [the Geneva] Conventions . . . is liable to imprisonment".⁶⁵²

⁶⁴⁸ Sweden, *IHL Manual* (1991), Section 5.7, p. 114.

⁶⁴⁹ UK, *Military Manual* (1958), § 541. ⁶⁵⁰ US, *Field Manual* (1956), § 388.

⁶⁵¹ Ireland, *Geneva Conventions Act as amended* (1962), Section 4(1) and (4).

⁶⁵² Norway, *Military Penal Code as amended* (1902), § 108(b).

National Case-law

664. No practice was found.

Other National Practice

665. No practice was found.

*III. Practice of International Organisations and Conferences**United Nations*

666. In a resolution adopted in 2000 on protection of civilians in armed conflicts, the UN Security Council called upon "all parties concerned, including neighbouring states, to cooperate fully with the United Nations Humanitarian Coordinator and United Nations agencies in providing... access" of humanitarian personnel.⁶⁵³

667. In 1994, a statement by its President regarding the situation in Rwanda, the UN Security Council called upon "all States to assist the Office of the United Nations High Commissioner for Refugees (UNHCR) and other humanitarian and relief agencies operating in the area in meeting the urgent humanitarian needs in Rwanda and its bordering States". The Council also called on "States bordering Rwanda... to facilitate transfer of goods and supplies to meet the needs of the displaced persons within Rwanda".⁶⁵⁴

668. In 1991, the UN General Assembly adopted a resolution on the strengthening of the coordination of humanitarian emergency assistance of the United Nations. The guiding principles on humanitarian assistance annexed to the resolution emphasise, *inter alia*, that "States in proximity to emergencies are urged to participate closely with the affected countries in international efforts, with a view to facilitating, to the extent possible, the transit of humanitarian assistance".⁶⁵⁵

669. In a decision adopted in 1996 on the humanitarian situation in Iraq, the UN Sub-Commission on Human Rights appealed to the "international community as a whole and to all Governments, including that of Iraq, to facilitate the supply of food and medicine to the civilian population".⁶⁵⁶

670. In 1999, in a report on the protection of civilians in armed conflict, the UN Secretary-General urged "neighbouring Member States to ensure access for humanitarian assistance".⁶⁵⁷

671. The Code of Conduct for Humanitarian Assistance in Sierra Leone, annexed to the 1999 United Nations Inter-Agency Consolidated Appeal for Sierra

⁶⁵³ UN Security Council, Res. 1296, 19 April 2000, § 8.

⁶⁵⁴ UN Security Council, Statement by the President, UN Doc. S/PRST/1994/21, 30 April 1994, p. 2.

⁶⁵⁵ UN General Assembly, Res. 46/182, 19 December 1991, Annex, § 7.

⁶⁵⁶ UN Sub-Commission on Human Rights, Decision on the humanitarian situation in Iraq, UN Doc. E/CN.4/Sub.2/DEC/1996/107, 25 November 1996.

⁶⁵⁷ UN Secretary-General, Report on the protection of civilians in armed conflict, UN Doc. S/1999/957, 8 September 1999, § 51, Recommendation 19.

Leone, contains certain guiding principles for States and non-State entities. One of these principles provides that "States in proximity to emergencies are urged to participate closely with affected countries in international efforts with a view to facilitating, to the extent possible, the transit of humanitarian assistance and humanitarian personnel".⁶⁵⁸

Other International Organisations

672. In a declaration on Yugoslavia in 1992, the EC called upon all parties to the conflict and other States "to facilitate the provision of humanitarian assistance...including through the establishment of humanitarian corridors".⁶⁵⁹

673. In a resolution adopted in 1993 on the situation in Angola, the OAU Assembly of Heads of State and Government called on "the OAU Member States and the international community to provide urgent humanitarian aid in order to mitigate the sufferings of the people in this country".⁶⁶⁰

International Conferences

674. No practice was found.

IV. Practice of International Judicial and Quasi-judicial Bodies

675. No practice was found.

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

676. At its Budapest Session in 1991, the Council of Delegates adopted a resolution on humanitarian assistance in situations of armed conflict, in which it called upon all parties to armed conflicts and, where applicable, any High Contracting Party "to agree to and cooperate in relief actions which are exclusively humanitarian, impartial and non-discriminatory in character, within the meaning of the Fundamental Principles of the International Red Cross and Red Crescent Movement".⁶⁶¹

VI. Other Practice

677. In a resolution adopted at its Wiesbaden Session in 1975, the Institute of International Law stated that "in cases where the territory controlled by

⁶⁵⁸ UN Office for the Coordination of Humanitarian Affairs, United Nations Inter-Agency Consolidated Appeal for Sierra Leone (January–December 1999), December 1998, Annex I, Code of Conduct for Humanitarian Assistance in Sierra Leone, p. 88.

⁶⁵⁹ EC, Declaration on Yugoslavia, 20 July 1992, § 4.

⁶⁶⁰ OAU, Assembly of Heads of State and Government, Declaration 2 (XXIX), 28–30 June 1993, § 9.

⁶⁶¹ International Red Cross and Red Crescent Movement, Council of Delegates, Budapest Session, 28–30 November 1991, Res. 12, § c.

one party can be reached only by crossing . . . the territory of a third State, free passage over such territory should be granted to any relief consignment, at least insofar as is provided for in Article 23 [GC IV]".⁶⁶²

Right of the civilian population in need to receive humanitarian relief

I. Treaties and Other Instruments

Treaties

678. Article 30, first paragraph, GC IV provides that:

Protected persons shall have every facility for making application to the Protecting Powers, the International Committee of the Red Cross, the National Red Cross (Red Crescent, Red Lion and Sun) Society of the country where they may be, as well as to any organization that might assist them.

679. Article 70(1) AP I provides that:

If the civilian population of any territory under the control of a Party to the conflict, other than occupied territory, is not adequately provided with the supplies mentioned in Article 69, relief actions which are humanitarian and impartial in character and conducted without any adverse distinction shall be undertaken, subject to the agreement of the Parties concerned in such relief actions. . . . In the distribution of relief consignments, priority shall be given to those persons, such as children, expectant mothers, maternity cases and nursing mothers, who, under the Fourth Convention or under this Protocol, are to be accorded privileged treatment or special protection.

Article 70 AP I was adopted by consensus.⁶⁶³

680. Article 18(2) AP II provides that:

If the civilian population is suffering undue hardship owing to a lack of the supplies essential for its survival, such as food-stuffs and medical supplies, relief actions for the civilian population which are of an exclusively humanitarian and impartial nature and which are conducted without any adverse distinction shall be undertaken subject to the consent of the High Contracting Party concerned.

Article 18 AP II was adopted by consensus.⁶⁶⁴

Other Instruments

681. Under Paragraph 5 of the 1992 Recommendation by the Parties to the Conflict in Bosnia and Herzegovina on the Tragic Situation of Civilians, "persons temporarily transferred to areas other than their areas of origin should benefit,

⁶⁶² Institute of International Law, Wiesbaden Session, Resolution III, The Principle of Non-Intervention in Civil Wars, 14 August 1975, Article 4(2).

⁶⁶³ CDDH, *Official Records*, Vol. VI, CDDH/SR.43, 27 May 1977, p. 245.

⁶⁶⁴ CDDH, *Official Records*, Vol. VII, CDDH/SR.53, 6 June 1977, p. 150.

as vulnerable groups, from international assistance, *inter alia*, in conformity with its mandate, by the ICRC”.

II. National Practice

Military Manuals

682. Argentina’s Law of War Manual states that, if the civilian population of any territory under the control of a party to the conflict, other than occupied territory, is insufficiently provided with supplies (such as foodstuffs, medical supplies, means of shelter and other supplies essential to the survival of the civilian population), relief actions of a humanitarian and impartial character shall be undertaken, subject to the agreement of the parties concerned.⁶⁶⁵

683. Canada’s LOAC Manual provides that “every opportunity must be given to protected persons to apply to the Protecting Powers, the ICRC, the local National Red Cross (or equivalent) society or any other organization that may assist them”.⁶⁶⁶

684. Germany’s Military Manual states that “civilians may at any time seek help from a protecting power, the International Committee of the Red Cross (ICRC) or any other aid society”.⁶⁶⁷

685. The Military Manual of the Netherlands provides that “if the civilian population of a certain area is not equipped with elementary necessities, relief actions have to be undertaken”.⁶⁶⁸

686. New Zealand’s Military Manual provides that “every opportunity must be given to protected persons to apply for help from the Protecting Powers, the International Committee of the Red Cross, the local national Red Cross (or equivalent) society or any other organisation that may assist them”.⁶⁶⁹

687. Nicaragua’s Military Manual states that “the civilian population has the right to receive the relief they need”.⁶⁷⁰

688. Switzerland’s Basic Military Manual provides that, in a territory temporarily occupied by foreign troops, “civilians shall have every facility for making application to the Protecting Powers, the International Committee of the Red Cross, the national Red Cross Society of the country where they may be, as well as to any organization that might assist them”.⁶⁷¹

689. The UK Military Manual provides that “every opportunity must be given to protected persons to apply to the Protecting Powers, the International

⁶⁶⁵ Argentina, *Law of War Manual* (1989), § 4.11.

⁶⁶⁶ Canada, *LOAC Manual* (1999), p. 11-4, § 31.

⁶⁶⁷ Germany, *Military Manual* (1992), § 516.

⁶⁶⁸ Netherlands, *Military Manual* (1993), p. VIII-4.

⁶⁶⁹ New Zealand, *Military Manual* (1992), § 1115.

⁶⁷⁰ Nicaragua, *Military Manual* (1996), Article 14(33).

⁶⁷¹ Switzerland, *Basic Military Manual* (1987), Article 155(1).

Committee of the Red Cross, the local national Red Cross (or equivalent) society or any other organisation that may assist them".⁶⁷²

690. The US Field Manual provides that "protected persons shall have every facility for making application to the Protecting Powers, the International Committee of the Red Cross, the National Red Cross (Red Crescent, Red Lion and Sun) Society of the country where they may be, as well as to any organization that might assist them".⁶⁷³

691. The US Air Force Pamphlet stresses that "Article 30 [GC IV] seeks to put teeth into the Geneva protections by requiring the parties to give protected persons every facility for making application to the Protecting Powers, the International Committee of the Red Cross, the National Red Cross (Red Crescent, Red Lion and Sun) Society of the country where they may be, as well as to any organization that might assist them".⁶⁷⁴

National Legislation

692. Bangladesh's International Crimes (Tribunal) Act states that the "violation of any humanitarian rules applicable in armed conflicts laid down in the Geneva Conventions of 1949" is a crime.⁶⁷⁵

693. Ireland's Geneva Conventions Act as amended provides that any "minor breach" of the Geneva Conventions, including violations of Article 30 GC IV, and of AP I, including violations of Article 70(1) AP I, as well as any "contravention" of AP II, including violations of Article 18(2) AP II, are punishable offences.⁶⁷⁶

694. Under Norway's Military Penal Code as amended, "anyone who contravenes or is accessory to the contravention of provisions relating to the protection of persons or property laid down in...the Geneva Conventions of 12 August 1949...[and in] the two additional protocols to these Conventions... is liable to imprisonment".⁶⁷⁷

National Case-law

695. No practice was found.

Other National Practice

696. The Report on the Practice of Colombia refers to a draft internal working paper in which the Colombian government stated that "the parties in conflict

⁶⁷² UK, *Military Manual* (1958), § 40.

⁶⁷³ US, *Field Manual* (1956), § 269. ⁶⁷⁴ US, *Air Force Pamphlet* (1976), § 14-4.

⁶⁷⁵ Bangladesh, *International Crimes (Tribunal) Act* (1973), Section 3(2)(e).

⁶⁷⁶ Ireland, *Geneva Conventions Act as amended* (1962), Section 4(1) and (4).

⁶⁷⁷ Norway, *Military Penal Code as amended* (1902), § 108.

must guarantee the right to protection and humanitarian assistance of the victims of political violence".⁶⁷⁸

697. In the context of the conflict in Ethiopia, it has been reported that "to combat new famine threats, in early 1991 the EPLF and the Ethiopian Government agreed on a joint and equal distribution of UN famine relief supplies".⁶⁷⁹ According to the Report on the Practice of Ethiopia, "this and similar practices tend to indicate that, however recent, the right to humanitarian relief is gaining respect" in Ethiopia.⁶⁸⁰

698. In 1993, during a parliamentary debate on the conflict in Bosnia and Herzegovina, a German Minister of State stated that existing IHL granted a right to the civilian population to receive humanitarian aid. Therefore, obtaining the consent of the occupying or besieging forces to grant transit of humanitarian goods was legally unnecessary.⁶⁸¹

699. In 1997, during an open debate in the UN Security Council, Germany declared that "we have witnessed... a worrisome development whereby civilian populations are denied humanitarian assistance by the Powers in control of the territory, in clear breach of the norms of international humanitarian and human rights law". The consequences of these actions were said to range from massive displacement to death by starvation.⁶⁸²

700. In 1990, in a meeting with the ICRC, but only after it had used starvation as a weapon against territories not under its control, did the government of a State agree that in principle humanitarian aid should be distributed to the civilian population in all parts of the country. It thus relinquished the use of starvation as a possible weapon in situations of dispute.⁶⁸³

III. Practice of International Organisations and Conferences

United Nations

701. In a resolution adopted in 1993 on the treatment of certain towns and surroundings in Bosnia and Herzegovina as safe areas, the UN Security Council condemned all violations of IHL in Bosnia and Herzegovina, in particular, "the denial or the obstruction of access of civilians to humanitarian aid and services such as medical assistance and basic utilities".⁶⁸⁴

702. In 1998, in a statement by its President considering the question of children and armed conflict, the UN Security Council expressed "its readiness

⁶⁷⁸ Report on the Practice of Colombia, 1998, Chapter 4.1, referring to Presidential Council, Proposal of the Government to the Coordinator Guerrillera Simón Bolívar to humanise war, Draft Internal Working Paper, Part entitled "El Derecho Internacional Humanitario", § 8.

⁶⁷⁹ Amnesty International, *Ethiopia: End of an Era of Brutal Repression*, London, May 1991, p. 43.

⁶⁸⁰ Report on the Practice of Ethiopia, 1998, Chapter 4.1.

⁶⁸¹ Germany, Lower House of Parliament, Statement by a Minister of State, 22 April 1993, *Plenarprotokoll* 12/152, p. 13074, § C.

⁶⁸² Germany, Statement before the UN Security Council, UN Doc. S/PV.3778 (Resumption 1), 21 May 1997, p. 18.

⁶⁸³ ICRC archive document. ⁶⁸⁴ UN Security Council, Res. 824, 6 May 1993, preamble.

to consider, when appropriate, means to assist with the effective provision and protection of humanitarian aid and assistance to civilian population in distress, in particular women and children".⁶⁸⁵

703. In a resolution adopted in 1970 on basic principles for the protection of civilian populations in armed conflicts, the UN General Assembly stated that "the provision of international relief to civilian population is in conformity with the humanitarian principles of the Charter of the United Nations, the Universal Declaration of Human Rights and other international instruments in the field of human rights".⁶⁸⁶

704. In the United Nations Millennium Declaration adopted by the UN General Assembly in 2000, the heads of State and government declared that they would:

spare no effort to ensure that children and all civilian populations that suffer disproportionately the consequences of natural disasters, genocide, armed conflicts and other humanitarian emergencies are given every assistance and protection so that they can resume normal life as soon as possible.⁶⁸⁷

705. In a resolution adopted in 1995 on the situation of human rights in the Sudan, the UN Commission on Human Rights was "deeply concerned that access by the civilian population to humanitarian assistance, despite some improvements, continues to be impeded, violating international humanitarian law and representing a threat to human life that constitutes an offence to human dignity".⁶⁸⁸

706. In 1996, in a report on emergency assistance to Sudan, the UN Secretary-General stated that the two main southern factions, the SPLM/A and the SSIA, had endorsed new rules on cooperation with OLS. These rules contained specific references to respect for and the upholding, *inter alia*, of a set of principles governing humanitarian aid, including "the right to offer and receive assistance". In his concluding observations, the Secretary-General condemned the fact that the conflict in Sudan had affected the lives of millions of Sudanese, stating that:

Under such circumstances any attempt to diminish the capacity of the international community to respond to conditions of suffering and hardship among the civilian population in the Sudan can only give rise to the most adamant expressions of concern as a violation of recognised humanitarian principles, most importantly, the right of civilian populations to receive humanitarian assistance in times of war.⁶⁸⁹

⁶⁸⁵ UN Security Council, Statement by the President, UN Doc. S/PRST/1998/18, 29 June 1998, pp. 1 and 2.

⁶⁸⁶ UN General Assembly, Res. 2675 (XXV), 9 December 1970, § 8.

⁶⁸⁷ UN General Assembly, Res. 55/2, 8 September 2000, § 26.

⁶⁸⁸ UN Commission on Human Rights, Res. 1995/77, 8 March 1995, preamble.

⁶⁸⁹ UN Secretary-General, Report on emergency assistance to Sudan, UN Doc. A/51/326, 4 September 1996, §§ 71 and 93.

707. In 1998, in a report on protection for humanitarian assistance to refugees and others in conflict situations, the UN Secretary-General stated that:

Under international law, refugees, displaced persons and other victims of conflict have a right to international protection and assistance where this is not available from their national authorities. However, if this right is to have any meaning for the intended beneficiaries, then the beneficiaries must have effective access to the providers of that protection and assistance. Access to humanitarian assistance and protection, or humanitarian access, is therefore an essential subsidiary or ancillary right that gives meaning and effect to the core rights of protection and assistance. Humanitarian access is, *inter alia*, a right of refugees, displaced persons and other civilians in conflict situations and should not be seen as a concession to be granted to humanitarian organizations on an arbitrary basis.⁶⁹⁰

708. In 1999, in a report on the protection of civilians in armed conflict, the UN Secretary-General stated that:

It is the obligation of States to ensure that affected populations have access to the assistance they require for their survival. If a State is unable to fulfil its obligation, the international community has a responsibility to ensure that humanitarian aid is provided. The rapid deployment of humanitarian assistance operations is critical when responding to the needs of civilians affected by armed conflict.

The Secretary-General also called on neighbouring States “to bring any issues that might threaten the right of civilians to assistance to the attention of the Security Council as a matter affecting peace and security”.⁶⁹¹

709. In 2001, in a report on the protection of civilians in armed conflict, the UN Secretary-General stated that “under international law, displaced persons and other victims of conflict are entitled to international protection and assistance where this is not available from national authorities”.⁶⁹²

Other International Organisations

710. No practice was found.

International Conferences

711. The Vienna Declaration and Programme of Action, adopted by the World Conference on Human Rights in 1993, reaffirmed “the right of the victims to be assisted by humanitarian organizations, as set forth in the Geneva Conventions of 1949 and other relevant instruments of international humanitarian law”.⁶⁹³

⁶⁹⁰ UN Secretary-General, Report on protection for humanitarian assistance to refugees and others in conflict situations, UN Doc. S/1998/883, 22 September 1998, § 15.

⁶⁹¹ UN Secretary-General, Report on the protection of civilians in armed conflict, UN Doc. S/1999/957, 8 September 1999, § 51 and recommendation 19.

⁶⁹² UN Secretary-General, Report on the protection of civilians in armed conflict, UN Doc. S/2001/331, 30 March 2001, § 17.

⁶⁹³ World Conference on Human Rights, Vienna, 14–25 June 1993, Vienna Declaration and Programme of Action, UN Doc. A/CONF.157/23, 12 July 1993, § I(29).

712. In the Final Declaration adopted by the International Conference for the Protection of War Victims in 1993, the participants declared that they refused to accept that “victims [are] denied elementary humanitarian assistance”.⁶⁹⁴

713. In 26th International Conference of the Red Cross and Red Crescent in 1995 adopted a resolution on protection of the civilian population in period of armed conflict in which it strongly reasserted “the right of a civilian population in need to benefit from impartial humanitarian relief actions in accordance with international humanitarian law”.⁶⁹⁵

714. The 26th International Conference of the Red Cross and Red Crescent in 1995 adopted a resolution on the principles and action in international humanitarian assistance and protection in which it took note of Resolution 11 of the Council of Delegates held in 1993 in Birmingham which, *inter alia*, reminded States of “the victims’ right to receive humanitarian assistance”.⁶⁹⁶

715. The Plan of Action for the years 2000–2003 adopted in 1999 by the 27th International Conference of the Red Cross and Red Crescent proposed that all the parties to an armed conflict take effective measures to ensure that “every possible effort is made to provide the civilian population with all essential goods and services for its survival”.⁶⁹⁷

716. The Final Declaration adopted in 2002 by the African Parliamentary Conference on International Humanitarian Law for the Protection of Civilians during Armed Conflict emphasised that “we agree that all civilians in need are to benefit from impartial humanitarian relief actions”.⁶⁹⁸

IV. Practice of International Judicial and Quasi-judicial Bodies

717. No practice was found.

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

718. At its Budapest Session in 1991, the Council of Delegates adopted a resolution on humanitarian assistance in situations of armed conflict which recalled that “the principle of humanity and the rules of international humanitarian law recognize the victims’ right to receive protection and assistance in all circumstances”.⁶⁹⁹

⁶⁹⁴ International Conference for the Protection of War Victims, Geneva, 30 August–1 September 1993, Final Declaration, § I(1), *ILM*, Vol. 33, 1994, p. 298.

⁶⁹⁵ 26th International Conference of the Red Cross and Red Crescent, Geneva, 3–7 December 1995, Res. II, § A(h).

⁶⁹⁶ 26th International Conference of the Red Cross and Red Crescent, Geneva, 3–7 December 1995, Res. IV, preamble.

⁶⁹⁷ 27th International Conference of the Red Cross and Red Crescent, Geneva, 31 October–6 November 1999, Res. I, Annex 2, Plan of Action for the years 2000–2003, Actions proposed for final goal 1.1, § 1(g).

⁶⁹⁸ African Parliamentary Conference on International Humanitarian Law for the Protection of Civilians during Armed Conflict, Niamey, 18–20 February 2002, Final Declaration, § 14.

⁶⁹⁹ International Red Cross and Red Crescent Movement, Council of Delegates, Budapest Session, 28–30 November 1991, Res. 12, preamble.

719. At its Birmingham Session in 1993, the Council of Delegates adopted a resolution on principles of humanitarian assistance in which it noted that victims have the “right to be recognized as victims and to receive assistance”, while States have

the duty – which is in the first instance theirs – to assist people who are placed *de jure* or *de facto* under their authority and, should they fail to discharge this duty, the obligation to authorize humanitarian organizations to provide such assistance, to grant such organizations access to the victims and to protect their action.⁷⁰⁰

720. The Code of Conduct for the International Red Cross and Red Crescent Movement and Non-Governmental Organisations (NGOs) in Disaster Relief states that “the right to receive humanitarian assistance, and to offer it, is a fundamental humanitarian principle which should be enjoyed by all citizens of all countries”.⁷⁰¹

721. In a communication to the press issued in 1997 concerning the conflict in Zaire (DRC), the ICRC requested that the ADFL grant its delegates unrestricted access to victims of the armed conflict. The ICRC appealed to all concerned to “respect the victims’ right to assistance and protection”.⁷⁰²

VI. Other Practice

722. The Declaration of Minimum Humanitarian Standards, adopted by an expert meeting convened by the Institute for Human Rights of Åbo Akademi University in Turku/Åbo, Finland in 1990, states that “deliberate deprivation of access to necessary food, drinking water and medicine” is prohibited.⁷⁰³

723. The Guiding Principles on the Right to Humanitarian Assistance, adopted by the Council of the IHL in 1993, state that:

Every human being has the right to humanitarian assistance in order to ensure respect for the human rights to life, health, protection against cruel and degrading treatment and other human rights which are essential to survival, well-being and protection in public emergencies.

The right to humanitarian assistance implies the right to request and to receive such assistance, as well as to participate in its practical implementation.⁷⁰⁴

724. In 1995, the IHL stated that any declaration on minimum humanitarian standards should be based on “principles . . . of jus cogens, expressing basic

⁷⁰⁰ International Red Cross and Red Crescent Movement, Council of Delegates, Birmingham Session, 29–30 October 1993, Res. 11, § 1(b).

⁷⁰¹ Code of Conduct for the International Red Cross and Red Crescent Movement and Non-Governmental Organisations (NGOs) in Disaster Relief, *IRRC*, No. 310, 1996, Annex VI.

⁷⁰² ICRC, Communication to the Press No. 97/08, Zaire: ICRC Demands Access to Conflict Victims, 2 April 1997.

⁷⁰³ Declaration of Minimum Humanitarian Standards, adopted by an expert meeting convened by the Institute for Human Rights, Åbo Akademi University, Turku/Åbo, 30 November–2 December 1990, Article 3(2)(f), *IRRC*, No. 282, 1991, p. 331.

⁷⁰⁴ IHL, Guiding Principles on the Right to Humanitarian Assistance, Principles 1 and 2, *IRRC*, No. 297, 1993, pp. 521–522.

humanitarian consideration[s] which are recognized to be universally binding". According to the IHL, this includes the principle that "the population and individuals have the right to receive humanitarian assistance when suffering undue hardship owing to the lack of supplies essential for their survival, when this is the result of the conflict or violence deployed in the area".⁷⁰⁵

D. Freedom of Movement of Humanitarian Relief Personnel

I. *Treaties and Other Instruments*

Treaties

725. Article 71(3) and (4) AP I provides that:

Each party in receipt of relief consignments shall, to the fullest extent practicable, assist the relief personnel... carrying out their relief mission. Only in case of imperative military necessity may the activities of the relief personnel be limited or their movements temporarily restricted.

Under no circumstances may relief personnel exceed the terms of their mission under this Protocol. In particular they shall take account of the security requirements of the Party in whose territory they are carrying out their duties. The mission of any personnel who do not respect these conditions may be terminated.

Article 71 AP I was adopted by consensus.⁷⁰⁶

Other Instruments

726. In the 1991 Hague Statement on Respect for Humanitarian Principles, the Presidents of the six republics of the former Yugoslavia reminded all fighting units of their obligation to apply the fundamental principle according to which "all Red Cross personnel and medical personnel assisting civilian populations and persons *hors combat* must be granted the necessary freedom of movement to achieve their tasks".

727. Paragraph 19 of the 1994 CSCE Code of Conduct provides that the participating States "will cooperate in support of humanitarian assistance to alleviate suffering among the civilian population, including facilitating the movement of personnel and resources dedicated to such tasks".

II. *National Practice*

Military Manuals

728. Spain's LOAC Manual states that limitations on the activities and movement of relief personnel are possible only in case of imperative military necessity.⁷⁰⁷

⁷⁰⁵ IHL, Comments on the Declaration of Minimum Humanitarian Standards submitted to the UN Secretary-General, §§ 1 and 21, reprinted in UN Doc. E/CN.4/1996/80, Report of the Secretary-General prepared pursuant to UN Commission on Human Rights resolution 1995/29, 28 November 1995, pp. 8 and 11.

⁷⁰⁶ CDDH, *Official Records*, Vol. VI, CDDH/SR.43, 27 May 1977, p. 245.

⁷⁰⁷ Spain, *LOAC Manual* (1996), Vol. I, § 2.4.(c).5.

National Legislation

729. Under Ireland's Geneva Conventions Act as amended, any "minor breach" of AP I, including violations of Article 71(3) and (4) AP I, is a punishable offence.⁷⁰⁸

730. Under Norway's Military Penal Code as amended, "anyone who contravenes or is accessory to the contravention of provisions relating to the protection of persons or property laid down in . . . the two additional protocols to [the Geneva] Conventions . . . is liable to imprisonment".⁷⁰⁹

National Case-law

731. No practice was found.

Other National Practice

732. In 1991, in a "Statement regarding the need for the respect of the norms of international humanitarian law in the armed conflicts in Yugoslavia", the Federal Executive Council of the SFRY (FRY) insisted on "the need to ensure freedom of movement for all Red Cross representatives and medical personnel who are assisting the civilian population behind the front lines".⁷¹⁰

733. In 1992, following an attack on an ICRC convoy carrying medical supplies in Sarajevo in May 1992, which led to the death of an ICRC delegate, the Presidency of the Republika Srpska of Bosnia and Herzegovina ordered all combatants to provide secure conditions and the freedom of movement necessary to personnel from the ICRC and other humanitarian organisations.⁷¹¹

III. Practice of International Organisations and Conferences

United Nations

734. In a resolution adopted in 1992 on humanitarian assistance to Somalia, the UN Security Council called upon "all parties, movements and factions, in Mogadishu in particular, and in Somalia in general, to . . . guarantee [the] complete freedom of movement [of humanitarian organizations] in and around Mogadishu and other parts of Somalia".⁷¹²

735. In a resolution adopted in 1992 on the establishment of a UN Operation in Somalia, the UN Security Council reiterated its call for the guarantee of

⁷⁰⁸ Ireland, *Geneva Conventions Act as amended* (1962), Section 4(1) and (4).

⁷⁰⁹ Norway, *Military Penal Code as amended* (1902), § 108(b).

⁷¹⁰ SFRY (FRY), Federal Executive Council, Statement regarding the need for the respect of the norms of international humanitarian law in the armed conflicts in Yugoslavia, Belgrade, 31 October 1991.

⁷¹¹ Bosnia and Herzegovina, Republika Srpska, Order issued by the President, 22 August 1992; Order issued by the President, 3 April 1994; see also Appeal by the Presidency, Pale, 7 June 1992.

⁷¹² UN Security Council, Res. 746, 17 March 1992, § 8.

"complete freedom of movement [of personnel of humanitarian organizations] in and around Mogadishu and other parts of Somalia".⁷¹³

736. In a resolution on Bosnia and Herzegovina adopted in 1993, the UN Security Council demanded that "all parties guarantee the... full freedom of movement of... members of humanitarian organizations".⁷¹⁴

737. In a resolution on Bosnia and Herzegovina adopted in 1995, the UN Security Council demanded that all parties ensure the complete freedom of movement of UNPROFOR personnel and others engaged in the delivery of humanitarian assistance.⁷¹⁵

738. In a resolution on Angola adopted in 1996, the UN Security Council demanded that "all parties to the conflict and others concerned in Angola take all necessary measures... to guarantee the... freedom of movement of humanitarian supplies throughout the country".⁷¹⁶

739. In a resolution adopted in 1996 on the situation in the Great Lakes region, the UN Security Council called upon all those concerned in the region "to ensure... the... freedom of movement of all international humanitarian personnel".⁷¹⁷

740. In a resolution adopted in 1996 on the situation in the Great Lakes region, the UN Security Council called upon all concerned in the region "to cooperate fully with... humanitarian agencies and to ensure the... freedom of movement of their personnel".⁷¹⁸

741. In a resolution on Liberia adopted in 1996, the UN Security Council demanded that the factions "facilitate the freedom of movement of... international organizations and agencies" delivering humanitarian assistance.⁷¹⁹

742. In a resolution on Bosnia and Herzegovina adopted in 1996, the UN Security Council demanded that "the parties respect the... freedom of movement of SFOR and other international personnel".⁷²⁰

743. In a resolution on Angola adopted in 1998, the UN Security Council called upon the Government of Unity and National Reconciliation, and in particular UNITA, "to guarantee unconditionally the... freedom of movement of all United Nations and international personnel".⁷²¹ The Security Council reiterated this call in a subsequent resolution adopted a few weeks later.⁷²²

744. In a resolution adopted in 1998 on the situation in Afghanistan, the UN Security Council demanded that "all Afghan factions and, in particular the

⁷¹³ UN Security Council, Res. 751, 24 April 1992, § 14.

⁷¹⁴ UN Security Council, Res. 819, 16 April 1993, § 10.

⁷¹⁵ UN Security Council, Res. 998, 16 June 1995, § 1.

⁷¹⁶ UN Security Council, Res. 1075, 11 October 1996, § 18.

⁷¹⁷ UN Security Council, Res. 1078, 9 November 1996, § A-5.

⁷¹⁸ UN Security Council, Res. 1080, 15 November 1996, § 6.

⁷¹⁹ UN Security Council, Res. 1083, 27 November 1996, § 8.

⁷²⁰ UN Security Council, Res. 1088, 12 December 1996, § 23.

⁷²¹ UN Security Council, Res. 1173, 12 June 1998, § 9.

⁷²² UN Security Council, Res. 1180, 29 June 1998, § 5.

Taliban, do everything possible to assure the... freedom of movement of the personnel of the United Nations and other international and humanitarian personnel".⁷²³

745. In a resolution adopted in 1998 on the situation in Angola, the UN Security Council demanded that "the Government of Angola and UNITA guarantee unconditionally the... freedom of movement of... all United Nations and international humanitarian personnel, including those providing assistance, throughout the territory of Angola".⁷²⁴

746. In a resolution adopted in 1998, the UN Security Council called on the government of Angola and in particular UNITA "to guarantee unconditionally the... freedom of movement of all international humanitarian personnel".⁷²⁵

747. In a resolution adopted in 1999 on children in armed conflicts, the UN Security Council underscored "the importance of the... freedom of movement of United Nations and associated personnel to the alleviation of the impact of armed conflict on children".⁷²⁶

748. In a resolution adopted in 1999 on protection of civilians in armed conflicts, the UN Security Council emphasised "the need for combatants to ensure the... freedom of movement of... personnel of international humanitarian organizations".⁷²⁷

749. In a resolution adopted in 2000 on protection of civilians in armed conflicts, the UN Security Council reiterated "its call to all parties concerned, including non-State parties, to ensure the... freedom of movement of... personnel of humanitarian organizations".⁷²⁸

750. In a resolution on Afghanistan adopted in 2000, the UN Security Council stressed that the Taliban "must provide guarantees for the... freedom of movement for... humanitarian relief personnel".⁷²⁹

751. In 1995, in a statement by its President in the context of the situation in Croatia, the UN Security Council reminded the parties, and in particular the Croatian government, "that they have an obligation to respect United Nations personnel [and] to ensure their... freedom of movement at all times".⁷³⁰

752. In 1996, in a statement by its President, the UN Security Council called upon the parties to the conflict in Tajikistan "to ensure the... freedom of movement of the personnel of the United Nations and other international organizations".⁷³¹

⁷²³ UN Security Council, Res. 1193, 28 August 1998, § 7.

⁷²⁴ UN Security Council, Res. 1202, 15 October 1998, § 10.

⁷²⁵ UN Security Council, Res. 1213, 3 December 1998, § 7.

⁷²⁶ UN Security Council, Res. 1261, 25 August 1999, § 12.

⁷²⁷ UN Security Council, Res. 1265, 17 September 1999, § 8.

⁷²⁸ UN Security Council, Res. 1296, 19 April 2000, § 12.

⁷²⁹ UN Security Council, Res. 1333, 19 December 2000, § 13.

⁷³⁰ UN Security Council, Statement by the President, UN Doc. S/PRST/1995/38, 4 August 1995, p. 1.

⁷³¹ UN Security Council, Statement by the President, UN Doc. S/PRST/1996/14, 29 March 1996, p. 2.

753. In 1996, in a statement by its President regarding the situation in Tajikistan, the UN Security Council expressed "its concern at the restrictions placed upon UNMOT by the parties" and called upon them, in particular the government of Tajikistan, "to ensure the . . . freedom of movement of the personnel of the United Nations and other international organizations".⁷³²

754. In 1996, in a statement by its President, the UN Security Council stressed that the international community's ability to assist in the conflict in Georgia depended on "the full cooperation of the parties, especially the fulfilment of their obligations regarding the . . . freedom of movement of international personnel".⁷³³

755. In 1996, in a statement by its President, the UN Security Council called on all parties in the Great Lakes region "to ensure the . . . freedom of movement of all international humanitarian personnel".⁷³⁴

756. In 1997, in a statement by its President with respect to the situation in the Great Lakes Region, the UN Security Council demanded that the parties ensure the "freedom of movement of all . . . humanitarian personnel".⁷³⁵

757. In 1997, in a statement by its President, the UN Security Council called upon the parties "to ensure . . . the freedom of movement of the personnel of the United Nations . . . and other international personnel in Tajikistan".⁷³⁶

758. In 1997, in a statement by its President regarding the situation in Somalia, the UN Security Council called upon the Somali factions "to ensure the . . . freedom of movement of all humanitarian personnel".⁷³⁷

759. In 1997, in a statement by its President in the context of the conflict in Angola, the UN Security Council called upon UNITA in particular "to ensure the freedom of movement . . . of international humanitarian organizations".⁷³⁸

760. In 1998, in a statement by its President regarding the situation in Angola, the UN Security Council demanded that the Angolan government, and in particular UNITA, "guarantee unconditionally the . . . freedom of movement of all . . . international personnel".⁷³⁹

⁷³² UN Security Council, Statement by the President, UN Doc. S/PRST/1996/25, 21 May 1996, p. 2.

⁷³³ UN Security Council, Statement by the President, UN Doc. S/PRST/1996/43, 22 October 1996, p. 2.

⁷³⁴ UN Security Council, Statement by the President, UN Doc. S/PRST/1996/44, 1 November 1996, p. 1.

⁷³⁵ UN Security Council, Statement by the President, UN Doc. S/PRST/1997/5, 7 February 1997, p. 1.

⁷³⁶ UN Security Council, Statement by the President, UN Doc. S/PRST/1997/6, 7 February 1997, p. 2.

⁷³⁷ UN Security Council, Statement by the President, UN Doc. S/PRST/1997/8, 27 February 1997, p. 2.

⁷³⁸ UN Security Council, Statement by the President, UN Doc. S/PRST/1997/39, 23 July 1997, p. 1.

⁷³⁹ UN Security Council, Statement by the President, UN Doc. S/PRST/1998/14, 22 May 1998, p. 1.

761. In July 1998, in a statement by its President, the UN Security Council urged all Afghan factions “to cooperate fully with . . . international humanitarian organizations” and called upon them, in particular the Taliban, “to take all necessary steps to ensure the . . . freedom of movement of such personnel”.⁷⁴⁰

762. In August 1998, in a statement by its President, the UN Security Council urged all Afghan factions “to cooperate fully with . . . international humanitarian organizations” and called upon them, in particular the Taliban, “to take the necessary steps to assure the . . . freedom of movement of such personnel”.⁷⁴¹

763. In 2000, in a statement by its President in the context of a debate on the humanitarian aspects of maintaining peace and security, the UN Security Council reiterated its call for combatants “to ensure the . . . freedom of movement of . . . humanitarian personnel”.⁷⁴²

764. In a resolution adopted in 1992 on the situation in Bosnia and Herzegovina, the UN General Assembly demanded that “all parties to the conflict ensure complete . . . freedom of movement for the International Committee of the Red Cross”.⁷⁴³

765. In a resolution adopted in 1996, the UN General Assembly called upon all parties, movements and factions in Somalia to guarantee the “complete freedom of movement” of personnel of the United Nations and its specialized agencies and of non-governmental organizations throughout Somalia.⁷⁴⁴

766. In a resolution adopted in 1998 on the situation of human rights in Kosovo, the UN General Assembly called upon all parties to ensure freedom of movement within Kosovo of personnel belonging to the OSCE Kosovo Verification Mission. It also called upon the FRY authorities “to grant . . . free and unaccompanied movement within Kosovo for all humanitarian aid workers”.⁷⁴⁵

767. In a resolution adopted in 1999 on the safety and security of humanitarian personnel and protection of United Nations personnel, the UN General Assembly strongly condemned “any act or failure to act which obstructs or prevents humanitarian personnel and United Nations personnel from discharging their humanitarian functions”.⁷⁴⁶

768. In a resolution adopted in 1999 on the situation of human rights in East Timor, the UN Commission on Human Rights called upon the government of Indonesia “to guarantee . . . the free movement of international personnel”.⁷⁴⁷

⁷⁴⁰ UN Security Council, Statement by the President, UN Doc. S/PRST/1998/22, 14 July 1998, p. 2.

⁷⁴¹ UN Security Council, Statement by the President, UN Doc. S/PRST/1998/24, 6 August 1998, p. 2.

⁷⁴² UN Security Council, Statement by the President, UN Doc. S/PRST/2000/7, 13 March 2000, p. 2.

⁷⁴³ UN General Assembly, Res. 46/242, 25 August 1992, § 9.

⁷⁴⁴ UN General Assembly, Res. 51/30 G, 13 December 1996, § 8.

⁷⁴⁵ UN General Assembly, Res. 53/164, 9 December 1998, §§ 3 and 17.

⁷⁴⁶ UN General Assembly, Res. 54/192, 17 December 1999, § 4.

⁷⁴⁷ UN Commission on Human Rights, Res. 1999/S-4/1, 27 September 1999, § 5(e).

Other International Organisations

769. No practice was found.

International Conferences

770. No practice was found.

IV. Practice of International Judicial and Quasi-judicial Bodies

771. No practice was found.

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

772. In an appeal issued in 1979 with respect to the conflict in Rhodesia/Zimbabwe, the ICRC appealed to all the parties to "allow the freedom of movement necessary to all Red Cross personnel seeking to bring relief to the civilian population in the war-affected areas".⁷⁴⁸

773. In an appeal issued in 1991, the ICRC enjoined the parties to the conflict in Yugoslavia "to allow all Red Cross staff and medical personnel the freedom of movement they need to assist the civilian population".⁷⁴⁹

774. In a press release issued in 1992, the ICRC enjoined the parties to the conflict in Bosnia and Herzegovina "to allow all Red Cross staff and medical personnel the freedom of movement they need to assist the civilian population".⁷⁵⁰

775. In two press releases issued in 1992, the ICRC enjoined the parties to the conflict in Afghanistan to allow all Red Cross and Red Crescent staff and other medical personnel the freedom of movement they needed to assist the civilian population.⁷⁵¹

776. In 1994, in a Memorandum on Respect for International Humanitarian Law in Angola, the ICRC stated that "all Red Cross personnel and medical personnel assisting the civilian population and persons *hors de combat* shall be allowed whatever freedom of movement they require".⁷⁵²

777. In 1994, in a Memorandum on Compliance with International Humanitarian Law by the Forces Participating in Opération Turquoise in the Great Lakes region, the ICRC stated that "the freedom of movement necessary for all

⁷⁴⁸ ICRC, Conflict in Southern Africa: ICRC appeal, 19 March 1979, § 5, *IRRC*, No. 209, 1979, p. 88.

⁷⁴⁹ ICRC, Appeal in behalf of civilians in Yugoslavia, Geneva, 4 October 1991.

⁷⁵⁰ ICRC, Press Release No. 1705, Bosnia and Herzegovina: ICRC calls for protection of civilians, 10 April 1992.

⁷⁵¹ ICRC, Press Release No. 1712, Afghanistan: ICRC appeals for compliance with humanitarian rules, 5 May 1992; Press Release No. 1726, Afghanistan: New ICRC appeal for compliance with humanitarian rules, 14 August 1992.

⁷⁵² ICRC, Memorandum on Respect for International Humanitarian Law in Angola, 8 June 1994, § III, *IRRC*, No. 320, 1997, p. 504.

Red Cross personnel and medical personnel called upon to assist the civilian population and persons *hors de combat* shall be safeguarded".⁷⁵³

VI. Other Practice

778. No practice was found.

⁷⁵³ ICRC, Memorandum on Compliance with International Humanitarian Law by the Forces Participating in Opération Turquoise, Geneva, 23 June 1994, § III, reprinted in Marco Sassòli and Antoine A. Bouvier, *How Does Law Protect in War?*, ICRC, Geneva, p. 1309.

DECEPTION

A. Ruses of War (practice relating to Rule 57)	§§ 1–66
B. Improper Use of the White Flag of Truce (practice relating to Rule 58)	§§ 67–167
C. Improper Use of the Distinctive Emblems of the Geneva Conventions (practice relating to Rule 59)	§§ 168–464
D. Improper Use of the United Nations Emblem or Uniform (practice relating to Rule 60)	§§ 465–549
E. Improper Use of Other Internationally Recognised Emblems (practice relating to Rule 61)	§§ 550–626
F. Improper Use of Flags or Military Emblems, Insignia or Uniforms of the Adversary (practice relating to Rule 62)	§§ 627–741
G. Use of Flags or Military Emblems, Insignia or Uniforms of Neutral or Other States Not Party to the Conflict (practice relating to Rule 63)	§§ 742–784
H. Conclusion of an Agreement to Suspend Combat with the Intention of Attacking by Surprise the Adversary Relying on It (practice relating to Rule 64)	§§ 785–846
I. Perfidy (practice relating to Rule 65)	§§ 847–1545
General	§§ 847–924
Killing, injuring or capturing an adversary by resort to perfidy	§§ 925–999
Simulation of being disabled by injuries or sickness	§§ 1000–1044
Simulation of surrender	§§ 1045–1129
Simulation of an intention to negotiate under the white flag of truce	§§ 1130–1218
Simulation of protected status by using the distinctive emblems of the Geneva Conventions	§§ 1219–1324
Simulation of protected status by using the United Nations emblem or uniform	§§ 1325–1397
Simulation of protected status by using other internationally recognised emblems	§§ 1398–1451
Simulation of civilian status	§§ 1452–1505
Simulation of protected status by using flags or military emblems, insignia or uniforms of neutral or other States not party to the conflict	§§ 1506–1545

A. Ruses of War

I. Treaties and Other Instruments

Treaties

1. Article 24 of the 1899 HR provides that “ruses of war and the employment of methods necessary to obtain information about the enemy and the country are considered permissible”.
2. Article 24 of the 1907 HR provides that “ruses of war and the employment of methods necessary for obtaining information about the enemy and the country are considered permissible”.
3. Article 37(2) AP I states that:

Ruses of war are not prohibited. Such ruses are acts which are intended to mislead an adversary or to induce him to act recklessly but which infringe no Rule of international law applicable in armed conflict and which are not perfidious because they do not invite the confidence of an adversary with respect to protection under that law. The following are examples of such ruses: the use of camouflage, decoys, mock operations and misinformation.

Article 37 AP I was adopted by consensus.¹

4. Article 21(2) of draft AP II submitted by the ICRC to the CDDH provided that “ruses of war, that is to say, those acts which, without inviting the confidence of the adversary, are intended to mislead him or to induce him to act recklessly, such as camouflage, traps, mock operations and misinformation, are not perfidious acts”.² This Article 21 was amended and adopted in Committee III of the CDDH by 21 votes in favour, 15 against and 41 abstentions.³ The approved text provided that “ruses are not prohibited”.⁴ Eventually, however, it was deleted by consensus in the plenary.⁵

Other Instruments

5. Article 15 of the 1863 Lieber Code states that “military necessity... allows... of such deception as does not involve the breaking of good faith either positively pledged, regarding agreements entered into during the war, or supposed by the modern law of war to exist”. Article 16 adds that “military necessity... admits of deception, but disclaims acts of perfidy”. Furthermore, Article 101 describes deception as a “just and necessary means of hostility”.
6. Article 14 of the 1874 Brussels Declaration provides that “ruses of war and the employment of methods necessary for obtaining information about the enemy and the country... are considered permissible”.

¹ CDDH, *Official Records*, Vol. VI, CDDH/SR.39, 25 May 1977, p. 103.

² CDDH, *Official Records*, Vol. I, Part Three, Draft Additional Protocols, June 1973, p. 39.

³ CDDH, *Official Records*, Vol. XV, CDDH/III/SR.59, 10 May 1977, p. 213, § 20.

⁴ CDDH, *Official Records*, Vol. XV, CDDH/407/Rev.1, 17 March–10 June 1977, p. 502.

⁵ CDDH, *Official Records*, Vol. VII, CDDH/SR.52, 6 June 1977, p. 128.

7. Article 15 of the 1913 Oxford Manual of Naval War states that “ruses of war are considered permissible”.
8. Paragraph 6 of the 1991 Memorandum of Understanding on the Application of IHL between Croatia and the SFRY requires that hostilities be conducted in accordance with Article 37 AP I.
9. Paragraph 2.5 of the 1992 Agreement on the Application of IHL between the Parties to the Conflict in Bosnia and Herzegovina requires that hostilities be conducted in accordance with Article 37 AP I.
10. Paragraph 110 of the 1994 San Remo Manual states that “ruses of war are permitted”.

II. National Practice

Military Manuals

11. Argentina’s Law of War Manual (1969) provides that “stratagems or ruses of war and the employment of methods necessary for obtaining information about the enemy and the country are considered as lawful”.⁶ It also states that “the observation of the principle of good faith must be constant and inalterable in dealings with the enemy. Consequently, the use of ruses and stratagems of war shall be legitimate as long as they do not imply the recourse to treachery or perfidy.”⁷
12. Argentina’s Law of War Manual (1989) states that stratagems are “acts which are intended to mislead an adversary or to induce him to act recklessly but which infringe no rule of international law and which are not perfidious”. It gives examples of stratagems, such as camouflage, mock operations and false information.⁸
13. Australia’s Commanders’ Guide provides that “ruses of war are lawful methods of deception that, over time, have been accepted as legitimate methods of fighting. Examples of ruses are: a. camouflage... b. decoys... c. false signals... d. surprise and ambush, and e. diversionary tactics.”⁹ It also states that “ruses of war are used to obtain an advantage by misleading the enemy. They are permissible provided they are free from any suspicion of treachery or perfidy and do not violate any expressed or tacit agreement.”¹⁰
14. Australia’s Defence Force Manual states that:

Ruses of war and the employment of measures necessary for obtaining information about the enemy and the enemy country are permissible. Ruses of war are used to obtain an advantage by misleading the enemy. They are permissible provided they are free from any suspicion of treachery or perfidy. Legitimate ruses include

⁶ Argentina, *Law of War Manual* (1969), § 1.016.

⁷ Argentina, *Law of War Manual* (1969), § 1.017.

⁸ Argentina, *Law of War Manual* (1989), § 1.05(3).

⁹ Australia, *Commanders’ Guide* (1994), § 508.

¹⁰ Australia, *Commanders’ Guide* (1994), § 901 (land warfare), see also § 826 (naval warfare).

surprises, ambushes, camouflage, decoys, mock operations and misinformation. Psychological operations are also permitted.¹¹

15. Belgium's Law of War Manual states that "ruses of war are acts which, without constituting a violation of a recognised rule, are intended to mislead an adversary or to induce him to act recklessly". It gives examples of ruses of war, such as surprise attacks, ambushes, feigning attacks, simulating quiet or inactivity, creating an impression of a stronger force than actually exists, making use of the enemy's code, transmitting false messages and using an informal cease-fire intended to collect the wounded to execute unobserved movements.¹²

16. Belgium's Teaching Manual for Officers provides that ruses of war are authorised.¹³

17. Benin's Military Manual states that "in order to conceal his intentions and actions from the enemy to induce him to react in a way detrimental to his interests, a military commander is permitted to use ruse . . . A ruse of war aims to: mislead the enemy [and] to induce the enemy to act recklessly."¹⁴

18. Cameroon's Instructors' Manual provides that ruses of war and stratagems are different from perfidy. They are lawful deceptions.¹⁵

19. Canada's Rules of Engagement for Operation Deliverance provides that:

Commanders are authorized to use military deception to protect against attack and to enhance the security and effectiveness of Canadian forces. Commanders may employ any deception means available to deny potentially hostile forces the ability to accurately locate, identify, track, and target Canadian or Coalition forces except as constrained or otherwise prohibited by international law or agreement, directive or these ROE.¹⁶

20. Canada's LOAC Manual states that:

Ruses of war are measures taken to obtain advantage of the enemy by confusing or misleading them.

Ruses of war are more formally defined as acts which are intended to mislead an adversary or to induce that adversary to act recklessly. Ruses must not infringe any rule of the LOAC. Ruses are lawful if they are not treacherous, perfidious and do not violate any express or tacit agreement.

The following are examples of ruses which are lawful:

- a. surprises;
- b. ambushes;
- c. feigning attacks, retreats or flights;
- d. simulating quiet and inactivity;
- e. giving large strong points to a small force;

¹¹ Australia, *Defence Force Manual* (1994), § 702.

¹² Belgium, *Law of War Manual* (1983), p. 32.

¹³ Belgium, *Teaching Manual for Officers* (1994), Part I, Title II, p. 33.

¹⁴ Benin, *Military Manual* (1995), Fascicule III, p. 13.

¹⁵ Cameroon, *Instructors' Manual* (1992), p. 30, § 131 and p. 89, § 222.

¹⁶ Canada, *Rules of Engagement for Operation Deliverance* (1992), § 27.

- f. constructing works, bridges etc. which it is not intended to use;
- g. transmitting bogus signal messages and sending bogus dispatches and newspapers with a view to their being intercepted by the enemy;
- h. making use of the enemy's signals, watchwords, wireless code signs, tuning calls and words of command;
- i. conducting a false military exercise on the wireless on a frequency easily intercepted while substantial troop movements are taking place elsewhere;
- j. pretending to communicate with troops or reinforcements that do not exist;
- k. moving landmarks;
- l. constructing dummy airfields and aircraft;
- m. putting up dummy guns or dummy tanks;
- n. laying dummy mines;
- o. removing badges from uniforms;
- p. clothing the men of a single unit in the uniforms of several different units to induce the enemy to believe that they face a large force; or
- q. giving false ground signals to enable airborne personnel or supplies to be dropped in a hostile area or to induce aircraft to land in a hostile area.¹⁷

In the context of air warfare, the manual also gives camouflage, decoys and fake radio signals as examples of legitimate ruses.¹⁸

21. Canada's Code of Conduct states that "ruses such as camouflage and other similar deceptions are not prohibited and as such are legitimate".¹⁹

22. Croatia's Commanders' Manual provides that "deception measures such as camouflage, decoys, mock operations are permitted".²⁰

23. Ecuador's Naval Manual states that:

The law of armed conflicts permits deceiving the enemy through stratagems and ruses of war intended to mislead him, to deter him from taking action, or to induce him to act recklessly, provided the ruses do not violate rules of international law applicable to armed conflict.

...

Stratagems and ruses of war permitted in armed conflict include such deceptions as camouflage, deceptive lighting, dummy ships and other armament, decoys, simulated forces, feigned attacks and withdrawals, ambushes, false intelligence information, electronic deceptions, and utilisation of enemy codes, passwords, and countersigns.²¹

24. France's LOAC Summary Note provides that "if ruse of war is authorised, perfidy is prohibited".²²

25. France's LOAC Manual incorporates the content of Article 24 of the 1907 HR.²³ It defines "lawful deception: the ruse of war or stratagem is a non-perfidious act but aimed at deceiving the enemy or inducing him to act

¹⁷ Canada, *LOAC Manual* (1999), pp. 6-1 and 6-2, §§ 5-7 (land warfare), see also p. 7-2, §§ 14 and 15 (air warfare) and p. 8-10, §§ 75-77 (naval warfare).

¹⁸ Canada, *LOAC Manual* (1999), p. 7-2, § 15.

¹⁹ Canada, *Code of Conduct* (2001), Rule 10, § 10.

²⁰ Croatia, *Commanders' Manual* (1992), § 46.

²¹ Ecuador, *Naval Manual* (1989), §§ 12.1 and 12.1.1.

²² France, *LOAC Summary Note* (1992), § 4.4. ²³ France, *LOAC Manual* (2001), p. 114.

recklessly".²⁴ It gives the examples of camouflage, decoy, feint, simulated demonstration or operation, disinformation, false information and technical ruses.²⁵ It also incorporates the content of Article 37(2) AP I.²⁶

26. Germany's Military Manual provides that "ruses of war and the employment of measures necessary for obtaining information about the adverse party and the country are considered permissible... Ruses of war include e.g. the use of enemy signals, passwords, signs, decoys, etc.; not, however, espionage."²⁷

27. Hungary's Military Manual lists camouflage, decoys, mock operations and misinformation as examples of deception.²⁸

28. Indonesia's Military Manual provides that "ruses of war... are allowed in armed conflict, such as camouflage, decoys, mock operations and intentional use of misinformation concerning military operations".²⁹

29. Israel's Manual on the Laws of War states that:

Surprise, stratagem, artifice are some of the most fundamental principles of war, giving the army a tactical advantage, and sometimes even a strategic one. The prohibition in the chapter on methods of warfare does not come to deny the armies the use of the element of surprise or to demand that each side be "transparent" to its enemy.

...

There is no prohibition on the use of camouflage, stratagems, ambushes and deceptions that are not perfidious means, i.e. where there is no situation of trust between the parties by virtue of the law of war, which is violated by one of the parties. Thus, for example, camouflaging a combatant to appear like objects in the natural surroundings (as opposed to the human surroundings) is permitted (such as painting the face black, adding leaves to helmet, and so forth). Interfering with the enemy's communication network and conducting psychological warfare are permissible... One may deceive the enemy with regard to the size of one's force or its intentions, as was done in the Yom Kippur War by the "Zvika Force". It is also allowed to conduct maneuvers of deception, flanking, dummy units and weapons, and the like. The law of war does not come to bar any party from exploiting tactical or strategic advantages or the enemy's naivete.³⁰

30. Italy's IHL Manual states that "stratagems of war and the employment of methods necessary for obtaining information about the enemy are considered lawful".³¹

31. Italy's LOAC Elementary Rules Manual states that "measures of deception, such as camouflage, decoys, mock operations and misinformation, are permitted".³²

²⁴ France, *LOAC Manual* (2001), p. 47, see also p. 114.

²⁵ France, *LOAC Manual* (2001), pp. 47 and 114, see also p. 115.

²⁶ France, *LOAC Manual* (2001), p. 123.

²⁷ Germany, *Military Manual* (1992), § 471, see also § 1018 (naval warfare).

²⁸ Hungary, *Military Manual* (1992), p. 63. ²⁹ Indonesia, *Military Manual* (1982), § 103.

³⁰ Israel, *Manual on the Laws of War* (1998), pp. 56 and 58.

³¹ Italy, *IHL Manual* (1991), Vol. I, § 9. ³² Italy, *LOAC Elementary Rules Manual* (1991), § 46.

32. Kenya's LOAC Manual states that "ruses of war... are permitted. They are acts intended to mislead an enemy but not inviting his confidence. Ruses of war include the use of camouflage, decoys, mock operations and misinformation."³³

33. South Korea's Military Law Manual states that ruses of war such as camouflage, decoys and misinformation are permitted. It adds that the dissemination of misinformation during some landing operations is also lawful.³⁴

34. Madagascar's Military Manual provides that "measures of deception, such as camouflage, decoys, mock operations and disinformation, are permitted".³⁵

35. The Military Manual of the Netherlands states that:

Ruses of war may be used... Ruses of war are defined as behaviour which is intended to mislead an enemy or to induce him to act recklessly, but which do not violate any rules of the humanitarian law of war. Such behaviour is not treacherous because it does not inspire the confidence of the adversary with respect to protection under the humanitarian law of war. Examples of ruses of war are the use of camouflage, ambushes, fake positions, mock operations, misleading messages and incorrect information.³⁶

36. The Military Handbook of the Netherlands provides that "ruses are permitted. For example: ambushes, feint, sending of mock messages, use of enemy watchwords and codes, mock positions and constructions, camouflage."³⁷

37. New Zealand's Military Manual states that:

Ruses of war are measures taken to gain advantage over the enemy by mystifying or misleading him. They are permitted provided they are free from any suspicion of treachery or perfidy and do not violate any expressed or tacit agreement...

Legitimate ruses include: surprises; ambushes; feigning attacks, retreats or flights; simulating quiet and inactivity; giving large strongpoints to a small force; constructing works, bridges, etc., which it is not intended to use; transmitting bogus signal messages, and sending bogus despatches and newspapers with a view to their being intercepted by the enemy; making use of the enemy's signals, watchwords, wireless code signs and tuning calls, and words of command; conducting a false military exercise on the wireless on a frequency easily interrupted while substantial troop movements are taking place on the ground; pretending to communicate with troops or reinforcements which do not exist; moving landmarks; constructing dummy airfields and aircraft; putting up dummy guns or dummy tanks; laying dummy mines; removing badges from uniforms; clothing the men of a single unit in the uniforms of several different units so that prisoners and dead may give the idea of a large force; giving false ground signals to enable airborne personnel or supplies to be dropped in a hostile area, or to induce aircraft to land in a hostile area.

³³ Kenya, *LOAC Manual* (1997), Précis No. 3, p. 7.

³⁴ South Korea, *Military Law Manual* (1996), p. 88.

³⁵ Madagascar, *Military Manual* (1994), Fiche No. 6-O, § 14.

³⁶ Netherlands, *Military Manual* (1993), pp. IV-1 and IV-2.

³⁷ Netherlands, *Military Handbook* (1995), p. 7-40, see also p. 7-36.

... [I]t would not be unlawful for a few men to call upon an enemy force to surrender on the ground that it was surrounded or to threaten bombardment although no guns are actually in place.³⁸

38. Nigeria's Military Manual states that:

A commander in his desire to fulfil his mission shall not mask his intentions and action from the enemy so as to induce the enemy to react in a manner prejudicial to his interests. Thus, to be consistent with the law of war, deceptions shall follow the distinction between permitted ruses and prohibited perjury [perfidy]... [Ruse] of war is considered to be a permissible method of warfare. These are acts intended to mislead an adversary or induce him to act recklessly but they infringe no rule of international law and are not perfidious because they do not invite the confidence of an adversary with respect to protection under that law. Examples of ruses of war are camouflage, decoys, mock operations, misinformation, surprises, ambushes and small scale raids.³⁹

39. Nigeria's Manual on the Laws of War states that "stratagems and ruses of war are measures to obtain advantage over the enemy by misleading or mystifying him. Such tactics are permissible provided they do not involve treachery." It gives examples of "legitimate tactics", such as surprises, ambushes, feigning attacks, retreats, flights and false movement of units, making use of the enemy code and password, giving false information to the enemy, employing spies and agents, moving landmarks, using dummies and psychological warfare.⁴⁰

40. South Africa's LOAC Manual states that:

Certain ruses of war, intended to mislead an adversary or to induce it to act recklessly, do not contravene international law. Examples given in [AP I] are camouflage, decoy, mock operations and disinformation. Others are surprise, ambush, psychological operations and deception by communication or movement.⁴¹

41. Spain's Field Regulations states that "the laws of war permit: ambushes, surprises, night attacks, simulated movements, false retreats to ambush, intimidation and provision of false information".⁴²

42. Spain's LOAC Manual states that stratagems are permitted.⁴³ It adds that, in order to fulfil his mission, the commander may dissimulate his intentions and actions to the enemy in order to mislead him, to induce him to act recklessly or to react against his own interests. However, stratagems must neither infringe any rule of international law applicable in armed conflicts, nor be perfidious.⁴⁴ It gives the following examples of stratagems: decoys, mock operations, misinformation, camouflage and disinformation.⁴⁵

³⁸ New Zealand, *Military Manual* (1992), §§ 502(1), 502(2) and 502(3) (land warfare), see also § 611(1) (air warfare) and § 713(1) (naval warfare).

³⁹ Nigeria, *Military Manual* (1994), pp. 42 and 43.

⁴⁰ Nigeria, *Manual on the Laws of War* (undated), § 14.

⁴¹ South Africa, *LOAC Manual* (1996), § 34(a). ⁴² Spain, *Field Regulations* (1882), § 863.

⁴³ Spain, *LOAC Manual* (1996), Vol. I, §§ 3.3.a.(1), 5.3.c, 7.3.a.(6) and 10.8.e.(1).

⁴⁴ Spain, *LOAC Manual* (1996), Vol. I, §§ 3.3.a.(1) and 5.3.c, see also §§ 2.3.b.(2) and 7.3.a.(6).

⁴⁵ Spain, *LOAC Manual* (1996), Vol. I, §§ 3.3.a.(1), 5.3.c, 7.3.a.(6) and 10.8.e.(1).

43. Sweden's IHL Manual states that:

In certain circumstances, ruses of war may become almost tantamount to perfidy. Here the important difference is that ruses of war are not based on betrayal of the adversary's confidence. Instead, the intention of a ruse is to mislead the adversary, which can lead to incorrect deployment of his forces or to reckless actions which, for example, prematurely reveal his forces, intended tactics or assault objectives. The [1907 HR] states that it is permitted to use ruses of war, and the same authority is given in API, Article 37:2. Typical examples of ruses are giving false information on the size of one's own forces, position and intentions, or hiding one's combat forces with camouflage, or misleading the adversary by means of mock objectives and mock operations.⁴⁶

44. Switzerland's Basic Military Manual provides that:

Ruses of war and the employment of methods necessary for obtaining information about the enemy and the country are lawful.

...

Examples of lawful ruses: surprises; ambushes; feigning attacks or retreats; constructing installations which it is not intended to use; constructing dummy airfields; putting up dummy guns or dummy tanks; giving large strong points to a small force; transmitting false information through newspapers or radio; making use of the enemy's watchwords, wireless code signs and tuning calls to transmit false instructions; pretending to communicate with troops or reinforcements which do not exist; moving landmarks; removing from uniforms the badges indicating the grade, unit, nationality or speciality; giving the men of a single unit badges of several different units so that the enemy thinks that he is facing a bigger force; inciting enemy soldiers to rebellion, mutiny or desertion, possibly taking with them arms and means of transportation such as aircraft; and inducing the enemy population to revolt against its government, etc.⁴⁷

45. Togo's Military Manual states that "in order to conceal his intentions and actions from the enemy to induce him to react in a way detrimental to his interests, a military commander is permitted to use ruse... A ruse of war aims to: mislead the enemy [and] to induce the enemy to act recklessly."⁴⁸

46. According to the UK Military Manual, "ruses of war are the measures taken to obtain advantage of the enemy by mystifying or misleading him. They are permissible provided they are free from any suspicion of treachery or perfidy and do not violate any express or tacit agreement."⁴⁹ It notes that "according to the debate which took place at the [Hague] Conference... [Article 24 of the 1907 HR] must not be taken to imply that every ruse is permissible. A ruse ceases to be permissible if it contravenes any generally accepted rule."⁵⁰ "Legitimate ruses" include:

⁴⁶ Sweden, *IHL Manual* (1991), Section 3.2.1.1.b, p. 30.

⁴⁷ Switzerland, *Basic Military Manual* (1987), Article 38, including commentary.

⁴⁸ Togo, *Military Manual* (1996), Fascicule III, p. 13.

⁴⁹ UK, *Military Manual* (1958), § 307. ⁵⁰ UK, *Military Manual* (1958), § 307, footnote 1.

Surprises; ambushes; feigning attacks, retreats or flights; simulating quiet and inactivity; giving large strong points to a small force; constructing works, bridges, etc., which it is not intended to use; transmitting bogus signal messages, and sending bogus despatches and newspapers with a view to their being intercepted by the enemy; making use of the enemy's signals, watchwords, wireless code signs and tuning calls, and words of command; conducting a false military exercise on the wireless on a frequency easily interrupted while substantial troop movements are taking place on the ground; pretending to communicate with troops or reinforcements which do not exist; moving landmarks; constructing dummy airfields and aircraft; putting up dummy guns or dummy tanks; laying dummy mines; removing badges from uniforms; clothing the men of a single unit in the uniform of several different units so that prisoners and dead may give the idea of a large force; giving false ground signals to enable airborne personnel or supplies to be dropped in a hostile area, or to induce aircraft to land in a hostile area.⁵¹

The manual also states that "a capitulation . . . may not . . . be annulled because one of the parties has been induced to agree to it by ruse".⁵²

47. The UK LOAC Manual states that "ruses of war . . . are permitted. They are acts intended to mislead an enemy but not inviting his confidence."⁵³ They include the use of camouflage, decoys, mock operations, dummy installations, misleading messages and misinformation.⁵⁴

48. The US Field Manual states that:

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

...

Absolute good faith with the enemy must be observed as a rule of conduct; but this does not prevent measures such as using spies and secret agents, encouraging defection or insurrection among the enemy civilian population, corrupting enemy civilians or soldiers by bribes, or inducing the enemy's soldiers to desert, surrender, or rebel. In general, a belligerent may resort to those measures for mystifying or misleading the enemy against which the enemy ought to take measures to protect himself.

...

Ruses of war are legitimate so long as they do not involve treachery or perfidy on the part of the belligerent resorting to them. They are, however, forbidden if they contravene any generally accepted rule.

The line of demarcation between legitimate ruses and forbidden acts of perfidy is sometimes indistinct . . . [I]t is a perfectly proper ruse to summon a force to surrender on the ground that it is surrounded and thereby induce such surrender with a small force.

...

Among legitimate ruses may be counted surprises; ambushes; feigning attacks, retreats or flights; simulating quiet and inactivity; use of small forces to simulate large

⁵¹ UK, *Military Manual* (1958), § 312. ⁵² UK, *Military Manual* (1958), § 484.

⁵³ UK, *LOAC Manual* (1981), Section 4, p. 12, § 2(a).

⁵⁴ UK, *LOAC Manual* (1981), Section 4, p. 12, § 2(a) and Annex A, p. 46, § 4.

units; transmitting false or misleading radio or telephone messages; deception of the enemy by bogus orders purporting to have been issued by the enemy commanders; making use of the enemy's signals and passwords; pretending to communicate with troops or reinforcements which have no existence; deceptive supply movements; deliberate planting of false information; use of spies and secret agents; moving landmarks; putting up dummy guns and vehicles or laying dummy mines; erection of dummy installations and airfields; removing unit identifications from uniforms; use of signal deceptive measures; and psychological warfare activities.⁵⁵

49. The US Air Force Pamphlet states that:

Ruses of war which have customarily been accepted as lawful, such as the use of camouflage, traps, mock operations and misinformation, are not perfidy. Ruses of war involve misinformation, deceit or other steps to mislead the enemy under circumstances where there is no obligation to speak the truth.

...

Article 24 of the 1907 Hague Regulations confirms the general rule that ruses of war not constituting perfidy are lawful. Among the permissible ruses are surprises, ambushes, feigning attacks, retreats, or flights; simulation of quiet and inactivity; use of small forces to simulate large units; transmission of false or misleading radio or telephone messages (not involving protection under international law such as internationally recognized signals of distress); deception by bogus orders purported to have been issued by the enemy commander; use of the enemy's signals and passwords; feigned communication with troops or reinforcements which have no existence; and resort to deceptive supply movements. Also included are the deliberate planting of false information, moving of landmarks, putting up dummy guns and vehicles, laying of dummy mines, erection of dummy installations and airfields, removal of unit identifications from uniforms, and use of signal deceptive measures.

...

The following examples provide guidelines for lawful ruses:

- (1) The use of aircraft decoys. Slower or older aircraft may be used as decoys to lure hostile aircraft into combat with faster and newer aircraft held in reserve. The use of aircraft decoys to attract ground fire in order to identify ground targets for attack by more sophisticated aircraft is also permissible.
- (2) Staging air combats. Another lawful ruse is the staging of air combat between two properly marked friendly aircraft with the object of inducing an enemy aircraft into entering the combat in aid of a supposed comrade.
- (3) Imitation of enemy signals. No objection can be made to the use by friendly forces of the signals or codes of an adversary. The signals or codes used by enemy aircraft or by enemy ground installations in contact with their aircraft may properly be employed by friendly forces to deceive or mislead an adversary. However, misuse of distress signals or distinctive signals internationally recognized as reserved for the exclusive use of medical aircraft would be perfidious.
- (4) Use of flares and fires. The lighting of large fires away from the true target area for the purpose of misleading enemy aircraft into believing that the large fires represent damage from prior attacks and thus leading them to the wrong

⁵⁵ US, *Field Manual* (1956), §§ 48–51.

target is a lawful ruse. The target marking flares of the enemy may also be used to mark false targets. However, it is an unlawful ruse to fire false target flare indicators over residential areas of a city or town which are not otherwise valid military objectives.

- (5) Camouflage use. The use of camouflage is a lawful ruse for misleading and deceiving enemy combatants. The camouflage of a flying aircraft must not conceal national markings of the aircraft, and the camouflage must not take the form of the national markings of the enemy or that of objects protected under international law.
- (6) Operational ruses. The ruse of the "switched raid" is a proper method of aerial warfare in which aircraft set a course, ostensibly for a particular target, and then, at a given moment, alter course in order to strike another military objective instead. This method was utilized successfully in World War II to deceive enemy fighter interceptor aircraft.⁵⁶

50. The US Naval Handbook states that:

The law of armed conflicts permits deceiving the enemy through stratagems and ruses of war intended to mislead him, to deter him from taking action, or to induce him to act recklessly, provided the ruses do not violate rules of international law applicable to armed conflict.

...

Stratagems and ruses of war permitted in armed conflict include such deceptions as camouflage, deceptive lighting, dummy ships and other armament, decoys, simulated forces, feigned attacks and withdrawals, ambushes, false intelligence information, electronic deceptions, and utilization of enemy codes, passwords, and countersigns.⁵⁷

51. The YPA Military Manual of the SFRY (FRY) states that ruses of war are lawful methods of conducting warfare which are used to deceive the enemy and achieve some advantage in battle or in the conduct of the war in general. It gives the following non-exhaustive list of ruses: all types of misinformation; simulation of large attacks, retreats, flights or panic, and any other type of simulation except vicious and perfidious ones; falsification of enemy commands; deceiving the enemy about the strength of one's own forces and reserves; putting up dummy forts, positions, aircraft, take-off strips and minefields; use of make-believe signals, enemy watchwords, code signs and passwords; use of enemy uniforms without badges, removal of badges of ranks, units or services from one's own uniform; and anything else that could deceive the enemy in order to achieve some advantage or which could in any other way have a psychological impact on the enemy.⁵⁸

⁵⁶ US, *Air Force Pamphlet* (1976), §§ 8-3(b), 8-4(a) and (b).

⁵⁷ US, *Naval Handbook* (1995), §§ 12.1 and 12.1.1.

⁵⁸ SFRY (FRY), *YPA Military Manual* (1988), § 108.

National Legislation

52. Italy's Law of War Decree as amended provides that "stratagems of war and the employment of methods necessary for obtaining information about the enemy are considered lawful".⁵⁹

National Case-law

53. According to a ruling of Colombia's Constitutional Court in 1997, the use of military tactics and stratagems must be in conformity with constitutional standards. However, it had in mind the protection of civilians rather than stratagems as a method of warfare.⁶⁰

Other National Practice

54. The Report on the Practice of Algeria recalls the old Islamic principle whereby "la guerre est ruse" (war is ruse). The report notes that Algerian fighters during the war of independence predominantly used methods of war such as surprise attacks, ambushes, camouflage, misinformation and mock operations.⁶¹

55. On the basis of the reply by Iraq's Ministry of Defence to a questionnaire, the Report on the Practice of Iraq states that ruses of war are permitted as long as they do not contravene religious and moral rules or local and international traditions.⁶²

56. According to the Report on the Practice of Malaysia, members of security forces who were interviewed indicated that, in practice, deception such as camouflage would be used in conducting operations.⁶³

57. As an example of a ruse of war, a commentator recalled that, during the War in the South Atlantic, the UK announced the establishment of a "maritime exclusion zone". The impression was given that a UK nuclear submarine was on station in the area. There were later complaints that misleading information had been released, when it was discovered that the vessel was in Scotland. Since the exclusion zone was not a formal blockade (it only applied to enemy naval vessels), which must be enforceable to be binding, it could be considered as a mere warning to Argentine naval forces. The commentator stated that "this was a perfectly valid and successful piece of 'disinformation'".⁶⁴

⁵⁹ Italy, *Law of War Decree as amended* (1938), Article 36.

⁶⁰ Colombia, Constitutional Court, *Constitutional Case No. T-303*, Judgement, 20 June 1997.

⁶¹ Report on the Practice of Algeria, 1997, Chapter 2.4.

⁶² Report on the Practice of Iraq, 1998, Reply by the Ministry of Defence to a questionnaire, July 1997, Chapter 2.4.

⁶³ Report on the Practice of Malaysia, 1997, Chapter 2.4.

⁶⁴ Howard S. Levie, "The Falklands Crisis and the Laws of War", in Alberto R. Coll and Anthony C. Arend (eds.), *The Falklands War: Lessons for Strategy, Diplomacy and International Law*, George Allen & Unwin, Boston, 1985, p. 65.

58. A training video on IHL produced by the UK Ministry of Defence states that ruses are permitted but underlines that it is difficult to differentiate ruses of war and treachery.⁶⁵

59. In 1992, in its final report to Congress on the conduct of the Gulf War, the US Department of Defense stated that:

Under the law of war, deception includes those measures designed to mislead the enemy by manipulation, distortion, or falsification of evidence to induce him to react in a manner prejudicial to his interests. Ruses are deception of the enemy by legitimate means, and are specifically allowed by Article 24, [1907 HR], and [AP I]

...

Coalition actions that convinced Iraqi military leaders that the ground campaign to liberate Kuwait would be focused in eastern Kuwait, and would include an amphibious assault, are examples of legitimate ruses...

There were few examples of perfidious practices during the Persian Gulf War. The most publicized were those associated with the battle of Ras Al-Khafji, which began on 29 January. As that battle began, Iraqi tanks entered Ras Al-Khafji with their turrets reversed, turning their guns forward only at the moment action began between Iraqi and Coalition forces. While there was some media speculation that this was an act of perfidy, it was not; a reversed turret is not a recognized indication of surrender *per se*. Some tactical confusion may have occurred, since Coalition ground forces were operating under a defensive posture at that time, and were to engage Iraqi forces only upon clear indication of hostile intent, or some hostile act.⁶⁶

III. Practice of International Organisations and Conferences

United Nations

60. No practice was found.

Other International Organisations

61. No practice was found.

International Conferences

62. The report of the Second Commission to the Hague Peace Conference in 1907 included an explanatory note stating that Article 24 of the 1907 HR aimed "only to say that ruses of war and methods of obtaining information are not prohibited as such. They would cease to be 'permissible' in case of infraction of a recognised imperative rule to the contrary."⁶⁷

⁶⁵ UK, Ministry of Defence, Training Video: The Geneva Conventions, 1986, Report on UK Practice, 1997, Chapter 2.4.

⁶⁶ US, Department of Defense, Final Report to Congress on the Conduct of the Persian Gulf War, Appendix O, The Role of the Law of War, 10 April 1992, *ILM*, Vol. 31, 1992, pp. 631–632.

⁶⁷ Howard S. Levie, *The Code of International Armed Conflict*, Oceana Publications, London, 1985, Vol. 1, Chapter 3.5, Section 35.1, p. 118.

IV. Practice of International Judicial and Quasi-judicial Bodies

63. No practice was found.

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

64. To fulfil its task of disseminating IHL, the ICRC has delegates around the world teaching armed and security forces that:

To be consistent with the law of war, deception shall follow the distinction between permitted ruses and prohibited perfidy.

"Ruse of war" or "stratagem" means any act not amounting to perfidy but intended:

- a) to mislead the enemy; or
- b) to induce the enemy to act recklessly.

Ruses of war are permitted.

Examples of ruses of war:

- a) camouflage (natural, paints, nets, smoke);
- b) displays (decoys, feint);
- c) demonstrations, mock operations;
- d) disinformation, misinformation;
- e) technical (electronic, communications).⁶⁸

VI. Other Practice

65. In their commentary on the 1977 Additional Protocols, Bothe, Partsch and Solf state that "ruses of war have always been permitted". They give as examples of such ruses:

the use of spies and secret agents, encouraging defection or insurrection among enemy civilians, corrupting enemy civilians or soldiers by bribes, or encouraging the enemy's combatants to desert, surrender or rebel (but not selectively to assassinate a particular individual), . . . surprise attacks, ambushes, simulating quiet and inactivity, use of small units to simulate large forces, transmitting false or misleading messages, making use of the enemy's signals, pretending to communicate with troops or reinforcements which do not exist, moving landmarks and route markers, putting up dummy weapons and the laying of dummy mines.⁶⁹

66. Commenting on Article 37(2) API, Oeter states that "deceiving the enemy about the military situation . . . has belonged to the common arsenal of warfare since time immemorial". He adds that:

Camouflaging one's own defence positions and using them for ambushes, setting up surprise attacks from such camouflaged positions, simulating operations of retreat,

⁶⁸ Frédéric de Mulinen, *Handbook on the Law of War for Armed Forces*, ICRC, Geneva, 1987, §§ 400–402.

⁶⁹ Michael Bothe, Karl Joseph Partsch, Waldemar A. Solf (eds.), *New Rules for Victims of Armed Conflicts*, Martinus Nijhoff, The Hague, 1982, pp. 202 and 207.

as well as simulating operations of attack, using dummy weapons, transmitting misleading messages, *inter alia*, by using the adversary's radio wavelengths, passwords, and codes, infiltrating the enemy's command chain in order to channel wrong orders, moving landmarks and route markers, giving members of one military unit the signs of other units to persuade the enemy that one's force is larger than it really is – all these are established elements of traditional tactics.⁷⁰

B. Improper Use of the White Flag of Truce

Note: For practice concerning the simulation of surrender and concerning the simulation of an intention to negotiate under the white flag of truce as acts considered perfidious, see *infra* section I of this chapter. For practice concerning the use of the white flag of truce by parlementaires, see Chapter 19, section A.

I. Treaties and Other Instruments

Treaties

67. Article 23(f) of the 1899 HR provides that “it is especially prohibited . . . to make improper use of a flag of truce”.

68. Article 23(f) of the 1907 HR provides that “it is especially forbidden . . . to make improper use of a flag of truce”.

69. Article 38(1) AP I provides that “it is . . . prohibited to misuse deliberately in an armed conflict . . . the flag of truce”. Article 38 AP I was adopted by consensus.⁷¹

70. Article 23(2) of draft AP II submitted by the ICRC to the CDDH provided that “it is forbidden to make improper use of the flag of truce”.⁷² This proposal was amended and adopted by consensus in Committee III of the CDDH.⁷³ The approved text provided that it was “forbidden to misuse deliberately in armed conflict other internationally recognized protective emblems . . . including the flag of truce”.⁷⁴ Eventually, however, it was deleted by consensus in the plenary.⁷⁵

71. Under Article 8(2)(b)(vii) of the 1998 ICC Statute, “making improper use of a flag of truce . . . resulting in death or serious personal injury” is a war crime in international armed conflicts.

Other Instruments

72. Article 114 of the 1863 Lieber Code provides that “if it be discovered, and fairly proved, that a flag of truce has been abused for surreptitiously obtaining

⁷⁰ Stefan Oeter, *Methods and Means of Combat*, Dieter Fleck (ed.), *The Handbook of Humanitarian Law in Armed Conflicts*, Oxford University Press, Oxford, 1995, pp. 199–200, § 471.

⁷¹ CDDH, *Official Records*, Vol. VI, CDDH/SR.39, 25 May 1977, p. 103.

⁷² CDDH, *Official Records*, Vol. I, Part Three, Draft Additional Protocols, June 1973, p. 39.

⁷³ CDDH, *Official Records*, Vol. XV, CDDH/III/SR.49, 4 June 1976, p. 109, § 8.

⁷⁴ CDDH, *Official Records*, Vol. XV, CDDH/236/Rev.1, 21 April–11 June 1976, p. 421.

⁷⁵ CDDH, *Official Records*, Vol. VII, CDDH/SR.52, 6 June 1977, p. 129.

military knowledge the bearer of the flag thus abusing his sacred character is deemed a spy".

73. Article 117 of the 1863 Lieber Code considers it "an act of bad faith, of infamy or fiendishness to deceive the enemy by flags of protection".

74. Article 13(f) of the 1874 Brussels Declaration especially forbids "making improper use of a flag of truce".

75. Article 8(d) of the 1880 Oxford Manual provides that "it is forbidden... to make improper use... of the flag of truce".

76. Based on several documents supplying evidence of outrages committed during the First World War, the 1919 Report of the Commission on Responsibility lists violations of the laws and customs of war which should be subject to criminal prosecution, including "misuse of flags".

77. Paragraph 6 of the 1991 Memorandum of Understanding on the Application of IHL between Croatia and the SFRY requires that hostilities be conducted in accordance with Article 38 AP I.

78. Paragraph 2.5 of the 1992 Agreement on the Application of IHL between the Parties to the Conflict in Bosnia and Herzegovina requires that hostilities be conducted in accordance with Article 38 AP I.

79. The 2000 UNTAET Regulation No. 2000/15 establishes panels with exclusive jurisdiction over serious criminal offences, including war crimes. According to Section 6 (1)(b)(vii), "making improper use of a flag of truce... resulting in death or serious personal injury" is a war crime in international armed conflicts.

II. National Practice

Military Manuals

80. Argentina's Law of War Manual (1969) provides that the improper use of the flag of parlementaires is a breach of good faith. It states, however, that the use said to be "improper" applies only in combat operations.⁷⁶

81. Argentina's Law of War Manual (1989) states that "it is prohibited... to deliberately abuse... internationally recognised protective emblems, signs or signals, including the flag of parlementaires".⁷⁷

82. Australia's Commanders' Guide provides that "the following examples constitute grave breaches or serious war crimes likely to warrant institution of criminal proceedings:... misusing or abusing... any... protected emblem for the purpose of gaining protection to which the user would not otherwise be entitled".⁷⁸

83. Australia's Defence Force Manual provides that "deliberate misuse of... protective symbols and emblems, signs and signals, including the flag

⁷⁶ Argentina, *Law of War Manual* (1969), § 1.017.

⁷⁷ Argentina, *Law of War Manual* (1989), § 1.06(1).

⁷⁸ Australia, *Commanders' Guide* (1994), § 1305(l).

of truce... is... prohibited".⁷⁹ It further states that "the following examples constitute grave breaches or serious war crimes likely to warrant institution of criminal proceedings:... misusing or abusing... any... protected emblem for the purpose of gaining protection to which the user would not otherwise be entitled".⁸⁰

84. Belgium's Teaching Manual for Officers specifies that "it is prohibited to abuse the protective signs provided for by the [Geneva] Conventions and [AP I]. Example: camouflaging arms and ammunition in a vehicle or a building flying... the white flag."⁸¹

85. Burkina Faso's Disciplinary Regulations provides that, under the laws and customs of war, it is prohibited "to use improperly the flag of parlementaires".⁸²

86. Cameroon's Disciplinary Regulations provides that, under the laws and customs of war, it is prohibited "to use improperly the flag of parlementaires".⁸³

87. Cameroon's Instructors' Manual states that the improper use of distinctive signs and signals is an unlawful deception.⁸⁴

88. Canada's LOAC Manual provides that "it is prohibited... to deliberately misuse... internationally recognized protective emblems, signs or signals including the flag of truce".⁸⁵ It further states that "improperly using a flag of truce" constitutes a war crime.⁸⁶

89. Congo's Disciplinary Regulations provides that, under the laws and customs of war, it is prohibited "to use [improperly] the flag of parlementaires".⁸⁷

90. Ecuador's Naval Manual emphasises that "use of the white flag to gain a military advantage over the enemy is unlawful".⁸⁸ It specifies that "protective signs and symbols may be used only to identify personnel, objects, and activities entitled to protected status which they designate. Any other use is forbidden by international law."⁸⁹ The manual also states that "the following acts constitute war crimes:... misuse [and] abuse... of flags of truce".⁹⁰

91. France's Disciplinary Regulations as amended provides that, under international conventions, it is prohibited "to use improperly the flag of parlementaires".⁹¹

92. France's LOAC Manual states that "it is prohibited... to use improperly... the white flag".⁹²

⁷⁹ Australia, *Defence Force Manual* (1994), § 704.

⁸⁰ Australia, *Defence Force Manual* (1994), § 1315(1).

⁸¹ Belgium, *Teaching Manual for Officers* (1994), Part I, Title II, p. 33.

⁸² Burkina Faso, *Disciplinary Regulations* (1994), Article 35(2).

⁸³ Cameroon, *Disciplinary Regulations* (1975), Article 32.

⁸⁴ Cameroon, *Instructors' Manual* (1992), p. 30, § 131.2 and p. 89, § 222.

⁸⁵ Canada, *LOAC Manual* (1999), p. 6-2, § 11(b).

⁸⁶ Canada, *LOAC Manual* (1999), p. 16-3, § 20(f).

⁸⁷ Congo, *Disciplinary Regulations* (1986), Article 32(2).

⁸⁸ Ecuador, *Naval Manual* (1989), § 12.2. ⁸⁹ Ecuador, *Naval Manual* (1989), § 11.10.5.

⁹⁰ Ecuador, *Naval Manual* (1989), § 6.2.5(11).

⁹¹ France, *Disciplinary Regulations as amended* (1975), Article 9 bis (2).

⁹² France, *LOAC Manual* (2001), p. 47.

93. Germany's Military Manual provides that "it is prohibited to make improper use of a flag of truce".⁹³
94. Italy's IHL Manual states that it is prohibited "to use improperly... the flag of parlementaires".⁹⁴ The manual further states that grave breaches of international conventions and protocols, including "the improper... use of international protective signs", constitute war crimes.⁹⁵
95. Under South Korea's Military Regulation 187, illegal use of the white flag is a war crime.⁹⁶
96. Lebanon's Army Regulations prohibits combatants from unlawfully using the white flag.⁹⁷
97. Madagascar's Military Manual states that the abuse of the white flag is prohibited.⁹⁸
98. Mali's Army Regulations stipulates that, under the laws and customs of war, it is prohibited "to use improperly the flag of parlementaires".⁹⁹
99. Morocco's Disciplinary Regulations provides that, under the laws and customs of war, it is prohibited "to use improperly the flag of parlementaires".¹⁰⁰
100. The Military Manual of the Netherlands states that "it is prohibited to misuse the flag of parlementaires".¹⁰¹ The manual further stresses that "the misuse of... recognised protective signs" is a grave breach of AP I.¹⁰²
101. The Military Handbook of the Netherlands stipulates that it is prohibited "to misuse the white flag".¹⁰³
102. New Zealand's Military Manual emphasises that "improper use of protective symbols... is prohibited".¹⁰⁴ It includes the white flag among the "protective symbols".¹⁰⁵ It further states that "improperly using a flag of truce" is a war crime.¹⁰⁶
103. Nigeria's Military Manual notes that it is prohibited "to make improper use of flag of truce".¹⁰⁷
104. Nigeria's Manual on the Laws of War provides that "improper use of the flag of truce" is an "illegitimate tactic".¹⁰⁸ It further states that the "abuse of... a white flag" is a war crime.¹⁰⁹

⁹³ Germany, *Military Manual* (1992), § 473.

⁹⁴ Italy, *IHL Manual* (1991), Vol. I, § 9(2). ⁹⁵ Italy, *IHL Manual* (1991), Vol. I, § 85.

⁹⁶ South Korea, *Military Regulation 187* (1991), Article 4.2.

⁹⁷ Lebanon, *Army Regulations* (1971), § 17.

⁹⁸ Madagascar, *Military Manual* (1994), Fiche No. 6-O, § 14.

⁹⁹ Mali, *Army Regulations* (1979), Article 36.

¹⁰⁰ Morocco, *Disciplinary Regulations* (1974), Article 25(2).

¹⁰¹ Netherlands, *Military Manual* (1993), p. IV-3.

¹⁰² Netherlands, *Military Manual* (1993), p. IX-5.

¹⁰³ Netherlands, *Military Handbook* (1995), p. 7-40.

¹⁰⁴ New Zealand, *Military Manual* (1992), § 502.7.

¹⁰⁵ New Zealand, *Military Manual* (1992), Annex B, § B42.

¹⁰⁶ New Zealand, *Military Manual* (1992), § 1704.2.f.

¹⁰⁷ Nigeria, *Military Manual* (1994), p. 40, § 5(1)(v).

¹⁰⁸ Nigeria, *Manual on the Laws of War* (undated), § 14.

¹⁰⁹ Nigeria, *Manual on the Laws of War* (undated), § 6.

105. Nigeria's Soldiers' Code of Conduct states that it is prohibited "to make improper use of flag of truce".¹¹⁰

106. Under Russia's Military Manual, the improper use of international signals and flags is a prohibited method of warfare.¹¹¹

107. Senegal's Disciplinary Regulations provides that, under the laws and customs of war, it is prohibited "to use improperly the flag of parlementaires".¹¹²

108. South Africa's LOAC Manual defines the "abuse of . . . a flag of truce" as a grave breach of the law of war and a war crime.¹¹³

109. Spain's LOAC Manual provides that the improper use – to identify persons and objects not protected – of the white flag is a prohibited deception.¹¹⁴ It also states that the white flag may not be used for other than its intended purpose.¹¹⁵

110. Sweden's IHL Manual considers that the prohibition of improper use of recognised emblems, as contained in Article 38 AP I, is part of customary international law.¹¹⁶ It adds that "in land combat it is not unusual for one of the parties to attempt to win a tactical advantage by concealing the character of his own forces prior to attack, in order to mislead or surprise the adversary . . . A flag of truce may not, however, be used for such purposes."¹¹⁷

111. The UK Military Manual provides that "improper use of a flag of truce or of signals of surrender is forbidden. The flag must not be used merely to gain time to effect a retreat or bring up reinforcements."¹¹⁸ In connection with the requirements for granting the status of combatant, the manual notes in particular that irregular troops should be warned against improper conduct with flags of truce.¹¹⁹ It further emphasises that "in addition to the 'grave breaches' of the 1949 [Geneva] Conventions, . . . the following are examples of punishable violations of the laws of war, or war crimes: . . . abuse of . . . a flag of truce".¹²⁰

112. The UK LOAC Manual provides that "it is forbidden . . . to make improper use in combat of a flag of truce".¹²¹

113. The US Field Manual states that "it is especially forbidden to make improper use of a flag of truce".¹²² It also provides that "flags of truce must not be used surreptitiously to obtain military information or merely to obtain time to effect a retreat or secure reinforcements or to feign a surrender in order to surprise an enemy".¹²³ The manual specifies that:

¹¹⁰ Nigeria, *Soldiers' Code of Conduct* (undated), § 12(f).

¹¹¹ Russia, *Military Manual* (1990), § 5(c).

¹¹² Senegal, *Disciplinary Regulations* (1990), Article 34(2).

¹¹³ South Africa, *LOAC Manual* (1996), §§ 39(e) and 41.

¹¹⁴ Spain, *LOAC Manual* (1996), Vol. I, § 5.3.c, see also § 10.8.e.(1).

¹¹⁵ Spain, *LOAC Manual* (1996), Vol. I, § 3.3.b.(2).

¹¹⁶ Sweden, *IHL Manual* (1991), Section 2.2.3, p. 19.

¹¹⁷ Sweden, *IHL Manual* (1991), Section 3.2.1.1.b, p. 30.

¹¹⁸ UK, *Military Manual* (1958), § 318. ¹¹⁹ UK, *Military Manual* (1958), § 95.

¹²⁰ UK, *Military Manual* (1958), § 626(d).

¹²¹ UK, *LOAC Manual* (1981), Section 4, p. 12, § 2d.

¹²² US, *Field Manual* (1956), § 52. ¹²³ US, *Field Manual* (1956), § 53.

It is an abuse of the flag of truce, forbidden as an improper ruse under Article 23 (f) [of the 1907] HR, for an enemy not to halt and cease firing while the parlementaire sent by him is advancing and being received by the other party; likewise, if the flag of truce is made use of for the purpose of inducing the enemy to believe that a parlementaire is going to be sent when no such intention exists.¹²⁴

The manual further notes that “in addition to the ‘grave breaches’ of the Geneva Conventions of 1949, the following acts are representative of violations of the law of war (‘war crimes’): . . . abuse of . . . the flag of truce”.¹²⁵

114. The US Air Force Pamphlet provides that “it is . . . forbidden to make improper use of the flag of truce”.¹²⁶ It further states that “in addition to the grave breaches of the Geneva Conventions of 1949, the following acts are representative of situations involving individual criminal responsibility: . . . deliberate . . . abuse of the flag of truce”.¹²⁷

115. The US Instructor’s Guide states that “in addition to the grave breaches of the Geneva Conventions, the following acts are further examples of war crimes: . . . abusing . . . the flag of truce”.¹²⁸

116. The US Naval Handbook emphasises that “use of the white flag to gain a military advantage over the enemy is unlawful”.¹²⁹ It specifies that “protective signs and symbols may be used only to identify personnel, objects, and activities entitled to protected status which they designate. Any other use is forbidden by international law.”¹³⁰ The Handbook also states that “the following acts are representative war crimes: . . . misuse [and] abuse . . . [of] flags of truce”.¹³¹

117. The YPA Military Manual of the SFRY (FRY) provides that “it is forbidden to use, during combat, in order to mislead the enemy . . . the flag of parlementaires and the white flag in general”.¹³²

National Legislation

118. Algeria’s Code of Military Justice punishes:

any individual, whether military or not, who, in time of war, in an area of operations . . . in violation of the laws and customs of war, improperly uses the distinctive signs and emblems defined by international conventions for the respect of persons, objects and places protected by these conventions.¹³³

119. Argentina’s Draft Code of Military Justice punishes any soldier who “uses improperly . . . the flag of parlementaires or of surrender”.¹³⁴

120. Australia’s War Crimes Act considers “any war crime within the meaning of the instrument of appointment of the Board of Inquiry [set up to investigate

¹²⁴ US, *Field Manual* (1956), § 467. ¹²⁵ US, *Field Manual* (1956), § 504(e).

¹²⁶ US, *Air Force Pamphlet* (1976), §§ 8-2(a) and 8-3(c).

¹²⁷ US, *Air Force Pamphlet* (1976), § 15-3(c)(3). ¹²⁸ US, *Instructor’s Guide* (1985), p. 13.

¹²⁹ US, *Naval Handbook* (1995), § 12.2. ¹³⁰ US, *Naval Handbook* (1995), § 11.9.6.

¹³¹ US, *Naval Handbook* (1995), § 6.2.5(11).

¹³² SFRY (FRY), *YPA Military Manual* (1988), § 105(1).

¹³³ Algeria, *Code of Military Justice* (1971), Article 299.

¹³⁴ Argentina, *Draft Code of Military Justice* (1998), Article 292, introducing a new Article 876(7) in the *Code of Military Justice as amended* (1951).

war crimes committed by enemy subjects]” as a war crime, including misuse of flags of truce.¹³⁵

121. Australia’s Geneva Conventions Act as amended provides that:

A person shall not, without the consent in writing of the Minister or of a person authorized in writing by the Minister to give consents . . . use for any purpose whatsoever any of the following:

...
such . . . emblems, identity cards, signs, signals, insignia or uniforms as are prescribed for the purpose of giving effect to [AP I].¹³⁶

122. Australia’s ICC (Consequential Amendments) Act incorporates in the Criminal Code the war crimes defined in the 1998 ICC Statute, including “improper use of a flag of truce” in international armed conflicts.¹³⁷

123. Azerbaijan’s Criminal Code provides that “the misuse of the white flag . . . which as a result caused death or serious injury to body of a victim” constitutes a war crime in international and non-international armed conflicts.¹³⁸

124. The Criminal Code of Belarus provides that it is a war crime to “use intentionally, during hostilities, in violation of international treaties, . . . signs protected by international law”.¹³⁹

125. Under the Criminal Code of the Federation of Bosnia and Herzegovina, “whoever misuses or carries without authorisation . . . any . . . international symbols recognised as the protection of certain objects from military operations” commits a war crime.¹⁴⁰ The Criminal Code of the Republika Srpska contains the same provision.¹⁴¹

126. Burkina Faso’s Code of Military Justice punishes the improper use, in violation of the laws and customs of war, of the distinctive insignia and emblems for the protection of persons, objects and locations as defined in international conventions, in time of war and in an area of military operations.¹⁴²

127. Under Burundi’s Draft Law on Genocide, Crimes against Humanity and War Crimes, “using improperly the flag of parlementaires” constitutes a war crime in international armed conflicts.¹⁴³

128. Canada’s Crimes against Humanity and War Crimes Act provides that the war crimes defined in Article 8(2) of the 1998 ICC Statute are “crimes according to customary international law” and, as such, indictable offences under the Act.¹⁴⁴

¹³⁵ Australia, *War Crimes Act* (1945), Section 3.

¹³⁶ Australia, *Geneva Conventions Act as amended* (1957), Section 15(1)(f).

¹³⁷ Australia, *ICC (Consequential Amendments) Act* (2002), Schedule 1, § 268.41.

¹³⁸ Azerbaijan, *Criminal Code* (1999), Article 119(2).

¹³⁹ Belarus, *Criminal Code* (1999), Article 138.

¹⁴⁰ Bosnia and Herzegovina, Federation, *Criminal Code* (1998), Article 166(1).

¹⁴¹ Bosnia and Herzegovina, Republika Srpska, *Criminal Code* (2000), Article 445(1).

¹⁴² Burkina Faso, *Code of Military Justice* (1994), Article 205.

¹⁴³ Burundi, *Draft Law on Genocide, Crimes against Humanity and War Crimes* (2001), Article 4(B)(g).

¹⁴⁴ Canada, *Crimes against Humanity and War Crimes Act* (2000), Section 4(1) and (4).

129. China's Law Governing the Trial of War Criminals provides that "indiscriminate use of the Armistice Flags" constitutes a war crime.¹⁴⁵

130. Congo's Genocide, War Crimes and Crimes against Humanity Act defines war crimes with reference to the categories of crimes defined in Article 8 of the 1998 ICC Statute.¹⁴⁶

131. The DRC Code of Military Justice as amended punishes "any individual, whether military or not, who, in time of war . . . improperly uses the distinctive signs and emblems defined by international conventions to ensure respect for the persons, objects and places protected under these conventions".¹⁴⁷

132. Côte d'Ivoire's Penal Code as amended punishes "anyone who, in an area of military operations, uses, in violation of the laws and customs of war, the distinctive insignia and emblems, defined by international conventions, to ensure respect for protected persons, objects and places".¹⁴⁸

133. Under Croatia's Criminal Code, "whoever misuses or carries without authorisation . . . recognised international signs used to mark objects for the purpose of protection against military operations" commits a war crime.¹⁴⁹

134. Under Estonia's Penal Code, "exploitative abuse . . . of the flag of truce" is a war crime.¹⁵⁰

135. France's Code of Military Justice punishes:

any individual, military or not, who, in time of war, in the area of operations of a force or unit, in violation of the laws and customs of war, uses improperly the distinctive signs and emblems defined by international conventions to ensure the respect for persons, objects and places protected by those conventions.¹⁵¹

136. Under Georgia's Criminal Code, any war crime provided for by the 1998 ICC Statute, which is not explicitly mentioned in the Code, such as "making improper use of a flag of truce, . . . resulting in death or serious personal injury" in international armed conflicts, is a crime.¹⁵²

137. Germany's Law Introducing the International Crimes Code punishes anyone who, in connection with an international or a non-international armed conflict, "makes improper use . . . of the flag of truce . . . thereby causing a person's death or serious injury".¹⁵³

138. Guinea's Criminal Code punishes "anyone [who], in an area of military operations and in violation of the laws and customs of war, uses distinctive insignia and emblems defined in international conventions to ensure respect for protected persons, objects and places".¹⁵⁴

¹⁴⁵ China, *Law Governing the Trial of War Criminals* (1946), Article 3(31).

¹⁴⁶ Congo, *Genocide, War Crimes and Crimes against Humanity Act* (1998), Article 4.

¹⁴⁷ DRC, *Code of Military Justice as amended* (1972), Article 455.

¹⁴⁸ Côte d'Ivoire, *Penal Code as amended* (1981), Article 473.

¹⁴⁹ Croatia, *Criminal Code* (1997), Article 168(1). ¹⁵⁰ Estonia, *Penal Code* (2001), § 105.

¹⁵¹ France, *Code of Military Justice* (1982), Article 439.

¹⁵² Georgia, *Criminal Code* (1999), Article 413(d).

¹⁵³ Germany, *Law Introducing the International Crimes Code* (2002), Article 1, § 10(2).

¹⁵⁴ Guinea, *Criminal Code* (1998), Article 579.

139. Under Ireland's Geneva Conventions Act as amended, any "minor breach" of AP I, including violations of Article 38(1) AP I, is a punishable offence.¹⁵⁵

140. Italy's Law of War Decree as amended provides that it is prohibited "to use improperly the flag of parlementaires".¹⁵⁶

141. Italy's Wartime Military Penal Code punishes anyone who "uses improperly . . . the flag of parlementaires".¹⁵⁷

142. Mali's Code of Military Justice punishes:

any individual . . . who, in time of war, in the area of operations of a military force and in violation of the laws and customs of war, improperly uses the distinctive signs and emblems defined in international conventions to ensure respect for persons, objects and places protected by these conventions.¹⁵⁸

143. Under Mali's Penal Code, "using the flag of parlementaires . . . and, thereby, causing loss of human lives or serious injuries" is a war crime in international armed conflicts.¹⁵⁹

144. The Definition of War Crimes Decree of the Netherlands includes "misuse of flags of truce" in its list of war crimes.¹⁶⁰

145. Under the International Crimes Act of the Netherlands, "making improper use of a flag of truce, . . . resulting in death or serious personal injury", is a crime, when committed in an international armed conflict.¹⁶¹

146. Under New Zealand's International Crimes and ICC Act, war crimes include the crimes defined in Article 8(2)(b)(vii) of the 1998 ICC Statute.¹⁶²

147. Nicaragua's Military Penal Code punishes any soldier who, in time of war and in an area of military operations, "unlawfully displays the flag of parlementaires".¹⁶³

148. Under Norway's Military Penal Code as amended, "anyone who contravenes or is accessory to the contravention of provisions relating to the protection of persons or property laid down in . . . the two additional protocols to [the Geneva] Conventions . . . is liable to imprisonment".¹⁶⁴

149. Poland's Penal Code punishes "any person who, during hostilities, uses . . . any . . . sign protected by international law", in violation thereof.¹⁶⁵

¹⁵⁵ Ireland, *Geneva Conventions Act as amended* (1962), Section 4(1) and (4).

¹⁵⁶ Italy, *Law of War Decree as amended* (1938), Article 36(1).

¹⁵⁷ Italy, *Wartime Military Penal Code* (1941), Article 180(4).

¹⁵⁸ Mali, *Code of Military Justice* (1995), Article 145.

¹⁵⁹ Mali, *Penal Code* (2001), Article 31(i)(7).

¹⁶⁰ Netherlands, *Definition of War Crimes Decree* (1946), Article 1.

¹⁶¹ Netherlands, *International Crimes Act* (2003), Article 5(3)(f).

¹⁶² New Zealand, *International Crimes and ICC Act* (2000), Section 11(2).

¹⁶³ Nicaragua, *Military Penal Code* (1996), Article 50(1).

¹⁶⁴ Norway, *Military Penal Code as amended* (1902), § 108(b).

¹⁶⁵ Poland, *Penal Code* (1997), Article 126(2).

150. Under Slovenia's Penal Code, "whoever abuses or carries without authorisation . . . internationally recognised symbols used for the protection . . . against military operations" commits a war crime.¹⁶⁶

151. Spain's Military Criminal Code punishes any soldier who "displays improperly the flag of parlementaires".¹⁶⁷

152. Spain's Penal Code punishes "anyone who, during an armed conflict, . . . uses improperly . . . the flag of parlementaires or of surrender".¹⁶⁸

153. Under Sweden's Penal Code as amended, "misuse of . . . the flag of parlementaires" constitutes a crime against international law.¹⁶⁹

154. Under Trinidad and Tobago's Draft ICC Act, it is a punishable offence to commit a war crime as defined in Article 8(2)(b)(vii) of the 1998 ICC Statute.¹⁷⁰

155. Under the UK ICC Act, it is a punishable offence to commit a war crime as defined in Article 8(2)(b)(vii) of the 1998 ICC Statute.¹⁷¹

156. Under the US War Crimes Act as amended, violations of Article 23(f) of the 1907 HR are war crimes.¹⁷²

157. Under the Penal Code as amended of the SFRY (FRY), the use of a prohibited method of combat is a war crime.¹⁷³ The commentary specifies that "the following methods of combat are banned under international law: . . . abuse of the flag of parlementaires, . . . the white flag".¹⁷⁴

National Case-law

158. No practice was found.

Other National Practice

159. A training video on IHL produced by the UK Ministry of Defence illustrates the rule that the false use of emblems is forbidden.¹⁷⁵

160. In 1987, the Deputy Legal Adviser of the US Department of State affirmed that "we support the principle that . . . internationally recognized protective emblems . . . not be improperly used".¹⁷⁶

¹⁶⁶ Slovenia, *Penal Code* (1994), Article 386(1).

¹⁶⁷ Spain, *Military Criminal Code* (1985), Article 75(1).

¹⁶⁸ Spain, *Penal Code* (1995), Article 612(6).

¹⁶⁹ Sweden, *Penal Code as amended* (1962), Chapter 22, § 6(2).

¹⁷⁰ Trinidad and Tobago, *Draft ICC Act* (1999), Section 5(1)(a).

¹⁷¹ UK, *ICC Act* (2001), Sections 50(1) and 51(1) (England and Wales) and Section 58(1) (Northern Ireland).

¹⁷² US, *War Crimes Act as amended* (1996), Section 2441(c)(2).

¹⁷³ SFRY(FRY), *Penal Code as amended* (1976), Article 148(1).

¹⁷⁴ SFRY(FRY), *Penal Code as amended* (1976), commentary on Article 148(1), see also Article 153(1).

¹⁷⁵ UK, Ministry of Defence, Training Video: The Geneva Conventions, 1986, Report on UK Practice, 1997, Chapter 2.4.

¹⁷⁶ US, Remarks of Michael J. Matheson, Deputy Legal Adviser, US Department of State, The Sixth Annual American Red Cross-Washington College of Law Conference on International Humanitarian Law: A Workshop on Customary International Law and the 1977 Protocols Additional to the 1949 Geneva Conventions, *American University Journal of International Law and Policy*, Vol. 2, 1987, p. 425.

III. Practice of International Organisations and Conferences

United Nations

161. In 1970, in a report on respect for human rights in armed conflicts, the UN Secretary-General stated that “as was felt by the experts convened by the International Committee of the Red Cross in 1969, the prohibition of the improper use of the white flag . . . contained in article 23(f) [of the 1907 HR], should be strongly reaffirmed”.¹⁷⁷

Other International Organisations

162. No practice was found.

International Conferences

163. No practice was found.

IV. Practice of International Judicial and Quasi-judicial Bodies

164. No practice was found.

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

165. To fulfil its task of disseminating IHL, the ICRC has delegates around the world teaching armed and security forces that “it is prohibited to make improper use (that is to mark other persons and objects than those entitled to) of . . . the white flag (flag of truce)”.¹⁷⁸

166. In a working paper on war crimes submitted in 1997 to the Preparatory Committee for the Establishment of an International Criminal Court, the ICRC included “improper use of a flag of truce”, when committed in an international armed conflict, in its list of war crimes to be subject to the jurisdiction of the Court.¹⁷⁹

VI. Other Practice

167. No practice was found.

C. Improper Use of the Distinctive Emblems of the Geneva Conventions

Note: *For practice concerning the simulation of protected status by using the distinctive emblems of the Geneva Conventions as an act considered perfidious, see infra section I of this chapter.*

¹⁷⁷ UN Secretary-General, Report on respect for human rights in armed conflicts, UN Doc. A/8052, 2 March 1970, § 102.

¹⁷⁸ Frédéric de Mulinen, *Handbook on the Law of War for Armed Forces*, ICRC, Geneva, 1987, § 407(e).

¹⁷⁹ ICRC, Working paper on war crimes submitted to the Preparatory Committee for the Establishment of an International Criminal Court, New York, 14 February 1997, § 2(x).

*I. Treaties and Other Instruments**Treaties*

168. Article 23(f) of the 1899 HR provides that “it is especially prohibited . . . to make improper use of . . . the distinctive badges of the [1864] Geneva Convention”.

169. The 1906 GC provides that:

Art. 27. The signatory powers whose legislation may not now be adequate engage to take or recommend to their legislatures such measures as may be necessary to prevent the use, by private persons or by societies other than those upon which this convention confers the right thereto, of the emblem or name of the Red Cross or Geneva Cross, particularly for commercial purposes by means of trade-marks or commercial labels . . .

Art. 28. In the event of their military penal laws being insufficient, the signatory governments also engage to take, or to recommend to their legislatures, the necessary measures to repress, in time of war, individual acts of robbery and ill treatment of the sick and wounded of the armies, as well as to punish, as usurpations of military insignia, the wrongful use of the flag and brassard of the Red Cross by military persons or private individuals not protected by the present convention.

170. Article 23(f) of the 1907 HR provides that “it is especially forbidden . . . to make improper use of . . . the distinctive badges of the [1864] Geneva Convention”.

171. Article 24 of the 1929 GC provides that:

The emblem of the red cross on a white ground and the words “Red Cross” or “Geneva Cross” shall not be used either in time of peace or in time of war, except to protect or to indicate the medical formations and establishments and the personnel and material protected by the Convention.

172. Article 28 of the 1929 GC provides that:

The Governments of the High Contracting Parties whose legislation is not at present adequate for the purpose, shall adopt or propose to their legislatures the measures necessary to prevent at all times:

- (a) The use of the emblem or designation “Red Cross” or “Geneva Cross” by private individuals or associations, firms or companies, other than those entitled thereto under the present Convention, as well as the use of any sign or designation constituting an imitation, for commercial or any other purposes;
- (b) By reason of the compliment paid to Switzerland by the adoption of the reversed Federal colours, the use by private individuals or associations, firms or companies of the arms of the Swiss Confederation or marks constituting an imitation, whether as trademarks or as parts of such marks, for a purpose contrary to commercial honesty, or in circumstances capable of wounding Swiss national sentiment.

173. Article 39 GC I provides that “under the direction of the competent military authority, the emblem [of the Red Cross, Red Crescent or Red Lion and

Sun] shall be displayed on the flags, armbands and on all equipment employed in the Medical Service”.

174. Article 44 GC I provides that:

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

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

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

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

175. Article 53 GC I provides that:

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

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

176. Article 54 GC I provides that “the High Contracting Parties shall, if their legislation is not already adequate, take measures necessary for the prevention and repression, at all times, of the abuses referred to under Article 53”.

177. Article 41, first paragraph, GC II provides that “under the direction of the competent military authority, the emblem of the red cross on a white ground shall be displayed on the flags, armlets and on all equipment employed in the Medical Service”.

178. Article 44 GC II provides that:

The distinguishing signs referred to in Article 43 [red cross, red crescent or red lion and sun on a white ground] can only be used, whether in time of peace or war, for indicating or protecting the ships therein mentioned, except as may be provided in any other international Convention or by agreement between all the Parties to the conflict concerned.

179. Under Article 45 GC II, “the High Contracting Parties shall, if their legislation is not already adequate, take the measures necessary for the prevention and repression, at all times, of any abuse of the distinctive signs provided for under Article 43 [red cross, red crescent or red lion and sun on a white ground]”.

180. According to the 1949 Geneva Conventions, the following are entitled to use the distinctive emblems:

- medical personnel exclusively engaged in the search for, or the collection, transport or treatment of the wounded or sick, or in the prevention of disease, staff exclusively engaged in the administration of medical units and establishments, as well as chaplains attached to the armed forces (Articles 24 and 40 GC I);
- the staff of National Red Cross Societies and that of other voluntary aid societies, duly recognised and authorised by their governments, who may be employed on the same duties as the personnel named in Article 24 (Articles 26, 40 and 44 GC I);
- the medical personnel and units of a recognised Society of a neutral country with the previous consent of its own government and the authorisation of the party to the conflict concerned (Articles 27 and 40 GC I);
- members of the armed forces specially trained for employment, should the need arise, as hospital orderlies, nurses or auxiliary stretcher-bearers, in the search for or the collection, transport or treatment of the wounded and sick, but only while carrying out medical duties (Articles 25 and 41 GC I);
- such medical units and establishments as are entitled to be respected under GC I, and only with the consent of the military authorities (Article 42 GC I);
- the international Red Cross organisations and their duly authorised personnel, at all times (Article 44 GC I);
- vehicles used as ambulances and aid stations exclusively assigned to the purpose of giving free treatment to the wounded or sick, as an exceptional measure in time of peace, in conformity with national legislation and with the express permission of one of the National Red Cross (Red Crescent, Red Lion and Sun) Societies (Article 44 GC I);
- the religious, medical and hospital personnel of hospital ships and their crews (Articles 36 and 42 GC II);
- the religious, medical and hospital personnel assigned to the medical or spiritual care of the persons designated in Articles 12 and 13 (wounded, sick and shipwrecked) (Articles 37 and 42 GC II);

- military hospital ships, that is to say, ships built or equipped by the powers specially and solely with a view to assisting the wounded, sick and shipwrecked, to treating them and to transporting them (Articles 22 and 43 GC II);
- hospital ships utilised by National Red Cross Societies, by officially recognised relief societies or by private persons (Articles 24 and 43 GC II);
- hospital ships utilised by National Red Cross Societies, officially recognised relief societies, or private persons of neutral countries (Articles 25 and 43 GC II);
- small craft employed by the State or by the officially recognised lifeboat institutions for coastal rescue operations (Articles 27 and 43 GC II);
- lifeboats of hospital ships, coastal lifeboats and all small craft used by the medical service (Article 43 GC II);
- civilian hospitals, if so authorised by the State (Article 18 GC IV);
- persons regularly and solely engaged in the operation and administration of civilian hospitals, including the personnel engaged in the search for, removal and transporting of and caring for wounded and sick civilians, the infirm and maternity cases, as well as other personnel who are engaged in the operation and administration of civilian hospitals, while they are employed on such duties (Article 20 GC IV).

181. Article 18(8) AP I provides that “the provisions of the Conventions and of this Protocol relating to the supervision of the use of the distinctive emblem and to the prevention and repression of any misuse thereof shall be applicable to distinctive signals”. These distinctive signals are defined in Annex I AP I for the identification of medical units and transports. Article 18 AP I was adopted by consensus.¹⁸⁰

182. Article 38(1) AP I provides that “it is prohibited to make improper use of the distinctive emblem of the red cross, red crescent or red lion and sun”. Article 38 was adopted by consensus.¹⁸¹

183. According to AP I, the following are entitled to use the distinctive emblems:

- medical personnel, meaning those persons assigned (permanently or temporarily), by a party to the conflict, exclusively to the medical purposes (the search for, collection, transportation, diagnosis or treatment – including first-aid treatment – of the wounded, sick and shipwrecked, or for the prevention of disease) or to the administration of medical units or to the operation or administration of medical transports. The terms include:
 - (a) medical personnel of a party to the conflict, whether military or civilian, including those described in GC I and II, and those assigned to civil defence organisations;
 - (b) medical personnel of National Red Cross (Red Crescent, Red Lion and Sun) Societies and other national voluntary aid societies duly recognised and authorised by a party to the conflict;
 - (c) medical personnel or medical units or medical transports described in Article 9(2) (permanent medical units and transports, other than hospital

¹⁸⁰ CDDH, *Official Records*, Vol. VI, CDDH/SR.37, 24 May 1977, p. 70.

¹⁸¹ CDDH, *Official Records*, Vol. VI, CDDH/SR.39, 25 May 1977, p. 103.

ships, and their personnel made available to a party to the conflict for humanitarian purposes: (a) by a neutral or other State which is not party to that conflict; (b) by a recognised and authorised aid society of such a State; (c) by an impartial international humanitarian organisation) (Article 8 AP I);

- religious personnel, meaning military or civilian persons, such as chaplains, who are exclusively engaged in the work of their ministry and attached:
 - (a) to the armed forces of a party to the conflict;
 - (b) to medical units or medical transports of a party to the conflict;
 - (c) to medical units or medical transports described in Article 9(2); or
 - (d) to civil defence organisations of a party to the conflict (Article 8 AP I);
- medical units (fixed or mobile, permanent or temporary), meaning establishments and other units, whether military or civilian, organised for medical purposes, namely the search for, collection, transportation, diagnosis or treatment – including first-aid treatment – of the wounded, sick and shipwrecked, or for the prevention of disease. The term includes, for example, hospitals and other similar units, blood transfusion centres, preventive medicine centres and institutes, medical depots and the medical and pharmaceutical stores of such units (Article 8 AP I);
- medical transports, meaning any means of transportation, whether military or civilian, permanent or temporary, assigned exclusively to medical transportation and under the control of a competent authority of a party to the conflict (Article 8 AP I);
- civilian medical personnel and civilian religious personnel in occupied territory and in areas where fighting is taking place or is likely to take place (Article 18(3) AP I);
- hospital ships and coastal rescue craft carrying civilian wounded, sick and shipwrecked who do not belong to one of the categories mentioned in Article 13 GC II (Articles 18(4) and 22 AP I);
- medical ships and craft other than those referred to in Article 22 AP I and Article 38 GC II (Article 23(1) AP I).

184. Article 12 AP II provides that:

Under the direction of the competent authority concerned, the distinctive emblem of the red cross, red crescent or red lion and sun on a white ground shall be displayed by medical and religious personnel and medical units, and on medical transports. It shall be respected in all circumstances. It shall not be used improperly.

Article 12 AP II was adopted by consensus.¹⁸²

185. Under Article 8(2)(b)(vii) of the 1998 ICC Statute, “making improper use...of the distinctive emblems of the Geneva Conventions, resulting in death or serious personal injury” is a war crime in international armed conflicts.

¹⁸² CDDH, *Official Records*, Vol. VII, CDDH/SR.51, 3 June 1977, p. 114.

Other Instruments

186. Article 117 of the 1863 Lieber Code considers it “an act of bad faith, of infamy or fiendishness to deceive the enemy by flags of protection”.

187. Article 13(f) of the 1874 Brussels Declaration provides that “making improper use of . . . the distinctive badges of the [1864] Geneva Convention” is especially prohibited.

188. Article 8(d) of the 1880 Oxford Manual provides that “it is forbidden . . . to make improper use . . . of the protective signs prescribed by the [1864] Geneva Convention”.

189. In the 1991 Hague Statement on Respect for Humanitarian Principles, the Presidents of the six republics of the former Yugoslavia called for respect for the red cross emblem. They stated that “it may be used only to designate sanitary troops or buildings as well as persons and vehicles belonging to this service”.

190. Paragraph 6 of the 1991 Memorandum of Understanding on the Application of IHL between Croatia and the SFRY requires that hostilities be conducted in accordance with Article 38(1) AP I. Paragraph 10 provides that “the parties shall repress any misuse of the [red cross] emblem”.

191. Paragraph 2.5 of the 1992 Agreement on the Application of IHL between the Parties to the Conflict in Bosnia and Herzegovina requires that hostilities be conducted in accordance with Article 38(1) AP I. In paragraph 3, the parties undertook “to use the [red cross] emblem only to identify medical units and personnel and to comply with the other rules of international humanitarian law relating to the use of the Red Cross emblem and shall repress any misuse of the emblem”.

192. Paragraph I(4) of the 1992 Agreement No. 3 on the ICRC Plan of Action between the Parties to the Conflict in Bosnia and Herzegovina considers that “misuse of the red cross emblem” is one of “the main obstacles to humanitarian activities”.

193. Paragraph 110(f) of the 1994 San Remo Manual provides that “warships and auxiliary vessels are prohibited . . . at all times from actively simulating the status of vessels entitled to be identified by the emblem of the red cross or red crescent”.

194. Section 9.7 of the 1999 UN Secretary-General’s Bulletin provides that the distinctive “emblems may not be employed except to indicate or to protect medical units and medical establishments, personnel and material. Any misuse of the Red Cross and Red Crescent emblems is prohibited.”

195. The 2000 UNTAET Regulation No. 2000/15 establishes panels with exclusive jurisdiction over serious criminal offences, including war crimes. According to Section 6(1)(b)(vii), “making improper use . . . of the distinctive emblems of the Geneva Conventions, resulting in death or serious personal injury” is a war crime in international armed conflicts.

*II. National Practice**Military Manuals*

196. Under Argentina's Law of War Manual (1969), the improper use of the distinctive emblems is an act violating the principle of good faith. The use is considered as "improper" only in combat operations.¹⁸³ The manual also states that the distinctive emblems "shall not be used... whether in time of peace or in time of war, for other purposes than indicating or protecting medical units and establishments, the personnel and material protected by the [Geneva Conventions]"¹⁸⁴

197. Argentina's Law of War Manual (1989) provides that "it is prohibited... to make improper use of the sign of the Red Cross"¹⁸⁵ It further states that "the distinctive sign of [GC I] and [AP I] can only be used for medical units and for medical and religious personnel whose protection is provided for in the Convention and Protocol, with the consent of the competent authority"¹⁸⁶

198. Australia's Commanders' Guide provides that "the following examples constitute grave breaches or serious war crimes likely to warrant institution of criminal proceedings:... misusing or abusing the Red Cross symbol... for the purpose of gaining protection to which the user would otherwise not be entitled"¹⁸⁷

199. Australia's Defence Force Manual provides that "it is prohibited to improperly use the distinctive emblem of the Red Cross or Red Crescent"¹⁸⁸ It also states that "the following examples constitute grave breaches or serious war crimes likely to warrant institution of criminal proceedings:... misusing or abusing the Red Cross symbol... for the purpose of gaining protection to which the user would otherwise not be entitled"¹⁸⁹

200. Belgium's Law of War Manual provides that "the abuse of the emblem of the Red Cross is strictly prohibited. One may not, therefore, display the emblem of the Red Cross on vehicles that transport troops, ammunition [or] foodstuffs to the frontline... One may not use the emblem of the Red Cross to protect observation posts or military depots."¹⁹⁰

201. Belgium's Teaching Manual for Officers stipulates that "it is prohibited to abuse the protective signs provided for by the [1949 Geneva] Conventions and [AP I]. Example: camouflaging arms and ammunition in a vehicle or a building displaying the protective sign of the red cross."¹⁹¹

¹⁸³ Argentina, *Law of War Manual* (1969), § 1.017.

¹⁸⁴ Argentina, *Law of War Manual* (1969), § 3. 018(7).

¹⁸⁵ Argentina, *Law of War Manual* (1989), § 1.06(1).

¹⁸⁶ Argentina, *Law of War Manual* (1989), § 6.09.

¹⁸⁷ Australia, *Commanders' Guide* (1994), § 1305(1).

¹⁸⁸ Australia, *Defence Force Manual* (1994), § 704.

¹⁸⁹ Australia, *Defence Force Manual* (1994), § 1315(1).

¹⁹⁰ Belgium, *Law of War Manual* (1983), p. 33.

¹⁹¹ Belgium, *Teaching Manual for Officers* (1994), Part I, Title II, p. 33.

202. Burkina Faso's Disciplinary Regulations states that, under the laws and customs of war, it is prohibited "to use improperly . . . the distinctive insignia recognised by international conventions".¹⁹²

203. Cameroon's Disciplinary Regulations states that, under the laws and customs of war, it is prohibited "to use improperly . . . the distinctive insignia recognised by international conventions".¹⁹³

204. Cameroon's Instructors' Manual states that the improper use of the distinctive signs and signals is an unlawful deception.¹⁹⁴

205. Canada's LOAC Manual provides that "it is prohibited to make improper use of the distinctive emblem of the Red Cross or Red Crescent".¹⁹⁵ Furthermore, "improperly using . . . the distinctive emblems of the Geneva Conventions" constitutes a war crime.¹⁹⁶ The manual also provides that, in a non-international armed conflict, "the distinctive emblem of the Red Cross or Red Crescent . . . must not be used improperly".¹⁹⁷

206. Canada's Code of Conduct provides that "false and improper use of the Red Cross/Red Crescent emblem is prohibited".¹⁹⁸

207. Colombia's Instructors' Manual states that it is a punishable offence "to use improperly insignia, flags and emblems of the Red Cross".¹⁹⁹

208. Congo's Disciplinary Regulations states that, under the laws and customs of war, it is prohibited "to use improperly . . . the distinctive insignia recognised by international conventions".²⁰⁰

209. The Military Manual of the Dominican Republic states that:

It is a serious breach of the laws of war when soldiers use these signs [red cross, red crescent, red lion and sun, and red star of David] to protect or hide military activities. Do not mark your position or yourself with a medical service emblem unless you have been designated to perform only medical duties. Your life may depend on the proper use of the Red Cross symbol.²⁰¹

210. Ecuador's Naval Manual, in a chapter entitled "Misuse of protective signs, signals and symbols", considers it illegal to use transports marked with the red cross or red crescent to carry armed combatants, weapons or ammunition with which to attack or elude enemy forces.²⁰² It specifies that "protective signs and symbols may be used only to identify personnel, objects, and activities entitled to the protected status which they designate. Any other use is forbidden by

¹⁹² Burkina Faso, *Disciplinary Regulations* (1994), Article 35(2).

¹⁹³ Cameroon, *Disciplinary Regulations* (1975), Article 32.

¹⁹⁴ Cameroon, *Instructors' Manual* (1992), p. 30, § 131.2 and p. 89, § 222.

¹⁹⁵ Canada, *LOAC Manual* (1999), p. 6-2, § 10.

¹⁹⁶ Canada, *LOAC Manual* (1999), p. 16-3, § 20(f).

¹⁹⁷ Canada, *LOAC Manual* (1999), p. 17-4, § 33.

¹⁹⁸ Canada, *Code of Conduct* (2001), Rule 10, § 10.

¹⁹⁹ Colombia, *Instructors' Manual* (1999), p. 31.

²⁰⁰ Congo, *Disciplinary Regulations* (1986), Article 32(2).

²⁰¹ Dominican Republic, *Military Manual* (1980), p. 5.

²⁰² Ecuador, *Naval Manual* (1989), § 12.2.

international law.”²⁰³ The manual further provides that “the following acts constitute war crimes: . . . misuse, abuse . . . of the Red Cross emblem, and of similar protective emblems and signs”.²⁰⁴

211. France’s Disciplinary Regulations as amended states that it is prohibited “to use improperly . . . the distinctive signs provided for in international conventions”.²⁰⁵

212. France’s LOAC Manual states that “it is prohibited . . . to use improperly the symbol of medical services”.²⁰⁶

213. Germany’s Military Manual provides that “it is prohibited to make improper use . . . of special internationally acknowledged protective emblems, e.g. the red cross or the red crescent”.²⁰⁷ It also states that the distinctive emblem “shall only be used for the intended purposes”.²⁰⁸ Furthermore:

According to § 125 of the Administrative Offences Act . . . the misuse of the emblem of the Red Cross or of the heraldic emblem of Switzerland constitutes an administrative offence which is liable to a fine . . .

The abuse of distinctive emblems and names which, according to the rules of international law, are equal in status to the Red Cross may also be prosecuted.²⁰⁹

214. Indonesia’s Military Manual emphasises that “it is prohibited to use the Red Cross emblem improperly”.²¹⁰

215. Italy’s IHL Manual provides that it is prohibited “to use improperly . . . the distinctive signs of the Red Cross and Red Crescent [or] of other authorised relief societies”.²¹¹ It also states that grave breaches of international conventions and protocols, including “the improper . . . use of international protective signs”, constitute war crimes.²¹²

216. Japan’s Self-Defence Force Notification provides that the commander of a unit should prevent the use of the red cross emblem by persons not entitled to use it.²¹³

217. South Korea’s Military Regulation 187 considers the illegal use of the red cross emblem as a war crime.²¹⁴

218. South Korea’s Military Law Manual prohibits the improper use of the red cross emblem.²¹⁵

219. Lebanon’s Army Regulations prohibits the unlawful use of the distinctive signs provided for in international agreements.²¹⁶

²⁰³ Ecuador, *Naval Manual* (1989), § 11.10.5.

²⁰⁴ Ecuador, *Naval Manual* (1989), § 6.2.5(11).

²⁰⁵ France, *Disciplinary Regulations as amended* (1975), Article 9 bis (2).

²⁰⁶ France, *LOAC Manual* (2001), p. 47.

²⁰⁷ Germany, *Military Manual* (1992), § 473, see also § 1019 (naval warfare).

²⁰⁸ Germany, *Military Manual* (1992), § 638.

²⁰⁹ Germany, *Military Manual* (1992), §§ 1211 and 1212.

²¹⁰ Indonesia, *Military Manual* (1982), § 104.

²¹¹ Italy, *IHL Manual* (1991), Vol. I, § 9(2). ²¹² Italy, *IHL Manual* (1991), Vol. I, § 85.

²¹³ Japan, *Self-Defence Force Notification* (1965), Article 11.

²¹⁴ South Korea, *Military Regulation 187* (1991), Article 4.2.

²¹⁵ South Korea, *Military Law Manual* (1996), p. 88.

²¹⁶ Lebanon, *Army Regulations* (1971), § 17.

- 220.** Madagascar's Military Manual prohibits the abuse of distinctive signs.²¹⁷
- 221.** Mali's Army Regulations provides that, under the laws and customs of war, it is prohibited "to use improperly . . . the distinctive insignia recognised by international conventions".²¹⁸
- 222.** Morocco's Disciplinary Regulations states that, under the laws and customs of war, it is prohibited "to use improperly . . . the distinctive insignia recognised by international conventions".²¹⁹
- 223.** The Military Manual of the Netherlands provides that "it is forbidden to make improper use of the recognised emblems of the Red Cross and Red Crescent".²²⁰ It adds that "the misuse of the emblem of the Red Cross (the Red Crescent)" is a grave breach of AP I.²²¹
- 224.** The Military Handbook of the Netherlands states that it is prohibited "to misuse . . . the red cross emblem".²²² It adds that "misuse of the red cross is a war crime".²²³
- 225.** New Zealand's Military Manual provides that "improper use of protective symbols . . . is prohibited".²²⁴ The red cross, red crescent, red lion and sun and red shield of David are regarded as "protective symbols".²²⁵ It further states that "improperly using . . . the distinctive emblems of the Geneva Conventions" is a war crime.²²⁶ In the case of naval warfare, the manual states that "flags or markings . . . of the Red Cross or Red Crescent may not be used as part of a ruse of war".²²⁷ It further provides that, in a non-international armed conflict, "the distinctive emblem of the Red Cross or Red Crescent . . . must not be used improperly".²²⁸
- 226.** Nigeria's Manual on the Laws of War states that the "misuse of the Red Cross or any equivalent emblem" is a war crime.²²⁹
- 227.** Russia's Military Manual provides that it is a prohibited method of warfare "to use improperly distinctive emblems".²³⁰
- 228.** Senegal's Disciplinary Regulations states that, under the laws and customs of war, it is prohibited "to use improperly . . . the distinctive insignia recognised by international conventions".²³¹

²¹⁷ Madagascar, *Military Manual* (1994), Fiche No. 6-O, § 14.

²¹⁸ Mali, *Army Regulations* (1979), Article 36.

²¹⁹ Morocco, *Disciplinary Regulations* (1974), Article 25(2).

²²⁰ Netherlands, *Military Manual* (1993), p. IV-3.

²²¹ Netherlands, *Military Manual* (1993), p. IX-5.

²²² Netherlands, *Military Handbook* (1995), pp. 7-36 and 7-40.

²²³ Netherlands, *Military Handbook* (1995), p. 7-41.

²²⁴ New Zealand, *Military Manual* (1992), § 502(7).

²²⁵ New Zealand, *Military Manual* (1992), Annex B, § B31.

²²⁶ New Zealand, *Military Manual* (1992), § 1704(2)(f).

²²⁷ New Zealand, *Military Manual* (1992), § 713(3).

²²⁸ New Zealand, *Military Manual* (1992), § 1818(1).

²²⁹ Nigeria, *Manual on the Laws of War* (undated), § 6.

²³⁰ Russia, *Military Manual* (1990), § 5(c).

²³¹ Senegal, *Disciplinary Regulations* (1990), Article 34(2).

229. Spain's Field Regulations provides that it is "indecent and repulsive" to protect or shield troops or military equipment or materials under a red cross emblem.²³²

230. Spain's LOAC Manual emphasises that it is prohibited "to make improper use of the emblems of the Red Cross or of the protective signs of medical units or personnel".²³³ It states that use of the protection provided for by the law of war is an unlawful method of deception. It gives the example of using an ambulance to transport ammunition.²³⁴ The manual further states that the distinctive sign of the red cross or equivalent and the distinctive signs and signals of the medical service may be used only for their intended purpose.²³⁵ It also provides that it is an unlawful deception "to use improperly, i.e., to indicate persons and objects not protected, the distinctive signs and signals of the medical service".²³⁶

231. Sweden's IHL Manual considers that the "prohibition of improper use of recognized emblems", as contained in Article 38 AP I, is part of customary international law.²³⁷ The manual also states that:

In land combat it is not unusual for one of the parties to attempt to win a tactical advantage by concealing the character of his own forces prior to attack, in order to mislead or surprise the adversary. The distinctive emblem of the Red Cross or similar organisation . . . may not, however, be used for such purposes. In IV Hague Convention it is forbidden to use these emblems improperly. The expression improperly is not defined but follows indirectly from the Geneva Convention articles (GC I Art. 44, GC II Art. 41) relative to permitted use.²³⁸

232. Switzerland's Basic Military Manual states that "the distinctive sign (Red Cross, Red Crescent) shall serve, under the control of the military authority, to indicate medical establishments, units, personnel, vehicles and material. They shall not be used for other purposes."²³⁹ The manual also states that the "abuse of the emblem or protection of the Red Cross" is a war crime.²⁴⁰

233. The UK Military Manual provides that the "use of the emblem of a red cross (red crescent, red lion and sun) on a white ground is authorised in order to indicate military hospitals and other military medical establishments as well as, subject to the authorisation of the Government, civilian hospitals and hospital trains". The emblem must not be used for other purposes.²⁴¹ It further states that:

Improper use of the Red Cross emblem is forbidden. The flag with the distinctive emblem must not be used to cover vehicles used for the transport of ammunition

²³² Spain, *Field Regulations* (1882), Article 864.

²³³ Spain, *LOAC Manual* (1996), Vol. I, § 7.3.c, see also § 10.8.e.(1).

²³⁴ Spain, *LOAC Manual* (1996), Vol. I, § 2.3.b.(3).

²³⁵ Spain, *LOAC Manual* (1996), Vol. I, § 3.3.b.(2).

²³⁶ Spain, *LOAC Manual* (1996), Vol. I, § 5.3.c.

²³⁷ Sweden, *IHL Manual* (1991), Section 2.2.3, p. 19.

²³⁸ Sweden, *IHL Manual* (1991), Section 3.2.1.1, p. 30.

²³⁹ Switzerland, *Basic Military Manual* (1987), Article 93.

²⁴⁰ Switzerland, *Basic Military Manual* (1987), Article 200(2)(b).

²⁴¹ UK, *Military Manual* (1958), § 302, see also § 377.

and non-medical stores. A hospital train must not be used to facilitate the escape of combatants. It is forbidden to fire from a tent, building or vehicle flying the flag with the distinctive emblem. A hospital or other building protected by the flying of the flag with the distinctive emblem . . . must not be used as an observation post or military office or store.²⁴²

The manual also considers that “in addition to the ‘grave breaches’ of the 1949 [Geneva] Conventions, . . . the following are examples of punishable violations of the laws of war, or war crimes: . . . misuse of the Red Cross or equivalent emblems”.²⁴³

234. The UK LOAC Manual provides that “it is forbidden . . . to make improper use in combat of . . . the Red Cross or Red Crescent emblems”.²⁴⁴

235. The US Field Manual incorporates the content of Article 44 GC I.²⁴⁵ It provides that “it is especially forbidden . . . to make improper use of . . . the distinctive badges of the [1864] Geneva Convention”.²⁴⁶ It adds that:

The use of the emblem of the Red Cross and other equivalent insignia must be limited to the indication or protection of medical units and establishments, the personnel and material protected by [GC I] and other similar conventions. The following are examples of the improper use of the emblem: using a hospital or other building accorded such protection as an observation post or military office or depot; firing from a building or tent displaying the emblem of the Red Cross; using a hospital train or airplane to facilitate the escape of combatants; displaying the emblem on vehicles containing ammunition or other nonmedical stores; and in general using it for cloaking acts of hostility.²⁴⁷

The manual also states that “in addition to ‘grave breaches’ of the Geneva Conventions of 1949, the following acts are representative of violations of the law of war (‘war crimes’): misuse of the Red Cross emblem”.²⁴⁸

236. The US Air Force Pamphlet incorporates the content of Article 23(f) of the 1907 HR.²⁴⁹ It also provides that “it is forbidden to make use of the distinctive emblem of the red cross (red crescent, red lion and sun) . . . other than as provided for in international agreements establishing these emblems”.²⁵⁰ The Pamphlet adds that:

The following are examples of improper use of the medical emblems: (i) using a hospital or other building marked with a red cross or equivalent insignia as an observation post, military office or depot; (ii) using distinctive signs, emblems or signals for cloaking acts of hostilities, such as firing from a building or other protected installation or means of medical transport; (iii) using protected means of medical transport, such as hospitals, trains or airplanes, to facilitate the escape of able-bodied combatants; (iv) displaying protective emblems on vehicles, trains,

²⁴² UK, *Military Manual* (1958), § 317. ²⁴³ UK, *Military Manual* (1958), § 626(e).

²⁴⁴ UK, *LOAC Manual* (1981), Section 4, p. 12, § 2d.

²⁴⁵ US, *Field Manual* (1956), § 244. ²⁴⁶ US, *Field Manual* (1956), § 52.

²⁴⁷ US, *Field Manual* (1956), § 55. ²⁴⁸ US, *Field Manual* (1956), § 504(f).

²⁴⁹ US, *Air Force Pamphlet* (1976), § 8-2.

²⁵⁰ US, *Air Force Pamphlet* (1976), § 8-3(c), see also §§ 8-6(b) and 12-2(d).

ships, airplanes, or other modes of transportation or other buildings containing ammunition or other military non-medical supplies.²⁵¹

The Pamphlet further states that “in addition to grave breaches of the Geneva Conventions of 1949, the following acts are representative of situations involving individual criminal responsibility: . . . wilful misuse of the Red Cross or a similar protective emblem”.²⁵²

237. The US Soldier’s Manual states that:

It is a serious breach of the laws of war when soldiers use these signs [red cross, red crescent and red shield of David] to protect or hide military activities. Do not mark your position or yourself with a medical service emblem unless you have been designated to perform only medical duties. Your life may depend on the proper use of the Red Cross symbol.²⁵³

238. The US Naval Handbook, in a chapter entitled “Misuse of protective signs, signals and symbols”, states that it is illegal to use transports marked with the red cross or red crescent to carry armed combatants, weapons or ammunition with which to attack or elude enemy forces.²⁵⁴ It further states that “protective signs and symbols may be used only to identify personnel, objects, and activities entitled to the protected status which they designate. Any other use is forbidden by international law.”²⁵⁵ The manual also states that “the following acts are representative war crimes: . . . misuse, abuse . . . [of] the Red Cross device, and similar protective emblems”.²⁵⁶

239. The YPA Military Manual of the SFRY (FRY) provides that “it is forbidden to use, during combat, in order to mislead the enemy, . . . internationally recognised signs”, including the red cross emblem.²⁵⁷ It adds that “its misuse is a criminal act.”²⁵⁸

National Legislation

240. Albania’s Emblem Law punishes “the use for any purpose of the Red Cross emblem and name by physical or legal persons in violation of this Law”. This also applies to the red crescent emblem and name.²⁵⁹

241. Algeria’s Code of Military Justice punishes:

any individual, whether military or not, who, in time of war, in an area of operations . . . in violation of the laws and customs of war, improperly uses the distinctive signs and emblems defined by international conventions for the respect of persons, objects and places protected by these conventions.²⁶⁰

²⁵¹ US, *Air Force Pamphlet* (1976), § 8-6(b). ²⁵² US, *Air Force Pamphlet* (1976), § 15-3(c)(2).

²⁵³ US, *Soldier’s Manual* (1984), p. 7. ²⁵⁴ US, *Naval Handbook* (1995), § 12.2.

²⁵⁵ US, *Naval Handbook* (1995), § 11.9.6. ²⁵⁶ US, *Naval Handbook* (1995), § 6.2.5(11).

²⁵⁷ SFRY (FRY), *YPA Military Manual* (1988), § 105(3).

²⁵⁸ SFRY (FRY), *YPA Military Manual* (1988), § 191.

²⁵⁹ Albania, *Emblem Law* (1994), Articles 7 and 9.

²⁶⁰ Algeria, *Code of Military Justice* (1971), Article 299.

242. The Red Cross Society Act of Antigua and Barbuda states that:

It shall not be lawful for any person other than those authorised under the provisions of the [1949 Geneva] Conventions to use for any purpose whatever the emblem of the red cross on white ground, or any colourable imitation thereof, or the words 'Red Cross' or the arms of the Swiss Confederation.²⁶¹

243. Argentina's Emblem Law punishes "(1) Any person who, without proper authorisation, wears the armband of the Red Cross. (2) Any person who improperly uses the name of the Argentine Red Cross Society or uses its emblems or insignia for any unlawful purpose."²⁶²

244. Argentina's Draft Code of Military Justice punishes any soldier who "uses improperly . . . the protective or distinctive signs established and recognised in international treaties to which the Argentine Republic is a party, especially the distinctive signs of the red cross and red crescent".²⁶³

245. Under Armenia's Penal Code, "the use during military actions of the emblems and distinctive signs of the red cross or red crescent . . . in breach of international treaties and international law" constitutes a crime against the peace and security of mankind.²⁶⁴

246. Armenia's Emblem Law states that:

On the territory of the Republic of Armenia, the following are prohibited for physical and legal persons:

- the use of the emblem, as a protective or indicative device, as well as a distinctive signal which would be contrary to the present law, to the [1949 Geneva] conventions, to [AP I and AP II] . . .
- the use of the names [Red Cross/Red Crescent] in the social name of legal persons, trademarks, as well as for any purpose in contradiction with the principles of the international movement of the Red Cross and Red Crescent;
- the representation of any sign, including a white cross on a red ground, that can create confusion, by assimilation with the protective emblem.²⁶⁵

247. Australia's War Crimes Act considers "any war crime within the meaning of the instrument of appointment of the Board of Inquiry [set up to investigate war crimes committed by enemy subjects]" as a war crime, including breach of rules relating to the red cross.²⁶⁶

248. Australia's Geneva Conventions Act as amended provides that "subject to this section, a person shall not, without the consent in writing of the Minister or of a person authorized in writing by the Minister to give consents under this section, use for any purpose whatsoever" the emblems of the red cross, red

²⁶¹ Antigua and Barbuda, *Red Cross Society Act* (1983), Section 8(2).

²⁶² Argentina, *Emblem Law* (1893), Article 1.

²⁶³ Argentina, *Draft Code of Military Justice* (1998), Article 292, introducing a new Article 876(5) in the *Code of Military Justice as amended* (1951).

²⁶⁴ Armenia, *Penal Code* (2003), Article 397.

²⁶⁵ Armenia, *Emblem Law* (2002), Article 19.

²⁶⁶ Australia, *War Crimes Act* (1945), Section 3.

crescent, red lion and sun on a white ground, the heraldic emblem of Switzerland, the designations "Red Cross" or "Geneva Cross", "Red Crescent" and "Red Lion and Sun", as well as a design or wording so nearly resembling any of those emblems or designations as to be capable of being mistaken for, or, as the case may be, understood as referring to, one of those emblems or designations.²⁶⁷

249. Australia's ICC (Consequential Amendments) Act incorporates in the Criminal Code the war crimes defined in the 1998 ICC Statute, including "improper use of the distinctive emblems of the Geneva Conventions" in international armed conflicts.²⁶⁸

250. Austria's Red Cross Protection Law provides that:

It is prohibited to use:

- a) the emblem of the red cross on a white ground and the words "Red Cross" or "Geneva Cross",
- b) the emblem of the red crescent on a white ground, the emblem of the red lion and sun on a white ground, the words "Red Crescent" or "Red Lion and Sun" or
- c) emblems and designations which are an imitation of the emblem of the red cross on a white ground or of the words "Red Cross" or "Geneva Cross"

in violation of the provisions of the [1949] Geneva Conventions.²⁶⁹

251. Azerbaijan's Criminal Code provides that "the misuse of the distinctive signs of the red cross or the red crescent in the territory of military operations by persons not entitled to use them" constitutes a war crime in international and non-international armed conflicts.²⁷⁰

252. The Red Cross Society Act of the Bahamas provides that "no person other than the Society or a person so authorized under the [1949 Geneva] Conventions shall, without the authority of the Council [of the Society], use for any purpose whatever" the emblems of the red cross, red crescent and red lion and sun on a white ground, as well as the designations "Red Cross" or "Geneva Cross", "Red Crescent" and "Red Lion and Sun".²⁷¹

253. Bangladesh's International Crimes (Tribunal) Act states that the "violation of any humanitarian rules applicable in armed conflicts laid down in the Geneva Conventions of 1949" is a crime.²⁷²

254. Bangladesh's Draft Emblems Protection Act provides that "subject to the provisions of this section, it shall not be lawful for any person, without the consent in writing of the Minister for Defence or a person authorized in writing by the Minister to give consents under this section, to use or display for any purpose whatsoever" the emblems of the red cross, red crescent and red lion and

²⁶⁷ Australia, *Geneva Conventions Act as amended* (1957), Section 15(1)(a)-(e).

²⁶⁸ Australia, *ICC (Consequential Amendments) Act* (2002), Schedule 1, § 268.44.

²⁶⁹ Austria, *Red Cross Protection Law* (1962), § 4.

²⁷⁰ Azerbaijan, *Criminal Code* (1999), Article 119(1).

²⁷¹ Bahamas, *Red Cross Society Act* (1975), Section 8.

²⁷² Bangladesh, *International Crimes (Tribunal) Act* (1973), Section 3(2)(e).

sun on a white ground, the heraldic emblem of Switzerland, the designations “Red Cross” or “Geneva Cross”, “Red Crescent” and “Red Lion and Sun”, as well as a design or wording so nearly resembling any of those emblems or designations as to be capable of being mistaken for, or, as the case may be, understood as referring to, one of those emblems or designations.²⁷³

255. The Geneva Conventions Act of Barbados provides that “no person shall, without the authority of the Defence Board, use” the emblems of the red cross, red crescent and red lion and sun on a white ground, as well as the designations “Red Cross” or “Geneva Cross”, “Red Crescent” and “Red Lion and Sun”.²⁷⁴

256. The Criminal Code of Belarus provides that it is a war crime to “use intentionally, during hostilities, in violation of international treaties, the emblems of the Red Cross [or] Red Crescent”.²⁷⁵

257. The Law on the Emblem of Belarus provides that:

In the territory of the Republic of Belarus legal and physical persons are prohibited to use:

- the emblem [red cross/red crescent] as a protective or distinctive sign as well as distinctive signals in contradiction to the present Law, the [1949 Geneva] Conventions, [AP I and AP II] and Regulations on the Use of the Emblem;
- the designations in the names of legal persons, in trademarks (service marks) as well as for purposes incompatible with the principles of the International Red Cross and Red Crescent Movement;
- representations of any signs, including that of the white cross on a red ground, that can be mistakenly identified with the emblem used as a protective sign.²⁷⁶

258. Belgium’s Law on the Protection of the Emblem punishes “without prejudice to other penal provisions, anyone who, in violation of international conventions that regulate their use, uses the designations “Red Cross”, “Geneva Cross”, “Red Crescent”, or “Red Lion and Sun”, or their corresponding signs and emblems”.²⁷⁷

259. Belize’s Red Cross Society Act states that:

It shall not be lawful for any persons other than those authorised under the provisions of the [1949 Geneva] Conventions to use for any purpose whatever the emblem of the Red Cross on white ground, or any colourable imitation thereof, or the words “Red Cross” or the arms of the Swiss Confederation.²⁷⁸

260. Bolivia’s Emblem Law punishes any “person who, wilfully and without being entitled to do so, has made use of the Emblem of the Red Cross, of the Red Crescent, of a distinctive signal or of any other sign or signal which is an imitation thereof or which can create confusion”.²⁷⁹

²⁷³ Bangladesh, *Draft Emblems Protection Act* (1998), Section 3(a)–(d) and (h).

²⁷⁴ Barbados, *Geneva Conventions Act* (1980), Section 9(1).

²⁷⁵ Belarus, *Criminal Code* (1999), Article 138.

²⁷⁶ Belarus, *Law on the Emblem* (2000), Article 18.

²⁷⁷ Belgium, *Law on the Protection of the Emblem* (1956), Article 1.

²⁷⁸ Belize, *Red Cross Society Act* (1983), Section 8.

²⁷⁹ Bolivia, *Emblem Law* (2002), Article 11.

261. Bosnia and Herzegovina's Emblem Decree punishes the wearing or use of the red cross emblem in wartime without being entitled to do so.²⁸⁰

262. Under the Criminal Code of the Federation of Bosnia and Herzegovina, "whoever misuses or carries without authorisation . . . the emblem or flag of the Red Cross, or symbols corresponding to them" commits a war crime.²⁸¹ The Criminal Code of the Republika Srpska contains the same provision.²⁸²

263. Botswana's Red Cross Society Act provides that "it shall not be lawful for any person other than the Society or such persons as may be authorized thereto under the [1949] Geneva Conventions to use for the purpose of his trade or business, or for any other purpose whatsoever" the emblems of the red cross, red crescent and red lion and sun on a white ground, the heraldic emblem of Switzerland, any design being a colourable imitation of those emblems, as well as the words "Red Cross", "Geneva Cross" or translation thereof.²⁸³

264. Brunei's Red Crescent Society Act provides that:

It shall not be lawful for any person, other than the [Red Crescent Society] and its staff, officials and members, to use for the purpose of his trade of business, or for any other purpose whatsoever, in Brunei without the authority of the Minister, the emblem of a red crescent on a white background . . . and the words "Bulan Sabit Merah" or in English "Red Crescent".²⁸⁴

265. Bulgaria's Penal Code as amended provides that "a person who, without having such right, bears the emblem of the Red Cross or of the Red Crescent, or who abuses a flag or a sign of the Red Cross or of the Red Crescent or the colour determined for the transport vehicles for medical evacuation" commits a war crime.²⁸⁵

266. Bulgaria's Red Cross Society Law provides that "in case of war, the use of the emblem shall be restricted in accordance with the provisions of the Geneva Conventions of 12 August 1949, and the Additional Protocols of 8 June 1977 . . . The misuse of the emblem set up by the Geneva Conventions . . . and the name of the Red Cross shall be punished."²⁸⁶

267. Burkina Faso's Code of Military Justice punishes the improper use, in violation of the laws and customs of war, of the distinctive insignia and emblems for the protection of persons, objects and locations as defined in international conventions, in time of war and in an area of military operations.²⁸⁷

268. Burundi's Red Cross Decree punishes "any person who, without being entitled to do so . . . uses the emblem or the denomination of the 'Red Cross' or 'Geneva Cross', or equivalent emblems or denominations that may cause

²⁸⁰ Bosnia and Herzegovina, *Emblem Decree* (1992), Article 16.

²⁸¹ Bosnia and Herzegovina, Federation, *Criminal Code* (1998), Article 166(1).

²⁸² Bosnia and Herzegovina, Republika Srpska, *Criminal Code* (2000), Article 445(1).

²⁸³ Botswana, *Red Cross Society Act* (1968), Section 10.

²⁸⁴ Brunei, *Red Crescent Society Act* (1983), Article 13.

²⁸⁵ Bulgaria, *Penal Code as amended* (1968), Article 413.

²⁸⁶ Bulgaria, *Red Cross Society Law* (1995), Articles 8 and 9.

²⁸⁷ Burkina Faso, *Code of Military Justice* (1994), Article 205.

confusion, . . . for any . . . purpose".²⁸⁸ It also punishes "any person who, in time of war, uses, without being entitled to do so, the armlet or the flag of the Red Cross".²⁸⁹

269. Under Burundi's Draft Law on Genocide, Crimes against Humanity and War Crimes, "using improperly . . . the distinctive signs provided for by the [1949] Geneva Conventions" constitutes a war crime in international armed conflicts.²⁹⁰

270. Cameroon's Emblem Law provides that "any use of the emblem or name 'Red Cross' by a physical or legal person other than those having the right to do so by virtue of the Geneva Conventions of 12 August 1949, of their Additional Protocols I and II of 8 June 1977 and of the present law is strictly forbidden".²⁹¹

271. Canada's Crimes against Humanity and War Crimes Act provides that the war crimes defined in Article 8(2) of the 1998 ICC Statute are "crimes according to customary international law" and, as such, indictable offences under the Act.²⁹²

272. Chad's Code of Military Justice punishes "any individual who, in the area of operations of a military force, publicly employs, without being entitled to do so, the armlet, flag or emblem of the red cross, or equivalent armlets, flags or emblems".²⁹³

273. Chile's Code of Military Justice provides that a person "who, in time of war and in the area of operations of a land military force, uses without being entitled to do so, the insignia, flags or emblems of the Red Cross" commits a punishable offence against international law.²⁹⁴

274. Chile's Emblem Law as amended states that:

Article 1. The emblem of the Red Cross on a white ground and the expressions "Red Cross" or "Geneva Cross" may be used, in peace time or in time of war, only as provided for by the Geneva Conventions of 12 August 1949 and their Additional Protocols of 1977.

...

Article 4. The use of any sign or denomination which constitutes an imitation of the emblem of the red cross on a white ground or of the names Red Cross or Geneva Cross, as well as the use of similar emblems or words which can create confusion, for commercial or any other purpose, is prohibited.²⁹⁵

275. China's Red Cross Society Law states that "the sign shall be used in conformity with the relevant provisions of the [1949] Geneva Conventions and their Additional Protocols . . . Abuse of the sign of the Red Cross is prohibited."²⁹⁶

²⁸⁸ Burundi, *Red Cross Decree* (1912), Article 2.

²⁸⁹ Burundi, *Red Cross Decree* (1912), Article 3.

²⁹⁰ Burundi, *Draft Law on Genocide, Crimes against Humanity and War Crimes* (2001), Article 4(B)(g).

²⁹¹ Cameroon, *Emblem Law* (1997), Article 14(1).

²⁹² Canada, *Crimes against Humanity and War Crimes Act* (2000), Section 4(1) and (4).

²⁹³ Chad, *Code of Military Justice* (1962), Article 87.

²⁹⁴ Chile, *Code of Military Justice* (1925), Article 264.

²⁹⁵ Chile, *Emblem Law as amended* (1939), Articles 1 and 4.

²⁹⁶ China, *Red Cross Society Law* (1993), Articles 16 and 19.

276. China's Emblem Regulations provide that:

Use of the red cross emblem by any organisations or individuals other than those mentioned in the present Regulations [medical establishments of the armed forces, the Chinese Red Cross Society, as well as foreign and domestic voluntary relief organisations and international Red Cross institutions with the approval of the State Council or the Central Military Commission] shall be forbidden.²⁹⁷

277. Colombia's Emblem Decree provides that "all national authorities shall ensure, in all circumstances, strict respect for the norms concerning the proper use of the emblem of the Red Cross and the denomination 'Red Cross' and the distinctive signals".²⁹⁸

278. The DRC Red Cross Decree punishes "any person who, without being entitled to do so . . . uses the emblem or the denomination of the 'Red Cross' or 'Geneva Cross', or equivalent emblems or denominations that may cause confusion, . . . for any . . . purpose".²⁹⁹ It also punishes "any person who, in time of war, uses, without being entitled to do so, the armband or the flag of the Red Cross".³⁰⁰

279. The DRC Code of Military Justice as amended punishes "any individual, whether military or not, who, in time of war . . . improperly uses the distinctive signs and emblems defined by international conventions to ensure respect for the persons, objects and places protected under these conventions".³⁰¹

280. Congo's Genocide, War Crimes and Crimes against Humanity Act defines war crimes with reference to the categories of crimes defined in Article 8 of the 1998 ICC Statute.³⁰²

281. The Geneva Conventions and Additional Protocols Act of the Cook Islands provides that "no person may, without the authority of the Minister or a person authorised by the Minister in writing to give consent under this section, use for any purpose" the emblems of the red cross, red crescent, red lion and sun on a white ground, the heraldic emblem of Switzerland, the distinctive signals of identification for medical units and transports, the designations "Red Cross" or "Geneva Cross", "Red Crescent" and "Red Lion and Sun", as well as any emblem, designation, or signal, so nearly resembling any of those emblems, designations, or signals as to be capable of being mistaken for, or, as the case may be, understood as referring to, one of those emblems, designations, or signals.³⁰³

282. Costa Rica's Emblem Law punishes "any person who uses without authorisation the emblem of the Red Cross, the distinctive signals, the denomination Red Cross or imitation which can create confusion".³⁰⁴

²⁹⁷ China, *Emblem Regulations* (1996), Article 3.

²⁹⁸ Colombia, *Emblem Decree* (1998), Article 11.

²⁹⁹ DRC, *Red Cross Decree* (1912), Article 2. ³⁰⁰ DRC, *Red Cross Decree* (1912), Article 3.

³⁰¹ DRC, *Code of Military Justice as amended* (1972), Article 455.

³⁰² Congo, *Genocide, War Crimes and Crimes against Humanity Act* (1998), Article 4.

³⁰³ Cook Islands, *Geneva Conventions and Additional Protocols Act* (2002), Section 10(1).

³⁰⁴ Costa Rica, *Emblem Law* (2000), Article 7.

283. Côte d'Ivoire's Penal Code as amended punishes "anyone who, in an area of military operations, uses, in violation of the laws and customs of war, the distinctive insignia and emblems, defined by international conventions, to ensure respect for protected persons, objects and places".³⁰⁵

284. Croatia's Emblem Law punishes any legal person "using the red cross emblem and name, while according to the [1949 Geneva Conventions] and on the basis of this Law, [it] does not have right to do so".³⁰⁶

285. Under Croatia's Criminal Code, "whoever misuses or carries without authorisation the flag or emblem of... the International Red Cross" commits a war crime.³⁰⁷

286. Cuba's Emblem Decree provides that "unlawful use of the insignia of the Red Cross... shall be judged and condemned in accordance with military penal law".³⁰⁸

287. Cuba's Military Criminal Code punishes "anyone who, in areas of military operations, uses unlawfully the Red Cross insignia, flags or symbols".³⁰⁹

288. Cyprus's Geneva Conventions Act provides that "the use for any purpose of the distinctive emblem which is used in the Republic under the provisions of the Geneva Conventions, without the Council of Ministers' permission, is prohibited".³¹⁰

289. Cyprus's API Act provides that "the use for any purpose of the distinctive emblem or signal which is used in the Republic, under the provisions of this Protocol, without the Council of Ministers' permission, is prohibited".³¹¹

290. The Czech Republic's Criminal Code as amended punishes any person who "misuses the insignia of the Red Cross, or other signs or colours recognised in international law as designating medical institutions or vehicles used for medical assistance or evacuation".³¹²

291. The Czech Republic's Emblem and Red Cross Society Act punishes "anyone who misuses the emblem or the name [red cross on a white ground and the words 'Red Cross' or 'Geneva Cross']... or anyone who assists in such misuse, ... in case this act was perpetrated at times to which the [1949] Geneva Conventions apply".³¹³

292. Denmark's Military Criminal Code as amended punishes "any person who, in time of war, abuses... any badge or designation that is reserved for personnel, institutions and material designed to give assistance to wounded or sick persons".³¹⁴

³⁰⁵ Côte d'Ivoire, *Penal Code as amended* (1981), Article 473.

³⁰⁶ Croatia, *Emblem Law* (1993), Article 18.

³⁰⁷ Croatia, *Criminal Code* (1997), Article 168(1). ³⁰⁸ Cuba, *Emblem Decree* (1910), § 6.

³⁰⁹ Cuba, *Military Criminal Code* (1979), Article 45.

³¹⁰ Cyprus, *Geneva Conventions Act* (1966), Section 6. ³¹¹ Cyprus, *API Act* (1979), Section 6.

³¹² Czech Republic, *Criminal Code as amended* (1961), Article 265(1).

³¹³ Czech Republic, *Emblem and Red Cross Society Act* (1992), § 2.

³¹⁴ Denmark, *Military Criminal Code as amended* (1978), Article 25.

293. Denmark's Penal Code punishes "anyone who uses unlawfully, and wilfully or negligently . . . the distinctive signs and designations reserved for persons, institutions and material assigned to give assistance to the wounded and sick in wartime".³¹⁵

294. Ecuador's Emblem Regulation provides that "the name and emblem of the Red Cross shall be efficiently protected against any abuse".³¹⁶

295. Egypt's Emblem Law provides that:

It is prohibited for persons other than the medical section of the Army or establishments or units attached thereto, or other societies so authorised, to use, in time of peace or in time of war, under any form and for any purpose, the Red Crescent and Red Cross emblems as well as their names.³¹⁷

296. El Salvador's Emblem Law provides that:

The emblems of the red cross and red crescent, as well as the names "Red Cross", "Geneva Cross" and "Red Crescent", shall only be used for the purposes defined in the Geneva Conventions of 1949 and their Additional Protocols of 1977, i.e., for personnel, transportation units, materials and establishments belonging to the medical services of the armed forces, to the chaplains assigned to the [armed forces], . . . to the National Red Cross Society, . . . to the International Committee of the Red Cross and to the International Federation of Red Cross and Red Crescent Societies.³¹⁸

It also punishes "anyone who, without the corresponding authorisation, makes use of the emblem of the red cross, red crescent, or of the names "Red Cross, "Geneva Cross" or "Red Crescent", or of any other sign or word which is an imitation thereof or which can create confusion with those emblems and names".³¹⁹

297. Under Estonia's Penal Code, "exploitative abuse of the emblem or name of the red cross, red crescent or red lion and sun" is a war crime.³²⁰

298. Under Ethiopia's Penal Code, it is a punishable offence to wear without authorisation the emblems or insignia of the red cross, red crescent or red lion and sun.³²¹

299. Finland's Emblem Act provides that:

The distinctive emblem of the Red Cross, the terms "Red Cross" or "Geneva Cross" . . . shall not be used in cases other than those provided for in this Act . . . Signs, pictures or terms which resemble the emblems, signs or terms referred to in § 1 to such a degree that confusion may arise shall not be used.³²²

The Act punishes "whosoever makes use of the emblems, signs, pictures or terms referred to in §§ 1 and 2 in . . . unauthorised activity".³²³

³¹⁵ Denmark, *Penal Code* (1978), Article 132.

³¹⁶ Ecuador, *Emblem Regulation* (1972), Article 9.

³¹⁷ Egypt, *Emblem Law* (1940), Article 1(1).

³¹⁸ El Salvador, *Emblem Law* (2000), Article 1.

³¹⁹ El Salvador, *Emblem Law* (2000), Article 15.

³²⁰ Estonia, *Penal Code* (2001), § 105.

³²¹ Ethiopia, *Penal Code* (1957), Article 294(a).

³²² Finland, *Emblem Act* (1979), §§ 1 and 2.

³²³ Finland, *Emblem Act* (1979), § 6.

300. Finland's Revised Penal Code provides that "a person who in an act of war... abuses an international symbol designated for the protection of the wounded or the sick... shall be sentenced for a war crime".³²⁴

301. France's Emblem Law provides that:

The use, either by private individuals or by societies or associations other than [medical services of the armed forces and societies officially authorised to give assistance], of the said emblems or denominations [red cross, "Red Cross" or "Geneva Cross"], as well as of any signs or denominations constituting an imitation thereof, regardless of the purpose... of the use, is prohibited at all times.³²⁵

302. France's Code of Military Justice punishes:

any individual, military or not, who, in time of war, in the area of operations of a force or unit, in violation of the laws and customs of war, uses improperly the distinctive signs and emblems defined by international conventions to ensure the respect for persons, objects and places protected by those conventions.³²⁶

303. Georgia's Criminal Code (1960) punishes the "illegal use of the Red Cross and Red Crescent distinctive signs as well as their titles".³²⁷ It also punishes the "use of Red Cross and Red Crescent signs in the zones of military operation by persons having no such right, as well as misuse in wartime of flags or signs of the Red Cross and Red Crescent or of the distinctive colours of sanitary evacuation transport".³²⁸

304. Under Georgia's Criminal Code (1999), any war crime provided for by the 1998 ICC Statute, which is not explicitly mentioned in the Code, such as "making improper use... of the distinctive emblems of the Geneva Conventions, resulting in death or serious personal injury" in international armed conflicts, is a crime.³²⁹

305. Germany's Law on Administrative Offences provides that:

- (1) Whoever uses the distinctive emblem of the red cross on a white ground or the denomination "Red Cross" or "Geneva Cross" without authorisation, acts irregularly.
- (2) Whoever uses the heraldic emblem of the Swiss Confederation without authorisation, also acts irregularly.
- (3) Emblems, denominations and heraldic signs which are as similar as to be mistaken with those mentioned in paragraphs (1) and (2) stand on an equal footing.
- (4) Paragraphs (1) and (3) apply by analogy to such emblems or denominations which, according to international law, stand on the same footing as the emblem of the red cross on a white ground or the denomination "Red Cross".³³⁰

³²⁴ Finland, *Revised Penal Code* (1995), Chapter 11, Section 1(1)(2).

³²⁵ France, *Emblem Law* (1939), Article 1.

³²⁶ France, *Code of Military Justice* (1982), Article 439.

³²⁷ Georgia, *Criminal Code* (1960), Article 224.

³²⁸ Georgia, *Criminal Code* (1960), Article 283.

³²⁹ Georgia, *Criminal Code* (1999), Article 413(d).

³³⁰ Germany, *Law on Administrative Offences* (1968), § 125.

306. Germany's Law Introducing the International Crimes Code punishes anyone who, in connection with an international or non-international armed conflict, "makes improper use of the distinctive emblems of the Geneva Conventions . . . thereby causing a person's death or serious injury".³³¹

307. Ghana's Red Cross Emblem Decree punishes violations of its provisions, including: "Except as otherwise provided in this Decree, no person shall after the expiry of six months from the commencement of this Decree, use any of the Red Cross Emblems . . . [red cross, red crescent and red lion and sun] for any purpose whatsoever."³³²

308. Greece's Emblem Law punishes any "soldier who makes an illegal use of the sign of the red cross on a white ground or of the designation 'Red Cross' in time of war".³³³ It also punishes any civilian who commits the same acts.³³⁴

309. Greece's Military Penal Code punishes any military person who, in time of war and in the operation zones, publicly wears a badge or armband or carries the flag with the red cross emblem without being entitled to do so.³³⁵

310. Grenada's Red Cross Society Law as amended provides that:

It shall not be lawful for any person other than those authorised under section 5 of this Law [Grenada Red Cross Society] or under the provisions of the [1949] Geneva Conventions to use for any purpose whatever the emblem of the red cross on a white ground mentioned in section 5 of this Law or the emblems of the red crescent or red lion on a white ground or any colourable imitations thereof or the words "Red Cross".³³⁶

311. Guatemala's Emblem Law provides that "the emblem of the Red Cross, as well as the denominations 'Red Cross' and 'Geneva Cross' may only be used for the purposes provided for in the Geneva Conventions of 1949 and their additional protocols of [1977]".³³⁷ It punishes "any person who, without authorisation, makes use of the emblem of the red cross or the names previously mentioned in this law, or of any other imitation that can create confusion".³³⁸

312. Guinea's Emblem Law provides that "nobody shall make use of the emblem and name of the Red Cross without having been authorised to do so by the provisions of the present law and the [1949] Geneva Conventions".³³⁹ It punishes "anyone who wears or uses in time of war the emblem of the Red Cross as a protective sign without belonging to the category of persons mentioned in article 8 paragraph 1 of the present law [personnel of public health organisations]".³⁴⁰

³³¹ Germany, *Law Introducing the International Crimes Code* (2002), Article 1, § 10(2).

³³² Ghana, *Red Cross Emblem Decree* (1973), Sections 1 and 7.

³³³ Greece, *Emblem Law* (1914), Article 5. ³³⁴ Greece, *Emblem Law* (1914), Article 6.

³³⁵ Greece, *Military Penal Code* (1995), Article 68(2).

³³⁶ Grenada, *Red Cross Society Law as amended* (1981), Section 9(1).

³³⁷ Guatemala, *Emblem Law* (1997), Article 2.

³³⁸ Guatemala, *Emblem Law* (1997), Article 11.

³³⁹ Guinea, *Emblem Law* (1995), Article 4.

³⁴⁰ Guinea, *Emblem Law* (1995), Article 11.

313. Guinea's Criminal Code punishes "anyone [who], in an area of military operations and in violation of the laws and customs of war, uses distinctive insignia and emblems defined in international conventions to ensure respect for protected persons, objects and places".³⁴¹

314. Guyana's Red Cross Society Act punishes:

any person not being a member of the [National Red Cross] Society who – . . . wears or displays the emblem of the red cross on an article of clothing, badge, paper, or in any other way whatsoever, or any insignia coloured in imitation thereof in such a way as to be likely to deceive those to whom it is visible, for the purpose of inducing the belief that he is a member of, or an agent for the Society, or that he has been recognised by the Society as possessing any qualification for administering first aid or other treatment for the relief of sickness.³⁴²

315. The Emblem Law of Honduras provides that:

The emblem of the International Red Cross consisting of a red cross on a white ground, as well as the words "Red Cross" and "Geneva Cross", shall only be used to protect and identify the personnel and materials protected by the Geneva Conventions, number I and II of 12 August 1949, such as the establishments, units, personnel, material, vehicles, ships, hospitals and ambulances of the Medical and Relief Service of the Armed Forces of Honduras, of the Honduras Red Cross and of other relief societies duly recognised and officially authorised to provide assistance to the Medical Service of the Armed Forces, as well as the chaplains and doctors who offer their professional services to the [Armed Forces]. The emblem and the name of the Red Cross shall not be used otherwise, with the exception of the cases mentioned in Articles 2 and 5 of the present Law [*inter alia*, civilian hospitals, their personnel, medical zones and localities, transports of wounded and sick civilians].³⁴³

316. Under Hungary's Criminal Code as amended, "whoever in war-time misuses the sign of the red cross (red crescent, red lion and sun) or other signs serving a similar purpose and recognised internationally" is guilty, upon conviction, of a war crime.³⁴⁴

317. Hungary's Red Cross Society Act as amended provides that:

- (3) The sign and emblem [of the red cross on a white ground] respectively together with the designation . . . may only be used, in times of peace or war, beside the Red Cross, by health formations and institutions specified in international treaties and may only be used for the protection [or] designation of the staff and equipment of the previously mentioned . . .
- (5) Use of the emblem apart from the ways specified in paragraphs (3) and (4) constitutes . . . a summary offence.³⁴⁵

³⁴¹ Guinea, *Criminal Code* (1998), Article 579.

³⁴² Guyana, *Red Cross Society Act* (1967), Section 9(b).

³⁴³ Honduras, *Emblem Law* (1971), Article 1.

³⁴⁴ Hungary, *Criminal Code as amended* (1978), Article 164.

³⁴⁵ Hungary, *Red Cross Society Act as amended* (1993), § 5(3) and (5).

318. India's Geneva Conventions Act provides that "no person shall, without the approval of the Central Government, use for any purpose whatsoever" the emblems of the red cross, red crescent and red lion and sun on a white ground, the heraldic emblem of Switzerland, the designations "Red Cross", "Geneva Cross", "Red Crescent" and "Red Lion and Sun", as well as any design or wording so nearly resembling any of those emblems or designations as to be capable of being mistaken for, or, as the case may be, understood as referring to, one of those emblems or designations.³⁴⁶

319. Indonesia's Penal Code punishes anyone who uses, without being entitled to do so, a mark of distinction which is assigned to a certain society or to the personnel of the health service of armed forces.³⁴⁷

320. Ireland's Red Cross Act as amended provides that "it shall not be lawful for any person to use for . . . any . . . purpose whatsoever, without the consent of the Minister of Defence," the emblems of the red cross, red crescent and red lion and sun on a white ground, or any emblems closely resembling such heraldic emblems, as well as the words "Cros Dearg", "Cros na Geinéibhe", "Red Cross" or "Geneva Cross" or any words closely resembling these words.³⁴⁸

321. Ireland's Geneva Conventions Act as amended provides that any "minor breach" of the Geneva Conventions, including violations of Articles 44, 53 and 54 GC I and 44 and 45 GC II, and of AP I, including violations of Articles 18(8) and 38(1) AP I, as well as any "contravention" of AP II, including violations of Article 12 AP II, are punishable offences.³⁴⁹

322. Israel's Red Shield of David Law provides that:

- (a) No person shall make any use of the emblem of the [Red Shield of David in Israel] Society or an emblem so similar to it as to be misleading or an emblem containing the words "*Magen David Adom*", whether for the purpose of a business or trade or for any other purpose, except by permission of the Society.
- (b) No person shall make any use of any emblem recognised by the [1949] Geneva Conventions as a distinctive emblem of the medical services of the armed forces, unless he is authorised by these Conventions or by permission of the Minister of Health to use it.
- (c) A person contravening the provisions of this section is liable to imprisonment.³⁵⁰

323. Italy's Law of War Decree as amended emphasises that it is prohibited "to use improperly . . . the distinctive signs of the Red Cross, of the other authorised relief societies, of hospital ships and of medical aircraft".³⁵¹

324. Italy's Law concerning the Unlawful Use of the Emblem punishes "anyone who, without authorisation of the Government, adopts, as emblem, the red

³⁴⁶ India, *Geneva Conventions Act* (1960), Section 12.

³⁴⁷ Indonesia, *Penal Code* (1946), Article 508.

³⁴⁸ Ireland, *Red Cross Act as amended* (1938), Section 4(1) and (1A).

³⁴⁹ Ireland, *Geneva Conventions Act as amended* (1962), Section 4(1) and (4).

³⁵⁰ Israel, *Red Shield of David Law* (1950), Section 7.

³⁵¹ Italy, *Law of War Decree as amended* (1938), Article 36(1).

cross on a white ground, or makes use of the designation 'Red Cross' or 'Geneva Cross'" ³⁵²

325. Italy's Wartime Military Penal Code punishes anyone who "uses improperly . . . the distinctive sign of the Red Cross" ³⁵³

326. Japan's Emblem Law provides that the emblem of the red cross (and equivalent) should not be used without permission. ³⁵⁴ Anyone who violates this provision may be sentenced to imprisonment. ³⁵⁵

327. Jordan's Red Crescent Society Law punishes "anyone who uses the sign or emblem [red crescent/red cross] without authorisation" ³⁵⁶

328. Jordan's Draft Emblem Law punishes:

without prejudice to the use of the emblem by persons and institutions under this Law in conformity with its provisions, any person who commits any of the following acts

...

- a. the intentional use of the emblem of the red crescent or red cross;
- b. the intentional use of the words "red crescent" or "red cross";
- c. the use of any sign, word or design so resembling the emblem of the red crescent or red cross or their names as to create confusion;
- d. the imitation of one or the other emblems and names protected. ³⁵⁷

329. Kazakhstan's Penal Code punishes the "illegal use of the emblem and identifying symbols of the Red Cross/Red Crescent as well as illegal use of the name of the Red Cross/Red Crescent" ³⁵⁸

330. South Korea's Red Cross Society Act as amended provides that "the use by individuals, societies, firms or companies other than the Red Cross Society, medical institutions of the armed forces or those entitled by the Red Cross Society, of the Red Cross or equivalent emblems . . . shall be prohibited at all times" ³⁵⁹

331. Kyrgyzstan's Emblem Law provides that:

Anyone who, intentionally and without being entitled to do so, makes use of the emblem of the red crescent or red cross, of a distinctive signal, or of any other sign or signal constituting an imitation thereof or being capable of causing confusion shall be held responsible in conformity with the legislation of the Kyrgyz Republic. ³⁶⁰

332. Latvia's Draft Red Cross Society Law provides that "during armed conflicts, Red Cross symbols should be used in accordance with international agreements . . . In case of breach of the order about the use of Red Cross symbols,

³⁵² Italy, *Law concerning the Unlawful Use of the Emblem* (1912), Article 1.

³⁵³ Italy, *Wartime Military Penal Code* (1941), Article 180(2).

³⁵⁴ Japan, *Emblem Law* (1947), Article 1.

³⁵⁵ Japan, *Emblem Law* (1947), Article 4.

³⁵⁶ Jordan, *Red Crescent Society Law* (1969), Article 5(b).

³⁵⁷ Jordan, *Draft Emblem Law* (1997), Article 14(A).

³⁵⁸ Kazakhstan, *Penal Code* (1997), Article 291.

³⁵⁹ South Korea, *Red Cross Society Act as amended* (1949), Article 25.

³⁶⁰ Kyrgyzstan, *Emblem Law* (2000), Article 10.

regulated by this Law, the offenders should be called to liability according to the legislation".³⁶¹

333. Lebanon's Code of Military Justice punishes "any person who, [in time of war] publicly and without being entitled to do so, uses in combat areas the emblem, flag or symbol of the red cross, or equivalent emblems, flags or symbols".³⁶²

334. Lesotho's Red Cross Society Act provides that:

It is unlawful for any person other than a person authorised under section seven [the personnel of the Red Cross Society] or under the provisions of the [1949 Geneva Conventions] to use for any purpose whatsoever the emblems... [red cross, red crescent, red lion and sun] or the words "Red Cross".³⁶³

335. Liechtenstein's Emblem Law states that:

The sign of the red cross on a white ground and the words "Red Cross" or "Geneva Cross" may, without prejudice to the cases mentioned in the following articles, only be used, in times of peace and war, in order to mark the personnel and material protected by [GC I and GC II], namely, the personnel, units, transports, installations and medical material of the medical service of the armed forces, including the voluntary medical services of the Red Cross of Liechtenstein, as well as the chaplains assigned to the armed forces.

...

Whoever uses, intentionally and in violation of the rules of this law, ... the sign of the red cross on a white ground or the words "Red Cross" or "Geneva Cross" or any other sign or word which could create confusion ... will be punished.³⁶⁴

336. Under Lithuania's Criminal Code as amended, "unlawful use of the Red Cross, the Red Crescent, sign ... in time of war or during an international armed conflict" is a war crime.³⁶⁵

337. Luxembourg's Emblem Law punishes "those who, without valid authorisation, carry the emblem of the Red Cross".³⁶⁶

338. Malawi's Red Cross Society Act states that "no person, other than a person so authorized under the [1949 Geneva Conventions], shall use for any purpose whatsoever" the emblems of the red cross, red crescent and red lion and sun on a white ground, and the designations "Red Cross", "Geneva Cross", "Red Crescent" and "Red Lion and Sun", as well as any design or wording so nearly resembling any of those emblems or designations as to be capable of being mistaken for, or, as the case may be, understood as referring to, one of those emblems or designations.³⁶⁷

³⁶¹ Latvia, *Draft Red Cross Society Law* (1998), Article 15.

³⁶² Lebanon, *Code of Military Justice* (1968), Article 146.

³⁶³ Lesotho, *Red Cross Society Act* (1967), Section 12(1).

³⁶⁴ Liechtenstein, *Emblem Law* (1957), Articles 1 and 8.

³⁶⁵ Lithuania, *Criminal Code as amended* (1961), Article 344.

³⁶⁶ Luxembourg, *Emblem Law* (1914), Article 1.

³⁶⁷ Malawi, *Red Cross Society Act* (1968), Section 8(1).

339. Malaysia's Geneva Conventions Act provides that "it shall not be lawful for any person to use for the purpose of his trade or business, or for any other purpose whatsoever, in the Federation without the authority of the Minister", the emblem of the red cross on a white ground and the words "Red Cross" or "Geneva Cross", the heraldic emblem of Switzerland, as well as any design being a colourable imitation of those emblems or any words so nearly resembling the words "Red Cross" or "Geneva Cross" as to be capable of being understood as referring to the said emblem.³⁶⁸

340. Mali's Code of Military Justice punishes:

any individual . . . who, in time of war, in the area of operations of a military force and in violation of the laws and customs of war, improperly uses the distinctive signs and emblems defined in international conventions to ensure respect for persons, objects and places protected by these conventions.³⁶⁹

341. Under Mali's Penal Code, "using . . . the distinctive signs provided for by the Geneva Conventions and, thereby, causing loss of human lives or serious injuries" is a war crime in international armed conflicts.³⁷⁰

342. Malta's Red Cross Society Act provides that:

- (a) It shall not be lawful for any person other than the [Red Cross] Society or any other person authorised under the provisions of the [1949 Geneva Conventions, AP I and AP II] to use for any purpose whatever the emblem of the Red Cross, the Red Crescent or any distinctive emblem as is referred to in Article 38 of [GC I], any colourable imitation thereof, or words "Red Cross" or "Red Crescent" in any language.
- (b) Any person who contravenes the provisions of paragraph (a) of this subsection shall be guilty of [a punishable] offence.³⁷¹

343. The Geneva Conventions Act of Mauritius provides that, "subject to this section, no person shall, without the authority of the Minister, use" the emblems of the red cross, red crescent and red lion and sun on a white ground, the heraldic emblem of Switzerland, the designations "Red Cross", "Geneva Cross", "Red Crescent" and "Red Lion and Sun", as well as any design or wording so nearly resembling any of those emblems or designations as to be capable of being mistaken for, or, as the case may be, understood as referring to, one of those emblems or designations.³⁷²

344. Moldova's Penal Code (1961) punishes:

the unlawful wearing and abuse of the signs of the red cross and red crescent in areas of military operations by persons not entitled to wear them, as well as the

³⁶⁸ Malaysia, *Geneva Conventions Act* (1962), Sections 8 and 9.

³⁶⁹ Mali, *Code of Military Justice* (1995), Article 145.

³⁷⁰ Mali, *Penal Code* (2001), Article 31(i)(7).

³⁷¹ Malta, *Red Cross Society Act* (1992), Section 4(2).

³⁷² Mauritius, *Geneva Conventions Act* (1970), Section 8.

abuse in time of war of the flags or signs of the red cross and red crescent and the emblem of the ambulances and vehicles of sanitary evacuation.³⁷³

345. Moldova's Penal Code (2002) punishes "the use by unauthorised persons of the red cross emblem and of the name 'Red Cross', as well as the insignia which may be confused with the red cross emblem, if such an act causes grave consequences".³⁷⁴

346. Moldova's Emblem Law punishes "the use of the emblem of the red cross, of the words 'Red Cross', by individuals and legal persons not entitled to such use, as well as the use of signs which can be identified with the emblem of the red cross".³⁷⁵

347. Monaco's Emblem Law prohibits the use of the red cross emblem by a person, society or association other than those authorised under the Geneva Conventions. Any breach of this provision shall be punished.³⁷⁶

348. Morocco's Emblem Law prohibits:

- a) the use, either by private individuals or by societies or associations other than [medical services of the armed forces and authorised voluntary relief societies], of the emblem of the Red Crescent and of the words "Red Crescent";
- b) the use of any sign and designation constituting an imitation thereof.³⁷⁷

349. Morocco's Code of Military Justice punishes "any individual who, in time of war, in the area of operations of a military field unit, publicly employs, without being entitled to do so, the armlet, the flag or emblem of the Red Crescent or Red Cross, or equivalent armlets, flags or emblems".³⁷⁸

350. Under the Penal Code as amended of the Netherlands, the use without prior authorisation of the red cross emblem, the words "Red Cross" or "Geneva Cross" or of other recognised protective emblems or terminology is a criminal offence.³⁷⁹

351. Under the International Crimes Act of the Netherlands, "making improper use . . . of the distinctive emblems of the Geneva Conventions, resulting in death or serious personal injury", is a crime, when committed in an international armed conflict.³⁸⁰

352. New Zealand's Geneva Conventions Act as amended provides that, "subject to the provisions of this section, it shall not be lawful for any person, without the authority of the Minister of Defence or a person authorised by him in writing to given consent under this section, to use for any purpose whatsoever" the emblems of the red cross, red crescent and red lion and sun on a white ground, the heraldic emblem of Switzerland, the designations "Red Cross", "Geneva Cross", "Red Crescent" and "Red Lion and Sun", as well as

³⁷³ Moldova, *Penal Code* (1961), Article 270, see also Article 217.

³⁷⁴ Moldova, *Penal Code* (2002) Article 363. ³⁷⁵ Moldova, *Emblem Law* (1999), Article 16.

³⁷⁶ Monaco, *Emblem Law* (1953), Articles 1 and 2.

³⁷⁷ Morocco, *Emblem Law* (1958), Article 2.

³⁷⁸ Morocco, *Code of Military Justice* (1956), Article 189.

³⁷⁹ Netherlands, *Penal Code as amended* (1881), Article 435(c).

³⁸⁰ Netherlands, *International Crimes Act* (2003), Article 5(3)(f).

any design or wording so nearly resembling any of those emblems or designations as to be capable of being mistaken for, or, as the case may be, understood as referring to, one of those emblems or designations.³⁸¹

353. Under New Zealand's International Crimes and ICC Act, war crimes include the crimes defined in Article 8(2)(b)(vii) of the 1998 ICC Statute.³⁸²

354. Nicaragua's Military Penal Law punishes "anyone who, in the area of military operations, unlawfully uses symbols of the Red Cross".³⁸³

355. Nicaragua's Military Penal Code punishes any soldier who, in time of war and in an area of military operations, "unlawfully displays . . . the insignia, flags or emblems of the Red Cross".³⁸⁴

356. Nicaragua's Emblem Law provides that "the emblem of the Red Cross, as well as the denominations 'Red Cross' and 'Geneva Cross', may only be used for the purposes defined under the Geneva Conventions of 1949 and their Additional Protocols of 1977".³⁸⁵

357. Nigeria's Geneva Conventions Act states that "subject to the provisions of this section, it shall not be lawful for any person, without the authority of the Minister of the Federation charged with responsibility for matters relating to defence, to use for any purpose whatsoever" the emblems of the red cross, red crescent and red lion and sun on a white ground, the designations "Red Cross", "Geneva Cross", "Red Crescent" and "Red Lion and Sun", as well as any design or wording so nearly resembling any of those emblems or designations as to be capable of being mistaken for, or, as the case may be, understood as referring to, one of those emblems or designations. It is also prohibited to use, without the authority of the Minister of the Federation charged with responsibility for matters relating to trade, for any purpose whatsoever the heraldic emblem of Switzerland or any other design so nearly resembling that design as to be capable of being mistaken for that heraldic emblem.³⁸⁶

358. Nigeria's Revised Red Cross Society Act punishes:

any person who falsely and fraudulently . . . wears or displays the emblem of the Red Cross on any article of clothing, badge, piece of paper, or in any other way whatsoever, or any insignia coloured in imitation thereof in such a way as to be likely to deceive those to whom it is visible, for the purpose of inducing the belief that he is a member of, or an agent for, the [Nigerian Red Cross] Society.³⁸⁷

359. Norway's Penal Code provides that it is a punishable offence to use "without authority publicly or for an unlawful purpose . . . any badge or designation which by international agreement binding on Norway is designed for use in connection with aid to the wounded and sick . . . in war".³⁸⁸

³⁸¹ New Zealand, *Geneva Conventions Act as amended* (1958), Section 8.

³⁸² New Zealand, *International Crimes and ICC Act* (2000), Section 11(2).

³⁸³ Nicaragua, *Military Penal Law* (1980), Article 83.

³⁸⁴ Nicaragua, *Military Penal Code* (1996), Article 50(1).

³⁸⁵ Nicaragua, *Emblem Law* (2002), Article 2.

³⁸⁶ Nigeria, *Geneva Conventions Act* (1960), Section 10(1) and (3).

³⁸⁷ Nigeria, *Revised Red Cross Society Act* (1990), Section 8(b).

³⁸⁸ Norway, *Penal Code* (1902), § 328(4)(b).

360. Under Norway's Military Penal Code as amended, "anyone who contravenes or is accessory to the contravention of provisions relating to the protection of persons or property laid down in... the Geneva Conventions of 12 August 1949... [and in] the two additional protocols to these Conventions... is liable to imprisonment".³⁸⁹

361. Panama's Emblem Law provides that:

The emblem of the Red Cross, as well as its denominations, shall only be used for the purposes provided for in the Geneva Conventions of 1949 and the [ir] Additional Protocols.

...

Any person, whether physical or legal, who, without being entitled to do so, makes use of the emblem of the Red Cross or Red Crescent, of the words *Red Cross* or *Red Crescent*, of a distinctive sign, denomination or signal which constitutes an imitation thereof or which can create confusion... shall be punished.³⁹⁰

362. Papua New Guinea's Geneva Conventions Act punishes any "person who, without the consent of the Minister, uses for any purpose" the emblems of the red cross, red crescent and red lion and sun on a white ground, the heraldic emblem of Switzerland, the designations "Red Cross", "Geneva Cross", "Red Crescent" and "Red Lion and Sun", as well as a design or wording so nearly resembling any of those emblems or designations as to be capable of being mistaken for, or understood as referring to, any of those emblems or designations.³⁹¹

363. Under Paraguay's Emblem Law, any person who improperly uses the emblem of the red cross in time of war, with a view to commit acts of banditry, shall be subject to military and criminal laws.³⁹²

364. The Red Cross Society Decree of the Philippines states that:

The use of the emblem of the red Greek cross on a white ground is reserved exclusively to the Philippine National Red Cross, medical services of the Armed Forces of the Philippines, and such other medical facilities or other institutions as may be authorized by the Philippine National Red Cross... It shall be unlawful for any other person or entity to use the words Red Cross or Geneva Cross or to use the emblem of the red Greek cross on a white ground or any designation, sign, or insignia constituting an imitation thereof for any purpose whatsoever.³⁹³

365. Poland's Red Cross Society Law provides that:

The sign or the name of the Red Cross as an emblem or distinctive and protective sign may be used in situations and in accordance with the principles determined in international conventions.

³⁸⁹ Norway, *Military Penal Code as amended* (1902), § 108.

³⁹⁰ Panama, *Emblem Law* (2001), Articles 2 and 12.

³⁹¹ Papua New Guinea, *Geneva Conventions Act* (1976), Section 13.

³⁹² Paraguay, *Emblem Law* (1928), Article 5.

³⁹³ Philippines, *Red Cross Society Decree* (1979), Section 15.

...

1. It shall be prohibited to use, in contravention of Art. 13, the sign or the name "Red Cross" or "Geneva Cross", as well as any signs or names constituting their imitations.
2. The prohibition contained in point (1) applies also to the use of signs and names of the "Red Crescent" and "Red Lion and Sun".³⁹⁴

366. Poland's Penal Code punishes "any person who, during hostilities, uses the sign of the Red Cross or of the Red Crescent in violation of international law".³⁹⁵

367. Romania's Penal Code punishes "the unlawful use, in time of war and in relation to military operations, of the emblem or name of the 'Red Cross', or of equivalent signs and names".³⁹⁶

368. Under Russia's Draft Law on the Red Cross Society and Emblem, "illegal use of the name and the emblem of the Red Cross entails responsibility provided for by the legislation of the Russian Federation".³⁹⁷

369. Rwanda's Red Cross Decree punishes "any person who, without being entitled to do so, . . . uses the emblem or the denomination of the 'Red Cross' or 'Geneva Cross', or equivalent emblems or denominations that may create confusion, . . . for any . . . purpose".³⁹⁸ It also punishes "any person who, in time of war, uses, without being entitled to do so, the armlet or the flag of the Red Cross".³⁹⁹

370. The Red Cross Society Act of Saint Kitts and Nevis provides that:

It shall not be lawful for any person other than those authorised . . . under the [1949 Geneva Conventions, AP I and AP II] to use for any purpose whatever the emblem of the red cross on white ground, or any colourable imitation thereof, or the words "Red Cross", or the arms of the Swiss Confederation.⁴⁰⁰

371. Samoa's Emblem Act states that "no person or body other than the Red Cross Society may use the term Red Cross or its distinctive emblem for any purpose or activity".⁴⁰¹

372. The Geneva Conventions Act of the Seychelles provides that, "subject to this section, no person shall, without the authority of the Minister, use for any purpose" the emblems of the red cross and red crescent on a white ground, the heraldic emblem of Switzerland, the designations "Red Cross", "Geneva Cross" and "Red Crescent", as well as any design or wording so nearly resembling any of those emblems or designations as to be capable of being mistaken for,

³⁹⁴ Poland, *Red Cross Society Law* (1964), Articles 13 and 14.

³⁹⁵ Poland, *Penal Code* (1997), Article 126(1).

³⁹⁶ Romania, *Penal Code* (1968), Article 351, see also Article 294.

³⁹⁷ Russia, *Draft Law on the Red Cross Society and Emblem* (1998), Article 7.

³⁹⁸ Rwanda, *Red Cross Decree* (1912), Article 2.

³⁹⁹ Rwanda, *Red Cross Decree* (1912), Article 3.

⁴⁰⁰ Saint Kitts and Nevis, *Red Cross Society Act* (1985), Section 9.

⁴⁰¹ Samoa, *Emblem Act* (1993), Section 3(1).

or, as the case may be, understood as referring to, one of those emblems or designations.⁴⁰²

373. Singapore's Geneva Conventions Act provides that "no person shall use for any purpose whatsoever in Singapore, without the authority of the Minister," the emblem of the red cross on a white ground, the heraldic emblem of Switzerland, the words "Red Cross" and "Geneva Cross", as well as any design being a colourable imitation of those emblems or any words so nearly resembling the words "Red Cross" or "Geneva Cross" as to be capable of being understood as referring to the said emblem.⁴⁰³

374. Singapore's Red Cross Society Act considers that:

No person other than the [Singapore Red Cross] Society and any person so authorised by the Minister shall use –

- (a) the heraldic emblem of the red cross on a white ground formed by reversing the Federal Colours of Switzerland; or
- (b) the words "Red Cross" or "Geneva Cross".⁴⁰⁴

375. Slovakia's Criminal Code as amended punishes any person who "misuses the insignia of the Red Cross, or other signs or colours recognised in international law as designating medical institutions or vehicles used for medical assistance or evacuation".⁴⁰⁵

376. Slovakia's Law on the Red Cross Society and Emblem states that:

In accordance with the [1949] Geneva Conventions and their Additional Protocols, the conclusions of the international conferences of the Red Cross and Red Crescent and rules of the International Committee of the Red Cross . . . for the use of the Red Cross sign and name by National Societies during peace time and war time, the sign and name of the Red Cross may only be used by:

- a) the military health service for indication and protection of the health units and institutes of staff and material protected by the Geneva Conventions, their Additional Protocols and other international conventions regulating similar affairs by which the Slovak Republic is bound;
- b) the Slovak Red Cross, its institutes and staff in their activity pursuant to letter a) and during peace time, and under the conditions stipulated by the Geneva Conventions and their Additional Protocols;
- c) the international organisations of the Red Cross and their staff under the conditions stipulated by the Geneva Conventions and their Additional Protocols;
- d) the operators of the vehicles intended as ambulances and the operators of rescue stations exclusively intended for free treatment of the wounded or sick; for indication of these ambulances and rescue stations during peace time only with the express approval of the Slovak Red Cross.⁴⁰⁶

⁴⁰² Seychelles, *Geneva Conventions Act* (1985), Section 9.

⁴⁰³ Singapore, *Geneva Conventions Act* (1973), Sections 8 and 9.

⁴⁰⁴ Singapore, *Red Cross Society Act* (1973), Section 10(1).

⁴⁰⁵ Slovakia, *Criminal Code as amended* (1961), Article 265(1).

⁴⁰⁶ Slovakia, *Law on the Red Cross Society and Emblem* (1994), Section 4(1).

It also punishes any person who unlawfully uses the sign or name of the red cross "during the time of events to which the Geneva Conventions and their Additional Protocols relate".⁴⁰⁷

377. Slovenia's Red Cross Society Law states that:

The Red Cross symbol on a white background and the name of the Red Cross may only be used in the manner specified by the [1949] Geneva Conventions, this Law and the regulations issued for the execution thereof.

...

All natural persons and legal entities, except those permitted by this Law, shall be permanently prohibited from using:

- the Red Cross symbol on a white background or the name of the Red Cross or the Geneva Cross, or
- the Red Crescent symbol on a white background or the name of the Red Crescent,
- as well as any symbol or name imitating the symbol or name under the first and second items, irrespective of the purpose of their use and the time of their adoption.⁴⁰⁸

378. Under Slovenia's Penal Code, "whoever abuses or carries without authorisation . . . the emblems or flag of the Red Cross" commits a war crime.⁴⁰⁹

379. South Africa's Geneva Conventions Notice provides that "it is an offence . . . to use the said emblem of the 'Red Cross' or 'Geneva Cross' for the purpose of trade or business or for any other purpose whatsoever without the authority of His Excellency the Governor-General-in-Council".⁴¹⁰

380. Spain's Military Criminal Code punishes any soldier who "displays improperly . . . the distinctive signs of the Geneva Conventions".⁴¹¹

381. Spain's Penal Code punishes "anyone who, during an armed conflict . . . uses improperly . . . the protective or distinctive signs, emblems or signals established and recognised under international treaties to which Spain is a party, in particular the distinctive signs of the Red Cross and the Red Crescent".⁴¹²

382. Sri Lanka's Draft Geneva Conventions Act provides that, "subject to the provisions of this section and section 14, it shall not be lawful for any person, without the consent in writing of the Minister of Defence or a person authorized in writing by the Minister to give consents under this section, to use or display for any purpose whatsoever" the emblems of the red cross, red crescent and red lion and sun on a white ground, the heraldic emblem of Switzerland, the designations "Red Cross", "Geneva Cross", "Red Crescent" and "Red Lion and Sun", as well as a design or wording so nearly resembling any of those emblems

⁴⁰⁷ Slovakia, *Law on the Red Cross Society and Emblem* (1994), Section 5(1).

⁴⁰⁸ Slovenia, *Red Cross Society Law* (1993), Articles 21 and 22.

⁴⁰⁹ Slovenia, *Penal Code* (1994), Article 386(1).

⁴¹⁰ South Africa, *Geneva Conventions Notice* (1915), § 4.

⁴¹¹ Spain, *Military Criminal Code* (1985), Article 75(1).

⁴¹² Spain, *Penal Code* (1995), Article 612(4).

or designations as to be capable of being mistaken for, or, as the case may be, understood as referring to, one of those emblems or designations.⁴¹³

383. Sweden's Emblems and Signs Act as amended provides that:

The Red Cross emblem, consisting of a red cross on a white background, or the name "Red Cross" or "Geneva Cross", may not be publicly used other than as a distinctive emblem of military medical services or for military religious personnel or in such cases as specified in Section 2.

...

The international Red Cross organizations are entitled to use the distinctive emblem and name as specified in Section 1. The same shall apply to foreign national associations, which in their own country have the right publicly to use the emblem or the name.

Having obtained the permission of the Government, the Swedish Red Cross and other Swedish associations, whose purpose it is to provide assistance in military medical services in wartime, may use the aforesaid emblem and name. The distinctive emblem specified above may, with the permission of the Government, be used as a distinctive emblem for civilian medical services in wartime and for rescue services along the coasts.⁴¹⁴

384. Under Sweden's Penal Code as amended, misuse of insignia referred to in the Emblems and Signs Act as amended, including the red cross, constitutes a crime against international law.⁴¹⁵

385. Switzerland's Emblem Law provides that:

The emblem of the red cross on white ground and the words "red cross" or "Geneva cross" shall, with the exception of the cases provided for in the following articles, be used, whether in time of peace or in time of war, only to designate the personnel and material protected by [GC I and GC II], meaning the personnel, units, transports, establishments and material of the medical service of the armed forces, including voluntary sanitary relief of the Swiss Red Cross, as well as the chaplains attached to the armed forces.

...

Anyone who, intentionally and in violation of the provisions of the present law ... has made use of the emblem of the red cross on a white ground or of the words "red cross" or "Geneva cross", or of any other sign or word capable of creating confusion [commits a punishable offence].⁴¹⁶

386. Tajikistan's Criminal Code punishes the "illegal use of emblems and distinctive signs of the red cross and red crescent, as well as red cross and red crescent names".⁴¹⁷

387. Tajikistan's Emblem Law provides that:

Any use of the emblems, appellations "Red Cross" and "Red Crescent" and distinctive signals by legal and natural persons within the territory of the Republic of

⁴¹³ Sri Lanka, *Draft Geneva Conventions Act* (2002), Section 12(1).

⁴¹⁴ Sweden, *Emblems and Signs Act as amended* (1953), Sections 1 and 2.

⁴¹⁵ Sweden, *Penal Code as amended* (1962), Chapter 22, § 6(2).

⁴¹⁶ Switzerland, *Emblem Law* (1954), Articles 1 and 8(1).

⁴¹⁷ Tajikistan, *Criminal Code* (1998), Article 333.

Tajikistan, which goes against the Law, the [1949] Geneva Conventions and Additional Protocols, as well as the Rules on the use of the Red Cross or Red Crescent emblems by National Societies, is prohibited.

Those found guilty of breaching or improperly following the Law are liable to prosecution in accordance with the legislation of the Republic of Tajikistan.⁴¹⁸

388. Tanzania's Red Cross Society Act punishes:

Any person who, falsely or with intent to deceive or defraud, –

...

wears or displays the emblem of the Red Cross or any colourable imitation thereof for the purpose of inducing the belief that he is a member of or an agent for the [Red Cross] Society or that he has been recognized by the Society as possessing any qualification for administering first-aid or other treatment for injury or sickness.⁴¹⁹

389. Thailand's Red Cross Act provides that:

Whoever, without being entitled according to the [1949 Geneva] Conventions or this Act, uses the Red Cross emblem or the Red Cross name shall be punished with imprisonment . . .

...

Whoever uses any emblem or wording imitating the Red Cross emblem or the Red Cross name, or resembling such emblem or name as may be inferred that it is so done in order to deceive the public, shall be punished with imprisonment . . .

...

Sections 9 [and] 10 . . . shall apply to the emblem of the red crescent on a white ground or of the red lion and sun on a white ground, and to the name "red crescent" or "red lion and sun", *mutatis mutandis*.⁴²⁰

390. Togo's Code of Military Justice punishes "any individual who, [in time of war] in the area of operations, uses publicly and without being entitled to do so the armlet, flag or emblem of the Red Cross, or equivalent armlets, flags or emblems".⁴²¹

391. Togo's Emblem Law punishes:

whoever, without being entitled to do so, makes use of the emblem of the Red Cross or Red Crescent, of the words "Red Cross" or "Red Crescent", of a distinctive signal or of any other sign, denomination or signal constituting an imitation thereof or capable of creating confusion, whatever the purpose of this use.⁴²²

392. Under Tonga's Red Cross Society Act, "it shall not be lawful for any person other than those authorised under section 5 of this Act or under the provisions of

⁴¹⁸ Tajikistan, *Emblem Law* (2001), Article 17.

⁴¹⁹ Tanzania, *Red Cross Society Act* (1962), Section 7(b).

⁴²⁰ Thailand, *Red Cross Act* (1956), Sections 9, 10 and 12.

⁴²¹ Togo, *Code of Military Justice* (1981), Article 122.

⁴²² Togo, *Emblem Law* (1999), Article 15.

the . . . [1949] Geneva Conventions to use for any purpose whatever the emblem of the red cross on a white ground".⁴²³

393. Trinidad and Tobago's Red Cross Society Act punishes:

Any person not being a member of the [Red Cross] Society who –

...

wears or displays the emblem of the Red Cross on an article of clothing, badge, paper, or in any other way whatsoever, or any insignia coloured in imitation thereof in such a way as to be likely to deceive those to whom it is visible, for the purpose of inducing the belief that he is a member of, or agent for the Society, or that he has been recognised by the Society as possessing any qualification for administering first aid or other treatment for the relief of sickness.⁴²⁴

394. Under Trinidad and Tobago's Draft ICC Act, it is a punishable offence to commit a war crime as defined in Article 8(2)(b)(vii) of the 1998 ICC Statute.⁴²⁵

395. Tunisia's Code of Military Justice as amended punishes "any individual who, in the area of operations of a military force . . . publicly uses, without being entitled to do so, the armlet, flag or emblem of the Red Crescent or Red Cross, or equivalent armlets, flags or emblems".⁴²⁶

396. Turkmenistan's Emblem Law provides that:

Anyone who, wilfully and without entitlement, has used the red crescent or red cross emblem, the designation "Red Crescent" or "Red Cross", a distinctive signal or any other sign, designation or signal which constitutes an imitation thereof or which might lead to confusion, shall be held responsible in accordance with the legislation of Turkmenistan.⁴²⁷

397. Under Uganda's Emblems Order, the emblems of the red cross or red crescent and the designations "Red Cross" or "Red Crescent" shall be for the exclusive use of:

1. The Uganda Red Cross Society.
2. The International Committee of the Red Cross (I.C.R.C.).
3. The International Federation of Red Cross and Red Crescent Societies.
4. The Medical personnel of the Armed Forces and religious personnel attached to the Armed Forces.⁴²⁸

398. Ukraine's Emblem Law provides that:

The use of the emblem of the red cross or red crescent, or red cross and red crescent, of the names "Red Cross" or "Red Crescent", or "Red Cross and Red Crescent", of the distinctive sign or any other sign, name or signal constituting an imitation thereof . . . or capable of creating confusion, regardless of the purpose of such use, in violation of the provisions of the present law . . . are prohibited.

⁴²³ Tonga, *Red Cross Society Act* (1972), Section 9(1).

⁴²⁴ Trinidad and Tobago, *Red Cross Society Act* (1963), Section 8(b).

⁴²⁵ Trinidad and Tobago, *Draft ICC Act* (1999), Section 5(1)(a).

⁴²⁶ Tunisia, *Code of Military Justice as amended* (1957), Article 127.

⁴²⁷ Turkmenistan, *Emblem Law* (2001), Article 14.

⁴²⁸ Uganda, *Emblems Order* (1993), Section 2 and Schedule.

...

Persons having committed a breach of the Ukrainian legislation of the use and symbolic of the Red Cross and Red Crescent are liable to punishment in conformity with Ukrainian legislation.⁴²⁹

399. Ukraine's Draft Red Cross Society Law states that:

In time of war (armed conflict), only the following are entitled to use the emblem:

- a) the Red Cross Society . . . its personnel and volunteers, on vehicles used by the medical public service, its transports, its installations . . .
- b) the medical service of the Armed Forces of Ukraine;
- c) the medical establishments of Ukraine directly assisting wounded, sick and victims;
- d) the other persons entitled by the Geneva Conventions of 1949 . . . and their first Additional Protocol.⁴³⁰

400. Pursuant to Ukraine's Criminal Code, the "carrying the Red Cross or Red Crescent symbols in an operational zone by persons not entitled to do so, as well as misuse of flags or signs of the Red Cross and Red Crescent or the colours attributed to medical vehicles in state of martial law" constitutes a war crime.⁴³¹

401. The UK Geneva Conventions Act as amended provides that, "subject to the provisions of this section, it shall not be lawful for any person, without the authority of the Secretary of State, to use for any purpose whatsoever" the emblems of the red cross, red crescent and red lion and sun on a white ground, the heraldic emblem of Switzerland, the designations "Red Cross", "Geneva Cross", "Red Crescent" and "Red Lion and Sun", as well as any design or wording so nearly resembling any of those emblems or designations as to be capable of being mistaken for, or, as the case may be, understood as referring to, one of those emblems or designations.⁴³²

402. Under the UK ICC Act, it is a punishable offence to commit a war crime as defined in Article 8(2)(b)(vii) of the 1998 ICC Statute.⁴³³

403. The US Criminal Statute on the Protection of the Emblem as amended states that the following are guilty of a criminal offence:

Whoever wears or displays the sign of the Red Cross or any insignia colored in imitation thereof for the fraudulent purpose of inducing the belief that he is a member of or an agent for the American National Red Cross; or

⁴²⁹ Ukraine, *Emblem Law* (1999), Articles 15 and 17.

⁴³⁰ Ukraine, *Draft Red Cross Society Law* (1999), Article 49.

⁴³¹ Ukraine, *Criminal Code* (2001), Article 435, see also Article 445.

⁴³² UK, *Geneva Conventions Act as amended* (1957), Section 6.

⁴³³ UK, *ICC Act* (2001), Sections 50(1) and 51(1) (England and Wales) and Section 58(1) (Northern Ireland).

Whoever, whether a corporation, association or person, other than the American National Red Cross and its duly authorized employees and agents and the sanitary and hospital authorities of the armed forces of the United States, uses the emblem of the Greek red cross on a white ground, or any sign or insignia made or colored in imitation thereof or the words "Red Cross" or "Geneva Cross" or any combination of these words.⁴³⁴

404. Under the US War Crimes Act as amended, violations of Article 23(f) of the 1907 HR are war crimes.⁴³⁵

405. Uruguay's Emblem Decree states that "the red cross and red crescent emblems, as well as the words 'Red Cross, 'Geneva Cross' and 'Red Crescent' may only be used for the purposes provided for in the Geneva Conventions of 1949 and their Additional Protocols of 1977".⁴³⁶

406. Vanuatu's Geneva Conventions Act provides that "no person shall, without the consent in writing of the Minister, use for any purpose whatsoever" the emblems of the red cross, red crescent and red lion and sun on a white ground, the designations "Red Cross", "Geneva Cross", "Red Crescent" and "Red Lion and Sun", as well as any design or wording so nearly resembling any of those emblems or designations as to be capable of being mistaken for, or as the case may be, understood as referring to, one of those emblems or designations.⁴³⁷

407. Venezuela's Emblem Law provides that:

The emblem of the Red Cross on a white ground and the words "Red Cross" may not be used, in time of peace or in time of war, except to protect and designate the personnel and material of medical formations and of establishments of the Medical Service of the Army, Navy and Air Force, as well as of voluntary relief societies duly recognised by the National Red Cross Society and officially authorised to offer its assistance.

...

The use of any sign or denomination constituting an imitation of the emblem or the words "Red Cross" is prohibited.

Likewise, the use for any purpose... of similar emblems or words which could create confusion is prohibited.⁴³⁸

It further stipulates that all violations of those provisions must be punished.⁴³⁹

408. Yemen's Emblem Law punishes:

any person who uses intentionally and without entitlement the emblem of the red crescent or red cross, or their denominations, or any other distinctive emblem or any other sign or denomination constituting an imitation thereof or which provokes confusion, whatever the purpose of the use".⁴⁴⁰

⁴³⁴ US, *Criminal Statute on the Protection of the Emblem as amended* (1905), Section 706.

⁴³⁵ US, *War Crimes Act as amended* (1996), Section 2441(c)|2).

⁴³⁶ Uruguay, *Emblem Decree* (1992), Article 1.

⁴³⁷ Vanuatu, *Geneva Conventions Act* (1982), Section 11.

⁴³⁸ Venezuela, *Emblem Law* (1965), Articles 1 and 4.

⁴³⁹ Venezuela, *Emblem Law* (1965), Article 5. ⁴⁴⁰ Yemen, *Emblem Law* (1999), Article 10.

409. Under the Penal Code as amended of the SFRY (FRY), “those who misuse or carry without permission . . . the Red Cross flag or corresponding emblems” commit a war crime.⁴⁴¹ The commentary on the Code states that:

The unauthorised carrying of an international emblem exists, for example, when a Red Cross emblem is carried by a person who is not a member of the medical corps (members of combat units) or, when such an emblem is placed, in general, on persons or objects not provided by international law regulations . . .

The misuse of international emblem is committed, as a rule, during a war or an armed conflict . . .

The aggravated form of this criminal act . . . exists when the misuse or unauthorised use of international emblems is committed in the war operations zone.⁴⁴²

410. The FRY Emblem Law prohibits the wearing or use of the emblem of the red cross as a protective sign, during war, imminent danger of war or state of emergency, without being entitled to do so.⁴⁴³

411. Zambia’s Red Cross Society Act states that “no person other than the [Red Cross] Society or a person so authorised under the [1949 Geneva] Conventions shall, without the authority of the Council, use for any purpose whatsoever” the emblems of the red cross, red crescent and red lion and sun on a white ground, as well as the designations “Red Cross”, “Geneva Cross”, “Red Crescent” and “Red Lion and Sun”.⁴⁴⁴

412. Zimbabwe’s Geneva Conventions Act as amended provides that, “subject to the provisions of this section and of section 7 of the Zimbabwe Red Cross Society Act, 1981, no person shall, without the authority in writing of the Minister of Health, use for any purpose whatsoever” the emblems of the red cross, red crescent and red lion and sun on a white ground, the heraldic emblem of Switzerland, the designations “Red Cross”, “Geneva Cross”, “Red Crescent” and “Red Lion and Sun”, as well as any design or wording so nearly resembling any of those emblems or designations as to be capable of being mistaken for or, as the case may be, understood as referring to one of those emblems or designations.⁴⁴⁵

National Case-law

413. In 1997, Colombia’s Council of State considered that the use of a medical vehicle for military operations was prohibited under IHL. The vehicles had been used to transport troops. The Council referred to the 1949 Geneva Conventions and to both Additional Protocols.⁴⁴⁶

⁴⁴¹ SFRY (FRY), *Penal Code as amended* (1976), Article 153(1), see also commentary on Article 148.

⁴⁴² SFRY (FRY), *Penal Code as amended* (1976), commentary on Article 153.

⁴⁴³ FRY, *Emblem Law* (1996), Article 13.

⁴⁴⁴ Zambia, *Red Cross Society Act* (1966), Section 6(1).

⁴⁴⁵ Zimbabwe, *Geneva Conventions Act as amended* (1981), Section 8.

⁴⁴⁶ Colombia, Council of State, *Administrative Case No. 11369*, Judgement, 6 February 1997.

414. In its judgement in the *Emblem case* in 1994, Germany's Federal Supreme Court stated that there was an essential common interest in the protection of the emblems against unauthorised use.⁴⁴⁷

415. In its judgement in the *Red Cross Emblem case* in 1979, the Supreme Court of the Netherlands held that the aim of the provision of the Criminal Code of the Netherlands prohibiting the use without prior authorisation of the distinctive emblems was to prevent unauthorised persons from using the emblems.⁴⁴⁸

Other National Practice

416. The Report on the Practice of Angola notes that, according to witnesses, vehicles, uniforms and the red cross emblem were used by UNITA forces when fleeing from attacks by governmental troops. It adds that, given the numerous reports of theft of vehicles of humanitarian organisations, incidents involving the improper use of the emblems had probably occurred many times during the conflict.⁴⁴⁹

417. In 1992, the Presidency of the Republika Srpska of Bosnia and Herzegovina made an urgent appeal "to respect the Red Cross emblem which ought to be used by medical personnel, hospitals and medical transports only".⁴⁵⁰

418. According to the Report on the Practice of China, it is China's opinion that unauthorised use of the ICRC emblem is not acceptable.⁴⁵¹

419. In a press release issued in 1996, Colombia's Ministry of Foreign Affairs expressed concern about the alleged misuse of the emblem. It reiterated its commitment to respect the relevant provisions of the 1949 Geneva Conventions and their Additional Protocols.⁴⁵²

420. In a 1996 study, Colombia's Presidential Council for Human Rights underlined the importance for a newly developed manual for the armed forces to include provisions such as the following: "Penal or disciplinary sanctions shall be established [and] imposed on members of the public forces for the improper use of the emblem of the Red Cross".⁴⁵³

421. The instructions given to the French armed forces for the conduct of Opération Mistral, simulating a military operation under the right of self-defence or a mandate of the UN Security Council, state that "any unlawful use of [the red cross or red crescent] is prohibited and must be punished".⁴⁵⁴

⁴⁴⁷ Germany, Federal Supreme Court, *Emblem case*, Judgement, 23 June 1994.

⁴⁴⁸ Netherlands, Supreme Court, *Red Cross Emblem case*, Judgement, 15 May 1979.

⁴⁴⁹ Report on the Practice of Angola, 1998, Chapter 2.5.

⁴⁵⁰ Bosnia and Herzegovina, Republika Srpska, Appeal of the Presidency concerning the International Committee of the Red Cross Operations, Pale, 7 June 1992.

⁴⁵¹ Report on the Practice of China, 1997, Chapter 2.5.

⁴⁵² Colombia, Ministry of Foreign Affairs, Press Release, 26 August 1996.

⁴⁵³ Colombia, Presidential Council for Human Rights, *Investigación académica sobre medidas nacionales de aplicación del Derecho Internacional Humanitario*, 1996, p. 55, Report on the Practice of Colombia, 1998, Chapter 2.8.

⁴⁵⁴ France, Etat-major de la Force d'Action Rapide, Ordres pour l'Opération Mistral, 1995, § 62.

422. Official documents of the German military authorities stress that military buses bearing the distinctive emblem may – even in peace time – only be used for medical purposes. That is to say, transports of soldiers in such buses may only be undertaken if the transport has a “medical component”. All other transports are forbidden. According to the Report on the Practice of Germany, one document states that, before discarding vehicles displaying the emblem, the emblem must be made invisible or erased to prevent any misuse of the discarded vehicle.⁴⁵⁵

423. On the basis of the reply by Iraq’s Ministry of Defence to a questionnaire, the Report on the Practice of Iraq states that improper use of the distinctive emblems is prohibited under international law.⁴⁵⁶

424. A training video on IHL produced by the UK Ministry of Defence illustrates the rule that the false use of emblems is forbidden.⁴⁵⁷

425. In 1987, the Deputy Legal Adviser of the US Department of State affirmed that “we support the principle . . . that internationally recognized protective emblems, such as the red cross, not be improperly used”.⁴⁵⁸

426. According to the Report on the Practice of the SFRY (FRY), the 1991 Hague Statement on Respect for Humanitarian Principles extended the prohibition of improper use of the distinctive emblem to internal conflicts and can thus be considered as the *opinio juris* of the six republics of the former Yugoslavia on the applicability of the rule in internal armed conflicts. According to the report, during the armed conflicts in Slovenia and Croatia, which involved the YPA, the distinctive emblem was flagrantly misused. The YPA did not deny these practices and actually admitted two such cases during the conflict in Slovenia. The first case involved the transport of YPA personnel released from prison in Slovenia carrying their personal weapons with them. The second case involved the transport of members of the SFRY Presidency to Slovenia for negotiations with the Slovenian authorities.⁴⁵⁹

427. In 1979, in a meeting with ICRC delegates, the Minister of Health of a State considered that the abuse of the emblem was a very serious matter and asked to be given the necessary documents to enable it to publish the relevant provisions in governmental documents.⁴⁶⁰

⁴⁵⁵ Report on the Practice of Germany, 1997, Chapter 2.5. (The report does not quote any source.)

⁴⁵⁶ Report on the Practice of Iraq, 1998, Reply by the Ministry of Defence to a questionnaire, July 1997, Chapter 2.5.

⁴⁵⁷ UK, Ministry of Defence, Training Video: The Geneva Conventions, 1986, Report on UK Practice, 1997, Chapter 2.4.

⁴⁵⁸ US, Remarks of Michael J. Matheson, Deputy Legal Adviser, US Department of State, The Sixth Annual American Red Cross-Washington College of Law Conference on International Humanitarian Law: A Workshop on Customary International Law and the 1977 Protocols Additional to the 1949 Geneva Conventions, *American University Journal of International Law and Policy*, Vol. 2, 1987, p. 425.

⁴⁵⁹ Report on the Practice of the SFRY (FRY), 1997, Chapter 2.5.

⁴⁶⁰ ICRC archive document.

428. In 1991, a State gave the ICRC assurances that measures would be taken to ensure that abuses of the distinctive emblems committed during the conflict would not be repeated.⁴⁶¹

429. In 1991, the Minister of Health of a State denounced the transport of military personnel and weapons by the army of another State in vehicles and helicopters marked with the distinctive emblem.⁴⁶²

III. Practice of International Organisations and Conferences

United Nations

430. In 1970, in a report on respect for human rights in armed conflicts, the UN Secretary-General stated that "as was felt by the experts convened by the International Committee of the Red Cross in 1969, the prohibition of the improper use . . . of the Red Cross emblem, contained in article 23(f) [of the 1907 HR], should be strongly reaffirmed".⁴⁶³

Other International Organisations

431. In 1981, in a report on refugees from El Salvador, the Parliamentary Assembly of the Council of Europe recalled that the ICRC had mounted a campaign in El Salvador to promote the application of IHL after it had noted a number of violations, including misuse of the red cross emblem.⁴⁶⁴

432. In a resolution adopted in 1988 on the protection of humanitarian medical missions, the Parliamentary Assembly of the Council of Europe urged medical missions to refrain from using the red cross emblem for non-medical activities, whether in international or non-international armed conflicts.⁴⁶⁵

433. In 1997, an incident occurred involving misuse of the distinctive emblem, when SFOR soldiers used a package marked with a red cross to gain entry to a hospital to arrest a person indicted by the ICTY.⁴⁶⁶ The SFOR spokesman initially denied that the soldiers had abused the symbol of the red cross, but later admitted that the soldiers had carried a parcel with the red cross label. He indicated, however, that the soldiers had not gained access to the hospital "in disguise or by subterfuge" and that they were armed and dressed as SFOR soldiers. He added that the ICRC was not involved in the operation.⁴⁶⁷

⁴⁶¹ ICRC archive document. ⁴⁶² ICRC archive document.

⁴⁶³ UN Secretary-General, Report on respect for human rights in armed conflicts, UN Doc. A/8052, 2 March 1970, § 102.

⁴⁶⁴ Council of Europe, Parliamentary Assembly, Report on refugees from El Salvador, Doc. 4698, 7 April 1981, p. 10.

⁴⁶⁵ Council of Europe, Parliamentary Assembly, Res. 904, 30 June 1988, § 9.

⁴⁶⁶ *The Independent*, Press clippings on the arrest of persons accused of war crimes, London, 11 July 1997.

⁴⁶⁷ NATO, Transcript: Joint Press Conference at the Coalition Press Information Centre Holiday Inn, Sarajevo, 11 July 1997; Joint Press Conference, 14 July 1997.

International Conferences

434. The 23rd International Conference of the Red Cross in 1977 adopted a resolution on misuse of the emblem of the red cross inviting States parties to the 1949 Geneva Conventions to “enforce effectively the existing national legislation repressing the abuses of the emblem of the red cross, red crescent, red lion and sun, to enact such legislation wherever it does not exist at present and to provide for punishment by way of adequate sentences for offenders”.⁴⁶⁸

435. In 1992, at the Helsinki Summit of Heads of State or Government, CSCE participating States reaffirmed their commitment to prevent misuse of the protective emblems of the red cross and red crescent.⁴⁶⁹

IV. Practice of International Judicial and Quasi-judicial Bodies

436. In a report in 1979, the IACiHR considered that the Nicaraguan government was responsible for the improper use of the red cross emblem. The Commission had been informed that:

Public Health and the Vélez Páiz Hospital in Managua [had] ambulances that [had] a painted Red Cross emblem, and that in the barrio OPEN No. 3, government ambulances with the Red Cross were used to transport soldiers, thus creating suspicion and confusion in the population with respect to the Red Cross.⁴⁷⁰

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

437. To fulfil its task of disseminating IHL, the ICRC has delegates around the world teaching armed and security forces that “it is prohibited to make improper use (that is to mark other persons and objects than those entitled to) of . . . the distinctive signs and signals of [the] medical service”.⁴⁷¹

438. In 1978, the ICRC indicated to a Red Crescent Society the criteria governing the use of the distinctive emblems by quoting Articles 18 and 20 GC IV.⁴⁷²

439. In 1979, the ICRC sent a note to a State following a report by one of its delegates that all religious organisations were routinely using the distinctive emblem and that vehicles transporting soldiers and weapons displayed the emblem. It asked for measures to be taken to put an end to this situation.⁴⁷³ In connection with the same conflict, the ICRC recalled the basic rules concerning the use of the distinctive emblem. It stated that, as a protective sign, the

⁴⁶⁸ 23rd International Conference of the Red Cross, Bucharest, 15–21 October 1977, Res. XI.

⁴⁶⁹ CSCE, Helsinki Summit of Heads of State or Government, 9–10 July 1992, Helsinki Document 1992: The Challenges of Change, Decisions, Chapter VI: The Human Dimension, § 51.

⁴⁷⁰ IACiHR, Report on the situation of human rights in Nicaragua, Doc. OEA/Ser.L/V/II.45 Doc. 16 rev. 1, 17 November 1979, pp. 43 and 77.

⁴⁷¹ Frédéric de Mulinen, *Handbook on the Law of War for Armed Forces*, ICRC, Geneva, 1987, § 407(a).

⁴⁷² ICRC archive document. ⁴⁷³ ICRC archive document.

red cross could only be displayed by military medical personnel and units, by civilian medical personnel and units provided they were recognised and authorised by the proper authority, and by ICRC delegates, vehicles and buildings. Any other use was forbidden.⁴⁷⁴

440. In 1979, the Secretary-General of a National Red Cross Society told the ICRC that the killing of two doctors had convinced the other doctors working in governmental hospitals that the only way to be efficiently protected was to display large red crosses on their vehicles. The Secretary-General added that to put an end to the practice would jeopardise medical activities. The ICRC agreed to tolerate the practice until a normal situation was re-established, and as long as it remained within the bounds of medical activities.⁴⁷⁵

441. In 1981, the ICRC raised the issue of improper use of the emblem in a meeting with the Health Ministry of a State. Vehicles displaying the emblem were allegedly used to transport soldiers and weapons. The Minister replied that the matter would be raised before the Cabinet.⁴⁷⁶

442. In 1985, in the context of a non-international armed conflict, an incident involving a plane from Aviation sans Frontières displaying the emblem was reported. The ICRC made representations to the organisation's head office.⁴⁷⁷

443. In 1987, in response to press reports of the use of a helicopter displaying the distinctive emblem by the *contras* in Nicaragua to transport military equipment, the ICRC issued a communiqué recalling that:

The red cross emblem must be used in conflicts by medical services of armed forces exclusively to protect the wounded and sick and those caring for them. Any other use of the emblem not only violates the rules in force, but above all can result in the wounded and sick being deprived of the humanitarian aid they are entitled to.⁴⁷⁸

444. In a press release in 1991, the ICRC urged the parties to the conflict in Yugoslavia to comply with the rules relative to the use of the red cross and red crescent emblems and to repress any misuse.⁴⁷⁹

445. In 1991, the ICRC reminded the parties to a conflict that "in times of armed conflict, only duly authorised military medical services, transports and civilian hospitals and their personnel have the right to use the protective emblem". It also held that the National Societies could display the emblems to identify their activities conducted in accordance with the fundamental principles of the Red Cross and Red Crescent Movement and that Red Cross international organisations, such as the ICRC, could display the emblem at all times for all their activities. Furthermore, the ICRC emphasised that "any unauthorised use of the red cross is a violation of international humanitarian law".⁴⁸⁰

⁴⁷⁴ ICRC archive document.

⁴⁷⁵ ICRC archive document.

⁴⁷⁶ ICRC archive document.

⁴⁷⁷ ICRC archive document.

⁴⁷⁸ ICRC, Communication to the Press No. 87/19/MMR, Use of the Red Cross Emblem, 17 June 1987.

⁴⁷⁹ ICRC, Press Release No. 1673, ICRC appeals for respect for international humanitarian law in Yugoslavia, 2 July 1991.

⁴⁸⁰ ICRC archive document.

446. In 1991, the Croatian Red Cross denounced the transport of military personnel and weapons by the YPA in vehicles and helicopters marked with the distinctive emblem.⁴⁸¹

447. At its Budapest Session in 1991, the Council of Delegates adopted a resolution on the use of the emblem by National Societies in which it invited "National Societies to assist their governments in meeting their obligations under the Geneva Conventions with regard to the emblem, in particular to prevent its misuse".⁴⁸²

448. In a press release issued in 1992 in the context of the conflict in Bosnia and Herzegovina, the ICRC reminded all parties to the conflict that "the abuse of the emblem is a breach of International Humanitarian Law".⁴⁸³

449. In 1992, the ICRC notified the Ministry of Defence of a State that its armed forces had taken vehicles displaying the emblem to transport armed troops. The ICRC emphasised that such acts jeopardised the appearance of neutrality of the ICRC and made those vehicles military objects.⁴⁸⁴

450. In a communication to the press in 1993, the ICRC enjoined the parties to the conflict in Somalia not to abuse the red cross or red crescent emblem.⁴⁸⁵

451. In 1993, the ICRC notified the Ministry of Defence of a State of the use of the red cross emblem slightly modified by an armed opposition group in a campaign against cholera. It added that it was trying to persuade very urgently officials of the armed opposition group to stop using the emblem.⁴⁸⁶

452. In 1994, in a Memorandum on Respect for International Humanitarian Law in Angola, the ICRC stated that "all improper use of the red cross emblem is prohibited and must be punished".⁴⁸⁷

453. In 1994, in a Memorandum on Compliance with International Humanitarian Law by the Forces Participating in Opération Turquoise in the Great Lakes region, the ICRC stated that "any abuse of the emblem of the Red Cross is prohibited and shall be punished".⁴⁸⁸

454. In 1996, in a meeting with an armed opposition group, the ICRC highlighted the improper use of the emblem, whereby ambulances displaying the emblem were used by armed officials of the said group. The ICRC delegation

⁴⁸¹ Croatian Red Cross, Appeal, 16 September 1991.

⁴⁸² International Red Cross and Red Crescent Movement, Council of Delegates, Budapest Session, 28–30 November 1991, Res. 5, § 4.

⁴⁸³ ICRC, Press Release, ICRC denies allegations, ICRC Belgrade, 22 May 1992.

⁴⁸⁴ ICRC archive document.

⁴⁸⁵ ICRC, Communication to the Press No. 93/17, Somalia: ICRC appeals for compliance with international humanitarian law, 17 June 1993.

⁴⁸⁶ ICRC archive document.

⁴⁸⁷ ICRC, Memorandum on Respect for International Humanitarian Law in Angola, 8 June 1994, § III, *IRRC*, No. 320, 1997, p. 504.

⁴⁸⁸ ICRC, Memorandum on Compliance with International Humanitarian Law by the Forces Participating in Opération Turquoise, 23 June 1994, § III, reprinted in Marco Sassòli and Antoine A. Bouvier, *How Does Law Protect in War?*, ICRC, Geneva, 1999, p. 1309.

asked them to cover the emblems if they were not willing to give the vehicles back. They promised to do so.⁴⁸⁹

455. In 1996, following allegations that a Red Cross ambulance had transported tear gas grenades, the Colombian Red Cross denied that it owned the vehicle and recalled that the use of Red Cross vehicles to transport arms or armed troops was forbidden.⁴⁹⁰

456. The 1996 ICRC Model Law concerning the Use and Protection of the Emblem of the Red Cross or Red Crescent provides that:

Anyone who, wilfully and without entitlement, has made use of the emblem of the red cross or red crescent, the words "Red Cross" or "Red Crescent", a distinctive signal or any other sign, designation or signal which constitutes an imitation thereof or which might lead to confusion, irrespective of the aim of such use;

anyone who, in particular, has displayed the said emblem or words on signs, posters, announcements, leaflets or commercial documents, or has affixed them to goods or packaging, or has sold, offered for sale or placed in circulation goods thus marked;

shall be punished by imprisonment for a period of . . . (days or months) and/or by payment of a fine of . . . (amount in local currency).

If the offence is committed in the management of a corporate body (commercial firm, association, etc.), the punishment shall apply to the persons who committed the offence or ordered the offence to be committed.⁴⁹¹

457. In a working paper on war crimes submitted in 1997 to the Preparatory Committee for the Establishment of an International Criminal Court, the ICRC included the "improper use of . . . the distinctive emblems of the Geneva Conventions", when committed in an international armed conflict, in its list of war crimes to be subject to the jurisdiction of the Court.⁴⁹²

458. In 1997, the ICRC expressed concern about misuse of the distinctive emblem following an incident in which SFOR soldiers used a package marked with the red cross to gain entry to a hospital to arrest a person indicted by the ICTY.⁴⁹³ The ICRC stated that it objected "to any organisation using the Red Cross in a manner which jeopardizes the neutrality and independence of the Red Cross movement".⁴⁹⁴ After SFOR admitted the use of the emblem, the ICRC reiterated its concerns and urged SFOR to "ensure all necessary measures to prevent any further such misrepresentation from occurring".⁴⁹⁵

459. On the basis of a letter from the British Red Cross, the Report on UK Practice notes that, since 1988, four cases have been initiated in the UK

⁴⁸⁹ ICRC archive document.

⁴⁹⁰ Colombian Red Cross, Press Release, 24 August 1996.

⁴⁹¹ ICRC, Model Law concerning the Use and Protection of the Emblem of the Red Cross or Red Crescent, Article 10, *IRRC*, No. 313, 1996, p. 492.

⁴⁹² ICRC, Working paper on war crimes submitted to the Preparatory Committee for the Establishment of an International Criminal Court, New York, 14 February 1997, § 2(x).

⁴⁹³ *The Independent*, Press clippings on the arrest of persons accused of war crimes, London, 11 July 1997.

⁴⁹⁴ ICRC, Information to the Press, ICRC Sarajevo, 11 July 1997.

⁴⁹⁵ ICRC, Information to the Press, ICRC Sarajevo, 12 July 1997.

“regarding the use of designs resembling the red cross emblem” and stresses that “unauthorised use of such emblems is prohibited at all times within UK territory, regardless of the nature of a particular conflict”.⁴⁹⁶

460. In a communication to the press issued in 2000 in connection with the hostilities in the Near East, the ICRC emphasised that “any misuse of the emblems protecting the medical services is a violation of international humanitarian law and puts the personnel working under those emblems at risk”. The ICRC called on all persons involved in violence “to refrain from misuse of the protective emblems and . . . on all the authorities concerned to prevent or repress such practices”.⁴⁹⁷

VI. Other Practice

461. In 1982, in a meeting with the ICRC, an armed opposition group denounced abuses of the red cross emblem by governmental forces.⁴⁹⁸

462. In 1983, during a conversation with the ICRC, a representative of the army of a State emphasised that the operational units of the army had been informed to take pictures and fully document any abuse of the red cross emblem by an armed opposition group.⁴⁹⁹

463. In 1993, according to an ICRC note, an officer assigned to a peacekeeping operation, in a meeting with an ambassador, indicated that an armed opposition group used, *inter alia*, the red cross emblem to protect its vehicles. Up to that time, only the emblem of MSF had been improperly used.⁵⁰⁰

464. The Report on SPLM/A Practice notes that no instances have been found in which the SPLA has used the distinctive emblem improperly. It concluded that “without evidence to the contrary, the practice of the SPLM/A is that it does not engage in the improper use of the protective emblem”.⁵⁰¹

D. Improper Use of the United Nations Emblem or Uniform

Note: For practice concerning the simulation of protected status by using the United Nations emblem or uniform as an act considered perfidious, see *infra* section I of this chapter.

I. Treaties and Other Instruments

Treaties

465. Article 38(2) AP I provides that “it is prohibited to make use of the distinctive emblem of the United Nations, except as authorized by that Organization”. Article 38 AP I was adopted by consensus.⁵⁰²

⁴⁹⁶ Report on UK Practice, 1997, Letter from the British Red Cross, 8 October 1997, Chapter 2.5.

⁴⁹⁷ ICRC, Communication to the Press No. 00/42, Appeal to all involved in violence in the Near East, 21 November 2000.

⁴⁹⁸ ICRC archive document. ⁴⁹⁹ ICRC archive document. ⁵⁰⁰ ICRC archive document.

⁵⁰¹ Report on SPLM/A Practice, 1998, Chapter 2.5.

⁵⁰² CDDH, *Official Records*, Vol. VI, CDDH/SR.39, 25 May 1977, p. 103.

466. Committee III of the CDDH adopted by consensus Article 23(2) of draft AP II.⁵⁰³ The approved text provided that “it is forbidden to make use of the distinctive emblem of the United Nations, except as authorized by that organization”.⁵⁰⁴ Eventually, however, it was deleted by consensus in the plenary.⁵⁰⁵

467. Article 3 of the 1994 Convention on the Safety of UN Personnel provides that:

The military and police components of a United Nations operation and their vehicles, vessels and aircraft shall bear distinctive identification. Other personnel, vehicles, vessels and aircraft involved in the United Nations operation shall be appropriately identified unless otherwise decided by the Secretary-General of the United Nations.

468. Under Article 8(2)(b)(vii) of the 1998 ICC Statute, “making improper use...of the flag or the military insignia or uniforms...of the United Nations...resulting in death or serious personal injury” is a war crime in international armed conflicts.

Other Instruments

469. According to paragraph 6 of the 1952 UN Flag Code, “the flag may be used in military operations only upon express authorization to that effect by a competent organ of the United Nations”. Paragraph 11 provides that “any violation of this Flag Code may be punished in accordance with the law of the country in which such violation takes place”.

470. Paragraph 6 of the 1991 Memorandum of Understanding on the Application of IHL between Croatia and the SFRY requires that hostilities be conducted in accordance with Article 38 AP I.

471. Paragraph 2.5 of the 1992 Agreement on the Application of IHL between the Parties to the Conflict in Bosnia and Herzegovina requires that hostilities be conducted in accordance with Article 38 AP I.

472. The 2000 UNTAET Regulation No. 2000/15 establishes panels with exclusive jurisdiction over serious criminal offences, including war crimes. According to Section 6(1)(b)(vii), “making improper use...of the flag or the military insignia or uniforms...of the United Nations...resulting in death or serious personal injury” is a war crime in international armed conflicts.

II. National Practice

Military Manuals

473. Argentina’s Law of War Manual states that “it is prohibited...to make use of the emblem of the United Nations, unless authorised [to do so]”.⁵⁰⁶

⁵⁰³ CDDH, *Official Records*, Vol. XV, CDDH/III/SR.49, 4 June 1976, p. 109, § 8.

⁵⁰⁴ CDDH, *Official Records*, Vol. XV, CDDH/236/Rev.1, 21 April–11 June 1976, p. 421.

⁵⁰⁵ CDDH, *Official Records*, Vol. VII, CDDH/SR.52, 6 June 1977, p. 129.

⁵⁰⁶ Argentina, *Law of War Manual* (1989), § 1.06(2).

474. Australia's Commanders' Guide notes that "improper use... of the distinctive emblem of the United Nations is prohibited".⁵⁰⁷ It stresses that "the United Nations symbol... is strictly protected and must not be abused".⁵⁰⁸ The Guide also states that "the following are examples of grave breaches or serious war crimes likely to warrant institution of criminal proceedings:... misusing or abusing... any... protected emblem for the purpose of gaining protection to which the user would not otherwise be entitled".⁵⁰⁹

475. Australia's Defence Force Manual provides that "use of the distinctive emblem of the UN is prohibited except when authorised by the UN".⁵¹⁰ It also states that "the following are examples of grave breaches or serious war crimes likely to warrant institution of criminal proceedings:... misusing or abusing... any... protected emblem for the purpose of gaining protection to which the user would not otherwise be entitled".⁵¹¹

476. Belgium's Teaching Manual for Officers states that "it is prohibited to abuse the protective signs provided for by the [Geneva] Conventions and [AP I]... It is equally prohibited to make use of the sign of the UN except when authorised by this organisation."⁵¹²

477. Burkina Faso's Disciplinary Regulations provides that, under the laws and customs of war, it is prohibited "to use improperly... the distinctive insignia recognised by international conventions".⁵¹³

478. Cameroon's Disciplinary Regulations provides that, under the laws and customs of war, it is prohibited "to use improperly... the distinctive insignia recognised by international conventions".⁵¹⁴

479. Cameroon's Instructors' Manual states that "using fraudulently the emblems and uniforms... of the UN except in specified cases" is an unlawful deception.⁵¹⁵

480. Canada's LOAC Manual states that "it is prohibited... to make use of the distinctive emblem of the United Nations, except as authorized by the organization".⁵¹⁶

481. Colombia's Instructors' Manual states that it is a punishable offence "to use improperly insignia, flags and emblems... of organisations accepted by humanitarian law".⁵¹⁷

⁵⁰⁷ Australia, *Commanders' Guide* (1994), § 903.

⁵⁰⁸ Australia, *Commanders' Guide* (1994), § 513.

⁵⁰⁹ Australia, *Commanders' Guide* (1994), § 1305(1).

⁵¹⁰ Australia, *Defence Force Manual* (1994), § 704.

⁵¹¹ Australia, *Defence Force Manual* (1994), § 1315(1).

⁵¹² Belgium, *Teaching Manual for Officers* (1994), Part I, Title II, p. 34.

⁵¹³ Burkina Faso, *Disciplinary Regulations* (1994), Article 35(2).

⁵¹⁴ Cameroon, *Disciplinary Regulations* (1975), Article 32.

⁵¹⁵ Cameroon, *Instructors' Manual* (1992), p. 30, § 131.2 and p. 89, § 222.

⁵¹⁶ Canada, *LOAC Manual* (1999), p. 6-2, § 11(c), see also p. 8-10, § 79(d) (prohibition of warships and auxiliary vessels actively simulating the status of vessels protected by the United Nations flag).

⁵¹⁷ Colombia, *Instructors' Manual* (1999), p. 31.

- 482.** Congo's Disciplinary Regulations provides that, under the laws and customs of war, it is prohibited "to use improperly . . . the distinctive insignia recognised by international conventions".⁵¹⁸
- 483.** Ecuador's Naval Manual states that "the flag of the United Nations and the letters 'UN' may not be used in armed conflict for any purpose without the authorisation of the United Nations".⁵¹⁹
- 484.** France's Disciplinary Regulations as amended states that it is prohibited "to use improperly . . . the distinctive signs provided for in international conventions".⁵²⁰
- 485.** France's LOAC Manual prohibits the use of the flags, emblems or uniforms of the UN.⁵²¹
- 486.** Germany's Military Manual states that "it is prohibited to make improper use . . . of a special internationally acknowledged protective emblem".⁵²²
- 487.** Italy's IHL Manual states that it is prohibited "to use improperly . . . the emblem of the United Nations".⁵²³ It also states that grave breaches of international conventions and protocols, including "the improper . . . use of international protective signs", constitute war crimes.⁵²⁴
- 488.** Mali's Army Regulations provides that, under the laws and customs of war, it is prohibited "to use improperly . . . the distinctive insignia recognised by international conventions".⁵²⁵
- 489.** Morocco's Disciplinary Regulations provides that, under the laws and customs of war, it is prohibited "to use improperly . . . the distinctive insignia recognised by international conventions".⁵²⁶
- 490.** The Military Manual of the Netherlands provides that it is "prohibited to misuse . . . the emblem of the United Nations".⁵²⁷ It further states that "the misuse of . . . recognised protective signs (UN for example)" is a grave breach of AP I.⁵²⁸
- 491.** New Zealand's Military Manual provides that "improper use of protective symbols including that of the United Nations is prohibited".⁵²⁹
- 492.** Under Russia's Military Manual, improper use of international signals and flags is a prohibited method of warfare.⁵³⁰
- 493.** Senegal's Disciplinary Regulations provides that, under the laws and customs of war, it is prohibited "to use improperly . . . the distinctive insignia recognised by international conventions".⁵³¹

⁵¹⁸ Congo, *Disciplinary Regulations* (1986), Article 32(2).

⁵¹⁹ Ecuador, *Naval Manual* (1989), § 12.4.

⁵²⁰ France, *Disciplinary Regulations as amended* (1975), Article 9 bis (2).

⁵²¹ France, *LOAC Manual* (2001), p. 47. ⁵²² Germany, *Military Manual* (1992), § 473.

⁵²³ Italy, *IHL Manual* (1991), Vol. I, § 9(2). ⁵²⁴ Italy, *IHL Manual* (1991), Vol. I, § 85.

⁵²⁵ Mali, *Army Regulations* (1979), Article 36.

⁵²⁶ Morocco, *Disciplinary Regulations* (1974), Article 25(2).

⁵²⁷ Netherlands, *Military Manual* (1993), p. IV-3.

⁵²⁸ Netherlands, *Military Manual* (1993), p. IX-5.

⁵²⁹ New Zealand, *Military Manual* (1992), § 502(7), see also § 713(3) (prohibition of the use of flags or markings of the UN as part of a ruse of war in naval warfare).

⁵³⁰ Russia, *Military Manual* (1990), § 5(c).

⁵³¹ Senegal, *Disciplinary Regulations* (1990), Article 34(2).

494. Spain's LOAC Manual provides that it is prohibited "to use the distinctive emblem of the UN, except in cases where this Organisation authorises it".⁵³² It further states that it is forbidden "to make improper use of the emblems of the United Nations".⁵³³

495. Sweden's IHL Manual considers that the "prohibition of improper use of recognized emblems", as contained in Article 38 AP I, is part of customary international law.⁵³⁴

496. The US Air Force Pamphlet provides that it is "forbidden to make improper use of . . . the distinctive sign of the United Nations".⁵³⁵ It further insists that "prohibitions concerning improper use of its [the UN] distinctive signs, emblems and signals should be observed".⁵³⁶

497. The US Naval Handbook states that "the flag of the United Nations and the letters 'UN' may not be used in armed conflict for any purpose without the authorization of the United Nations".⁵³⁷

498. The YPA Military Manual of the SFRY (FRY) provides that "it is forbidden to use, during combat, in order to mislead the enemy, . . . internationally recognised emblems", *inter alia*, the UN emblem.⁵³⁸

National Legislation

499. Algeria's Code of Military Justice punishes:

any individual, whether military or not, who, in time of war, in an area of operations . . . in violation of the laws and customs of war, improperly uses the distinctive signs and emblems defined by international conventions for the respect of persons, objects and places protected by these conventions.⁵³⁹

500. Argentina's Draft Code of Military Justice punishes any soldier who "uses improperly . . . the flag, uniform, insignia or distinctive emblem . . . of the United Nations".⁵⁴⁰

501. Under Armenia's Penal Code, "the use during military actions of . . . the flags of international organisations . . . in breach of international treaties and international law" constitutes a crime against the peace and security of mankind.⁵⁴¹

502. Australia's Geneva Conventions Act as amended provides that:

A person shall not, without the consent in writing of the Minister or of a person authorized in writing by the Minister to give consents . . . use for any purpose whatsoever any of the following: . . .

⁵³² Spain, *LOAC Manual* (1996), Vol. I, § 5.3.c, see also § 3.3.c.(2).

⁵³³ Spain, *LOAC Manual* (1996), Vol. I, § 7.3.c.

⁵³⁴ Sweden, *IHL Manual* (1991), Section 2.2.3, p. 19.

⁵³⁵ US, *Air Force Pamphlet* (1976), § 8-3(c).

⁵³⁶ US, *Air Force Pamphlet* (1976), § 8-6(b). ⁵³⁷ US, *Naval Handbook* (1995), § 12.4.

⁵³⁸ SFRY (FRY), *YPA Military Manual* (1988), § 105(3).

⁵³⁹ Algeria, *Code of Military Justice* (1971), Article 299.

⁵⁴⁰ Argentina, *Draft Code of Military Justice* (1998), Article 292, introducing a new Article 876(6) in the *Code of Military Justice as amended* (1951).

⁵⁴¹ Armenia, *Penal Code* (2003), Article 397.

such... emblems, identity cards, signs, signals, insignia or uniforms as are prescribed for the purpose of giving effect to [AP I].⁵⁴²

503. Australia's ICC (Consequential Amendments) Act incorporates in the Criminal Code the war crimes defined in the 1998 ICC Statute, including "improper use of a flag, insignia or uniform of the United Nations" in international armed conflicts.⁵⁴³

504. Azerbaijan's Criminal Code provides that "the misuse of... the flag, sign or clothes of the United Nations, ... which as a result caused death or serious injury to body of a victim", constitutes a war crime in international and non-international armed conflicts.⁵⁴⁴

505. The Criminal Code of Belarus provides that it is a war crime to "use intentionally, during hostilities, in violation of international treaties, ... the flag or sign of an international organisation".⁵⁴⁵

506. Under the Criminal Code of the Federation of Bosnia and Herzegovina, "whoever misuses or carries without authorisation the flag or emblem of the Organisation of the United Nations" commits a war crime.⁵⁴⁶ The Criminal Code of the Republika Srpska contains the same provision.⁵⁴⁷

507. Burkina Faso's Code of Military Justice punishes the improper use, in violation of the laws and customs of war, of the distinctive insignia and emblems for the protection of persons, objects and locations as defined in international conventions, in time of war and in an area of military operations.⁵⁴⁸

508. Under Burundi's Draft Law on Genocide, Crimes against Humanity and War Crimes, "using improperly... the flag or military insignia and uniform... of the United Nations Organisation" constitutes a war crime in international armed conflicts.⁵⁴⁹

509. Canada's Crimes against Humanity and War Crimes Act provides that the war crimes defined in Article 8(2) of the 1998 ICC Statute are "crimes according to customary international law" and, as such, indictable offences under the Act.⁵⁵⁰

510. The DRC Code of Military Justice as amended punishes "any individual, whether military or not, who, in time of war... improperly uses the distinctive signs and emblems defined by international conventions to ensure respect for the persons, objects and places protected under these conventions".⁵⁵¹

⁵⁴² Australia, *Geneva Conventions Act as amended* (1957), Section 15(1)(f).

⁵⁴³ Australia, *ICC (Consequential Amendments) Act* (2002), Schedule 1, § 268.43.

⁵⁴⁴ Azerbaijan, *Criminal Code* (1999), Article 119(2).

⁵⁴⁵ Belarus, *Criminal Code* (1999), Article 138.

⁵⁴⁶ Bosnia and Herzegovina, Federation, *Criminal Code* (1998), Article 166(1).

⁵⁴⁷ Bosnia and Herzegovina, Republika Srpska, *Criminal Code* (2000), Article 445(1).

⁵⁴⁸ Burkina Faso, *Code of Military Justice* (1994), Article 205.

⁵⁴⁹ Burundi, *Draft Law on Genocide, Crimes against Humanity and War Crimes* (2001), Article 4(B)(g).

⁵⁵⁰ Canada, *Crimes against Humanity and War Crimes Act* (2000), Section 4(1) and (4).

⁵⁵¹ DRC, *Code of Military Justice as amended* (1972), Article 455.

511. Congo's Genocide, War Crimes and Crimes against Humanity Act defines war crimes with reference to the categories of crimes defined in Article 8 of the 1998 ICC Statute.⁵⁵²

512. Côte d'Ivoire's Penal Code as amended punishes "any individual who, in an area of military operations, uses, in violation of the laws and customs of war, the distinctive insignia and emblems, defined by international conventions, to ensure respect for protected persons, objects and places".⁵⁵³

513. Under Croatia's Criminal Code, "whoever misuses or carries without authorisation the flag or emblem of the United Nations" commits a war crime.⁵⁵⁴

514. The Czech Republic's Criminal Code as amended punishes any "person who, in time of war, misuses the flag of the United Nations Organisation".⁵⁵⁵

515. Denmark's Penal Code punishes "anyone who uses unlawfully, and wilfully or negligently... the distinctive signs and names of international organisations".⁵⁵⁶

516. France's Code of Military Justice punishes:

any individual, military or not, who, in time of war, in the area of operations of a force or unit, in violation of the laws and customs of war, uses improperly the distinctive signs and emblems defined by international conventions to ensure respect for persons, objects and places protected by those conventions.⁵⁵⁷

517. Under Georgia's Criminal Code, any war crime provided for by the 1998 ICC Statute, which is not explicitly mentioned in the Code, such as "making improper use... of the flag or of the military insignia and uniform... of the United Nations, ... resulting in death or serious personal injury" in international armed conflicts, is a crime.⁵⁵⁸

518. Germany's Law Introducing the International Crimes Code punishes anyone who, in connection with an international or non-international armed conflict, "makes improper use... of the flag... or of the uniform... of the United Nations, thereby causing a person's death or serious injury".⁵⁵⁹

519. Guinea's Criminal Code punishes "anyone [who], in an area of military operations and in violation of the laws and customs of war, uses distinctive insignia and emblems defined in international conventions to ensure respect for protected persons, objects and places".⁵⁶⁰

520. Under Ireland's Geneva Conventions Act as amended, any "minor breach" of AP I, including violations of Article 38(2) AP I, is a punishable offence.⁵⁶¹

⁵⁵² Congo, *Genocide, War Crimes and Crimes against Humanity Act* (1998), Article 4.

⁵⁵³ Côte d'Ivoire, *Penal Code as amended* (1981), Article 473.

⁵⁵⁴ Croatia, *Criminal Code* (1997), Article 168(1).

⁵⁵⁵ Czech Republic, *Criminal Code as amended* (1961), Article 265(2).

⁵⁵⁶ Denmark, *Penal Code* (1978), Article 132.

⁵⁵⁷ France, *Code of Military Justice* (1982), Article 439.

⁵⁵⁸ Georgia, *Criminal Code* (1999), Article 413(d).

⁵⁵⁹ Germany, *Law Introducing the International Crimes Code* (2002), Article 1, § 10(2).

⁵⁶⁰ Guinea, *Criminal Code* (1998), Article 579.

⁵⁶¹ Ireland, *Geneva Conventions Act as amended* (1962), Section 4(1) and (4).

521. Italy's Wartime Military Penal Code punishes anyone who "uses improperly . . . the international distinctive signs of protection".⁵⁶²

522. Under Lithuania's Criminal Code as amended, "unlawful use of . . . the emblem of the United Nations, . . . in time of war, or during an international armed conflict" is a war crime.⁵⁶³

523. Mali's Code of Military Justice punishes:

any individual . . . who, in time of war, in the area of operations of a military force and in violation of the laws and customs of war, improperly uses the distinctive signs and emblems defined in international conventions to ensure respect for persons, objects and places protected by these conventions.⁵⁶⁴

524. Under Mali's Penal Code, "using . . . the flag or military insignia or uniform . . . of the United Nations Organisation . . . and, thereby, causing loss of human lives or serious injuries" is a war crime in international armed conflicts.⁵⁶⁵

525. Under the International Crimes Act of the Netherlands, "making improper use . . . of the flag or of the military insignia and uniform . . . of the United Nations, . . . resulting in death or serious personal injury", is a crime, when committed in an international armed conflict.⁵⁶⁶

526. Under New Zealand's International Crimes and ICC Act, war crimes include the crimes defined in Article 8(2)(b)(vii) of the 1998 ICC Statute.⁵⁶⁷

527. Norway's Penal Code provides that it is a punishable offence to use:

without authority publicly or for an unlawful purpose . . . any designation recognized or commonly used in Norway or abroad of an international organisation or any insignia or seal used by an international organisation if Norway is a member of the said organisation or has by international agreement undertaken to give protection against such use.⁵⁶⁸

528. Under Norway's Military Penal Code as amended, "anyone who contravenes or is accessory to the contravention of provisions relating to the protection of persons or property laid down in . . . the two additional protocols to [the Geneva] Conventions . . . is liable to imprisonment".⁵⁶⁹

529. Poland's Penal Code punishes "any person who, during hostilities, uses . . . flags . . . of an international organisation . . . in violation of international law".⁵⁷⁰

530. Slovakia's Criminal Code as amended punishes any "person who, in time of war, misuses the flag of the United Nations Organisation".⁵⁷¹

⁵⁶² Italy, *Wartime Military Penal Code* (1941), Article 180(3).

⁵⁶³ Lithuania, *Criminal Code as amended* (1961), Article 344.

⁵⁶⁴ Mali, *Code of Military Justice* (1995), Article 145.

⁵⁶⁵ Mali, *Penal Code* (2001), Article 31(i)(7).

⁵⁶⁶ Netherlands, *International Crimes Act* (2003), Article 5(3)(f).

⁵⁶⁷ New Zealand, *International Crimes and ICC Act* (2000), Section 11(2).

⁵⁶⁸ Norway, *Penal Code* (1902), § 328(4)(b).

⁵⁶⁹ Norway, *Military Penal Code as amended* (1902), § 108(b).

⁵⁷⁰ Poland, *Penal Code* (1997), Article 126(2).

⁵⁷¹ Slovakia, *Criminal Code as amended* (1961), Article 265(2).

531. Under Slovenia's Penal Code, "whoever abuses or carries without authorisation the flag or emblem of the United Nations Organisation" commits a war crime.⁵⁷²

532. Spain's Penal Code punishes "anyone who, during an armed conflict... uses improperly... the flag, uniform, insignia or distinctive emblem... of the United Nations".⁵⁷³

533. Under Sweden's Penal Code as amended, "misuse of the insignia of the United Nations" constitutes a crime against international law.⁵⁷⁴

534. Switzerland's Law on the Protection of the UN Names and Emblems provides that:

1. It is prohibited, except as authorised by the Secretary-General of the Organisation of the United Nations, to use the following signs, belonging to the said organisation
 - ...
 - a. The name of the organisation (in every language);
 - b. Its acronyms (in official Swiss languages and in English);
 - c. Its arms, flags and other emblems.
2. The prohibition applies similarly to imitations of the signs referred to in paragraph (1).
- ...

Anyone who, intentionally and in violation of the provisions of the present law, has made use of the names, acronyms, arms, flags and other emblems of intergovernmental organisations referred to in article 1... or of any other signs constituting imitation thereof, ... [commits a punishable offence].⁵⁷⁵

535. Under Trinidad and Tobago's Draft ICC Act, it is a punishable offence to commit a war crime as defined in Article 8(2)(b)(vii) of the 1998 ICC Statute.⁵⁷⁶

536. Under the UK ICC Act, it is a punishable offence to commit a war crime as defined in Article 8(2)(b)(vii) of the 1998 ICC Statute.⁵⁷⁷

537. Under the Penal Code as amended of the SFRY (FRY), "those who misuse or carry without permission the flag or emblem of the United Nations Organisation" commit a war crime.⁵⁷⁸ The Commentary on the Code specifies that "the misuse of international emblems is committed, as a rule, during a war or an armed conflict... The aggravated form of this criminal act... exists when the misuse or unauthorised use of international emblems is committed in the war operations zone."⁵⁷⁹

⁵⁷² Slovenia, *Penal Code* (1994), Article 386(1).

⁵⁷³ Spain, *Penal Code* (1995), Article 612(5).

⁵⁷⁴ Sweden, *Penal Code as amended* (1962), Chapter 22, § 6(2).

⁵⁷⁵ Switzerland, *Law on the Protection of the UN Names and Emblems* (1961), Articles 1 and 7(1).

⁵⁷⁶ Trinidad and Tobago, *Draft ICC Act* (1999), Section 5(1)(a).

⁵⁷⁷ UK, *ICC Act* (2001), Sections 50(1) and 51(1) (England and Wales) and Section 58(1) (Northern Ireland).

⁵⁷⁸ SFRY (FRY), *Penal Code as amended* (1976), Article 153(1).

⁵⁷⁹ SFRY (FRY), *Penal Code as amended* (1976), Commentary on Article 153.

National Case-law

538. No practice was found.

Other National Practice

539. According to the Report on the Practice of Indonesia, although it is not specifically mentioned in Indonesia's Military Manual, senior officers of the Indonesian armed forces consider that the use of UN peacekeeping uniforms would come within the prohibition of the use of uniforms of neutral States or other States not parties to the conflict.⁵⁸⁰

540. A training video on IHL produced by the UK Ministry of Defence illustrates the rule that the false use of emblems is forbidden.⁵⁸¹

541. In 1987, the Deputy Legal Adviser of the US Department of State affirmed that "we support the principle... that internationally recognized protective emblems... not be improperly used".⁵⁸²

*III. Practice of International Organisations and Conferences**United Nations*

542. In a resolution adopted in 1946 on the official seal and emblem of the UN, the UN General Assembly provided that member States:

should take such legislative or other appropriate measures as are necessary to prevent the use, without authorization by the Secretary-General of the United Nations, and in particular for commercial purposes by means of trade marks or commercial labels, of the emblem... of the United Nations.⁵⁸³

543. In 1995, in a report concerning the former Yugoslavia, the UN Secretary-General reported, on the basis of information gathered by UNPROFOR, the alleged use of UN uniforms by Bosnian Serbs.⁵⁸⁴

544. In 1995, in a report on the situation of human rights in the territory of the former Yugoslavia, the Special Rapporteur of the UN Commission on Human Rights reported the use of UNPROFOR uniforms by Bosnian Serb soldiers at the fall of Srebrenica. They had allegedly pretended to be local UNPROFOR staff

⁵⁸⁰ Report on the Practice of Indonesia, 1997, Interviews with senior officers of the armed forces, Chapter 2.6, referring to *Military Manual* (1982), § 104.

⁵⁸¹ UK, Ministry of Defence, Training Video: The Geneva Conventions, 1986, Report on UK Practice, 1997, Chapter 2.4.

⁵⁸² US, Remarks of Michael J. Matheson, Deputy Legal Adviser, US Department of State, The Sixth Annual American Red Cross-Washington College of Law Conference on International Humanitarian Law: A Workshop on Customary International Law and the 1977 Protocols Additional to the 1949 Geneva Conventions, *American University Journal of International Law and Policy*, Vol. 2, 1987, p. 425.

⁵⁸³ UN General Assembly, Res. 92 (I), 7 December 1946, § (a).

⁵⁸⁴ UN Secretary-General, Report submitted pursuant to Security Council Resolution 1010 (1995), UN Doc. S/1995/755, 30 August 1995, § 11.

and urged people fleeing from Srebrenica to go to particular locations, possibly into traps.⁵⁸⁵

Other International Organisations

545. No practice was found.

International Conferences

546. In 1992, at the Helsinki Summit of Heads of State or Government, CSCE participating States reaffirmed their commitment to prevent the misuse of the UN emblem.⁵⁸⁶

IV. Practice of International Judicial and Quasi-judicial Bodies

547. No practice was found.

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

548. To fulfil its task of disseminating IHL, the ICRC has delegates around the world teaching armed and security forces that “it is prohibited to use the distinctive emblem of the United Nations, except as authorized by that Organization”.⁵⁸⁷

VI. Other Practice

549. In 1993, according to an ICRC note, an officer assigned to a peacekeeping operation, in a meeting with an ambassador, indicated that an armed opposition group used, *inter alia*, the UN emblem to protect its vehicles. Up to that time, only the emblem of MSF had been improperly used.⁵⁸⁸

E. Improper Use of Other Internationally Recognised Emblems

Note: For practice concerning the simulation of protected status by using other internationally recognised emblems as an act considered perfidious, see *infra* section I of this chapter.

⁵⁸⁵ UN Commission on Human Rights, Special Rapporteur on the Situation of Human Rights in the Former Yugoslavia, Final periodic report, UN Doc. E/CN.4/1996/9, 22 August 1995, § 35.

⁵⁸⁶ CSCE, Helsinki Summit of Heads of State or Government, 9–10 July 1992, Helsinki Document 1992: The Challenges of Change, Decisions, Chapter VI: The Human Dimension, § 51.

⁵⁸⁷ Frédéric de Mulinen, *Handbook on the Law of War for Armed Forces*, ICRC, Geneva, 1987, § 406.

⁵⁸⁸ ICRC archive document.

*I. Treaties and Other Instruments**Treaties*

550. Article 17 of the 1954 Hague Convention provides that:

1. The distinctive emblem repeated three times may be used only as a means of identification of:
 - (a) immovable cultural property under special protection;
 - (b) the transport of cultural property under the conditions provided for in Articles 12 and 13;
 - (c) improvised refuges, under the conditions provided for in the Regulations for the execution of the Convention.
2. The distinctive emblem may be used alone only as a means of identification of:
 - (a) cultural property not under special protection;
 - (b) the persons responsible for the duties of control in accordance with the Regulations for the execution of the Convention;
 - (c) the personnel engaged in the protection of cultural property;
 - (d) the identity cards mentioned in the Regulations for the execution of the Convention.
3. During an armed conflict, the use of the distinctive emblem in any other cases than those mentioned in the preceding paragraphs of the present Article, and the use for any purpose whatever of a sign resembling the distinctive emblem, shall be forbidden.

551. Under Article 38(1) AP I, "it is... prohibited to misuse deliberately in an armed conflict... internationally recognized protective emblems, signs or signals, including... the protective emblem of cultural property". Article 38 AP I was adopted by consensus.⁵⁸⁹

552. Article 66(8) AP I provides that "the High Contracting Parties and the Parties to the conflict shall take the measures necessary to supervise the display of the international distinctive sign of civil defence and to prevent and repress any misuse thereof". Article 66 AP I was adopted by consensus.⁵⁹⁰

553. Upon ratification of AP I, Canada stated that:

In situations where the Medical Service of the armed forces of a party to an armed conflict is identified by another emblem than the emblems referred to in Article 38 of the First Geneva Convention of August 12, 1949, ... when notified, ... misuse of such an emblem should be considered as misuse of emblems referred to in Article 38 of the First Geneva Convention and Protocol I.⁵⁹¹

554. Article 23 of draft AP II submitted by the ICRC to the CDDH provided that "it is forbidden to make use... of the protective emblem of cultural property for purposes other than those provided for in the Convention establishing [this] sign".⁵⁹² This proposal was amended and adopted by consensus in Committee

⁵⁸⁹ CDDH, *Official Records*, Vol. VI, CDDH/SR.39, 25 May 1977, p. 103.

⁵⁹⁰ CDDH, *Official Records*, Vol. VI, CDDH/SR.43, 27 May 1977, p. 243.

⁵⁹¹ Canada, Reservations and statements of understanding made upon ratification of AP I, 20 November 1990, § 4.

⁵⁹² CDDH, *Official Records*, Vol. I, Part Three, Draft Additional Protocols, June 1973, p. 39.

III of the CDDH.⁵⁹³ The approved text provided that it was “forbidden to misuse deliberately in armed conflict other internationally recognized protective emblems...including...whenever applicable, the protective emblem of cultural property”.⁵⁹⁴ Eventually, however, it was deleted by consensus in the plenary.⁵⁹⁵

Other Instruments

555. No practice was found.

II. National Practice

Military Manuals

556. Argentina’s Law of War Manual prohibits the deliberate abuse of internationally recognised protective emblems, including the emblem of cultural property.⁵⁹⁶

557. Australia’s Commanders’ Guide provides that “the following examples constitute grave breaches or serious war crimes likely to warrant institution of criminal proceedings:...misusing or abusing...any...protected emblem for the purpose of gaining protection to which the user would not otherwise be entitled”.⁵⁹⁷

558. Australia’s Defence Force Manual prohibits the “deliberate misuse of...protective symbols and emblems...including the protective emblem of cultural property”.⁵⁹⁸ It also provides that “the following examples constitute grave breaches or serious war crimes likely to warrant institution of criminal proceedings:...misusing or abusing...any...protected emblem for the purpose of gaining protection to which the user would not otherwise be entitled”.⁵⁹⁹

559. Belgium’s Teaching Manual for Officers stipulates that “it is prohibited to abuse the protective signs provided for by the [Geneva] Conventions and [AP I]. Example: camouflaging arms and ammunition in a vehicle or a building displaying the protective sign...of cultural property [or] of civil defence”.⁶⁰⁰

560. Burkina Faso’s Disciplinary Regulations provides that, under the laws and customs of war, it is prohibited “to use improperly...the distinctive insignia recognised by international conventions”.⁶⁰¹

⁵⁹³ CDDH, *Official Records*, Vol. XV, CDDH/III/SR.49, 4 June 1976, p. 109, § 8.

⁵⁹⁴ CDDH, *Official Records*, Vol. XV, CDDH/236/Rev.1, 21 April–11 June 1976, p. 421.

⁵⁹⁵ CDDH, *Official Records*, Vol. VII, CDDH/SR.52, 6 June 1977, p. 129.

⁵⁹⁶ Argentina, *Law of War Manual* (1989), § 1.06(1).

⁵⁹⁷ Australia, *Commanders’ Guide* (1994), § 1305(1).

⁵⁹⁸ Australia, *Defence Force Manual* (1994), § 704.

⁵⁹⁹ Australia, *Defence Force Manual* (1994), § 1315(1).

⁶⁰⁰ Belgium, *Teaching Manual for Officers* (1994), Part I, Title II, p. 33.

⁶⁰¹ Burkina Faso, *Disciplinary Regulations* (1994), Article 35(2).

561. Cameroon's Disciplinary Regulations provides that, under the laws and customs of war, it is prohibited "to use improperly . . . the distinctive insignia recognised by international conventions".⁶⁰²

562. Cameroon's Instructors' Manual states that improper use of distinctive signs and signals is an unlawful deception.⁶⁰³

563. Canada's LOAC Manual states that it is prohibited "to make improper use of the . . . emblems, signs or signals provided for by the *Geneva Conventions* or *Additional Protocols* [and] to deliberately misuse . . . internationally recognized protective emblems, signs or signals including . . . the protective emblem of cultural property".⁶⁰⁴

564. Colombia's Instructors' Manual states that it is a punishable offence "to use improperly insignia, flags and emblems . . . of organisations accepted by humanitarian law".⁶⁰⁵

565. Congo's Disciplinary Regulations provides that, under the laws and customs of war, it is prohibited "to use improperly . . . the distinctive insignia recognised by international conventions".⁶⁰⁶

566. Ecuador's Naval Manual states that "protective signs and symbols may be used only to identify personnel, objects, and activities entitled to protected status which they designate. Any other use is forbidden by international law."⁶⁰⁷

567. France's Disciplinary Regulations as amended states that it is prohibited "to use improperly . . . the distinctive signs provided for in international conventions".⁶⁰⁸

568. France's LOAC Manual prohibits the improper use of the symbols of civil defence, cultural property, works and installations containing dangerous forces and other recognised symbols.⁶⁰⁹

569. Germany's Military Manual states that "it is prohibited to make improper use . . . of special internationally acknowledged protective emblems".⁶¹⁰ It also states that "during an international armed conflict, the use of the distinctive emblem for any other purpose than that of the protection of cultural property is forbidden".⁶¹¹

570. Under Italy's IHL Manual, misuse of the distinctive signs of civil defence, cultural property and installations containing dangerous forces is prohibited.⁶¹² The manual also states that grave breaches of international conventions and

⁶⁰² Cameroon, *Disciplinary Regulations* (1975), Article 32.

⁶⁰³ Cameroon, *Instructors' Manual* (1992), p. 30, § 131.2 and p. 89, § 222.

⁶⁰⁴ Canada, *LOAC Manual* (1999), p. 6-2, § 11(a) and (b), see also p. 8-10, § 79(g) (prohibition of warships and auxiliary vessels actively simulating the status of vessels engaged in transporting cultural property under special protection).

⁶⁰⁵ Colombia, *Instructors' Manual* (1999), p. 31.

⁶⁰⁶ Congo, *Disciplinary Regulations* (1986), Article 32(2).

⁶⁰⁷ Ecuador, *Naval Manual* (1989), § 11.10.5.

⁶⁰⁸ France, *Disciplinary Regulations as amended* (1975), Article 9 bis (2).

⁶⁰⁹ France, *LOAC Manual* (2001), p. 47. ⁶¹⁰ Germany, *Military Manual* (1992), § 473.

⁶¹¹ Germany, *Military Manual* (1992), § 932. ⁶¹² Italy, *IHL Manual* (1991), Vol. I, § 9(2).

protocols, including “the improper . . . use of international protective signs”, are considered war crimes.⁶¹³

571. Lebanon’s Army Regulations prohibits the unlawful use of the distinctive signs provided for in international agreements.⁶¹⁴

572. Mali’s Army Regulations provides that, under the laws and customs of war, it is prohibited “to use improperly . . . the distinctive insignia recognised by international conventions”.⁶¹⁵

573. Morocco’s Disciplinary Regulations provides that, under the laws and customs of war, it is prohibited “to use improperly . . . the distinctive insignia recognised by international conventions”.⁶¹⁶

574. The Military Manual of the Netherlands provides that:

It is . . . forbidden to make improper use of . . . emblems and signals which are mentioned in treaties on the law of war. This concerns, *inter alia*, the signs for civil defence and cultural property. The signals are light signals and electronic communication and identification as regulated in Annex I to Additional Protocol I.⁶¹⁷

The manual further states that “the misuse of . . . recognised protective signs” is a grave breach of AP I.⁶¹⁸

575. New Zealand’s Military Manual provides that “improper use of protective symbols . . . is prohibited”. In its list of protective symbols, the manual includes: symbols for civil defence, cultural property, installations containing dangerous forces, demilitarised zones and non-defended localities, internment camps, hospitals and safety zones and prisoner-of-war camps.⁶¹⁹

576. Russia’s Military Manual regards the improper use of international signals and flags as a prohibited method of warfare.⁶²⁰

577. Senegal’s Disciplinary Regulations provides that, under the laws and customs of war, it is prohibited “to use improperly . . . the distinctive insignia recognised by international conventions”.⁶²¹

578. Spain’s LOAC Manual provides that the emblems for civil defence, cultural property and installations containing dangerous forces, as well as other internationally recognised emblems, signs or signals, can only be used for their intended purpose.⁶²²

579. Sweden’s IHL Manual considers that the “prohibition of improper use of recognized emblems”, as contained in Article 38 AP I, is part of customary international law.⁶²³

⁶¹³ Italy, *IHL Manual* (1991), Vol. I, § 85. ⁶¹⁴ Lebanon, *Army Regulations* (1971), § 17.

⁶¹⁵ Mali, *Army Regulations* (1979), Article 36.

⁶¹⁶ Morocco, *Disciplinary Regulations* (1974), Article 25(2).

⁶¹⁷ Netherlands, *Military Manual* (1993), p. IV-3.

⁶¹⁸ Netherlands, *Military Manual* (1993), p. IX-5.

⁶¹⁹ New Zealand, *Military Manual* (1992), §§ 502(7) and Annex B.

⁶²⁰ Russia, *Military Manual* (1990), § 5(c).

⁶²¹ Senegal, *Disciplinary Regulations* (1990), Article 34(2).

⁶²² Spain, *LOAC Manual* (1996), Vol. I, §§ 3.3.b.(2) and 5.3.c.

⁶²³ Sweden, *IHL Manual* (1991), Section 2.2.3, p. 19.

580. The US Air Force Pamphlet provides that "it is forbidden to make use of . . . the protective signs for safety zones other than as provided for in international agreements establishing these [signs] . . . It is also prohibited to make improper use of . . . the protective emblem of cultural property."⁶²⁴

581. The US Naval Handbook states that "protective signs and symbols may be used only to identify personnel, objects, and activities entitled to protected status which they designate. Any other use is forbidden by international law."⁶²⁵ The Handbook lists the protective emblem for cultural property among emblems not to be misused.⁶²⁶

582. The YPA Military Manual of the SFRY (FRY) provides that "it is forbidden to use, during combat, in order to mislead the enemy, . . . internationally recognised signs", *inter alia*, the sign of protected cultural property.⁶²⁷

National Legislation

583. Algeria's Code of Military Justice punishes:

any individual, whether military or not, who, in time of war, in an area of operations . . . in violation of the laws and customs of war, improperly uses the distinctive signs and emblems defined by international conventions for the respect of persons, objects and places protected by these conventions".⁶²⁸

584. Argentina's Draft Code of Military Justice punishes any soldier who "uses improperly . . . the protective or distinctive signs established and recognised in international treaties to which the Argentine Republic is a party".⁶²⁹

585. Argentina's Law on Civil Defence in Buenos Aires "prohibits in the whole territory of the city of Buenos Aires the use of the denominations, symbols, distinctive signs . . . officially used for civil defence, for purposes other than those intended, or when it may create confusion as to its real significance".⁶³⁰

586. Under Armenia's Penal Code, "the use during military actions of . . . the signs designed to identify cultural property or of other protective signs . . . in breach of international treaties and international law" constitutes a crime against the peace and security of mankind.⁶³¹

587. Australia's Geneva Conventions Act as amended provides that:

A person shall not, without the consent in writing of the Minister or of a person authorized in writing by the Minister to give consents . . . use for any purpose whatsoever any of the following:

⁶²⁴ US, *Air Force Pamphlet* (1976), §§ 8-3(c) and 8-6(b).

⁶²⁵ US, *Naval Handbook* (1995), § 11.9.6.

⁶²⁶ US, *Naval Handbook* (1995), §§ 11.9.4 and 12.2.

⁶²⁷ SFRY (FRY), *YPA Military Manual* (1988), § 105(3).

⁶²⁸ Algeria, *Code of Military Justice* (1971), Article 299.

⁶²⁹ Argentina, *Draft Code of Military Justice* (1998), Article 292, introducing a new Article 876(5) in the *Code of Military Justice as amended* (1951).

⁶³⁰ Argentina, *Law on Civil Defence in Buenos Aires* (1981), Article 15.

⁶³¹ Armenia, *Penal Code* (2003), Article 397.

...

such... emblems, identity cards, signs, signals, insignia or uniforms as are prescribed for the purpose of giving effect to [AP I].⁶³²

588. Bangladesh's Draft Emblems Protection Act provides that:

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

...

(e) the sign of an equilateral blue triangle on, and completely surrounded by, an orange ground, being the international distinctive sign of civil defence;

...

(g) the sign consisting of a group of three bright orange circles of equal size, placed on the same axis, the distance between each circle being one radius, being the international special sign for works and installations containing dangerous forces;

(h) a design, wording or signal so nearly resembling any of the emblems, designations, signs or signals specified in paragraph... (e)... or (g) as to be capable of being mistaken for, or, as the case may be, understood as referring to, one of those emblems, designations, signs or signals;

(i) such other emblems, identity cards, identification cards, signs, signals, insignia or uniforms as are prescribed for the purpose of giving effect to the [1949 Geneva] Conventions or Protocols.⁶³³

589. The Criminal Code of Belarus provides that it is a war crime to "use intentionally, during hostilities, in violation of international treaties, ... the protective signs of cultural property or other signs protected under international law".⁶³⁴

590. Under the Criminal Code of the Federation of Bosnia and Herzegovina, "whoever misuses or carries without authorisation... any... international symbols recognised as the protection of certain objects from military operations" commits a war crime.⁶³⁵ The Criminal Code of the Republika Srpska contains the same provision.⁶³⁶

591. Burkina Faso's Code of Military Justice punishes the improper use, in violation of the laws and customs of war, of the distinctive insignia and emblems for the protection of persons, objects and locations as defined in international conventions, in time of war and in an area of military operations.⁶³⁷

592. The DRC Code of Military Justice as amended punishes "any individual, whether military or not, who, in time of war... improperly uses the distinctive signs and emblems defined by international conventions to

⁶³² Australia, *Geneva Conventions Act as amended* (1957), Section 15(1)(f).

⁶³³ Bangladesh, *Draft Emblems Protection Act* (1998), Section 3.

⁶³⁴ Belarus, *Criminal Code* (1999), Article 138.

⁶³⁵ Bosnia and Herzegovina, Federation, *Criminal Code* (1998), Article 166(1).

⁶³⁶ Bosnia and Herzegovina, Republika Srpska, *Criminal Code* (2000), Article 445(1).

⁶³⁷ Burkina Faso, *Code of Military Justice* (1994), Article 205.

ensure respect for the persons, objects and places protected under these conventions".⁶³⁸

593. The Geneva Conventions and Additional Protocols Act of the Cook Islands provides that:

No person may, without the authority of the Minister or a person authorised by the Minister in writing to give consent under this section, use for any purpose any of the following:

- (a) The sign of an equilateral blue triangle on, and completely surrounded by, an orange ground (which is the international distinctive sign of civil defence);
- ...
- (f) The sign of a group of three bright orange circles of equal size, placed on the same axis, the distance between each circle being one radius (which is the international special sign for works and installations containing dangerous forces);
- (g) Any emblem, designation, or signal, so nearly resembling any of the emblems, designations, or signals, specified in paragraphs [(e) and] (g) as to be capable of being mistaken for, or, as the case may be, understood as referring to, one of those emblems, designations, or signals.⁶³⁹

594. Côte d'Ivoire's Penal Code as amended punishes "anyone who, in an area of military operations, uses, in violation of the laws and customs of war, the distinctive insignia and emblems, defined by international conventions, to ensure respect for protected persons, objects and places".⁶⁴⁰

595. Under Croatia's Criminal Code, "whoever misuses or carries without authorisation... recognised international signs used to mark objects for the purpose of protection against military operations" commits a war crime.⁶⁴¹

596. Denmark's Rescue Preparedness Act punishes "any person who, during crisis or in times of war, deliberately abuses... the signs which, according to an international agreement ratified by Denmark, have been reserved for the tasks attended to by the rescue preparedness [i.e. civil defence] in Denmark".⁶⁴²

597. Under Estonia's Penal Code, "exploitative abuse... of the distinctive signs of a structure containing a prisoner-of-war camp, a cultural monument, civil defence object or dangerous forces" is a war crime.⁶⁴³

598. Finland's Emblem Act provides that:

The international distinctive sign of civil defence shall not be used in cases other than those provided for in this Act...

The international distinctive sign of civil defence... is to be utilized as provided for in the Protocols Additional to the Geneva Conventions...

...

Signs, pictures or terms which resemble the emblems, signs or terms referred to in § 1 to such a degree that confusion may arise, shall not be used.⁶⁴⁴

⁶³⁸ DRC, *Code of Military Justice as amended* (1972), Article 455.

⁶³⁹ Cook Islands, *Geneva Conventions and Additional Protocols Act* (2002), Section 10(1).

⁶⁴⁰ Côte d'Ivoire, *Penal Code as amended* (1981), Article 473.

⁶⁴¹ Croatia, *Criminal Code* (1997), Article 168(1).

⁶⁴² Denmark, *Rescue Preparedness Act* (1992), Article 68.

⁶⁴³ Estonia, *Penal Code* (2001), § 105. ⁶⁴⁴ Finland, *Emblem Act* (1979), §§ 1 and 2.

The Act further punishes “whosoever makes use of the emblems, signs, pictures or terms referred to in §§ 1 and 2 in . . . unauthorised activity”.⁶⁴⁵

599. France’s Code of Military Justice punishes:

any individual, military or not, who, in time of war, in the area of operations of a force or unit, in violation of the laws and customs of war, uses improperly the distinctive signs and emblems defined by international conventions to ensure respect for persons, objects and places protected by those conventions.⁶⁴⁶

600. Guinea’s Criminal Code punishes “anyone [who], in an area of military operations and in violation of the laws and customs of war, uses distinctive insignia and emblems defined in international conventions to ensure respect for protected persons, objects and places”.⁶⁴⁷

601. Under Ireland’s Geneva Conventions Act as amended, any “minor breach” of AP I, including violations of Articles 38(1) and 66(8) AP I, is a punishable offence.⁶⁴⁸

602. Italy’s Wartime Military Penal Code punishes anyone who “uses improperly . . . the international distinctive signs of protection”.⁶⁴⁹

603. Mali’s Code of Military Justice punishes:

any individual . . . who, in time of war, in the area of operations of a military force and in violation of the laws and customs of war, improperly uses the distinctive signs and emblems defined in international conventions to ensure respect for persons, objects and places protected by these conventions.⁶⁵⁰

604. Norway’s Penal Code provides that it is a punishable offence to use “without authority publicly or for an unlawful purpose . . . any badge or designation which by international agreement binding on Norway is designed for use in connection with . . . the protection of cultural values in war”.⁶⁵¹

605. Under Norway’s Military Penal Code as amended, “anyone who contravenes or is accessory to the contravention of provisions relating to the protection of persons or property laid down in . . . the two additional protocols to [the Geneva] Conventions . . . is liable to imprisonment”.⁶⁵²

606. Poland’s Penal Code punishes “any person who, during hostilities, uses the protective sign of cultural property or any other sign protected by international law”, in violation thereof.⁶⁵³

607. Under Slovenia’s Penal Code, “whoever abuses or carries without authorisation . . . internationally recognised symbols used for the protection . . . against military operations” commits a war crime.⁶⁵⁴

⁶⁴⁵ Finland, *Emblem Act* (1979), § 6.

⁶⁴⁶ France, *Code of Military Justice* (1982), Article 439.

⁶⁴⁷ Guinea, *Criminal Code* (1998), Article 579.

⁶⁴⁸ Ireland, *Geneva Conventions Act as amended* (1962), Section 4(1) and (4).

⁶⁴⁹ Italy, *Wartime Military Penal Code* (1941), Article 180(3).

⁶⁵⁰ Mali, *Code of Military Justice* (1995), Article 145.

⁶⁵¹ Norway, *Penal Code* (1902), § 328(4)(b).

⁶⁵² Norway, *Military Penal Code as amended* (1902), § 108(b).

⁶⁵³ Poland, *Penal Code* (1997), Article 126(2).

⁶⁵⁴ Slovenia, *Penal Code* (1994), Article 386(1).

608. Spain's Penal Code punishes "anyone who, during an armed conflict . . . uses improperly the protective or distinctive signs, emblems or signals established and recognised under international treaties to which Spain is a party".⁶⁵⁵

609. Under Sweden's Emblems and Signs Act as amended, "the international distinctive sign of civil defence . . . may not be used without the permission of the Government or a competent agency authorised by the Government".⁶⁵⁶

610. Under Sweden's Penal Code as amended, misuse of the insignia referred to in the Emblems and Signs Act as amended, including the sign of civil defence, and misuse of "other internationally recognised insignia" are crimes against international law.⁶⁵⁷

611. Switzerland's Law on the Protection of the UN Names and Emblems provides that:

1. It is prohibited to use the following signs, communicated to Switzerland through the International Bureau for the Protection of Industrial Property and belonging to the specialised agencies of the United Nations or to other inter-governmental organisations linked to the United Nations:
 - a. The name of these organisations (in official Swiss languages and in English);
 - b. Their acronyms (in official Swiss languages and in English);
 - c. Their arms, flags and other emblems.
2. The prohibition applies similarly to imitations of the signs referred to in paragraph (1).

...

Anyone who, intentionally and in violation of the provisions of the present law, has made use of the names, acronyms, arms, flags and other emblems of inter-governmental organisations referred to in article . . . 2 . . . or of any other signs constituting imitation thereof, . . . [commits a punishable offence].⁶⁵⁸

612. Switzerland's Law on the Protection of Cultural Property notes that "the sign of cultural property as a protective sign and the denomination 'cultural property sign' may be used only for the purpose of protecting cultural property".⁶⁵⁹ It punishes "whoever, intentionally and without being entitled to do so, in order to obtain protection of public international law or another advantage, uses the sign of cultural property or the denomination 'cultural property sign' or any other sign capable of causing confusion".⁶⁶⁰

613. The UK Geneva Conventions Act as amended provides that:

Subject to the provisions of this section, it shall not be lawful for any person, without the authority of the Secretary of State, to use for any purpose whatsoever any of the following emblems or designations, that is to say –

⁶⁵⁵ Spain, *Penal Code* (1995), Article 612(4).

⁶⁵⁶ Sweden, *Emblems and Signs Act as amended* (1953), Section 4.

⁶⁵⁷ Sweden, *Penal Code as amended* (1962), Chapter 22, § 6(2).

⁶⁵⁸ Switzerland, *Law on the Protection of the UN Names and Emblems* (1961), Articles 2 and 7(1).

⁶⁵⁹ Switzerland, *Law on the Protection of Cultural Property* (1966), Article 19.

⁶⁶⁰ Switzerland, *Law on the Protection of Cultural Property* (1966), Article 27.

...
 (d) the sign of an equilateral blue triangle on, and completely surrounded by, an orange ground, being the international distinctive sign of civil defence...⁶⁶¹

614. Under the Penal Code as amended of the SFRY (FRY), “those who misuse or carry without permission... recognised international emblems which are used to mark certain objects in order to protect them from military operations” commit a war crime.⁶⁶² The commentary on the Code states that “the misuse of international emblems is committed, as a rule, during a war or an armed conflict... The aggravated form of this criminal act... exists when the misuse or unauthorised use of international emblems is committed in the war operations zone.”⁶⁶³

615. Zimbabwe’s Geneva Conventions Act as amended provides that:

Subject to the provisions of this section and of section 7 of the Zimbabwe Red Cross Society Act, 1981, no person shall, without the authority in writing of the Minister of Health, use for any purpose whatsoever any of the following emblems or designations –

...
 (d) the sign of an equilateral blue triangle on and completely surrounded by an orange ground, being the international distinctive sign of civil defence.⁶⁶⁴

National Case-law

616. No practice was found.

Other National Practice

617. At the final plenary meeting of the CDDH, Israel declared that:

With regard to Article 36 of draft additional Protocol I [now Article 38 AP I], the delegation of Israel wishes to declare that it attaches special importance to the second sentence of paragraph 1. This sentence forbids the misuse of any other protective emblem which has been recognized by States or has been used with the knowledge of the other Party.⁶⁶⁵

618. A training video on IHL produced by the UK Ministry of Defence illustrates the rule that the false use of emblems is forbidden.⁶⁶⁶

619. In 1987, the Deputy Legal Adviser of the US Department of State affirmed that “we support the principle... that internationally recognized protective emblems... not be improperly used”.⁶⁶⁷

⁶⁶¹ UK, *Geneva Conventions Act as amended* (1957), Section 6(1)(d).

⁶⁶² SFRY (FRY), *Penal Code as amended* (1976), Article 153(1).

⁶⁶³ SFRY (FRY), *Penal Code as amended* (1976), commentary on Article 153.

⁶⁶⁴ Zimbabwe, *Geneva Conventions Act as amended* (1981), Section 8(1)(d).

⁶⁶⁵ Israel, Statement at the CDDH, *Official Records*, Vol. VI, CDDH/SR.39, 25 May 1977, p. 116.

⁶⁶⁶ UK, Ministry of Defence, Training Video: The Geneva Conventions, 1986, Report on UK Practice, 1997, Chapter 2.4.

⁶⁶⁷ US, Remarks of Michael J. Matheson, Deputy Legal Adviser, US Department of State, The Sixth Annual American Red Cross-Washington College of Law Conference on International Humanitarian Law: A Workshop on Customary International Law and the 1977 Protocols

*III. Practice of International Organisations and Conferences**United Nations*

620. No practice was found.

Other International Organisations

621. No practice was found.

International Conferences

622. In a meeting of independent experts organised by the ICDO and the ICRC in 1997, "the importance was strongly emphasised of adopting appropriate national legislation to regulate use of the civil defence emblem and impose penalties for incorrect use and for misuse. It was agreed that the States party to [AP I] should be reminded of that obligation."⁶⁶⁸ Furthermore, "the problem that civil defence activities were wider than those entitled to protection had been raised and care must be exercised to ensure that in wartime the emblem was borne only in the performance of activities entitled to protection under Protocol I".⁶⁶⁹ According to a survey conducted by the ICDO and the ICRC, 63 per cent of States party to AP I that replied had a law forbidding the abusive use of the civil defence emblem (the number of replies was not indicated).⁶⁷⁰

IV. Practice of International Judicial and Quasi-judicial Bodies

623. No practice was found.

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

624. According to the ICRC Commentary on the Additional Protocols, "Israel claims that the prohibition of deliberately misusing internationally recognized protective emblems, signs or signals in armed conflicts also applies to the red shield of David".⁶⁷¹

625. To fulfil its task of disseminating IHL, the ICRC has delegates around the world teaching armed and security forces that:

Additional to the 1949 Geneva Conventions, *American University Journal of International Law and Policy*, Vol. 2, 1987, p. 425.

⁶⁶⁸ Stéphane Jeannet (ed.), *Civil Defence 1977–1997. From Law to Practice*, Report of a Meeting of Experts on Civil Defence, ICDO and ICRC, Geneva, 1997, pp. 17 and 18.

⁶⁶⁹ Stéphane Jeannet (ed.), *Civil Defence 1977–1997. From Law to Practice*, Report of a Meeting of Experts on Civil Defence, ICDO and ICRC, Geneva, 1997, p. 64.

⁶⁷⁰ Stéphane Jeannet (ed.), *Civil Defence 1977–1997. From Law to Practice*, Report of a Meeting of Experts on Civil Defence, ICDO and ICRC, Geneva, 1997, p. 76.

⁶⁷¹ Yves Sandoz *et al.* (eds.), *Commentary on the Additional Protocols*, ICRC, Geneva, 1987, § 1557, footnote 40.

It is prohibited to make improper use (that is to mark other persons and objects than those entitled to) of:

- ...
- (b) the distinctive sign of civil defence;
- (c) the distinctive sign of cultural objects;
- (d) the distinctive sign of works and installations containing dangerous forces;
- ...
- (f) other internationally recognized distinctive signs and signals (e.g. ad hoc signs for demilitarized zones, for non-defended localities, ad hoc signals for civil defence).⁶⁷²

VI. *Other Practice*

626. No practice was found.

F. **Improper Use of Flags or Military Emblems, Insignia or Uniforms of the Adversary**

I. *Treaties and Other Instruments*

Treaties

627. Article 23(f) of the 1899 HR provides that "it is especially prohibited . . . to make improper use of . . . the national flag or military ensigns and uniform of the enemy".

628. Article 23(f) of the 1907 HR provides that "it is especially forbidden . . . to make improper use . . . of the national flag or of the military insignia and uniform of the enemy".

629. Article 93, second paragraph, GC III provides that:

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

630. Article 39(2) AP I provides that "it is prohibited to make use of the flags or military emblems, insignia or uniforms of adverse Parties while engaging in attacks or in order to shield, favour, protect or impede military operations". Article 39 AP I was adopted by consensus.⁶⁷³

631. Canada made a reservation upon ratification of AP I, stating that it "does not intend to be bound by the prohibitions contained in paragraph 2 of Article

⁶⁷² Frédéric de Mulinen, *Handbook on the Law of War for Armed Forces*, ICRC, Geneva, 1987, § 407(b), (c), (d) and (f).

⁶⁷³ CDDH, *Official Records*, Vol. VI, CDDH/SR.39, 25 May 1977, p. 103.

39 to make use of military emblems, insignia or uniforms of adverse parties in order to shield, favour, protect or impede military operations.⁶⁷⁴

632. Article 21(1) of draft AP II submitted by the ICRC to the CDDH provided that “when carried out in order to commit or resume hostilities, . . . the use in combat of the enemy’s distinctive military emblems” was considered as perfidy.⁶⁷⁵ However, this proposal was deleted from draft Article 21 adopted in Committee III of the CDDH.⁶⁷⁶

633. Pursuant to Article 8(2)(b)(vii) of the 1998 ICC Statute, “making improper use . . . of the flag or of the military insignia and uniform of the enemy . . . resulting in death or serious personal injury” is a war crime in international armed conflicts.

Other Instruments

634. Article 63 of the 1863 Lieber Code states that those fighting in the uniform of their enemy can expect no quarter. Article 65 states that the “use of the enemy’s national standard, flag, or other emblem of nationality, for the purpose of deceiving the enemy in battle, is an act of perfidy by which [troops] lose all claim to the protection of the laws of war”.

635. Article 13(f) of the 1874 Brussels Declaration provides that “making improper use . . . of the national flag or of the military insignia and uniform of the enemy” is “especially forbidden”.

636. Article 8(d) of the 1880 Oxford Manual provides that “it is forbidden . . . to make improper use of the national flag, military insignia or uniform of the enemy”.

637. Paragraph 6 of the 1991 Memorandum of Understanding on the Application of IHL between Croatia and the SFRY requires that hostilities be conducted in accordance with Article 39(2) AP I.

638. Paragraph 2.5 of the 1992 Agreement on the Application of IHL between the Parties to the Conflict in Bosnia and Herzegovina requires that hostilities be conducted in accordance with Article 39(2) AP I.

639. According to paragraph 110 of the 1994 San Remo Manual, “warships and auxiliary vessels . . . are prohibited from launching an attack whilst flying a false flag”.

640. The 2000 UNTAET Regulation No. 2000/15 establishes panels with exclusive jurisdiction over serious criminal offences, including war crimes. According to Section 6(1)(b)(vii), “making improper use . . . of the flag or of the military insignia and uniform of the enemy . . . resulting in death or serious personal injury” is a war crime in international armed conflicts.

⁶⁷⁴ Canada, Reservations and statements of understanding made upon ratification, 20 November 1990, § 2.

⁶⁷⁵ CDDH, *Official Records*, Vol. I, Part Three, Draft Additional Protocols, June 1973, p. 39.

⁶⁷⁶ CDDH, *Official Records*, Vol. XV, CDDH/407/Rev.1, 17 March–10 June 1977.

II. National Practice

Military Manuals

641. Argentina's Law of War Manual (1969) states that it is an act violating the principle of good faith "to make an improper use of the enemy's national flag, . . . uniforms and/or military insignia". It considers such use "improper" when it occurs during combat operations.⁶⁷⁷

642. Argentina's Law of War Manual (1989) provides that "it is prohibited . . . to use the flags, emblems, insignia or military uniforms of the enemy during the execution of military operations".⁶⁷⁸

643. Australia's Commanders' Guide provides that "it is . . . prohibited to use the flags or military emblems, insignia or uniforms of the enemy while engaging in attacks or in order to shield, favour, protect or impede military operations".⁶⁷⁹ It also provides that "it is illegal to use in battle emblems, markings or clothing of . . . [the] enemy".⁶⁸⁰ The manual further states that "according to custom, it is permissible for a belligerent warship to use false colours and disguise her outward appearance in order to deceive an enemy, provided that prior to going into action the warship shows her true colours".⁶⁸¹

644. Australia's Defence Force Manual provides that "it is . . . prohibited to use the flags or military emblems, insignia or uniforms of the enemy while engaging in attacks or in order to shield, favour, protect or impede military operations. Enemy uniforms may otherwise be worn."⁶⁸² The manual also states that "warships and auxiliary vessels may fly a false flag up until the moment of launching an attack but are prohibited from launching an attack whilst flying a false flag".⁶⁸³

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

The [1907 HR] prohibits to use "*improperly*" the national flag, or the military insignia and uniform of the enemy.

The word "*improperly*" must be stressed. It follows that opening fire or participating in an attack while wearing the enemy uniform doubtlessly constitutes an act of perfidy. It is also the case when opening fire from a captured enemy combat vehicle with its insignia.

However, infiltrating enemy lines in order to create panic to the point that the adversary starts firing on its own soldiers believing that they are disguised enemies or operating behind enemy lines wearing enemy uniform in order to collect information or commit acts of sabotage is not considered as using "*improperly*" enemy uniform . . .

⁶⁷⁷ Argentina, *Law of War Manual* (1969), § 1.017.

⁶⁷⁸ Argentina, *Law of War Manual* (1989), § 1.06(3).

⁶⁷⁹ Australia, *Commanders' Guide* (1994), § 904.

⁶⁸⁰ Australia, *Commanders' Guide* (1994), § 507.

⁶⁸¹ Australia, *Commanders' Guide* (1994), § 826.

⁶⁸² Australia, *Defence Force Manual* (1994), § 705.

⁶⁸³ Australia, *Defence Force Manual* (1994), § 635.

It is a recognised practice that warships may, without contravening the law of war, fly the enemy flag, as a ruse, on the condition that at the moment of opening fire the warship shows her true colours . . .

It is prohibited for belligerents to display false markings, especially enemy markings, on their military aircraft.⁶⁸⁴ [emphasis in original]

646. Belgium's Teaching Manual for Officers provides that "the use of flags, symbols, insignia and uniforms of the enemy is prohibited during attacks or to shield, favour, protect or impede a military operation".⁶⁸⁵

647. Burkina Faso's Disciplinary Regulations provides that, under the laws and customs of war, it is prohibited "to use improperly . . . the national flag of the enemy".⁶⁸⁶

648. Cameroon's Disciplinary Regulations provides that, under the laws and customs of war, it is prohibited "to use improperly . . . the national flag of the enemy".⁶⁸⁷

649. Cameroon's Instructors' Manual states that "using fraudulently the emblems and uniforms of enemy States" is an unlawful deception.⁶⁸⁸

650. Canada's LOAC Manual provides that:

It is prohibited to make use of the flags or military emblems, insignia or uniforms of *adverse parties while engaging in attacks*.

When depositing its ratification of Additional Protocol I, Canada reserved the right to make use of the flags or military emblems, insignia or uniforms of adverse parties *to shield, favour, protect or impede military operations*. Any decision to do so should only be carried out with national level approval.⁶⁸⁹ [emphasis in original]

The manual also states that "it is not unlawful to use captured enemy aircraft. However, the enemy's markings must be removed."⁶⁹⁰ It considers it an act of perfidy in air warfare if a hostile act is committed while "using false markings on military aircraft such as the markings of . . . enemy aircraft".⁶⁹¹ In respect of naval warfare, the manual states that "warships and auxiliary vessels are prohibited from opening fire while flying a false flag".⁶⁹² It also states that "improperly using . . . the national flag or military insignia and uniform of the enemy" constitutes a war crime.⁶⁹³

651. Congo's Disciplinary Regulations provides that, under the laws and customs of war, it is prohibited "to use improperly . . . the national flag of the enemy".⁶⁹⁴

⁶⁸⁴ Belgium, *Law of War Manual* (1983), pp. 32 and 33.

⁶⁸⁵ Belgium, *Teaching Manual for Officers* (1994), Part I, Title II, p. 34.

⁶⁸⁶ Burkina Faso, *Disciplinary Regulations* (1994), Article 35(2).

⁶⁸⁷ Cameroon, *Disciplinary Regulations* (1975), Article 32.

⁶⁸⁸ Cameroon, *Instructors' Manual* (1992), p. 30, § 131.2 and p. 89, § 222.

⁶⁸⁹ Canada, *LOAC Manual* (1999), p. 6-2, §§ 13 and 14.

⁶⁹⁰ Canada, *LOAC Manual* (1999), p. 7-3, § 19.

⁶⁹¹ Canada, *LOAC Manual* (1999), p. 7-2 § 18(a).

⁶⁹² Canada, *LOAC Manual* (1999), p. 8-10, § 78.

⁶⁹³ Canada, *LOAC Manual* (1999), p. 16-3, § 20(f).

⁶⁹⁴ Congo, *Disciplinary Regulations* (1986), Article 32(2).

652. Croatia's *Commanders' Manual* states that "it is prohibited to feign a protected status by inviting the confidence of the enemy: . . . use of enemy uniform or flag".⁶⁹⁵

653. Ecuador's *Naval Manual* provides that:

At sea. Naval surface and subsurface forces may fly enemy colours and display enemy markings to deceive the enemy. Warships must, however, display their true colours prior to an actual armed engagement.

In the air. The use in combat of enemy markings by belligerent military aircraft is forbidden.

On land. The law of land warfare does not prohibit the use by belligerent land forces of enemy flags, insignia, or uniforms to deceive the enemy either before or following an armed engagement. Combatants risk severe punishment, however, if they are captured while displaying enemy colours or insignia or wearing enemy uniforms in combat.

Similarly, combatants caught behind enemy lines wearing the uniform of their adversaries are not entitled to prisoner-of-war status or protection and, historically, have been subjected to severe punishment. It is permissible, however, for downed aircrews and escaping prisoners of war to use enemy uniforms to evade capture, so long as they do not attack enemy forces, collect military intelligence, or engage in similar military operations while so attired. As a general rule, enemy markings should be removed from captured enemy equipment before it is used in combat.⁶⁹⁶

654. France's *Disciplinary Regulations as amended* states that it is prohibited "to use improperly . . . the national flag of the enemy".⁶⁹⁷

655. France's *LOAC Summary Note* provides that "perfidy is prohibited. It is prohibited . . . to use the uniform or emblem of the enemy."⁶⁹⁸

656. France's *LOAC Teaching Note* provides that "perfidy is prohibited, notably . . . the use of the uniform or emblem of the adversary".⁶⁹⁹

657. France's *LOAC Manual* states that "it is normally prohibited to use the flags, emblems or uniforms of enemy States in combat with the view to dissimulate, favour or impede military operations. However, it is traditionally permitted for warships to hoist false flags as long as they are not engaged in combat."⁷⁰⁰

658. Germany's *Military Manual* provides that "it is prohibited to make improper use of . . . enemy . . . national flags, military insignia and uniforms".⁷⁰¹ It further states that "ruses of war are permissible also in naval warfare. Unlike land and aerial warfare, naval warfare permits the use of false flags or military emblems . . . Before opening fire, however, the true flag shall always be displayed."⁷⁰²

⁶⁹⁵ Croatia, *Commanders' Manual* (1992), § 46.

⁶⁹⁶ Ecuador, *Naval Manual* (1989), § 12.5.

⁶⁹⁷ France, *Disciplinary Regulations as amended* (1975), Article 9 bis (2).

⁶⁹⁸ France, *LOAC Summary Note* (1992), § 4.4.

⁶⁹⁹ France, *LOAC Teaching Note* (2000), p. 3.

⁷⁰⁰ France, *LOAC Manual* (2001), p. 47, see also p. 115.

⁷⁰¹ Germany, *Military Manual* (1992), § 473. ⁷⁰² Germany, *Military Manual* (1992), § 1018.

- 659.** Hungary's Military Manual regards it as an act of perfidy to feign protected status by using enemy uniforms or flag.⁷⁰³
- 660.** Indonesia's Military Manual provides that "it is . . . prohibited to use the flags, emblems, and badges of the enemy".⁷⁰⁴
- 661.** Referring to Israel's Law of War Booklet, the Report on the Practice of Israel states that the unlawful use of uniforms is prohibited.⁷⁰⁵
- 662.** Israel's Manual on the Laws of War provides that "it is forbidden to make inappropriate use of the enemy's flag, uniform and emblems". "Inappropriate use" is qualified as a perfidious act.⁷⁰⁶
- 663.** Under Italy's IHL Manual, it is prohibited "to use flags, insignia or military uniforms other than the country's own".⁷⁰⁷
- 664.** Italy's LOAC Elementary Rules Manual provides that "it is prohibited to feign a protected status by inviting the confidence of the enemy: . . . use of enemy uniform or flag".⁷⁰⁸
- 665.** Under South Korea's Military Law Manual, improper use of enemy uniforms is forbidden.⁷⁰⁹
- 666.** Lebanon's Army Regulations prohibits the unlawful use of the enemy flag.⁷¹⁰
- 667.** Madagascar's Military Manual prohibits the use of enemy uniforms in general.⁷¹¹
- 668.** Mali's Army Regulations states that, under the laws and customs of war, it is prohibited "to use improperly . . . the national emblem of the enemy".⁷¹²
- 669.** Morocco's Disciplinary Regulations provides that, under the laws and customs of war, it is prohibited "to use improperly . . . the national emblem of the enemy".⁷¹³
- 670.** The Military Manual of the Netherlands provides that "it is . . . prohibited to make use of the flag, military emblems, insignia or uniforms of the adverse party".⁷¹⁴
- 671.** The Military Handbook of the Netherlands states that it is prohibited "to use insignia and uniforms of the adverse party".⁷¹⁵
- 672.** New Zealand's Military Manual states that "it is prohibited to make use of the flags or military emblems, insignia or uniforms of adverse Parties while engaging in attacks or in order to shield, favour, protect or impede military

⁷⁰³ Hungary, *Military Manual* (1992), p. 63. ⁷⁰⁴ Indonesia, *Military Manual* (1982), § 104.

⁷⁰⁵ Report on the Practice of Israel, 1997, Chapter 2.4, referring to *Law of War Booklet* (1986), p. 8.

⁷⁰⁶ Israel, *Manual on the Laws of War* (1998), p. 56.

⁷⁰⁷ Italy, *IHL Manual* (1991) Vol. I, § 9(1).

⁷⁰⁸ Italy, *LOAC Elementary Rules Manual* (1991), § 46.

⁷⁰⁹ South Korea, *Military Law Manual* (1996), p. 88.

⁷¹⁰ Lebanon, *Army Regulations* (1971), § 17.

⁷¹¹ Madagascar, *Military Manual* (1994), Fiche No. 6-O, § 14.

⁷¹² Mali, *Army Regulations* (1979), Article 36.

⁷¹³ Morocco, *Disciplinary Regulations* (1974), Article 25(2).

⁷¹⁴ Netherlands, *Military Manual* (1993), p. IV-3.

⁷¹⁵ Netherlands, *Military Handbook* (1995), p. 7-40.

operations".⁷¹⁶ In respect of naval warfare, it provides that "according to custom, it is permissible for a belligerent warship to use false colours and to disguise her outward appearance in other ways in order to deceive an enemy, provided that prior to going into action the warship shows her true colours. Aircraft are not, however, entitled to use false markings."⁷¹⁷ The manual also specifies that "the use of false markings on military aircraft such as the markings of . . . enemy aircraft is the prime example of perfidious conduct in air warfare and is prohibited".⁷¹⁸ It further states that "improperly using . . . the national flag or military insignia and uniform of the enemy" is a war crime.⁷¹⁹

673. Nigeria's Manual on the Laws of War states that the "use . . . of enemy uniform by troops engaged in a battle" is a war crime.⁷²⁰

674. Nigeria's Soldiers' Code of Conduct provides that it is prohibited "to make improper use of the national flag or of the military insignia and uniform of the enemy".⁷²¹

675. Under Romania's Soldiers' Manual, the "use of enemy's uniforms and insignia" is an act of perfidy.⁷²²

676. Under Russia's Military Manual, the improper use of national signals and flags is a prohibited method of warfare.⁷²³

677. Senegal's Disciplinary Regulations provides that, under the laws and customs of war, it is prohibited "to use improperly . . . the national emblem of the enemy".⁷²⁴

678. South Africa's LOAC Manual provides that "it is prohibited to use the insignia or uniforms of the enemy while engaging in attacks or in order to shield, favour, protect or impede military operations . . . All insignia on enemy equipment must be removed before the equipment may be utilised by own forces."⁷²⁵

679. Spain's LOAC Manual provides that the use of enemy flags, emblems, insignia and military uniforms while engaging in attack or in order to shield, favour, protect or impede military operations is prohibited.⁷²⁶ It also states that "it is prohibited to feign a protected status by inviting the confidence of the enemy: . . . use of enemy uniform or flag".⁷²⁷

680. Sweden's IHL Manual considers that the "prohibition of improper use of . . . emblems of nationality", as contained in Article 39 AP I, is part of

⁷¹⁶ New Zealand, *Military Manual* (1992), § 502(8).

⁷¹⁷ New Zealand, *Military Manual* (1992), § 713(1), see also § 713(3).

⁷¹⁸ New Zealand, *Military Manual* (1992), § 611(2).

⁷¹⁹ New Zealand, *Military Manual* (1992), § 1704(2)(f).

⁷²⁰ Nigeria, *Manual on the Laws of War* (undated), § 6(6).

⁷²¹ Nigeria, *Soldiers' Code of Conduct* (undated), § 12(f).

⁷²² Romania, *Soldiers' Manual* (1991), p. 35.

⁷²³ Russia, *Military Manual* (1990), § 5(c).

⁷²⁴ Senegal, *Disciplinary Regulations* (1990), Article 34(2).

⁷²⁵ South Africa, *LOAC Manual* (1996), § 34(b).

⁷²⁶ Spain, *LOAC Manual* (1996), Vol. I, §§ 3.3.c.(1) and 5.3.c.

⁷²⁷ Spain, *LOAC Manual* (1996), Vol. I, § 10.8.e.(1).

customary international law.⁷²⁸ It stresses that Article 39(2) AP I “constitutes a valuable clarification of international humanitarian law, and one which is also significant for Swedish defence”. The manual explains that:

The prohibition of improper use has been interpreted to mean that enemy uniform may not be used in connection with or during combat, and this has led to great uncertainty in application.

During the 1974–1977 diplomatic conference, certain of the great powers wished to retain the possibility of appearing in enemy uniforms, while most of the smaller states claimed that this possibility should be excluded or minimized. The conference accepted the view of the smaller states here. The rule in Article 39:2 [AP I] can be interpreted to mean that enemy uniform may be used only as personal protection, for example under extreme weather conditions, and may never be used in connection with any type of military operation. Where prisoners of war make use of enemy uniforms in connection with escape attempts, this may not be seen as an infringement of Article 39.⁷²⁹

681. Switzerland’s Basic Military Manual provides that “it is notably forbidden . . . to abuse a protected status by using . . . emblems or uniforms of the adverse . . . nation”. It regards this behaviour as a perfidious act.⁷³⁰ It further stresses that “it is prohibited to use improperly the military insignia or uniform of the enemy”. It gives the example of the prohibition of attacking the enemy while wearing its uniform.⁷³¹

682. The UK Military Manual describes as treachery calling out “Do not fire, we are friends”, and then firing, noting that this “device is often accompanied by the use of enemy uniforms”.⁷³² It also states that “if, owing to shortage of clothing, it becomes necessary to utilise apparel captured from the enemy, the badges should be removed before the articles are worn”.⁷³³ It further states that:

The employment of the national flag, military insignia or uniform of the enemy for the purpose of ruse is not forbidden, but the [1907 HR] prohibit their improper use, leaving unsettled what use is proper and what use is not. However, their employment is forbidden during a combat, that is, the opening of fire whilst in the guise of the enemy. But there is no unanimity as to whether the uniform of the enemy may be worn and his flag displayed for the purpose of approach or withdrawal. Use of enemy uniform for the purpose of and in connection with sabotage is in the same category as spying.⁷³⁴

Furthermore, the manual states that “in addition to ‘grave breaches’ of the 1949 [Geneva] Conventions, . . . the following are examples of punishable violations of the laws of war, or war crimes: . . . use . . . of enemy uniform by troops engaged in a battle”.⁷³⁵ Lastly, it states that “although no such opportunities of closing

⁷²⁸ Sweden, *IHL Manual* (1991), Section 2.2.3, p. 19.

⁷²⁹ Sweden, *IHL Manual* (1991), Section 3.2.1.1.b, p. 31.

⁷³⁰ Switzerland, *Basic Military Manual* (1987), Article 39.

⁷³¹ Switzerland, *Basic Military Manual* (1987), Article 40, including commentary.

⁷³² UK, *Military Manual* (1958), § 311, footnote 1. ⁷³³ UK, *Military Manual* (1958), § 322.

⁷³⁴ UK, *Military Manual* (1958), § 320.

⁷³⁵ UK, *Military Manual* (1958), § 626(f).

with the enemy by exhibiting his flag are possible in land warfare as in the case of naval warfare, national flags might be used to mislead the enemy".⁷³⁶

683. The UK LOAC Manual provides that "it is forbidden . . . to make improper use in combat . . . of the enemy's national flag or uniform".⁷³⁷

684. The US Field Manual states that "it is especially forbidden to make improper use . . . of the national flag, or military insignia and uniform of the enemy".⁷³⁸ According to the manual,

In practice, it has been authorized to make use of national flags, insignia, and uniforms as a ruse. The foregoing rule (*HR, art. 23, par. (f)*) does not prohibit such employment, but does prohibit their *improper use*. It is certainly forbidden to employ them during combat, but their use at other times is not forbidden.⁷³⁹ [emphasis in original]

The manual also states that:

Members of the armed forces of a party to the conflict and members of militias or volunteer corps forming part of such armed forces lose their right to be treated as prisoners of war whenever they deliberately conceal their status in order to pass behind the military lines of the enemy for the purpose of gathering military information or for the purpose of waging war by destruction of life or property. Putting on civilian clothes or the uniform of the enemy are examples of concealment of the status of a member of the armed forces.⁷⁴⁰

685. The US Air Force Pamphlet incorporates the content of Article 23(f) of the 1907 HR and adds that the prohibited improper use of the enemy's flags, military insignia, national markings and uniforms "involves use in actual attacks".⁷⁴¹ It further provides that:

Members of the armed forces of a party to the conflict and members of militias or volunteer corps forming part of such armed forces lose their right to be treated as prisoners of war whenever they deliberately conceal their status in order to pass behind the military lines of the enemy for the purpose of gathering military information or for the purpose of waging war by destruction of life or property. Putting on civilian clothes or the uniform of the enemy are examples of concealment of the status of a member of the armed forces. Ground forces engaged in actual combat, in contrast to ground forces preparing for combat, are required to wear their own uniform or distinctive national insignia.

...

While combatant airmen are not absolutely required to wear a uniform or distinctive national insignia while flying in combat, improper use of the military insignia or uniform of the enemy is forbidden. Consequently, airmen should not wear the uniform or national insignia of the enemy while engaging in combat operations. Military aircraft, as entities of combat in aerial warfare, are also required to be marked with appropriate signs of their nationality and military character.⁷⁴²

⁷³⁶ UK, *Military Manual* (1958), § 321. ⁷³⁷ UK, *LOAC Manual* (1981), Section 4, p. 12, § 2d.

⁷³⁸ US, *Field Manual* (1956), § 52. ⁷³⁹ US, *Field Manual* (1956), § 54.

⁷⁴⁰ US, *Field Manual* (1956), § 74.

⁷⁴¹ US, *Air Force Pamphlet* (1976), §§ 8-2 and 8-6(c), see also § 8-3(d).

⁷⁴² US, *Air Force Pamphlet* (1976), §§ 7-2 and 7-4.

686. The US Naval Handbook states that:

At Sea. Naval surface and subsurface forces may fly enemy colors and display enemy markings to deceive the enemy. Warships must, however, display their true colors prior to an actual armed engagement.

In the Air. The use in combat of enemy markings by belligerent military aircraft is forbidden.

On Land. The law of land warfare does not prohibit the use by belligerent land forces of enemy flags, insignia, or uniforms to deceive the enemy either before or following an armed engagement. Combatants risk severe punishment, however, if they are captured while displaying enemy colors or insignia or wearing enemy uniforms in combat.

Similarly, combatants caught behind enemy lines wearing the uniform of their adversaries are not entitled to prisoner-of-war status or protection and, historically, have been subjected to severe punishment. It is permissible, however, for downed aircrews and escaping prisoners of war to use enemy uniforms to evade capture, so long as they do not attack enemy forces, collect military intelligence, or engage in similar military operations while so attired. As a general rule, enemy markings should be removed from captured enemy equipment before it is used in combat.⁷⁴³

687. The YPA Military Manual of the SFRY (FRY) provides that “it is forbidden to use, during combat, in order to mislead the enemy, . . . enemy military insignia (military flags, emblems or badges)”.⁷⁴⁴

National Legislation

688. Algeria’s Code of Military Justice punishes the unauthorised use of the insignia of foreign armed forces.⁷⁴⁵

689. Argentina’s Draft Code of Military Justice punishes any soldier who

uses improperly, or in a perfidious manner, the flag, uniform, insignia or distinctive emblem . . . of adverse parties, during attacks or to cover, favour, protect or impede military operations, except in cases expressly provided for in international treaties to which the Argentine Republic is a party.⁷⁴⁶

690. Under Armenia’s Penal Code, “the use during military actions of . . . the flag or insignia of the enemy . . . in breach of international treaties and international law” constitutes a crime against the peace and security of mankind.⁷⁴⁷

691. Australia’s ICC (Consequential Amendments) Act incorporates in the Criminal Code the war crimes defined in the 1998 ICC Statute, including “improper use of a flag, insignia or uniform of the adverse party . . . while

⁷⁴³ US, *Naval Handbook* (1995), § 12.5.

⁷⁴⁴ SFRY (FRY), *YPA Military Manual* (1988), § 105(2).

⁷⁴⁵ Algeria, *Code of Military Justice* (1971), Article 298.

⁷⁴⁶ Argentina, *Draft Code of Military Justice* (1998), Article 292, introducing a new Article 876(6) in the *Code of Military Justice as amended* (1951).

⁷⁴⁷ Armenia, *Penal Code* (2003), Article 397.

engaged in an attack or in order to shield, favour, protect or impede military operations" in international armed conflicts.⁷⁴⁸

692. The Criminal Code of Belarus provides that it is a war crime to "use intentionally, during hostilities, in violation of international treaties, . . . the national flag or distinctive signs of an adverse Power".⁷⁴⁹

693. Under Burundi's Draft Law on Genocide, Crimes against Humanity and War Crimes, "using improperly . . . the flag or military insignia and uniform of the enemy" constitutes a war crime in international armed conflicts.⁷⁵⁰

694. Canada's Crimes against Humanity and War Crimes Act provides that the war crimes defined in Article 8(2) of the 1998 ICC Statute are "crimes according to customary international law" and, as such, indictable offences under the Act.⁷⁵¹

695. Under Colombia's Penal Code, the use of enemy uniforms with the intent to injure or kill an adversary is a punishable offence.⁷⁵²

696. Congo's Genocide, War Crimes and Crimes against Humanity Act defines war crimes with reference to the categories of crimes defined in Article 8 of the 1998 ICC Statute.⁷⁵³

697. Egypt's Military Criminal Code punishes any enemy soldier who, disguised in a friendly uniform, enters a military camp, defended position or institution.⁷⁵⁴

698. Under Georgia's Criminal Code, any war crime provided for by the 1998 ICC Statute, which is not explicitly mentioned in the Code, such as "making improper use . . . of the flag or of the military insignia and uniform of the enemy . . . resulting in death or serious personal injury" in international armed conflicts, is a crime.⁷⁵⁵

699. Germany's Law Introducing the International Crimes Code punishes anyone who, in connection with an international or non-international armed conflict, "makes improper use . . . of the flag or of the military insignia or of the uniform of the enemy . . . thereby causing a person's death or serious injury".⁷⁵⁶

700. Greece's Military Penal Code prohibits the misuse of military uniforms or emblems.⁷⁵⁷

701. Under Ireland's Geneva Conventions Act as amended, any "minor breach" of AP I, including violations of Article 39(2) AP I, is a punishable offence.⁷⁵⁸

⁷⁴⁸ Australia, *ICC (Consequential Amendments) Act* (2002), Schedule 1, § 268.42.

⁷⁴⁹ Belarus, *Criminal Code* (1999), Article 138.

⁷⁵⁰ Burundi, *Draft Law on Genocide, Crimes against Humanity and War Crimes* (2001), Article 4(B)(g).

⁷⁵¹ Canada, *Crimes against Humanity and War Crimes Act* (2000), Section 4(1) and (4).

⁷⁵² Colombia, *Penal Code* (2000), Article 143.

⁷⁵³ Congo, *Genocide, War Crimes and Crimes against Humanity Act* (1998), Article 4.

⁷⁵⁴ Egypt, *Military Criminal Code* (1966), Article 133.

⁷⁵⁵ Georgia, *Criminal Code* (1999), Article 413(d).

⁷⁵⁶ Germany, *Law Introducing the International Crimes Code* (2002), Article 1, § 10(2).

⁷⁵⁷ Greece, *Military Penal Code* (1995), Article 68.

⁷⁵⁸ Ireland, *Geneva Conventions Act as amended* (1962), Section 4(1) and (4).

702. Under Italy's Law of War Decree as amended, it is prohibited "to use flags, insignia or military uniforms other than the country's own".⁷⁵⁹ It further provides that "warships may not enter into hostilities without a flag or with a flag other than the country's own".⁷⁶⁰

703. Italy's Wartime Military Penal Code punishes anyone who "uses improperly the flag, insignia or military uniforms other than the country's own".⁷⁶¹

704. Under Mali's Penal Code, "using...the flag or military insignia and uniform of the enemy...and, thereby, causing loss of human lives or serious injuries" is a war crime in international armed conflicts.⁷⁶²

705. Under the International Crimes Act of the Netherlands, "making improper use...of the flag or of the military insignia and uniform of the enemy, ...resulting in death of serious personal injury", is a crime, when committed in an international armed conflict.⁷⁶³

706. Under New Zealand's International Crimes and ICC Act, war crimes include the crimes defined in Article 8(2)(b)(vii) of the 1998 ICC Statute.⁷⁶⁴

707. Nicaragua's Military Penal Code punishes any soldier who, in time of war and in an area of military operations, "unlawfully displays...enemy flags or emblems".⁷⁶⁵

708. Under Norway's Military Penal Code as amended, "anyone who contravenes or is accessory to the contravention of provisions relating to the protection of persons or property laid down in...the two additional protocols to [the Geneva] Conventions...is liable to imprisonment".⁷⁶⁶

709. According to the Report on the Practice of Pakistan, Pakistan's Official Secrets Act and Public Order Ordinance punish the unauthorised use of the uniforms or insignia of the armed forces.⁷⁶⁷

710. Poland's Penal Code punishes "any person who, during hostilities, uses...flags or military emblems of an enemy...State...in violation of international law".⁷⁶⁸

711. Spain's Royal Ordinance for the Armed Forces states that "the combatant...shall not display treacherously...the enemy flag".⁷⁶⁹

712. Spain's Military Criminal Code punishes any soldier who "displays improperly...enemy flags and emblems".⁷⁷⁰

⁷⁵⁹ Italy, *Law of War Decree as amended* (1938), Article 36(2).

⁷⁶⁰ Italy, *Law of War Decree as amended* (1938), Article 138.

⁷⁶¹ Italy, *Wartime Military Penal Code* (1941), Article 180.

⁷⁶² Mali, *Penal Code* (2001), Article 31(i)(7).

⁷⁶³ Netherlands, *International Crimes Act* (2003), Article 5(3)(f).

⁷⁶⁴ New Zealand, *International Crimes and ICC Act* (2000), Section 11(2).

⁷⁶⁵ Nicaragua, *Military Penal Code* (1996), Article 50(1).

⁷⁶⁶ Norway, *Military Penal Code as amended* (1902), § 108(b).

⁷⁶⁷ Report on the Practice of Pakistan, 1998, Chapter 2.6, referring to *Official Secrets Act* (1923), Section 6 and *Public Order Ordinance* (1958), Section 3.

⁷⁶⁸ Poland, *Penal Code* (1997), Article 126(2).

⁷⁶⁹ Spain, *Royal Ordinance for the Armed Forces* (1978), Article 138.

⁷⁷⁰ Spain, *Military Criminal Code* (1985), Article 75(1).

713. Spain's Penal Code punishes "anyone who, during an armed conflict . . . uses improperly or in a perfidious manner the flag, uniform, insignia or distinctive emblem . . . of adverse Parties, during attacks or to cover, favour, protect or impede military operations".⁷⁷¹

714. Syria's Penal Code punishes the wearing by any person of an official uniform or insignia of a foreign State.⁷⁷²

715. Under Trinidad and Tobago's Draft ICC Act, it is a punishable offence to commit a war crime as defined in Article 8(2)(b)(vii) of the 1998 ICC Statute.⁷⁷³

716. Under the UK ICC Act, it is a punishable offence to commit a war crime as defined in Article 8(2)(b)(vii) of the 1998 ICC Statute.⁷⁷⁴

717. Under the US War Crimes Act as amended, violations of Article 23(f) of the 1907 HR are war crimes.⁷⁷⁵

718. Under the Penal Code as amended of the SFRY (FRY), the use of a prohibited method of combat is a war crime.⁷⁷⁶ The commentary on the Code provides that "the following methods of combat are banned under international law: . . . abuse of . . . enemy uniforms or enemy army or state flag".⁷⁷⁷

National Case-law

719. In the *Skorzeny case* before the US General Military Court of the US Zone of Germany in 1947, the accused, German officers, were charged with participating in the improper use of American uniforms by entering into combat disguised therewith and treacherously firing upon and killing members of the US armed forces. The Court did not consider it improper for German officers to wear enemy uniforms while trying to occupy enemy military objectives. There was no evidence that they had used their weapons while so disguised, so the accusation of war crime was rejected. All the accused were acquitted and the Court did not give reasons for its decision.⁷⁷⁸

Other National Practice

720. During the Chinese civil war, the Chinese Communist Party denounced the use of Red Army uniforms by Nationalist soldiers. The uniforms were used while committing reprehensible acts to discredit the Red Army. According to the Report on the Practice of China, soldiers captured while wearing the Red Army uniform were still treated as prisoners of war.⁷⁷⁹

⁷⁷¹ Spain, *Penal Code* (1995), Article 612(5).

⁷⁷² Syria, *Penal Code* (1949), § 381.

⁷⁷³ Trinidad and Tobago, *Draft ICC Act* (1999), Section 5(1)(a).

⁷⁷⁴ UK, *ICC Act* (2001), Sections 50(1) and 51(1) (England and Wales) and Section 58(1) (Northern Ireland).

⁷⁷⁵ US, *War Crimes Act as amended* (1996), Section 2441(c)(2).

⁷⁷⁶ SFRY(FRY), *Penal Code as amended* (1976), Article 148(1).

⁷⁷⁷ SFRY(FRY), *Penal Code as amended* (1976), commentary on Article 148(1).

⁷⁷⁸ US, General Military Court of the US Zone of Germany, *Skorzeny case*, Judgement, 9 September 1947.

⁷⁷⁹ Report on the Practice of China, 1997, Chapter 2.6. (No source or document is cited.)

721. The Report on the Practice of Germany provides that:

An official document of 1978 states that the improper use of uniforms can be seen as an act of perfidy. It continues by stating that there would be no breach in the case of wearing a uniform which is incomplete. International law contains no rules on the composition of uniforms. The important element is a certain designation or identification in order to comply with the principle of distinction. This designation does not necessarily have to be a uniform in the traditional sense.⁷⁸⁰

722. According to the Report on the Practice of India, there are no provisions in the Indian Army Regulations which would permit the use of enemy uniforms either in combat or other circumstances.⁷⁸¹

723. On the basis of the reply by Iraq's Ministry of Defence to a questionnaire, the Report on the Practice of Iraq concludes that a combatant wearing an enemy uniform to create confusion and disorder among its ranks would lose any protection under international law.⁷⁸²

724. According to the Report on the Practice of Jordan, there is no Jordanian provision prohibiting the use of enemy uniforms.⁷⁸³

725. According to the Report on the Practice of South Korea, in the context of the North Korean Submarine Infiltration case, a report of the Intelligence Analysis Division of the Korean Ministry of Reunification pointed out that North Korean military personnel wearing South Korean military uniform lost their prisoner-of-war status. In the same context, a spokesman for the South Korean Ministry of Defence condemned the use of South Korean military uniforms by North Korean military personnel.⁷⁸⁴

726. On the basis of replies by army officers to a questionnaire, the Report on the Practice of Rwanda states that "treason . . . is prohibited" and "the improper use of uniforms is considered an act of treason" as well as a crime.⁷⁸⁵

727. In 1996, in its oral pleadings before the ECtHR in the case of *Akdivar and Others v. Turkey*, Turkey complained that the PKK very often used uniforms of soldiers belonging to the Turkish army who had been killed, so as to conceal the identities of the actual perpetrators of attacks.⁷⁸⁶

728. It was reported that, during the December 1944 Battle of the Bulge, the US army executed 18 German soldiers apprehended in US uniforms on charges of spying.⁷⁸⁷

⁷⁸⁰ Report on the Practice of Germany, 1997, Chapter 2.6. (No source or document is cited.)

⁷⁸¹ Report on the Practice of India, 1997, Answers to additional questions on Chapter 2.6.

⁷⁸² Report on the Practice of Iraq, 1998, Reply by the Ministry of Defence to a questionnaire, July 1997, Chapter 2.6.

⁷⁸³ Report on the Practice of Jordan, 1997, Chapter 2.6.

⁷⁸⁴ Report on the Practice of South Korea, 1997, Chapter 2.6.

⁷⁸⁵ Report on the Practice of Rwanda, 1997, Replies by army officers to a questionnaire, 1997, Chapter 2.6.

⁷⁸⁶ Turkey, Oral pleadings before the ECtHR, *Akdivar and Others v. Turkey*, Verbatim Record, 25 April 1996, p. 3.

⁷⁸⁷ W. Hays Parks, "Air War and the Law of War", *The Air Force Law Review*, Vol. 32, 1990, p. 77, footnote 259; Peter Rowe, "The Use of Special Forces and the Laws of War. Wearing the

729. In 1987, the Deputy Legal Adviser of the US Department of State affirmed that “we do not support the prohibition in article 39 [AP I] of the use of enemy emblems and uniforms during military operations”.⁷⁸⁸

730. According to the Report on US Practice, the *Skorzeny case* is the leading authority for the US armed forces. It adds that it is the *opinio juris* of the US that the use of enemy uniforms is a lawful ruse of war as long as they are not used in actual combat.⁷⁸⁹

731. The Report on the Practice of the SFRY (FRY) mentions the use of YPA insignia by Croatian soldiers when entering a Serb village. Civilians who went out to greet them were killed. No official statement on or reaction to the incident is provided by the report.⁷⁹⁰ The report also notes that misuse or improper use of uniforms on the part of paramilitary formations and armed forces occurred at the beginning of the conflicts in Slovenia and Croatia. According to the report, it appears that the issue was not of primary importance and, therefore, cases of violations were not systematically recorded, although they undoubtedly existed and were committed by all parties to the conflict.⁷⁹¹

732. The Report on the Practice of Zimbabwe states that “improper use of uniforms could be regarded as a legitimate ruse of war and is not necessarily perfidious”. No documents or sources are mentioned.⁷⁹²

III. Practice of International Organisations and Conferences

733. No practice was found.

IV. Practice of International Judicial and Quasi-judicial Bodies

734. In its report in *Chrysostomos and Papachrysostomou v. Turkey* in 1993, the ECiHR noted the admitted practice that Turkish soldiers and Turkish Cypriot soldiers were wearing the same camouflage uniforms. It considered that the practice constituted “a deliberate tactic of disguise aimed at preventing the public from distinguishing between actions by Turkish soldiers and actions by Turkish Cypriot soldiers”. The Commission did not condemn the practice as such, but it considered that it had to take it into account when

Uniform of the Enemy or Civilian Clothes and of Spying and Assassination”, *Revue de Droit Militaire et de Droit de la Guerre*, Vol. 33, 1994, p. 217.

⁷⁸⁸ US, Remarks of Michael J. Matheson, Deputy Legal Adviser, US Department of State, The Sixth Annual American Red Cross-Washington College of Law Conference on International Humanitarian Law: A Workshop on Customary International Law and the 1977 Protocols Additional to the 1949 Geneva Conventions, *American University Journal of International Law and Policy*, Vol. 2, 1987, p. 425.

⁷⁸⁹ Report on US Practice, 1997, Chapter 2.6.

⁷⁹⁰ Report on the Practice of the SFRY (FRY), 1997, Chapter 2.4, referring to Miodrag Starcevic and Nikola Petkovic, *Croatia '91-Violence and Crime Against the Law*, Belgrade, 1991, pp. 34–35.

⁷⁹¹ Report on the Practice of the SFRY (FRY), 1997, Chapter 2.6.

⁷⁹² Report on the Practice of Zimbabwe, 1998, Chapter 2.6.

determining the responsibility of Turkey. In fact, recalling the practice, it found that the applicants' arrest was imputable to Turkey.⁷⁹³

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

735. The ICRC Commentary on the Additional Protocols states that:

The prohibition formulated in Article 39 [AP I], "while engaging in attacks or in order to shield, favour, protect or impede military operations", includes the preparatory stage to the attack . . . It means that every possible exception should always be examined on its merits, a point that legal experts had stressed throughout . . . Under the provisions of the Hague Regulations [1907 HR], there is no doubt whatsoever that wearing an enemy uniform is not prohibited in this case [in order to conceal, facilitate or protect escape].⁷⁹⁴

736. To fulfil its task of disseminating IHL, the ICRC has delegates around the world teaching armed and security forces that "it is prohibited to use the flags, emblems or uniforms of the enemy: a) while engaging in combat action; b) in order to shield, favour or impede military operations".⁷⁹⁵

737. In a working paper on war crimes submitted in 1997 to the Preparatory Committee for the Establishment of an International Criminal Court, the ICRC included the "improper use . . . of the national flag or of the military insignia and uniform of the enemy", when committed in an international armed conflict, in its list of war crimes to be subject to the jurisdiction of the Court.⁷⁹⁶

VI. Other Practice

738. In 1986, in a report on human rights in Nicaragua, Americas Watch noted that, in some incidents involving attacks against non-combatants, "some of the *contras* . . . are said to wear red and black kerchiefs, traditionally worn by the *Sandinistas*, as a way of deceiving people about their true identity". It also reported that some of the forces of the FDN, when they launched an attack on a certain city, "entered the town surreptitiously wearing uniforms resembling those worn by Nicaraguan Army troops".⁷⁹⁷

739. In 1991, a Minister of a State transmitted to the ICRC allegations of use of army uniforms by irregular forces when ICRC delegates or EC observers were approaching.⁷⁹⁸

⁷⁹³ ECiHR, *Chrysostomos and Papachrysostomou v. Turkey*, Report, 8 July 1993, §§ 94–102.

⁷⁹⁴ Yves Sandoz *et al.* (eds.), *Commentary on the Additional Protocols*, ICRC, Geneva, 1987, §§ 1575 and 1576.

⁷⁹⁵ Frédéric de Mulinen, *Handbook on the Law of War for Armed Forces*, ICRC, Geneva, 1987, § 403.

⁷⁹⁶ ICRC, Working paper on war crimes submitted to the Preparatory Committee for the Establishment of an International Criminal Court, New York, 14 February 1997, § 2(x).

⁷⁹⁷ Americas Watch, *Human Rights in Nicaragua: 1985–1986*, New York, March 1986, pp. 89 and 106.

⁷⁹⁸ ICRC archive document.

740. Parks has established a list of examples of conflicts since the Second World War in which the wearing of enemy uniforms was practised: France in Algeria (1958–1962); North Vietnam in South Vietnam (1968); US in Southeast Asia (1965–1972); Soviet Union in Southeast Asia (1971–1972); Israel in the Middle East (1967, 1973); Rhodesia in Zambia and Mozambique (1970s); Israel in Uganda (1976); Mozambique in South Africa (1978); North Korea in South Korea (June 1983); Sendero Luminoso (“Shining Path”) in Peru (1984); Chad in Libya (1985); FMLN in El Salvador (1985–1988); and Sandinistas in Nicaragua (1986).⁷⁹⁹

741. The Report on SPLM/A Practice notes that the SPLA successfully deceived a high-ranking commander of the governmental forces into landing at a rendez-vous secured by SPLA forces. The officer was lured in part by SPLA combatants wearing governmental uniforms. In another instance, a SPLA contingent captured a town “without firing a shot” by entering the town under the guise of friendly troops bringing supplies and salaries.⁸⁰⁰

G. Use of Flags or Military Emblems, Insignia or Uniforms of Neutral or Other States Not Party to the Conflict

Note: *For practice concerning the use of flags or military emblems, insignia or uniforms of neutral or other States not party to the conflict as an act considered perfidious, see infra section I of this chapter.*

I. Treaties and Other Instruments

Treaties

742. Under Article 39(1) AP I, “it is prohibited to make use in an armed conflict of the flags or military emblems, insignia or uniforms of neutral or other States not Parties to the conflict”. Article 39 AP I was adopted by consensus.⁸⁰¹

Other Instruments

743. Paragraph 109 of the 1994 San Remo Manual provides that “military and auxiliary aircraft are prohibited at all times from feigning...neutral status”.

II. National Practice

Military Manuals

744. Australia’s Commanders’ Guide states that “it is prohibited to use flags, military emblems, insignia or uniforms of neutral or other States not party to the conflict”.⁸⁰² It further specifies that:

⁷⁹⁹ W. Hays Parks, *Air War and the Law of War*, *The Air Force Law Review*, Vol. 32, 1990, p. 77, footnote 259.

⁸⁰⁰ Report on SPLM/A Practice, 1998, Chapter 2.6.

⁸⁰¹ CDDH, *Official Records*, Vol. VI, CDDH/SR.39, 25 May 1977, p. 103.

⁸⁰² Australia, *Commanders’ Guide* (1994), § 904.

The clothing of neutral nations must never be worn by the forces of a belligerent. Nor should flags, symbols and military markings of a neutral nation be used by a belligerent. While naval ships may use such markings in operations that do not involve actual combat, no similar rule applies to military aircraft or land operations.⁸⁰³

745. Australia's Defence Force Manual provides that "in armed conflict, it is prohibited to use flags, military emblems, insignia or uniforms of neutral or other nations not party to the conflict".⁸⁰⁴

746. Belgium's Teaching Manual for Officers stipulates that the use of flags, symbols, insignia and uniforms of neutral or other States not parties to the conflict is prohibited "in all circumstances".⁸⁰⁵

747. Cameroon's Instructors' Manual states that "using fraudulently the emblems and uniforms of neutral States" is an unlawful deception.⁸⁰⁶

748. Canada's LOAC Manual states that "it is prohibited to make use in armed conflict of flags or military emblems, insignia or uniforms of *neutral or other states not parties to the conflict*".⁸⁰⁷ (emphasis in original)

749. Ecuador's Naval Manual states that:

At Sea. Under the customary international law of naval warfare, it is permissible for a belligerent warship to fly false colours and disguise its outward appearance in other ways in order to deceive the enemy into believing the vessel is of neutral nationality or is other than a warship. However, it is unlawful for a warship to go into action without first showing her true colours. Use of neutral flags, insignia, or uniforms during an actual armed engagement at sea is, therefore, forbidden.

In the Air. Use in combat of false or deceptive markings to disguise belligerent military aircraft as being of neutral nationality is prohibited.

On Land. The law of armed conflict applicable to land warfare has no rule of law analogous to that which permits belligerent warships to display neutral colours.

Belligerents engaged in armed conflict on land are not permitted to use the flags, insignia, or uniforms of a neutral nation to deceive the enemy.⁸⁰⁸

750. France's LOAC Manual provides that "it is prohibited to use the flags, emblems or uniforms of neutral States".⁸⁰⁹

751. Germany's Military Manual states that "it is prohibited to make improper use of . . . neutral national flags, military insignia and uniforms".⁸¹⁰

752. Indonesia's Military Manual states that "it is . . . prohibited to use . . . the military uniforms of neutral States or other States which are not parties to the conflict".⁸¹¹

⁸⁰³ Australia, *Commanders' Guide* (1994), § 510.

⁸⁰⁴ Australia, *Defence Force Manual* (1994), § 705.

⁸⁰⁵ Belgium, *Teaching Manual for Officers* (1994), Part I, Title II, p. 34.

⁸⁰⁶ Cameroon, *Instructors' Manual* (1992), p. 30, § 131.2 and p. 89, § 222.

⁸⁰⁷ Canada, *LOAC Manual* (1999), p. 6-2, § 12.

⁸⁰⁸ Ecuador, *Naval Manual* (1989), § 12.3. ⁸⁰⁹ France, *LOAC Manual* (2001), p. 47.

⁸¹⁰ Germany, *Military Manual* (1992), § 473.

753. Under Italy's IHL Manual, it is prohibited, without qualification, "to use any flag, insignia or military uniforms other than the country's own".⁸¹²

754. The Military Manual of the Netherlands states that "in an armed conflict, it is prohibited to make use of the flags, military emblems, uniforms and insignia of States which are not parties to the conflict".⁸¹³

755. The Military Handbook of the Netherlands provides that it is prohibited "to use insignia and uniforms . . . of neutral States".⁸¹⁴

756. New Zealand's Military Manual states that "it is prohibited to make use in an armed conflict of the flags or military emblems, insignia or uniforms of neutral or other States not Parties to the conflict".⁸¹⁵ In respect of naval warfare, the manual stipulates that "flags or markings of neutral . . . ships may be used prior to going into action".⁸¹⁶

757. Russia's Military Manual considers that the improper use of national signals and flags is a prohibited method of warfare.⁸¹⁷

758. Spain's LOAC Manual prohibits the use of flags, emblems or uniforms of neutral States.⁸¹⁸

759. Sweden's IHL Manual considers that the "prohibition of improper use of . . . emblems of nationality", as contained in Article 39 AP I, is part of customary international law.⁸¹⁹ It also notes that, during the CDDH:

There was a consensus in favour of introducing a rule forbidding this type of abuse on the part of belligerents. It should be noted that Article 39:1 [AP I] prohibits any form of use in armed conflict. The rule relates not only to the uniforms etc. of neutral states, but also to those belonging to states that – without being neutral – are not parties to the conflict. By this are meant states that have the status of non-belligerents.⁸²⁰

760. The US Air Force Pamphlet specifies that "military aircraft may not bear . . . markings of neutral aircraft while engaging in combat".⁸²¹

761. The US Naval Handbook states that:

At Sea. Under the customary international law of naval warfare, it is permissible for a belligerent warship to fly false colors and disguise its outward appearance in other ways in order to deceive the enemy into believing the vessel is of neutral nationality or is other than a warship. However, it is unlawful for a warship to go into action without first showing her true colors. Use of neutral flags, insignia, or uniforms during an actual armed engagement at sea is, therefore, forbidden.

In the Air. Use in combat of false or deceptive markings to disguise belligerent military aircraft as being of neutral nationality is prohibited.

⁸¹¹ Indonesia, *Military Manual* (1982), § 104. ⁸¹² Italy, *IHL Manual* (1991), Vol. I, § 9(1).

⁸¹³ Netherlands, *Military Manual* (1993), p. IV-3.

⁸¹⁴ Netherlands, *Military Handbook* (1995), p. 7-40.

⁸¹⁵ New Zealand, *Military Manual* (1992), § 502(8).

⁸¹⁶ New Zealand, *Military Manual* (1992), § 713(3). ⁸¹⁷ Russia, *Military Manual* (1990), § 5(c).

⁸¹⁸ Spain, *LOAC Manual* (1996), Vol. I, §§ 3.3.b.(3) and 5.3.c.

⁸¹⁹ Sweden, *IHL Manual* (1991), Section 2.2.3, p. 19.

⁸²⁰ Sweden, *IHL Manual* (1991), Section 3.2.1.1.b, pp. 31 and 32.

⁸²¹ US, *Air Force Pamphlet* (1976), § 7-4.

On Land. The law of armed conflict applicable to land warfare has no rule of law analogous to that which permits belligerent warships to display neutral colors. Belligerents engaged in armed conflict on land are not permitted to use the flags, insignia, or uniforms of a neutral nation to deceive the enemy.⁸²²

National Legislation

762. Algeria's Code of Military Justice punishes the unauthorised use of the insignia of foreign armed forces.⁸²³

763. Argentina's Draft Code of Military Justice punishes any soldier who "uses improperly ... the flag, uniform, insignia or distinctive emblem ... of neutral States ... or of other States which are not parties to the conflict".⁸²⁴

764. Under Armenia's Penal Code, "the use during military actions of ... the flag or insignia of ... a neutral State ... in breach of international treaties and international law" constitutes a crime against the peace and security of mankind.⁸²⁵

765. Australia's Geneva Conventions Act as amended provides that:

A person shall not, without the consent in writing of the Minister or of a person authorized in writing by the Minister to give consents ... use for any purpose whatsoever any of the following:

...
(f) such ... emblems, identity cards, signs, signals, insignia or uniforms as are prescribed for the purpose of giving effect to [AP I].⁸²⁶

766. The Criminal Code of Belarus provides that it is a war crime to "use intentionally, during hostilities, in violation of international treaties, ... the national flag or distinctive signs ... of a neutral State".⁸²⁷

767. The Czech Republic's Criminal Code as amended punishes any "person who, in time of war, misuses ... the flag ... or military emblem, or the insignia or uniform of a neutral country or another country ... which is not a party to the conflict".⁸²⁸

768. Under Ireland's Geneva Conventions Act as amended, any "minor breach" of AP I, including violations of Article 39(1) AP I, is a punishable offence.⁸²⁹

769. Under Italy's Law of War Decree as amended, it is prohibited, without qualification, "to use any flag, insignia or military uniforms other than the country's own".⁸³⁰

⁸²² US, *Naval Handbook* (1995), § 12.3.

⁸²³ Algeria, *Code of Military Justice* (1971), Article 298.

⁸²⁴ Argentina, *Draft Code of Military Justice* (1998), Article 292, introducing a new Article 876(6) in the *Code of Military Justice as amended* (1951).

⁸²⁵ Armenia, *Penal Code* (2003), Article 397.

⁸²⁶ Australia, *Geneva Conventions Act as amended* (1957), Section 15(1)(f).

⁸²⁷ Belarus, *Criminal Code* (1999), Article 138.

⁸²⁸ Czech Republic, *Criminal Code as amended* (1961), Article 265(2).

⁸²⁹ Ireland, *Geneva Conventions Act as amended* (1962), Section 4(1) and (4).

⁸³⁰ Italy, *Law of War Decree as amended* (1938), Article 36(2).

770. Italy's Wartime Military Penal Code punishes anyone who uses improperly the flag, insignia or military uniforms of a State other than his/her own.⁸³¹

771. Nicaragua's Military Penal Code punishes any soldier who, in time of war and in an area of military operations, "unlawfully displays . . . the flags or emblems . . . of neutral [States]".⁸³²

772. Under Norway's Military Penal Code as amended, "anyone who contravenes or is accessory to the contravention of provisions relating to the protection of persons or property laid down in . . . the two additional protocols to [the Geneva] Conventions . . . is liable to imprisonment".⁸³³

773. Under the Diplomatic Immunities Act of the Philippines, it is a punishable offence "with intent to deceive or mislead, within the jurisdiction of the Republic, [to] wear any naval, military, police, or other official uniform, decoration or regalia of any foreign State, nation or government with which the Republic of the Philippines is at peace".⁸³⁴

774. Poland's Penal Code punishes "any person who, during hostilities, uses . . . flags or military emblems of a . . . neutral State . . . in violation of international law".⁸³⁵

775. Slovakia's Criminal Code as amended punishes any "person who, in time of war, misuses . . . the flag . . . or military emblem, or the insignia or uniform of a neutral country or another country . . . which is not a party to the conflict".⁸³⁶

776. Spain's Military Criminal Code punishes any soldier who "displays improperly . . . neutral flags and emblems".⁸³⁷

777. Spain's Penal Code punishes "anyone who, during an armed conflict . . . uses improperly . . . the flag, uniform, insignia or distinctive emblem . . . of neutral States . . . or States that are not parties to the conflict".⁸³⁸

778. Under Syria's Penal Code, the wearing by any person of an official uniform or insignia of the Syrian State or of a foreign State is a punishable offence.⁸³⁹

National Case-law

779. No practice was found.

Other National Practice

780. No practice was found.

⁸³¹ Italy, *Wartime Military Penal Code* (1941), Article 180.

⁸³² Nicaragua, *Military Penal Code* (1996), Article 50(1).

⁸³³ Norway, *Military Penal Code as amended* (1902), § 108(b).

⁸³⁴ Philippines, *Diplomatic Immunities Act* (1946), Section 3.

⁸³⁵ Poland, *Penal Code* (1997), Article 126(2).

⁸³⁶ Slovakia, *Criminal Code as amended* (1961), Article 265(2).

⁸³⁷ Spain, *Military Criminal Code* (1985), Article 75(1).

⁸³⁸ Spain, *Penal Code* (1995), Article 612(5). ⁸³⁹ Syria, *Penal Code* (1949), § 381.

III. Practice of International Organisations and Conferences

781. No practice was found.

IV. Practice of International Judicial and Quasi-judicial Bodies

782. No practice was found.

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

783. To fulfil its task of disseminating IHL, the ICRC has delegates around the world teaching armed and security forces that "it is prohibited to use the flags, emblems or uniforms of neutral States".⁸⁴⁰

VI. Other Practice

784. No practice was found.

H. Conclusion of an Agreement to Suspend Combat with the Intention of Attacking by Surprise the Adversary Relying on It

*I. Treaties and Other Instruments**Treaties*

785. Article 21(1) of draft AP II submitted by the ICRC to the CDDH provided that "when carried out in order to commit or resume hostilities, . . . the feigning of a cease-fire" was considered as perfidy.⁸⁴¹ However, this proposal was deleted from draft Article 21 adopted in Committee III of the CDDH.⁸⁴²

Other Instruments

786. Article 15 of the 1863 Lieber Code states that:

Military necessity admits . . . of such deception as does not involve the breaking of good faith either positively pledged, regarding agreements entered into during the war, or supposed by the modern law of war to exist. Men who take up arms against one another in public war do not cease on this account to be moral beings, responsible to one another and to God.

⁸⁴⁰ Frédéric de Mulinen, *Handbook on the Law of War for Armed Forces*, ICRC, Geneva, 1987, § 405.

⁸⁴¹ CDDH, *Official Records*, Vol. I, Part Three, Draft Additional Protocols, June 1973, p. 39.

⁸⁴² CDDH, *Official Records*, Vol. XV, CDDH/407/Rev.1, 17 March–10 June 1977, p. 502.

II. National Practice

Military Manuals

787. Belgium's Law of War Manual states that "the denunciation of an armistice for doubtful motives in order to surprise the adversary without giving him the time to prepare could be considered as an act of perfidy".⁸⁴³

788. Burkina Faso's Disciplinary Regulations provides that, under the laws and customs of war, it is prohibited "to fire at, injure or kill an enemy . . . with whom a suspension of combat has been concluded".⁸⁴⁴

789. Cameroon's Disciplinary Regulations provides that, under the laws and customs of war, it is prohibited "to fire at, injure or kill an enemy . . . with whom a suspension of combat has been concluded".⁸⁴⁵

790. Canada's LOAC Manual states that:

Any agreement made by belligerent commanders must be adhered to, and any breach of its conditions would involve international responsibility if ordered by a government, and personal liability, (which might amount to a war crime) if committed by an individual on his or her own authority . . .

Between combatants, the most common purpose of such agreements is to arrange for an armistice or truce, whether for a specific purpose or more generally.⁸⁴⁶

791. Congo's Disciplinary Regulations provides that, under the laws and customs of war, it is prohibited "to fire at, injure or kill an enemy . . . with whom a suspension of combat has been concluded".⁸⁴⁷

792. France's Disciplinary Regulations as amended provides that, under ratified international conventions, it is prohibited "to fire at, injure or kill an enemy . . . with whom a suspension of combat has been concluded".⁸⁴⁸

793. Germany's Military Manual gives as an example of an act of perfidy the conclusion of a "humanitarian agreement to suspend combat with the intention of attacking by surprise the enemy relying on it".⁸⁴⁹ It also states that "during an armistice, it is . . . definitely forbidden to move the forces in contact with the enemy forward or to employ reconnaissance patrols".⁸⁵⁰

794. Italy's IHL Manual provides that in case of a violation of an armistice, the local commander can react as circumstances require. Only the supreme commander, with the consent of the government, can denounce an armistice or order the resumption of hostilities.⁸⁵¹ Hostile acts committed by individuals on

⁸⁴³ Belgium, *Law of War Manual* (1983), p. 42.

⁸⁴⁴ Burkina Faso, *Disciplinary Regulations* (1994), Article 35(2).

⁸⁴⁵ Cameroon, *Disciplinary Regulations* (1975), Article 32.

⁸⁴⁶ Canada, *LOAC Manual* (1999), p. 14-2, §§ 12 and 13.

⁸⁴⁷ Congo, *Disciplinary Regulations* (1986), Article 32(2).

⁸⁴⁸ France, *Disciplinary Regulations as amended* (1975), Article 9 bis (2).

⁸⁴⁹ Germany, *Military Manual* (1992), § 472.

⁸⁵⁰ Germany, *Military Manual* (1992), § 237.

⁸⁵¹ Italy, *IHL Manual* (1991), Vol. I, § 77.

their own initiative are not considered as violations of the armistice agreement, but punishment and indemnity can be demanded.⁸⁵²

795. Under South Korea's Military Regulation 187, acts committed in violation of the terms of a capitulation agreement constitute a war crime.⁸⁵³

796. Mali's Army Regulations states that, under the laws and customs of war, it is prohibited "to fire at, injure or kill an enemy . . . with whom a suspension of combat has been concluded".⁸⁵⁴

797. Morocco's Disciplinary Regulations provides that, under the laws and customs of war, it is prohibited "to fire at, injure or kill an enemy . . . with whom a suspension of combat has been concluded".⁸⁵⁵

798. The Military Handbook of the Netherlands provides that it is prohibited "to violate an agreement concluded with the adverse party (for example concerning a cease-fire to search for and collect the wounded and dead)".⁸⁵⁶

799. New Zealand's Military Manual provides that:

Any agreement made by belligerent commanders must be scrupulously adhered to and a breach of its conditions would involve international responsibility and liability for compensation, if ordered by a government, or personal liability which might amount to a war crime, if committed by an individual on his own authority.⁸⁵⁷

The manual also states that "in general, it is contrary to modern practice to attempt to obtain advantage of the enemy by deliberate lying, for instance, by declaring that an armistice has been agreed upon when in fact that is not the case".⁸⁵⁸ In addition, "violation of the terms of an armistice by an individual acting on his own initiative entitles the injured party to demand the punishment of the offender. If the party injured captures the offender, it may try him for a war crime."⁸⁵⁹

800. Nigeria's Manual on the Laws of War states that "informing the enemy that there is an armistice in order to make him leave his position" is an "illegitimate tactic".⁸⁶⁰ It also states that "violation of surrender terms" is a war crime.⁸⁶¹

801. Senegal's Disciplinary Regulations provides that, under the laws and customs of war, it is prohibited "to fire at, injure or kill an enemy . . . with whom a suspension of combat has been concluded".⁸⁶²

⁸⁵² Italy, *IHL Manual* (1991), Vol. I, § 79.

⁸⁵³ South Korea, *Military Regulation 187* (1991), Article 4.2.

⁸⁵⁴ Mali, *Army Regulations* (1979), Article 36.

⁸⁵⁵ Morocco, *Disciplinary Regulations* (1974), Article 25(2).

⁸⁵⁶ Netherlands, *Military Handbook* (1995), p. 7-40.

⁸⁵⁷ New Zealand, *Military Manual* (1992), § 407(1).

⁸⁵⁸ New Zealand, *Military Manual* (1992), § 502(3).

⁸⁵⁹ New Zealand, *Military Manual* (1992), § 1704(3).

⁸⁶⁰ Nigeria, *Manual on the Laws of War* (undated), § 14.

⁸⁶¹ Nigeria, *Manual on the Laws of War* (undated), § 6.

⁸⁶² Senegal, *Disciplinary Regulations* (1990), Article 34(2).

802. Switzerland's Basic Military Manual states that the violation of an armistice is prohibited and the "carrying out of hostilities after the conclusion of an armistice or the violation of its provisions" are war crimes.⁸⁶³

803. The UK Military Manual emphasises that "good faith, as expressed in the observance of promises, is essential in war, for without it hostilities could not be terminated with any degree of safety short of the total destruction of one of the contending parties".⁸⁶⁴ It also states that "in general, it is contrary to modern practice to attempt to obtain advantage of the enemy by deliberate lying, for instance, by declaring that an armistice has been agreed upon when in fact that is not the case".⁸⁶⁵ The manual further specifies that "to demand a suspension of arms and then to break it by surprise, or to violate a safe conduct or any other agreement, in order to obtain an advantage, is an act of perfidy and as such forbidden".⁸⁶⁶ It also provides that "it would be perfidy to denounce an armistice for a motive or under a pretext more or less specious and to surprise the enemy without giving him time to put himself on his guard".⁸⁶⁷ Lastly, the manual states that "in addition to the 'grave breaches' of the 1949 [Geneva] Conventions, . . . the following are examples of punishable violations of the laws of war, or war crimes: . . . violation of surrender terms".⁸⁶⁸

804. The US Field Manual provides that "to broadcast to the enemy that an armistice has been agreed upon when such is not the case would be treacherous".⁸⁶⁹ The manual also states that:

It would be an outrageous act of perfidy for either party, without warning, to resume hostilities during the period of an armistice, with or without a formal denunciation thereof, except in case of urgency and upon convincing proof of intentional and serious violation of its terms by the other party.⁸⁷⁰

The manual further states that "in addition to the 'grave breaches' of the Geneva Conventions of 1949, the following acts are representative of violations of the law of war ('war crimes'): . . . violation of surrender terms".⁸⁷¹

805. The US Air Force Pamphlet states that "the feigning of a cease-fire" is an example of perfidy.⁸⁷² The Pamphlet adds that "a false broadcast to the enemy that an armistice has been agreed upon has been widely recognized to be treacherous. [This] language . . . expresses the customary and conventional law in this area."⁸⁷³

806. The US Instructor's Guide provides that "in addition to the grave breaches of the Geneva Conventions, the following acts are further examples of war crimes: . . . violating surrender terms".⁸⁷⁴

⁸⁶³ Switzerland, *Basic Military Manual* (1987), Articles 194(2) and 200(2)(g).

⁸⁶⁴ UK, *Military Manual* (1958), § 308. ⁸⁶⁵ UK, *Military Manual* (1958), § 314.

⁸⁶⁶ UK, *Military Manual* (1958), § 316. ⁸⁶⁷ UK, *Military Manual* (1958), § 459.

⁸⁶⁸ UK, *Military Manual* (1958), § 626(n). ⁸⁶⁹ US, *Field Manual* (1956), § 50.

⁸⁷⁰ US, *Field Manual* (1956), § 493. ⁸⁷¹ US, *Field Manual* (1956), § 504(n).

⁸⁷² US, *Air Force Pamphlet* (1976), § 8-3(a).

⁸⁷³ US, *Air Force Pamphlet* (1976), § 8-6(a).

⁸⁷⁴ US, *Instructor's Guide* (1985), pp. 13 and 14.

National Legislation

807. Argentina's Penal Code punishes any person "who violates treaties concluded with foreign nations, truces and armistice agreements between the Republic and an enemy power".⁸⁷⁵

808. Argentina's Code of Military Justice as amended punishes any soldier "who continues hostilities after having received the official notice that peace, a truce or an armistice has been concluded".⁸⁷⁶

809. Argentina's Draft Code of Military Justice punishes any soldier "who violates a suspension of arms, armistice, capitulation or other agreement with the enemy".⁸⁷⁷

810. Azerbaijan's Criminal Code provides that "violations of temporary armistice agreements or agreements about the stopping of military actions with the aim of removing, exchanging or transporting the dead and wounded" constitute war crimes in international and non-international armed conflicts.⁸⁷⁸

811. The Criminal Code of Belarus provides that any "violation of truces, agreements on the suspension of hostilities or local arrangements concluded for the removal, exchange or transport of the wounded and dead left on the battlefield" is a war crime.⁸⁷⁹

812. Bolivia's Penal Code as amended provides that "anyone who violates treaties, truce or armistice concluded between the Nation and the enemy or between belligerent forces" commits a "crime against international law".⁸⁸⁰

813. Chile's Code of Military Justice punishes "anyone who, without justification, continues hostilities after having received the official information that peace, armistice or truce has been agreed with the enemy, violates any of these agreements or a capitulation".⁸⁸¹

814. Costa Rica's Penal Code as amended punishes any person "who violates the truce or armistice agreed with between the nation and an enemy country or belligerent forces".⁸⁸²

815. Ecuador's National Civil Police Penal Code punishes the members of the National Civil Police "who breach or violate a treaty, truce or armistice".⁸⁸³

816. Ecuador's Penal Code punishes "anyone who violates a truce or armistice concluded with the enemy, after it has been formally rendered public".⁸⁸⁴

⁸⁷⁵ Argentina, *Penal Code* (1984), Article 220.

⁸⁷⁶ Argentina, *Code of Military Justice as amended* (1951), Article 741.

⁸⁷⁷ Argentina, *Draft Code of Military Justice* (1998), Article 294, introducing a new Article 878 in the *Code of Military Justice as amended* (1951).

⁸⁷⁸ Azerbaijan, *Criminal Code* (1999), Article 116(9).

⁸⁷⁹ Belarus, *Criminal Code* (1999), Article 136(9).

⁸⁸⁰ Bolivia, *Penal Code as amended* (1972), Article 137.

⁸⁸¹ Chile, *Code of Military Justice* (1925), Article 260.

⁸⁸² Costa Rica, *Penal Code as amended* (1970), Article 283.

⁸⁸³ Ecuador, *National Civil Police Penal Code* (1960), Article 117(6).

⁸⁸⁴ Ecuador, *Penal Code* (1971), Article 123.

817. El Salvador's Code of Military Justice punishes any "soldier who... violates a truce, armistice, capitulation or other agreement concluded with the enemy".⁸⁸⁵

818. Ethiopia's Penal Code punishes "whosoever, having been officially informed of an armistice or peace treaty duly concluded, contrary to orders given continues hostilities, or in any other way knowingly infringes one of the agreed conditions".⁸⁸⁶

819. Guatemala's Penal Code punishes "anyone who violates a truce or armistice concluded between Guatemala and a foreign power or between their belligerent forces".⁸⁸⁷

820. Under Hungary's Criminal Code as amended, "the person who infringes the conditions of armistice" is guilty, upon conviction, of a war crime.⁸⁸⁸

821. Italy's Law of War Decree as amended provides that in case of a violation of an armistice, the local commander can react as circumstances require. Only the supreme commander can denounce an armistice or order to resume hostilities.⁸⁸⁹ Hostile acts committed by individuals on their own initiative are not considered as violations of the armistice agreement, but punishment and indemnity can be demanded.⁸⁹⁰

822. Italy's Wartime Military Penal Code punishes any commander who, without justification, commits hostile acts against the enemy during a truce or an armistice, except in case of necessity.⁸⁹¹

823. Mexico's Code of Military Justice as amended punishes "anyone who, without justification... violates a truce, armistice, capitulation or other agreement concluded with the enemy, if, because of his conduct, hostilities are restarted".⁸⁹²

824. Under the Definition of War Crimes Decree of the Netherlands, the "commission, contrary to the conditions of a truce, of hostile acts or the incitement thereto" constitutes a war crime.⁸⁹³

825. Nicaragua's Military Penal Code punishes any "soldier who, without justification and after official notification, violates peace, armistice, truce or capitulation agreements".⁸⁹⁴

826. Peru's Code of Military Justice punishes any soldier who "violates an armistice, a truce,... a capitulation or any other legitimate agreement

⁸⁸⁵ El Salvador, *Code of Military Justice* (1934), Article 67.

⁸⁸⁶ Ethiopia, *Penal Code* (1957), Article 289.

⁸⁸⁷ Guatemala, *Penal Code* (1973), Article 373.

⁸⁸⁸ Hungary, *Criminal Code as amended* (1978), Section 162(1).

⁸⁸⁹ Italy, *Law of War Decree as amended* (1938), Article 81.

⁸⁹⁰ Italy, *Law of War Decree as amended* (1938), Article 82.

⁸⁹¹ Italy, *Wartime Military Penal Code* (1941), Article 170.

⁸⁹² Mexico, *Code of Military Justice as amended* (1933), Article 208(II).

⁸⁹³ Netherlands, *Definition of War Crimes Decree* (1946), Article 1.

⁸⁹⁴ Nicaragua, *Military Penal Code* (1996), Article 49.

concluded with another nation, or prolongs the hostilities after having received official notice of peace, truce or armistice".⁸⁹⁵

827. Peru's Penal Code punishes any person who violates a truce or armistice.⁸⁹⁶

828. Spain's Military Criminal Code punishes any soldier "who violates a suspension of arms, an armistice, a capitulation or another agreement concluded with the enemy".⁸⁹⁷

829. Spain's Penal Code punishes "anyone who violates a truce or an armistice concluded between the Spanish Nation and the enemy or between their belligerent forces".⁸⁹⁸

830. Switzerland's Military Criminal Code as amended punishes "anyone who continues hostilities, after having official knowledge of the conclusion of an armistice or of peace, [and] anyone who, in any other way, violates the conditions of an officially known armistice".⁸⁹⁹

831. Venezuela's Code of Military Justice as amended punishes "those who violate . . . truces or armistices".⁹⁰⁰

832. Venezuela's Revised Penal Code punishes "nationals and foreigners who, during a war between Venezuela and another Nation, violate a truce or armistice".⁹⁰¹

National Case-law

833. No practice was found.

Other National Practice

834. According to the Report on the Practice of China, the conduct of the Nationalist Government after a truce agreement was concluded with the Chinese Communist Party in January 1946 was perfidious. At the time, Mao Zedong reported that "Chiang Kai-Shek used [the] agreement as a disguise with a view to arranging a large scale military offensive".⁹⁰²

835. In 1984, during the Iran–Iraq War, the two belligerents concluded an agreement under the auspices of the UN Secretary-General not to attack cities and villages.⁹⁰³ However, Iraq alleged in a letter to the UN Secretary-General that Iran was using the agreement to concentrate armed forces in border towns.⁹⁰⁴

⁸⁹⁵ Peru, *Code of Military Justice* (1980), Article 91(2).

⁸⁹⁶ Peru, *Penal Code as amended* (1991), Article 340.

⁸⁹⁷ Spain, *Military Criminal Code* (1985), Article 72. ⁸⁹⁸ Spain, *Penal Code* (1995), Article 593.

⁸⁹⁹ Switzerland, *Military Criminal Code as amended* (1927), Article 113.

⁹⁰⁰ Venezuela, *Code of Military Justice as amended* (1998), Article 474(7).

⁹⁰¹ Venezuela, *Revised Penal Code* (2000), Article 156(1).

⁹⁰² Report on the Practice of China, 1997, Chapter 2.4, referring to Mao Zedong, To Shatter the Offensives of Chiang Kai-shek by Way of Self-defence, 20 July 1946, *Selected Works of Mao Zedong*, Vol. 4, The People's Press, p. 1189.

⁹⁰³ UN Secretary-General, Note verbale dated 26 June 1984 addressed to Member States and Observer States that are States parties to the Geneva Conventions of 1949, UN Doc. S/16648, 26 June 1994.

⁹⁰⁴ Iraq, Letter dated 28 June 1984 to the UN Secretary-General, UN Doc. S/16649, 28 June 1984.

836. According to the Report on the Practice of Iraq, in a military communiqué issued during the Iran–Iraq War, Iraq stated that it regarded as perfidious an attack on its defensive line after the Iranian armed forces had announced that their military operations had come to an end.⁹⁰⁵

837. In 1991, in a document entitled “Examples of violations of the rules of international law committed by the so-called armed forces of Slovenia”, the Ministry of Defence of the SFRY stated that “members of the so-called armed forces of Slovenia have used [each agreed upon cease-fire] to attack the Yugoslav People’s Army units, by bringing their own units in a more advantageous position, thus performing similar faithless procedures”.⁹⁰⁶

838. In 1995, the Minister of Foreign Affairs of the SFRY denounced the violation of an agreement whereby Serb troops, after handing over their heavy weapons, were to be allowed free passage by the Croatian army but were attacked instead.⁹⁰⁷

839. According to the Report on the Practice of the SFRY (FRY), during the conflict in the former Yugoslavia, the YPA cited attacks against its soldiers during an armistice as examples of perfidious conduct.⁹⁰⁸

840. In 1992, an ICRC report noted that a State denounced violations of a cease-fire agreed upon with another State.⁹⁰⁹

III. Practice of International Organisations and Conferences

United Nations

841. In 1984, with regard to the Iran–Iraq War, the UN Secretary-General stated that he was “deeply concerned that allegations have been made that civilian population centres are being used for concentration of military forces. If this were indeed the case, such actions would constitute a violation of the spirit of my appeal and of basic standards of warfare that the international community expects to be observed.”⁹¹⁰

Other International Organisations

842. No practice was found.

International Conferences

843. No practice was found.

⁹⁰⁵ Report on the Practice of Iraq, 1998, Chapter 2.4, referring to Military communiqué, 1 March 1987.

⁹⁰⁶ SFRY (FRY), Ministry of Defence, Examples of violations of the rules of international law committed by the so-called armed forces of Slovenia, July 1991, § 5.

⁹⁰⁷ SFRY (FRY), Appeal by the Yugoslav Federal Minister of Foreign Affairs, 7 August 1995.

⁹⁰⁸ Report on the Practice of the SFRY (FRY), 1997, Chapter 2.4, referring to *The Truth about the Armed Conflict in Slovenia*, Narodna armija, Belgrade, 1991, p. 60.

⁹⁰⁹ ICRC archive document.

⁹¹⁰ UN Secretary-General, Messages dated 29 June 1984 to the President of Iran and to the President of Iraq, UN Doc. S/16663, 6 July 1984, p. 1.

IV. Practice of International Judicial and Quasi-judicial Bodies

844. No practice was found.

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

845. In a working paper on war crimes submitted in 1997 to the Preparatory Committee for the Establishment of an International Criminal Court, the ICRC included the “violation of armistices, suspensions of fire or local arrangements concluded for the removal, exchange and transport of the wounded and the dead left on the battlefield”, when committed in international and non-international armed conflicts, in its list of war crimes to be subject to the jurisdiction of the Court.⁹¹¹

VI. Other Practice

846. No practice was found.

I. Perfidy**General***I. Treaties and Other Instruments**Treaties*

847. Article 37(1) AP I provides that “acts inviting the confidence of an adversary to lead him to believe that he is entitled to, or is obliged to accord, protection under the rules of international law applicable in armed conflict, with the intent to betray that confidence, shall constitute perfidy”. Article 37 AP I was adopted by consensus.⁹¹²

848. Article 21(1) of draft AP II submitted by the ICRC to the CDDH provided that “acts inviting the confidence of the adversary with intent to betray that confidence are deemed to constitute perfidy”.⁹¹³ However, this proposal was deleted from draft Article 21 adopted in Committee III of the CDDH.⁹¹⁴

Other Instruments

849. Article 15 of the 1863 Lieber Code provides that:

Military necessity admits . . . of such deception as does not involve the breaking of good faith either positively pledged, regarding agreements entered into during

⁹¹¹ ICRC, Working paper on war crimes submitted to the Preparatory Committee for the Establishment of an International Criminal Court, New York, 14 February 1997, §§ 2(ix) and 3(xvii).

⁹¹² CDDH, *Official Records*, Vol. VI, CDDH/SR.39, 25 May 1977, p. 103.

⁹¹³ CDDH, *Official Records*, Vol. I, Part Three, Draft Additional Protocols, June 1973, p. 39.

⁹¹⁴ CDDH, *Official Records*, Vol. XV, CDDH/407/Rev.1, 17 March–10 June 1977, p. 502.

the war, or supposed by the modern law of war to exist. Men who take up arms against one another in public war do not cease on this account to be moral beings, responsible to one another and to God.

850. Article 16 of the 1863 Lieber Code provides that “military necessity . . . admits of deception, but disclaims acts of perfidy”.

851. Article 4 of the 1880 Oxford Manual states that belligerents “are to abstain especially . . . from all perfidious . . . acts”.

852. Article 15 of the 1913 Oxford Manual of Naval War states that “methods . . . which involve treachery are forbidden”.

853. Paragraph 6 of the 1991 Memorandum of Understanding on the Application of IHL between Croatia and the SFRY requires that hostilities be conducted in accordance with Article 37 AP I.

854. Paragraph 2.5 of the 1992 Agreement on the Application of IHL between the Parties to the Conflict in Bosnia and Herzegovina requires that hostilities be conducted in accordance with Article 37 AP I.

855. Paragraph 111 of the 1994 San Remo Manual states that “perfidy is prohibited. Acts inviting the confidence of an adversary to lead it to believe that it is entitled to, or is obliged to accord, protection under the rules of international law applicable in armed conflict, with intent to betray that confidence, constitute perfidy.”

II. National Practice

Military Manuals

856. Argentina’s Law of War Manual (1969) provides that “the use of ruses and stratagems of war shall be legitimate as long as they do not imply the recourse to treason or to perfidy”, which are violations of the principle of good faith.⁹¹⁵

857. Argentina’s Law of War Manual (1989) states that:

Those acts are perfidious, which, relying on the good faith of an adversary with the intention to betray him, lead him to believe that he is entitled to, or is obliged to accord, protection under the rules of international law . . .

The prohibition of employing perfidious methods does not include stratagems.⁹¹⁶

858. Australia’s Commanders’ Guide provides that:

Acts which constitute perfidy are those inviting the confidence of an adversary, leading him to believe that he is entitled or obliged to accord protection under the rules of international law, with an intent to betray that confidence. Perfidious conduct is outlawed by LOAC and therefore, either a person who engages or a commander who orders or acquiesces in perfidious conduct may be prosecuted.⁹¹⁷

⁹¹⁵ Argentina, *Law of War Manual* (1969), § 1.017.

⁹¹⁶ Argentina, *Law of War Manual* (1989), § 1.05(2) and (3).

⁹¹⁷ Australia, *Commanders’ Guide* (1994), § 502, see also § 826 (naval warfare) and § 902 (land warfare).

859. Australia's Defence Force Manual states that:

Perfidy is forbidden. Acts which constitute perfidy are those inviting the confidence of an adversary, thus leading that adversary to believe that there is an entitlement, or an obligation, to accord protection provided under LOAC, with an intent to betray that confidence.⁹¹⁸

860. Belgium's Law of War Manual states that "perfidious acts are acts which abuse the confidence of the adversary so that he thinks he is facing a friend or a situation protected by the law of war".⁹¹⁹

861. Belgium's Teaching Manual for Officers provides that acts of perfidy are prohibited. It describes perfidy as "ruses aimed at neutralising the enemy (capturing, injuring or killing him) by leading him to believe that he has an obligation to respect a rule of humanitarian law".⁹²⁰

862. Belgium's Teaching Manual for Soldiers defines perfidy as "any act intended to deceive or abuse the enemy's confidence by inviting him to afford humanitarian protection and to respect a humanitarian rule".⁹²¹

863. Benin's Military Manual states that "it is prohibited to use perfidy" and adds that "perfidy . . . consists of committing a hostile act under the cover of a legal protection".⁹²²

864. Cameroon's Instructors' Manual stresses that "perfidy is condemned . . . by the Law of War".⁹²³ It describes perfidy "claiming an international protection with an intent to betray the enemy".⁹²⁴ It also provides the same definition of perfidy as contained in Article 37(1) AP I.⁹²⁵

865. Canada's LOAC Manual states that:

Acts inviting the confidence of adversaries and leading them to believe that they are entitled to protection or are obliged to grant protection under the LOAC, *with intent to betray that confidence*, constitute perfidy. In other words, perfidy consists of committing a hostile act under the cover of a legal protection.⁹²⁶ [emphasis in original]

866. Canada's Code of Conduct provides that "perfidy is a war crime".⁹²⁷

867. Under Colombia's Instructors' Manual, the instructor must explain what perfidy is, i.e., "conduct which is prohibited by International Humanitarian Law".⁹²⁸

⁹¹⁸ Australia, *Defence Force Manual* (1994), § 703.

⁹¹⁹ Belgium, *Law of War Manual* (1983), p. 32.

⁹²⁰ Belgium, *Teaching Manual for Officers* (1994), Part I, Title II, p. 34.

⁹²¹ Belgium, *Teaching Manual for Soldiers* (undated), p. 19, footnote (1).

⁹²² Benin, *Military Manual* (1995), Fascicule III, p. 13.

⁹²³ Cameroon, *Instructors' Manual* (1992), p. 149, § 531.1.

⁹²⁴ Cameroon, *Instructors' Manual* (1992), p. 30, § 131 and p. 89, § 222.

⁹²⁵ Cameroon, *Instructors' Manual* (1992), p. 63, § 234.

⁹²⁶ Canada, *LOAC Manual* (1999), p. 6-2, § 8 (land warfare), p. 7-2, § 16 (air warfare) and pp. 8-10 and 8-11, § 80 (naval warfare).

⁹²⁷ Canada, *Code of Conduct* (2001), Rule 10, § 10.

⁹²⁸ Colombia, *Instructors' Manual* (1999), p. 31.

868. Croatia's LOAC Compendium lists perfidy as a prohibited method of warfare.⁹²⁹

869. Croatia's Commanders' Manual states that "it is prohibited to feign a protected status by inviting the confidence of the enemy".⁹³⁰

870. Ecuador's Naval Manual states that:

The use of unlawful deceptions is called "perfidy". Acts of perfidy are deceptions designed to invite the confidence of the enemy to lead him to believe that he is entitled to, or is obliged to accord, protected status under the law of armed conflict, with the intent to betray that confidence.⁹³¹

871. France's LOAC Summary Note prohibits perfidy. It does not define "perfidy" as such, but states that "it is forbidden to feign a protected status to invite the confidence of the enemy".⁹³²

872. France's LOAC Teaching Note prohibits the recourse to perfidy.⁹³³

873. France's LOAC Manual stresses that "contrary to ruses of war, treachery is prohibited by the law of armed conflicts when it leads to the use of perfidious means, *i.e.* inviting the good faith of the adversary to lead him to believe that he is entitled to receive, or the obligation to accord, the protection provided for by the law of armed conflict".⁹³⁴ It considers that perfidy is a prohibited method of warfare.⁹³⁵ It also incorporates the definition of perfidy contained in Article 37 AP I.⁹³⁶ According to the manual, "there are two elements which constitute perfidy: a fraudulent intention to kill, injure or capture an enemy, and a will to invite his good faith. When a perfidious act causes the death or serious physical injury to the adversary, it constitutes a war crime."⁹³⁷

874. Germany's Soldiers' Manual defines perfidious acts as those "by which the adversary is induced to believe that there is a situation affording protection under public international law, so that he may be attacked by surprise".⁹³⁸

875. Germany's Military Manual provides that "perfidy is prohibited. The term 'perfidy' refers to acts misleading the adverse party to believe that there is a situation affording protection under international law."⁹³⁹

876. Hungary's Military Manual considers perfidy as a "prohibited method" of warfare.⁹⁴⁰ It states that perfidy is "to falsely claim protected status, thereby inviting the confidence of the enemy".⁹⁴¹

877. Israel's Manual on the Laws of War states that:

⁹²⁹ Croatia, *LOAC Compendium* (1991), p. 40.

⁹³⁰ Croatia, *Commanders' Manual* (1992), § 46.

⁹³¹ Ecuador, *Naval Manual* (1989), § 12.1.2.

⁹³² France, *LOAC Summary Note* (1992), § 4.4.

⁹³³ France, *LOAC Teaching Note* (2000), p. 3.

⁹³⁴ France, *LOAC Manual* (2001), p. 123. ⁹³⁵ France, *LOAC Manual* (2001), p. 85.

⁹³⁶ France, *LOAC Manual* (2001), p. 123, see also p. 93.

⁹³⁷ France, *LOAC Manual* (2001), p. 94, see also p. 85.

⁹³⁸ Germany, *Soldiers' Manual* (1991), p. 2.

⁹³⁹ Germany, *Military Manual* (1992), § 472, see also § 1018 (naval warfare).

⁹⁴⁰ Hungary, *Military Manual* (1992), p. 64. ⁹⁴¹ Hungary, *Military Manual* (1992), p. 63.

The distinction between stratagem (which is allowed) and perfidious or treacherous means is that the latter are defined as acts designed to cause the enemy to think that it is entitled to the protection extended by the law of war, or to create a situation in which the enemy is obliged to trust the adversary with the intent of betraying that trust.⁹⁴²

878. Under Italy's LOAC Elementary Rules Manual, "it is prohibited to feign a protected status by inviting the confidence of the enemy".⁹⁴³

879. Kenya's LOAC Manual defines perfidy as "tricking an enemy into believing that he is entitled to, or is required to be given, protection under international law, with intent to betray that confidence".⁹⁴⁴

880. South Korea's Military Law Manual provides that resort to perfidy is prohibited.⁹⁴⁵

881. South Korea's Operational Law Manual states that perfidy against humanitarian principles is not permitted.⁹⁴⁶

882. Madagascar's Military Manual provides that "it is prohibited to feign a protected status thereby inviting the confidence of the enemy".⁹⁴⁷

883. The Military Manual of the Netherlands provides that:

Treacherous behaviour (also known as perfidy) is . . . prohibited . . . Treacherous behaviour consists of acts which are intended to deceive the enemy in order for him to believe that he is faced with a situation which is protected by the humanitarian law of war . . . Treacherous means misusing the protection given by the law of war.⁹⁴⁸

884. Under the Military Handbook of the Netherlands, "treachery means misusing the protection provided by the law of war".⁹⁴⁹ It is a prohibited method of warfare "to perform treacherous acts".⁹⁵⁰

885. New Zealand's Military Manual provides that:

Acts inviting the confidence of an adversary to lead him to believe that he is entitled to, or is obliged to accord, protection under the rules of international law applicable in armed conflict, with the intent to betray that confidence, shall constitute perfidy . . . The definition of perfidy codifies customary law.⁹⁵¹

886. Nigeria's Military Manual states that:

A commander in his desire to fulfil his mission shall not mask his intentions and action from the enemy so as to induce the enemy to react in a manner prejudicial

⁹⁴² Israel, *Manual on the Laws of War* (1998), p. 56.

⁹⁴³ Italy, *LOAC Elementary Rules Manual* (1991), § 46.

⁹⁴⁴ Kenya, *LOAC Manual* (1997), Précis No. 3, p. 7.

⁹⁴⁵ South Korea, *Military Law Manual* (1996), p. 88.

⁹⁴⁶ South Korea, *Operational Law Manual* (1996), p. 135.

⁹⁴⁷ Madagascar, *Military Manual* (1994), Fiche No. 6-O, § 14.

⁹⁴⁸ Netherlands, *Military Manual* (1993), pp. IV-1 and IV-2.

⁹⁴⁹ Netherlands, *Military Handbook* (1995), p. 7-36.

⁹⁵⁰ Netherlands, *Military Handbook* (1995), p. 7-40.

⁹⁵¹ New Zealand, *Military Manual* (1992), § 502(5), including footnote 2 (land warfare), see also § 713(2) (naval warfare) and § 611(2) (air warfare).

to his interests. Thus, to be consistent with the law of war, deceptions shall follow the distinction between permitted ruses and prohibited perfidy [perfidy].⁹⁵²

887. Nigeria's Manual on the Laws of War provides that stratagems and ruses of war "are permissible provided they do not involve treachery".⁹⁵³

888. Russia's Military Manual considers that perfidy is a prohibited method of warfare.⁹⁵⁴

889. South Africa's LOAC Manual provides that "it is not permissible to attempt to deceive the enemy by abusing the LOAC or misusing the various protections it affords . . . Such actions are referred to as 'perfidy' and constitute grave breaches of the LOAC."⁹⁵⁵

890. South Africa's Medical Services Military Manual prohibits perfidy.⁹⁵⁶

891. Spain's Field Regulations provides that perfidy is not permitted.⁹⁵⁷

892. Spain's LOAC Manual provides the same definition of perfidy as the one contained in Article 37(1) AP I.⁹⁵⁸ It further states that "perfidy consists in committing a hostile act under the cover of a legal protection".⁹⁵⁹ The manual also states that "it is prohibited to feign a protected status by inviting the confidence of the enemy".⁹⁶⁰

893. Sweden's IHL Manual considers that the prohibition of perfidy as contained in Article 37 AP I is part of customary international law.⁹⁶¹ It states that:

Sweden and several other countries wished the [prohibition of perfidy] to be inserted in Additional Protocol II as well, since perfidy is probably equally common in internal conflicts. The majority were against this, however, the main reason being that, in conflicts of this type, particular difficulties may arise in determining exactly what may be considered perfidy.

The concept of perfidy, or perfidious conduct which is a more adequate expression, is defined as acts inviting the confidence of an adversary giving the acting party a legally protected status. This protection is abused in order to kill, injure or capture the adversary's soldiers. Perfidy thus means that one party deliberately and on false grounds invites the confidence of the other in order then to betray this confidence by acts of violence. It should be added that perfidy, as defined in Article 37 [AP I], refers to acts against persons, but does not include sabotage or the destruction of property . . .

Only where protected status is employed for killing, injuring or capturing the adversary is the act considered as perfidy . . .

⁹⁵² Nigeria, *Military Manual* (1994), p. 42.

⁹⁵³ Nigeria, *Manual on the Laws of War* (undated), § 14.

⁹⁵⁴ Russia, *Military Manual* (1990), § 5(e).

⁹⁵⁵ South Africa, *LOAC Manual* (1996), § 34(c).

⁹⁵⁶ South Africa, *Medical Services Military Manual* (undated), § 39.

⁹⁵⁷ Spain, *Field Regulations* (1882), § 862.

⁹⁵⁸ Spain, *LOAC Manual* (1996), Vol. I, § 3.3.b.(1), see also § 7.3.c.

⁹⁵⁹ Spain, *LOAC Manual* (1996), Vol. I, § 5.3.c.

⁹⁶⁰ Spain, *LOAC Manual* (1996), Vol. I, § 10.8.e.(1).

⁹⁶¹ Sweden, *IHL Manual* (1991), Section 2.2.3, p. 18.

Accusations of perfidy are always judged to be extremely grave, since a crime against Article 37 [AP I] shall according to the bases of Additional Protocol I be viewed as a grave breach of international humanitarian law.⁹⁶²

894. Switzerland's Basic Military Manual states that "ruses of war based on treachery and perfidy are prohibited".⁹⁶³

895. Togo's Military Manual states that "it is prohibited to use perfidy". and adds that "perfidy . . . consists of committing a hostile act under the cover of a legal protection".⁹⁶⁴

896. The UK Military Manual states that:

Good faith, as expressed in the observance of promises, is essential in war, for without it hostilities could not be terminated with any degree of safety short of the total destruction of one of the contending parties.

...

The borderline between legitimate ruses and forbidden treachery has varied at different times, and it is difficult to lay down hard and fast rules in the matter. Many of the doubtful cases, however, which arose at a time when, from the nature of their weapons, troops could only engage at close range, can now seldom or never occur.⁹⁶⁵

The manual also notes, in connection with the requirements to be granted the status of combatant, that irregular troops "should have been warned against the employment of treachery".⁹⁶⁶

897. The UK LOAC Manual states that treachery "means tricking an enemy into believing that he is entitled to, or required to give, protection under international law, with intent to betray that confidence".⁹⁶⁷

898. The US Field Manual states that:

The line of demarcation between legitimate ruses and forbidden acts of perfidy is sometimes indistinct . . . It would be an improper practice to secure an advantage of the enemy by deliberate lying or misleading conduct which involves a breach of faith, or when there is a moral obligation to speak the truth . . .

Treacherous or perfidious conduct in war is forbidden because it destroys the basis for a restoration of peace short of the complete annihilation of one belligerent by the other.⁹⁶⁸

899. The US Air Force Pamphlet states that:

Perfidy or treachery involves acts inviting the confidence of the adversary that he is entitled to protection or is obliged to accord protection under international law, combined with intent to betray that confidence . . . Like ruses perfidy involves simulation, but it aims at falsely creating a situation in which the adversary, under international law, feels obliged to take action or abstain from taking action, or

⁹⁶² Sweden, *IHL Manual* (1991), Section 3.2.1.1.b, pp. 28–30.

⁹⁶³ Switzerland, *Basic Military Manual* (1987), Article 39(1).

⁹⁶⁴ Togo, *Military Manual* (1996), Fascicule III, p. 13.

⁹⁶⁵ UK, *Military Manual* (1958), §§ 308 and 310. ⁹⁶⁶ UK, *Military Manual* (1958), § 95.

⁹⁶⁷ UK, *LOAC Manual* (1981), Section 4, p. 12, § 2(a), see also Annex A, p. 46, § 4.

⁹⁶⁸ US, *Field Manual* (1956), § 50.

because of protection under international law neglects to take precautions which are otherwise necessary . . . In addition, perfidy tends to destroy the basis for restoration of peace and causes the conflict to degenerate into savagery.⁹⁶⁹

900. The US Instructor's Guide notes that "the law of war prohibits treacherous acts".⁹⁷⁰

901. The US Naval Handbook states that:

The use of unlawful deceptions is called "perfidy". Acts of perfidy are deceptions designed to invite the confidence of the enemy to lead him to believe that he is entitled to, or is obliged to accord, protected status under the law of armed conflict, with the intent to betray that confidence.⁹⁷¹

902. The YPA Military Manual of the SFRY (FRY) prohibits perfidy and defines it as "confidence-betraying ruses".⁹⁷²

National Legislation

903. In an Article entitled "Perfidy" under the Draft Amendments to the Penal Code of El Salvador, the person "who, in time of international or internal armed conflict, simulates the status of protected person, with the view to deceive or attack the adversary" commits a crime against humanity.⁹⁷³

904. Under Ireland's Geneva Conventions Act as amended, any "minor breach" of AP I, including violations of Article 37(1) AP I, is a punishable offence.⁹⁷⁴

905. Kyrgyzstan's Emblem Law provides that "recourse to perfidy means inviting, with intent to deceive it, the good faith of the adversary to lead him to believe that he was entitled to receive, or obliged to accord, the protection provided for under the rules of international humanitarian law".⁹⁷⁵

906. Moldova's Emblem Law defines "perfidious use" as "acts inviting the confidence of an adversary, with intent to betray it, to lead him to believe that he was entitled to, or was obliged to accord, protection provided for under the rules of international humanitarian law".⁹⁷⁶

907. Under Norway's Military Penal Code as amended, "anyone who contravenes or is accessory to the contravention of provisions relating to the protection of persons or property laid down in . . . the two additional protocols to [the Geneva] Conventions . . . is liable to imprisonment".⁹⁷⁷

National Case-law

908. No practice was found.

⁹⁶⁹ US, *Air Force Pamphlet* (1976), § 8-3(a).

⁹⁷⁰ US, *Instructor's Guide* (1985), p. 8.

⁹⁷¹ US, *Naval Handbook* (1995), § 12.1.2.

⁹⁷² SFRY (FRY), *YPA Military Manual* (1988), §§ 104 and 108.

⁹⁷³ El Salvador, *Draft Amendments to the Penal Code* (1998), Article entitled "Perfidy".

⁹⁷⁴ Ireland, *Geneva Conventions Act as amended* (1962), Section 4(1) and (4).

⁹⁷⁵ Kyrgyzstan, *Emblem Law* (2000), Article 10.

⁹⁷⁶ Moldova, *Emblem Law* (1999), Article 17(2).

⁹⁷⁷ Norway, *Military Penal Code as amended* (1902), § 108(b).

Other National Practice

909. During the Algerian war of independence, the use by Algerian combatants of perfidious methods of warfare was prohibited. Perfidy was understood to mean methods that aggravated suffering without having a direct effect on the issue of the struggle. The Report on the Practice of Algeria notes, however, that there were instances in which acts considered to be perfidious were committed, but it concludes that such acts were rare and that they did not affect a general line of conduct of proscribing perfidy.⁹⁷⁸

910. At the CDDH, Chile stated that it had abstained from voting on draft Article 21 AP II (which was dropped in the final text) because it found the wording too vague. However, it agreed that the prohibition of perfidy as established in AP I should also be included in the protocol relative to non-international conflicts.⁹⁷⁹

911. The Report on the Practice of Colombia refers to a draft internal working paper in which the Colombian government stated that perfidy was prohibited under IHL.⁹⁸⁰

912. According to the Report on the Practice of Iraq, perfidy and treachery are absolutely prohibited.⁹⁸¹ In the reply by the Iraqi Ministry of Defence to a questionnaire, mentioned in the report, reference is made to Article 37 AP I.⁹⁸²

913. At the CDDH, Peru deplored the elimination of numerous articles and paragraphs in the final version of AP II, especially the one relating to the prohibition of perfidy.⁹⁸³

914. The Report on the Practice of the Philippines notes that officers of the Philippine armed forces make the distinction between ruses of war and acts of perfidy, adding that US military manuals are usually followed.⁹⁸⁴

915. A training video on IHL produced by the UK Ministry of Defence describes as "complicated" the difference between ruses and treachery.⁹⁸⁵

916. In 1991, in response to an ICRC memorandum on the applicability of IHL in the Gulf region, the US Department of the Army stated that its

⁹⁷⁸ Report on the Practice of Algeria, 1997, Chapter 2.4, referring to *El Moudjahid*, Vol. 1, p. 16.

⁹⁷⁹ Chile, Statement at the CDDH, *Official Records*, Vol. XV, CDDH/III/SR.59, 10 May 1977, p. 217, § 47.

⁹⁸⁰ Report on the Practice of Colombia, 1998, Chapter 4.1, referring to Presidential Council, Proposal of the Government to the Coordinator Guerrillera Simón Bolívar to humanise war, Draft Internal Working Paper, Part entitled "El Derecho Internacional Humanitario", § 5.

⁹⁸¹ Report on the Practice of Iraq, 1998, Chapter 2.4.

⁹⁸² Report on the Practice of Iraq, 1998, Reply by the Ministry of Defence to a questionnaire, July 1997, Chapter 2.4.

⁹⁸³ Peru, Statement at the CDDH, *Official Records*, Vol. VII, CDDH/SR.56, 8 June 1977, p. 226, § 161.

⁹⁸⁴ Report on the Practice of the Philippines, 1997, Interview with a naval officer, 5 March 1997, Chapter 2.4.

⁹⁸⁵ UK, Ministry of Defence, Training Video: The Geneva Conventions, 1986, Report on UK Practice, 1997, Chapter 2.4.

practice was consistent with the definition and prohibition of perfidy contained in Article 37 AP I.⁹⁸⁶

917. In 1992, in its final report to Congress on the conduct of the Gulf War, the US Department of Defense stated that:

Perfidy is prohibited by the law of war. Perfidy is defined in Article 37(1) of [AP I] as:

Acts inviting the confidence of an adversary to lead him to believe that he is entitled to, or is obliged to accord, protection under the law [of war], with intent to betray that confidence . . .

Perfidious acts are prohibited on the basis that perfidy may damage mutual respect for the law of war, may lead to unnecessary escalation of the conflict, may result in the injury or death of enemy forces legitimately attempting to surrender or discharging their humanitarian duties, or may impede the restoration of peace . . .

However, there does not appear to have been any centrally directed Iraqi policy to carry out acts of perfidy. The fundamental principles of the law of war applied to Coalition and Iraqi forces throughout the war.⁹⁸⁷

918. In 1991, in a document entitled "Examples of violations of the rules of international law committed by the so-called armed forces of Slovenia", the Ministry of Defence of the SFRY included the following example: "Faithless behaviour. Throughout the overall armed conflict members of the so-called armed forces of Slovenia have applied faithless and perfidious behaviour."⁹⁸⁸

III. Practice of International Organisations and Conferences

919. No practice was found.

IV. Practice of International Judicial and Quasi-judicial Bodies

920. In the interlocutory appeal in the *Tadić case* in 1995, the ICTY referred specifically to a case of perfidy to illustrate that general principles of customary international law in areas relating to methods of warfare applicable in international armed conflicts had evolved to be applied in non-international armed conflicts as well.⁹⁸⁹

⁹⁸⁶ US, Letter from the Department of the Army to the legal adviser of the US Army forces deployed in the Gulf region, 11 January 1991, § 8(j), Report on US Practice, 1997, Chapter 2.8.

⁹⁸⁷ US, Department of Defense, Final Report to Congress on the Conduct of the Persian Gulf War, Appendix O, The Role of the Law of War, 10 April 1992, *ILM*, Vol. 31, 1992, p. 632.

⁹⁸⁸ SFRY (FRY), Ministry of Defence, Examples of violations of the rules of international law committed by the so-called armed forces of Slovenia, July 1991, § 5.

⁹⁸⁹ ICTY, *Tadić case*, Interlocutory Appeal, 2 October 1995, § 125.

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

921. To fulfil its task of disseminating IHL, the ICRC has delegates around the world teaching armed and security forces that perfidy consists of “committing a hostile act under the cover of a legal protection”.⁹⁹⁰

922. At the CE (1972), the ICRC stated, with regard to a certain number of articles, including the article on perfidy, that it was “anxious to maintain the same kind of arrangements with respect to international and to non-international armed conflicts”.⁹⁹¹

923. In a working paper on war crimes submitted in 1997 to the Preparatory Committee for the Establishment of an International Criminal Court, the ICRC included “perfidy”, when committed in an international or a non-international armed conflict, in its list of war crimes to be subject to the jurisdiction of the Court.⁹⁹²

VI. Other Practice

924. Rule A4 of the Rules of International Humanitarian Law Governing the Conduct of Hostilities in Non-international Armed Conflicts, adopted in 1990 by the Council of the IIHL, defines perfidy in the context of non-international armed conflicts as “acts inviting the confidence of an adversary to lead him to believe that he is entitled to, or is obliged to accord, protection under the rules of international law applicable to non-international armed conflicts, with intent to betray that confidence”.⁹⁹³

Killing, injuring or capturing an adversary by resort to perfidy

I. Treaties and Other Instruments

Treaties

925. Article 23(b) of the 1899 HR provides that “it is especially prohibited . . . to kill or wound treacherously individuals belonging to the hostile nation or army”.

926. Article 23(b) of the 1907 HR provides that “it is especially forbidden . . . to kill or wound treacherously individuals belonging to the hostile nation or army”.

⁹⁹⁰ Frédéric de Mulinen, *Handbook on the Law of War for Armed Forces*, ICRC, Geneva, 1987, § 408.

⁹⁹¹ ICRC, Statement at the CE (1972), *Report on the Work of the Conference*, Vol. I, p. 104, § 2.384.

⁹⁹² ICRC, Working paper on war crimes submitted to the Preparatory Committee for the Establishment of an International Criminal Court, New York, 14 February 1997, §§ 2(vi) and 3(xiv).

⁹⁹³ IIHL, Rules of International Humanitarian Law Governing the Conduct of Hostilities in Non-international Armed Conflicts, Rule A4, *IRRC*, No. 278, pp. 390–391.

927. Article 37(1) AP I provides that “it is prohibited to kill, injure or capture an adversary by resort to perfidy”. Article 37 AP I was adopted by consensus.⁹⁹⁴

928. Article 21(1) of draft AP II submitted by the ICRC to the CDDH provided that “it is forbidden to kill, injure or capture an adversary by resort to perfidy”.⁹⁹⁵ This proposal was adopted in Committee III of the CDDH by 21 votes in favour, 15 against and 41 abstentions.⁹⁹⁶ Eventually, however, it was deleted by consensus in the plenary.⁹⁹⁷

929. Under Article 8(2)(b)(xi) of the 1998 ICC Statute, “killing or wounding treacherously individuals belonging to the hostile nation or army” is a war crime in international armed conflicts. Under Article 8(2)(e)(ix), “killing or wounding treacherously a combatant adversary” is a war crime in non-international armed conflicts.

Other Instruments

930. Article 101 of the 1863 Lieber Code provides that “the common law of war allows even capital punishment for clandestine or treacherous attempts to injure an enemy, because they are so dangerous, and it is difficult to guard against them”.

931. Article 13(b) of the 1874 Brussels Declaration prohibits “murder by treachery of individuals belonging to the hostile nation or army”.

932. Article 8 of the 1880 Oxford Manual prohibits the making of “treacherous attempts upon the life of an enemy; as for example by keeping assassins in pay”.

933. Article 15 of the 1913 Oxford Manual of Naval War states that “it is forbidden . . . to kill or wound treacherously individuals belonging to the opposite side”.

934. Paragraph 6 of the 1991 Memorandum of Understanding on the Application of IHL between Croatia and the SFRY (FRY) requires that hostilities be conducted in accordance with Article 37 AP I.

935. Paragraph 2.5 of the 1992 Agreement on the Application of IHL between the Parties to the Conflict in Bosnia and Herzegovina requires that hostilities be conducted in accordance with Article 37 AP I.

936. The 2000 UNTAET Regulation No. 2000/15 establishes panels with exclusive jurisdiction over serious criminal offences, including war crimes. According to Section 6(1)(b)(xi), “killing or wounding treacherously individuals belonging to the hostile nation or army” is a war crime in international armed conflicts. Under Section 6(1)(e)(ix), “killing or wounding treacherously a combatant adversary” is a war crime in non-international armed conflicts.

⁹⁹⁴ CDDH, *Official Records*, Vol. VI, CDDH/SR.39, 25 May 1977, p. 103.

⁹⁹⁵ CDDH, *Official Records*, Vol. I, Part Three, Draft Additional Protocols, June 1973, p. 39.

⁹⁹⁶ CDDH, *Official Records*, Vol. XV, CDDH/III/SR.59, 10 May 1977, p. 213, § 20.

⁹⁹⁷ CDDH, *Official Records*, Vol. VII, CDDH/SR.52, 6 June 1977, p. 128.

II. National Practice

Military Manuals

937. Argentina's Law of War Manual provides that "it is prohibited to employ perfidious methods to kill, injure or capture an adversary".⁹⁹⁸

938. Australia's Defence Force Manual states that:

Assassination is the sudden or secret killing by treacherous means of an individual who is not a combatant, by premeditated assault, for political or religious reasons. Assassination is unlawful. In addition, it is prohibited to put a price on the head of an enemy individual. Any offer for an enemy "dead or alive" is forbidden. If prior information of an intended assassination or other act of treachery should reach the party on whose behalf the act is committed, that party should endeavour to prevent its occurrence.

The prohibition against assassination is not to be confused with attacks on individual members of the enemy's armed forces as those persons are combatants and are legitimate military targets.⁹⁹⁹

939. Australia's Commanders' Guide states that "it is generally recognised by the international community that assassination of civilian political figures and issuance of orders that an enemy is to be taken 'dead or alive' constitutes treacherous behaviour and is, therefore, proscribed by LOAC".¹⁰⁰⁰ It further states that:

Assassination is the killing or wounding of a selected individual behind the line of battle by enemy agents or unlawful combatants, and is prohibited. In addition, the proscription, outlawing, putting a price on the head of an enemy individual or any offer for an enemy "dead or alive" is forbidden. If prior information of an intended assassination or other act of treachery should reach the party on whose behalf the act is to be committed, that party should endeavour to prevent its occurrence.

It is not forbidden to send a detachment of individual members of the armed forces to kill, by sudden attack, members or a member of the enemy armed forces.¹⁰⁰¹

940. Belgium's Law of War Manual provides that "killing or wounding by treachery is forbidden".¹⁰⁰²

941. Cameroon's Instructors' Manual states that it is prohibited "to kill, wound or capture an adversary by resort to perfidy".¹⁰⁰³

942. Canada's LOAC Manual states that "it is prohibited to kill, injure or capture adversaries by resort to perfidy".¹⁰⁰⁴ It further provides that "treacherously killing or wounding any individual belonging to the hostile nation or army" constitutes a war crime.¹⁰⁰⁵ The manual also states that:

⁹⁹⁸ Argentina, *Law of War Manual* (1989), § 1.05(1).

⁹⁹⁹ Australia, *Defence Force Manual* (1994), §§ 724 and 725.

¹⁰⁰⁰ Australia, *Commanders' Guide* (1994), § 512.

¹⁰⁰¹ Australia, *Commanders' Guide* (1994), §§ 919 and 920.

¹⁰⁰² Belgium, *Law of War Manual* (1983), p. 31.

¹⁰⁰³ Cameroon, *Instructors' Manual* (1992), p. 109, § 421.1.

¹⁰⁰⁴ Canada, *LOAC Manual* (1999), p. 6-2, § 8 (land warfare), p. 7-2, § 16 (air warfare) and p. 8-10, § 80 (naval warfare).

¹⁰⁰⁵ Canada, *LOAC Manual* (1999), p. 16-3, § 20(b).

Assassination is prohibited. Assassination means the killing or wounding of a selected non-combatant for a political or religious motive. It is not forbidden, however, to send a detachment or individual members of the armed forces to kill, by sudden attack, a person who is a combatant.

If prior information of an intended assassination should reach the party on whose behalf the act is to be committed, that party should make the utmost effort to prevent its being carried out.

It is forbidden to put a price on the head of an enemy individual or to offer a bounty for an enemy "dead of alive".¹⁰⁰⁶

943. France's LOAC Manual states that "it is prohibited to injure, kill or capture [an adversary] by resort to perfidy". This may constitute a war crime.¹⁰⁰⁷

944. Indonesia's Military Manual provides that "it is prohibited to kill or injure the enemy by perfidy".¹⁰⁰⁸

945. Referring to Israel's Law of War Booklet, the Report on the Practice of Israel states that "as a basic policy, the IDF prohibits the resort to perfidy to kill, injure or capture an adversary".¹⁰⁰⁹

946. Israel's Manual on the Laws of War gives the following example of perfidy: "An attempt on the lives of enemy leaders (civilian or military) is forbidden. As a rule, it is forbidden to single out a specific person on the adversary's side and request his death (whether by dispatching an assassin or by offering an award for his liquidation)."¹⁰¹⁰

947. Italy's IHL Manual provides that is prohibited to kill or injure an enemy by treachery.¹⁰¹¹

948. Kenya's LOAC Manual states that "it is forbidden to kill or [wound] an enemy by treachery".¹⁰¹²

949. The Military Manual of the Netherlands states that "the exact formulation of the rule is that it is prohibited to kill, injure or capture an adversary in a treacherous manner".¹⁰¹³

950. The Military Handbook of the Netherlands states that "it is prohibited to kill, injure or capture by means of treachery".¹⁰¹⁴

951. New Zealand's Military Manual states that "it is prohibited to kill, injure or capture an adversary by resort to perfidy".¹⁰¹⁵ It further states that "the treacherous killing or wounding of any individual belonging to the hostile nation or army" constitutes a war crime.¹⁰¹⁶ The manual also states that:

¹⁰⁰⁶ Canada, *LOAC Manual* (1999), p. 6-3, §§ 25-27.

¹⁰⁰⁷ France, *LOAC Manual* (2001), p. 47, see also p. 85.

¹⁰⁰⁸ Indonesia, *Military Manual* (1982), § 103.

¹⁰⁰⁹ Report on the Practice of Israel, 1997, Chapter 2.4, referring to *Law of War Booklet* (1986), p. 8.

¹⁰¹⁰ Israel, *Manual on the Laws of War* (1998), p. 57.

¹⁰¹¹ Italy, *IHL Manual* (1991), Vol. I, § 8(2).

¹⁰¹² Kenya, *LOAC Manual* (1997), Précis No. 3, p. 7.

¹⁰¹³ Netherlands, *Military Manual* (1993), p. IV-2.

¹⁰¹⁴ Netherlands, *Military Handbook* (1995), p. 7-36.

¹⁰¹⁵ New Zealand, *Military Manual* (1992), §§ 502(5) (land warfare) and 713(2) (naval warfare).

¹⁰¹⁶ New Zealand, *Military Manual* (1992), § 1704(2)(b).

Assassination, that is, the killing or wounding of a selected individual behind the line of battle by enemy agents or unlawful combatants is prohibited. In addition, the proscription or outlawing or the putting of a price on the head of an enemy individual or any offer for an enemy “dead or alive” is forbidden. If prior information of an intended assassination or other act of treachery should reach the Party on whose behalf the act is to be committed, that Party should endeavour to prevent its being carried out.¹⁰¹⁷

952. Under Nigeria’s Military Manual, it is forbidden “to kill or wound treacherously individuals belonging to the hostile nation’s army”.¹⁰¹⁸

953. Under Nigeria’s Soldiers’ Code of Conduct it is forbidden “to kill or wound treacherously individuals belonging to the hostile nation or army”.¹⁰¹⁹

954. Romania’s Soldiers’ Manual prohibits “the killing, wounding or capture of an adversary by acts of perfidy, committed with the intent to deceive his good faith and to make him believe that he is entitled to receive, or has the obligation to accord, the protection provided by the rules of international humanitarian law”.¹⁰²⁰

955. Russia’s Military Manual provides that “killing or wounding a person belonging to enemy troops by resort to perfidy” is a prohibited method of warfare.¹⁰²¹

956. Spain’s LOAC Manual states that “it is prohibited to kill, injure or capture an adversary by resort to perfidy. Perfidy consists in committing a hostile act under the cover of a legal protection.”¹⁰²²

957. Sweden’s IHL Manual affirms that “under the provisions of the [1907 HR] it is prohibited to kill or injure an enemy by resort to perfidy”.¹⁰²³

958. Switzerland’s Basic Military Manual provides that “it is prohibited to kill or injure by treachery individuals belonging to the enemy nation or army”. It also states that “it is not permitted to place a price on the head of an enemy military or civil leader”.¹⁰²⁴

959. The UK Military Manual states that “it is expressly forbidden by the [1907 HR] to kill or wound by treachery individuals belonging to the opposing State or army”.¹⁰²⁵ It also states that:

Assassination, the killing or wounding of a selected individual behind the line of battle by enemy agents or partisans, and the killing or wounding by treachery of individuals belonging to the opposing nation or army, are not lawful acts of war. The perpetrator of such an act has to claim to be treated as a combatant, but should

¹⁰¹⁷ New Zealand, *Military Manual* (1992), § 507.

¹⁰¹⁸ Nigeria, *Military Manual* (1994), p. 39, § 5(1)(ii).

¹⁰¹⁹ Nigeria, *Soldiers’ Code of Conduct* (undated), § 12(b).

¹⁰²⁰ Romania, *Soldiers’ Manual* (1991), pp. 34 and 35.

¹⁰²¹ Russia, *Military Manual* (1990), § 5(a).

¹⁰²² Spain, *LOAC Manual* (1996), Vol. I, § 5.3.c.

¹⁰²³ Sweden, *IHL Manual* (1991), Section 3.2.1.1.b, pp. 28 and 29.

¹⁰²⁴ Switzerland, *Basic Military Manual* (1987), Article 18, including commentary.

¹⁰²⁵ UK, *Military Manual* (1958), § 311.

be put on trial as a war criminal. If prior information of an intended assassination or other act of treachery should reach the government on whose behalf the act is to be committed, that government should endeavour to prevent its being carried out.

...

It is not forbidden to send a detachment or individual members of the armed forces to kill, by sudden attack, members or a member of the enemy armed forces.

...

In view of the prohibition of assassination, the proscription or outlawing or the putting of a price on the head of an enemy individual or any offer for an enemy "dead or alive" is forbidden.

...

The prohibition extends to offers of rewards for the killing or wounding of all enemies, or of a class of enemy persons, *e.g.*, officers . . . Offers of rewards for the capture unharmed of enemy personnel generally or of particular enemy personnel would seem to be lawful . . .

How far do the above rules apply to armed conflicts not of an international character occurring in the territory of a State, *e.g.*, a civil war or large scale armed insurrection? The acts which are prohibited in such conflicts are those set out in common Art. 3 of the 1949 [Geneva] Conventions, see paras. 7 and 8. Para (1) (a) of that article forbids "murder of all kinds" in respect of persons who do not take an active part in the hostilities and those members of armed forces who have laid down their arms or who are *hors de combat*. If a government or military commander offers rewards for all or individual armed insurgents killed or wounded by the forces engaged in quelling the insurrection, such offers are open to the same objection as those set out above in respect of hostilities between belligerents and are probably unlawful.¹⁰²⁶

960. The UK LOAC Manual provides that "it is forbidden . . . to kill or wound an enemy by treachery".¹⁰²⁷

961. The US Field Manual states that:

It is especially forbidden to kill or wound treacherously individuals belonging to the hostile nation or army . . .

[Article 23(b) of the 1907 HR] is construed as prohibiting assassination, proscription, or outlawry of an enemy, or putting a price upon an enemy's head, as well as offering a reward for an enemy "dead or alive". It does not, however, preclude attacks on individual soldiers or officers of the enemy whether in the zone of hostilities, occupied territory, or elsewhere.¹⁰²⁸

962. The US Air Force Pamphlet provides that "it is especially forbidden . . . to kill or wound treacherously individuals belonging to the hostile nation or army".¹⁰²⁹ It also states that:

Article 23(b) [of the 1907] HR . . . prohibits the killing or wounding treacherously of individuals belonging to a hostile nation or army, whether they are combatants or

¹⁰²⁶ UK, *Military Manual* (1958), § 115, including footnote 2, and § 116, including footnote 1.

¹⁰²⁷ UK, *LOAC Manual* (1981), Section 4, p. 12, § 2(a), see also Annex A, p. 46, § 4.

¹⁰²⁸ US, *Field Manual* (1956), § 31. ¹⁰²⁹ US, *Air Force Pamphlet* (1976), § 8-2.

civilians. This article has been construed as prohibiting assassination, proscription, or outlawry of an enemy, or putting a price upon an enemy's head, as well as offering a reward for an enemy "dead or alive". Obviously, it does not preclude lawful attacks by lawful combatants on individual soldiers or officers of the enemy.¹⁰³⁰

963. The YPA Military Manual of the SFRY (FRY) states that "it is prohibited to kill or wound members of the enemy armed forces and enemy civilians by means of treachery".¹⁰³¹ It adds that it is prohibited to put a price on someone's head, whether State or military commander or any other person.¹⁰³²

National Legislation

964. Australia's ICC (Consequential Amendments) Act incorporates in the Criminal Code the war crimes defined in the 1998 ICC Statute, including "treacherously killing or injuring" a person belonging to the adverse party, in international and non-international armed conflicts.¹⁰³³

965. Under the Criminal Code of the Federation of Bosnia and Herzegovina, if the killing of an enemy who has laid down arms or has surrendered at discretion, or has no longer any means of defence, is committed in an "insidious way", this constitutes an aggravating circumstance of the war crime.¹⁰³⁴ The Criminal Code of the Republika Srpska contains the same provision.¹⁰³⁵

966. Under Burundi's Draft Law on Genocide, Crimes against Humanity and War Crimes, "killing or injuring treacherously individuals belonging to the enemy nation or army" constitutes a war crime in international armed conflicts, while "killing or injuring treacherously a combatant adversary" constitutes a war crime in non-international armed conflicts.¹⁰³⁶

967. Canada's Crimes against Humanity and War Crimes Act provides that the war crimes defined in Article 8(2) of the 1998 ICC Statute are "crimes according to customary international law" and, as such, indictable offences under the Act.¹⁰³⁷

968. Congo's Genocide, War Crimes and Crimes against Humanity Act defines war crimes with reference to the categories of crimes defined in Article 8 of the 1998 ICC Statute.¹⁰³⁸

969. Under Croatia's Criminal Code, if the killing of an enemy who has laid down arms or has surrendered at discretion, or has no longer any means of

¹⁰³⁰ US, *Air Force Pamphlet* (1976), § 8-6(d).

¹⁰³¹ SFRY (FRY), *YPA Military Manual* (1988), § 104.

¹⁰³² SFRY (FRY), *YPA Military Manual* (1988), § 106.

¹⁰³³ Australia, *ICC (Consequential Amendments) Act* (2002), Schedule 1, §§ 268.49 and 268.90.

¹⁰³⁴ Bosnia and Herzegovina, Federation, *Criminal Code* (1998), Article 158(2).

¹⁰³⁵ Bosnia and Herzegovina, Republika Srpska, *Criminal Code* (2000), Article 438(2).

¹⁰³⁶ Burundi, *Draft Law on Genocide, Crimes against Humanity and War Crimes* (2001), Article 4(B)(k) and (D)(i).

¹⁰³⁷ Canada, *Crimes against Humanity and War Crimes Act* (2000), Section 4(1) and (4).

¹⁰³⁸ Congo, *Genocide, War Crimes and Crimes against Humanity Act* (1998), Article 4.

defence, is committed in a “treacherous way”, this constitutes an aggravating circumstance of the war crime.¹⁰³⁹

970. Under Georgia’s Criminal Code, any war crime provided for by the 1998 ICC Statute, which is not explicitly mentioned in the Code, such as “killing or wounding treacherously individuals belonging to the hostile nation or army” in international armed conflicts, and “killing or wounding treacherously a combatant adversary” in non-international armed conflicts, are crimes.¹⁰⁴⁰

971. Germany’s Law Introducing the International Crimes Code punishes anyone who, in connection with an international or non-international armed conflict, “treacherously kills or wounds a member of the hostile armed forces or a combatant of the adverse party”.¹⁰⁴¹

972. Under Ireland’s Geneva Conventions Act as amended, any “minor breach” of AP I, including violations of Article 37(1) AP I, is a punishable offence.¹⁰⁴²

973. Italy’s Law of War Decree as amended states that it is prohibited to kill or injure an enemy by treachery.¹⁰⁴³

974. Under Mali’s Penal Code, “killing or wounding by treachery individuals belonging to the enemy nation or army” is a war crime in international armed conflicts.¹⁰⁴⁴

975. Under the International Crimes Act of the Netherlands, “treacherously killing or wounding individuals belonging to the hostile nation or army” is a crime, whether in time of international or non-international armed conflict.¹⁰⁴⁵

976. Under New Zealand’s International Crimes and ICC Act, war crimes include the crimes defined in Articles 8(2)(b)(xi) and 8(2)(e)(ix) of the 1998 ICC Statute.¹⁰⁴⁶

977. Under Norway’s Military Penal Code as amended, “anyone who contravenes or is accessory to the contravention of provisions relating to the protection of persons or property laid down in . . . the two additional protocols to [the Geneva] Conventions . . . is liable to imprisonment”.¹⁰⁴⁷

978. Under Slovenia’s Penal Code, if the killing of an enemy who has laid down arms or has surrendered at discretion, or has no longer any means of defence, is executed in a “perfidious way”, this constitutes an aggravating circumstance of the war crime.¹⁰⁴⁸

¹⁰³⁹ Croatia, *Criminal Code* (1997), Article 161(2).

¹⁰⁴⁰ Georgia, *Criminal Code* (1999), Article 413(d).

¹⁰⁴¹ Germany, *Law Introducing the International Crimes Code* (2002), Article 1, § 11(1)(7).

¹⁰⁴² Ireland, *Geneva Conventions Act as amended* (1962), Section 4(1) and (4).

¹⁰⁴³ Italy, *Law of War Decree as amended* (1938), Article 35(2).

¹⁰⁴⁴ Mali, *Penal Code* (2001), Article 31(i)(11).

¹⁰⁴⁵ Netherlands, *International Crimes Act* (2003), Articles 5(3)(d) and 6(2)(d).

¹⁰⁴⁶ New Zealand, *International Crimes and ICC Act* (2000), Section 11(2).

¹⁰⁴⁷ Norway, *Military Penal Code as amended* (1902), § 108(b).

¹⁰⁴⁸ Slovenia, *Penal Code* (1994), Article 379(2).

979. Under Sweden's Penal Code as amended, "the killing or injuring of an opponent by means of some . . . form of treacherous behaviour" constitutes a crime against international law.¹⁰⁴⁹

980. Under Trinidad and Tobago's Draft ICC Act, it is a punishable offence to commit a war crime as defined in Article 8(2)(b)(xi) and (e)(ix) of the 1998 ICC Statute.¹⁰⁵⁰

981. Under the UK ICC Act, it is a punishable offence to commit a war crime as defined in Article 8(2)(b)(xi) and (e)(ix) of the 1998 ICC Statute.¹⁰⁵¹

982. Under the US War Crimes Act as amended, violations of Article 23(b) of the 1907 HR are war crimes.¹⁰⁵²

983. Under the Penal Code as amended of the SFRY (FRY), if the killing of an enemy who has laid down arms or has surrendered, or has no means of defence, has been committed in a "perfidious manner", this constitutes an aggravating circumstance of the war crime.¹⁰⁵³ Generally speaking, the Code provides that the use of a prohibited method of combat is a war crime, including the "perfidious killing or wounding of members of the enemy army".¹⁰⁵⁴

National Case-law

984. No practice was found.

Other National Practice

985. According to the Report on the Practice of Iraq, perfidy and treachery are absolutely prohibited.¹⁰⁵⁵ In the reply by the Iraqi Ministry of Defence to a questionnaire, mentioned in the report, reference is made to Article 37 AP I.¹⁰⁵⁶

986. In its Country Reports on Human Rights Practices for 1996, in a section entitled "Use of Excessive Force and Violations of Humanitarian Law in Internal Conflicts", the US Department of State noted that, in Uganda, "newspapers reported that [a rebel leader] offered bounties for the killing of prominent Ugandan military personnel, including the Minister of State for Defence".¹⁰⁵⁷

987. The US Presidential Executive Order 12333 of 1981 provides that "no person employed by or acting on behalf of the United States Government shall engage in, or conspire to engage in, assassination".¹⁰⁵⁸

¹⁰⁴⁹ Sweden, *Penal Code as amended* (1962), Chapter 22, § 6(2).

¹⁰⁵⁰ Trinidad and Tobago, *Draft ICC Act* (1999), Section 5(1)(a).

¹⁰⁵¹ UK, *ICC Act* (2001), Sections 50(1) and 51(1) (England and Wales) and Section 58(1) (Northern Ireland).

¹⁰⁵² US, *War Crimes Act as amended* (1996), Section 2441(c)(2).

¹⁰⁵³ SFRY(FRY), *Penal Code as amended* (1976), Article 146(2).

¹⁰⁵⁴ SFRY(FRY), *Penal Code as amended* (1976), Article 148(1), including commentary.

¹⁰⁵⁵ Report on the Practice of Iraq, 1998, Chapter 2.4.

¹⁰⁵⁶ Report on the Practice of Iraq, 1998, Reply by the Ministry of Defence to a questionnaire, July 1997, Chapter 2.4.

¹⁰⁵⁷ US, Department of State, *Country Reports on Human Rights Practices for 1996*, Washington D.C., 30 January 1997.

¹⁰⁵⁸ US, Executive Order 12333, 4 December 1981, CFR, 1981 Comp. (1982), p. 213.

988. In 1987, the Deputy Legal Adviser of the US Department of State, referring to Article 37 AP I, affirmed that “we support the principle that individual combatants not kill, injure, or capture enemy personnel by resort to perfidy”.¹⁰⁵⁹

989. In 1989, in a memorandum of law, the Office of the Judge Advocate General of the US Department of the Army concluded that:

The clandestine, low visibility or overt use of military force against legitimate targets in time of war, or against similar targets in time of peace where such individuals or groups pose an immediate threat to United States citizens or the national security of the United States, as determined by the competent authority, does not constitute assassination or conspiracy to engage in assassination, and would not be prohibited by the proscription in [Executive Order] 12333 or by international law.¹⁰⁶⁰

990. In 1991, in response to an ICRC memorandum on the applicability of IHL in the Gulf region, the US Department of the Army stated that its practice was consistent with the prohibition of killing, injuring or capturing an adversary by resort to perfidy contained in Article 37 AP I.¹⁰⁶¹

III. Practice of International Organisations and Conferences

United Nations

991. No practice was found.

Other International Organisations

992. No practice was found.

International Conferences

993. The report of the Working Group to Committee III of the CDDH stated that:

It should be noted that article 35 [now Article 37 AP I] does not prohibit perfidy *per se*, but merely “to kill, injure or capture an adversary by resort to perfidy”. Additionally, it should be noted that, in order to be perfidy, an act must be done “with intent to betray” the confidence created. This was intended to mean that

¹⁰⁵⁹ US, Remarks of Michael J. Matheson, Deputy Legal Adviser, US Department of State, The Sixth Annual American Red Cross-Washington College of Law Conference on International Humanitarian Law: A Workshop on Customary International Law and the 1977 Protocols Additional to the 1949 Geneva Conventions, *American University Journal of International Law and Policy*, Vol. 2, 1987, p. 425.

¹⁰⁶⁰ US, Department of the Army, Office of the Judge Advocate General, Memorandum of Law: Executive Order 12333 and Assassination, 2 November 1989, *The Army Lawyer*, Pamphlet 27-50-204, December 1989, p. 4.

¹⁰⁶¹ US, Letter from the Department of the Army to the legal adviser of the US Army forces deployed in the Gulf region, 11 January 1991, § 8(J), Report on US Practice, 1997, Chapter 2.8.

the requisite intent would be an intent to kill, injure or capture by means of the betrayal of confidence. Thus, acts . . . which are intended merely to save one's life would not be perfidy.¹⁰⁶²

IV. Practice of International Judicial and Quasi-judicial Bodies

994. No practice was found.

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

995. The ICRC Commentary on the Additional Protocols states that Article 37 AP I does not replace the 1907 HR: "It is thus clear that the prohibition on the treacherous killing or wounding of individuals belonging to the nation or the army of the enemy, as formulated in Article 23(b) of the Regulations, has survived in its entirety."¹⁰⁶³ In analysing Article 37(1) AP I, the Commentary further states that "it seems evident that the attempted or unsuccessful act also falls under the scope of this prohibition [of perfidy]"¹⁰⁶⁴

996. To fulfil its task of disseminating IHL, the ICRC has delegates around the world teaching armed and security forces that "it is prohibited to kill, injure or capture an enemy by resort to perfidy"¹⁰⁶⁵

VI. Other Practice

997. In 1985, in a report on violations of the laws of war in Nicaragua, Americas Watch stated that "the following . . . are prohibited by applicable international law rules: . . . Assassination of civilian officials, such as judges or political leaders."¹⁰⁶⁶

998. In 1989, in a report on violations of the laws of war in Angola, Africa Watch stated that "applicable international law rules prohibit the following kinds of practices . . . Assassination of civilian officials, such as political leaders."¹⁰⁶⁷

999. Rule A4 of the Rules of International Humanitarian Law Governing the Conduct of Hostilities in Non-international Armed Conflicts, adopted in 1990 by the Council of the IHL, provides that "the prohibition to kill, injure or

¹⁰⁶² CDDH, *Official Records*, Vol. XV, CDDH/III/338, 21 April 1976–11 June 1976, p. 426.

¹⁰⁶³ Yves Sandoz *et al.* (eds.), *Commentary on the Additional Protocols*, ICRC, Geneva, 1987, § 1488.

¹⁰⁶⁴ Yves Sandoz *et al.* (eds.), *Commentary on the Additional Protocols*, ICRC, Geneva, 1987, § 1493.

¹⁰⁶⁵ Frédéric de Mulinen, *Handbook on the Law of War for Armed Forces*, ICRC, Geneva, 1987, § 408.

¹⁰⁶⁶ Americas Watch, *Violations of the Laws of War by Both Sides in Nicaragua: 1981–1985*, New York, March 1985, pp. 33 and 34.

¹⁰⁶⁷ Africa Watch, *Angola: Violations of the Laws of War by Both Sides*, New York, April 1989, p. 141.

capture an adversary by resort to perfidy is a general rule applicable in non-international armed conflicts".¹⁰⁶⁸

Simulation of being disabled by injuries or sickness

I. Treaties and Other Instruments

Treaties

1000. Article 37(1)(b) AP I lists "the feigning of an incapacitation by wounds or sickness" as an act of perfidy. Article 37 AP I was adopted by consensus.¹⁰⁶⁹

1001. Article 21(1) of draft AP II submitted by the ICRC to the CDDH provided that "when carried out in order to commit or resume hostilities, . . . the feigning of a situation of distress" was considered perfidy.¹⁰⁷⁰ However, this proposal was deleted from draft Article 21 adopted in Committee III of the CDDH.¹⁰⁷¹

Other Instruments

1002. Paragraph 111(b) of the 1994 San Remo Manual states that "perfidious acts include the launching of an attack while feigning . . . distress by, e.g., sending a distress signal or by the crew taking to life rafts".

II. National Practice

Military Manuals

1003. Argentina's Law of War Manual states that "feigning incapacitation by wounds or sickness" is an example of perfidy.¹⁰⁷²

1004. Australia's Commanders' Guide states that "acts which constitute perfidy include feigning of . . . an incapacitation by wounds or sickness".¹⁰⁷³ In a section entitled "Perfidy", it also states that "it is unlawful to falsely claim injury or distress for the purpose of escaping attack or inviting an enemy to lower their guard".¹⁰⁷⁴

1005. Australia's Defence Force Manual states that "acts which constitute perfidy include feigning of . . . an incapacitation by wounds or sickness".¹⁰⁷⁵

1006. Belgium's Law of War Manual states that "feigning being wounded and wanting to surrender and firing at an adversary willing to help" and "showing signs of distress in order to mislead the enemy" are acts of perfidy.¹⁰⁷⁶

¹⁰⁶⁸ IHL, Rules of International Humanitarian Law Governing the Conduct of Hostilities in Non-international Armed Conflicts, Rule A4, *IRRC*, No. 278, 1990, p. 390.

¹⁰⁶⁹ CDDH, *Official Records*, Vol. VI, CDDH/SR.39, 25 May 1977, p. 103.

¹⁰⁷⁰ CDDH, *Official Records*, Vol. I, Part Three, Draft Additional Protocols, June 1973, p. 39.

¹⁰⁷¹ CDDH, *Official Records*, Vol. XV, CDDH/407/Rev.1, 17 March–10 June 1977, p. 502.

¹⁰⁷² Argentina, *Law of War Manual* (1989), § 1.05(2)(2).

¹⁰⁷³ Australia, *Commanders' Guide* (1994), § 826(b) (naval warfare) and § 902(b) (land warfare).

¹⁰⁷⁴ Australia, *Commanders' Guide* (1994), § 503.

¹⁰⁷⁵ Australia, *Defence Force Manual* (1994), § 703(b).

¹⁰⁷⁶ Belgium, *Law of War Manual* (1983), p. 32.

1007. Belgium's Teaching Manual for Officers prohibits perfidy. For example, "feigning being dead to avoid capture is lawful, but not feigning to be wounded to kill an enemy who tries to help you".¹⁰⁷⁷

1008. Cameroon's Instructors' Manual provides that "feigning incapacitation by wounds or sickness" is an example of perfidy.¹⁰⁷⁸ Likewise, "feigning being *hors de combat*" is qualified as an act of perfidy.¹⁰⁷⁹

1009. Canada's LOAC Manual states that "the following are examples of perfidy if a hostile act is committed while: . . . feigning incapacitation by wounds or sickness".¹⁰⁸⁰

1010. Croatia's Commanders' Manual states that "it is prohibited to feign a protected status by inviting the confidence of the enemy: . . . feigning . . . of incapacitation by wounds or sickness".¹⁰⁸¹

1011. Ecuador's Naval Manual states that:

It is a violation of the law of armed conflict to kill, injure or capture the enemy . . . by feigning shipwreck, sickness, [or] wounds . . . A surprise attack by a person feigning shipwreck, sickness, or wounds undermines the protected status of those rendered incapable of combat . . . Such acts of perfidy are punishable war crimes.¹⁰⁸²

1012. France's LOAC Summary Note prohibits perfidy and provides that "it is forbidden . . . to feign . . . wounds or sickness".¹⁰⁸³

1013. Under Germany's Soldiers' Manual, "the feigning of being incapacitated for combat" constitutes a perfidious act.¹⁰⁸⁴

1014. Under Hungary's Military Manual, feigning incapacitation by wounds or sickness is an example of perfidy.¹⁰⁸⁵

1015. Referring to Israel's Law of War Booklet, the Report on the Practice of Israel states that the IDF "prohibits the resort to perfidy to kill, injure or capture an adversary. Therefore, the IDF does not . . . feign incapacitation."¹⁰⁸⁶

1016. Israel's Manual on the Laws of War gives the following example of perfidy: "Pretending damage to fighting capacity through injury or illness with a view to gaining military advantage."¹⁰⁸⁷

1017. Under Italy's LOAC Elementary Rules Manual, "it is prohibited to feign a protected status by inviting the confidence of the enemy: . . . feigning . . . to be *hors de combat* because of wounds or sickness".¹⁰⁸⁸

¹⁰⁷⁷ Belgium, *Teaching Manual for Officers* (1994), Part I, Title II, p. 33.

¹⁰⁷⁸ Cameroon, *Instructors' Manual* (1992), p. 63, § 234.

¹⁰⁷⁹ Cameroon, *Instructors' Manual* (1992), p. 149, § 531.1.

¹⁰⁸⁰ Canada, *LOAC Manual* (1999), p. 6-2, § 9(b) (land warfare), p. 7-2, § 17(b) (air warfare) and p. 8-11, § 81(c) (naval warfare).

¹⁰⁸¹ Croatia, *Commanders' Manual* (1992), § 46.

¹⁰⁸² Ecuador, *Naval Manual* (1989), § 12.7. ¹⁰⁸³ France, *LOAC Summary Note* (1992), § 4.4.

¹⁰⁸⁴ Germany, *Soldiers' Manual* (1991), p. 2. ¹⁰⁸⁵ Hungary, *Military Manual* (1992), p. 63.

¹⁰⁸⁶ Report on the Practice of Israel, 1997, Chapter 2.4, referring to *Law of War Booklet* (1986), p. 8.

¹⁰⁸⁷ Israel, *Manual on the Laws of War* (1998), p. 57.

¹⁰⁸⁸ Italy, *LOAC Elementary Rules Manual* (1991), § 46.

- 1018.** Madagascar's Military Manual states that feigning incapacitation because of wounds or sickness is prohibited.¹⁰⁸⁹
- 1019.** The Military Manual of the Netherlands states that API "gives a number of examples of treacherous behaviour [including] feigning to be *hors de combat* by wounds or sickness".¹⁰⁹⁰
- 1020.** The Military Handbook of the Netherlands provides that it is a prohibited method of warfare "to perform treacherous acts (for example, feigning to have been killed or to be wounded... and then suddenly resume fighting)".¹⁰⁹¹
- 1021.** New Zealand's Military Manual specifies that "the feigning of an incapacitation by wounds or sickness" is an example of perfidy.¹⁰⁹² However, the manual notes that "if the motive is survival rather than hostile intent, a soldier can, without committing perfidy, feign incapacity in order to live to fight another day".¹⁰⁹³
- 1022.** Nigeria's Military Manual gives the following example of "perjury" (perfidy): "feigning incapacitation by wounds or sickness".¹⁰⁹⁴
- 1023.** Under Romania's Soldiers' Manual, "simulation of incapacity due to wound or sickness" is an act of perfidy.¹⁰⁹⁵
- 1024.** South Africa's LOAC Manual provides that "it is forbidden to feign... injury... Such actions are referred to as 'perfidy' and constitute grave breaches of the LOAC."¹⁰⁹⁶
- 1025.** Spain's LOAC Manual states that "it is prohibited to feign a protected status by inviting the confidence of the enemy:... feigning... incapacitation by wounds or sickness".¹⁰⁹⁷ This is considered as an example of a perfidious act.¹⁰⁹⁸
- 1026.** Under Sweden's IHL Manual, "the feigning of incapacitation by wounds or sickness" constitutes perfidious conduct. However, "if for example a soldier simulates injury or sickness only to avoid an adversary's attack, this is not judged as perfidy".¹⁰⁹⁹
- 1027.** Switzerland's Basic Military Manual provides that perfidy is forbidden and that "it is notably prohibited... to feign incapacitation for combat by wounds or sickness".¹¹⁰⁰
- 1028.** According to the UK Military Manual, "it would be treachery for a soldier to sham wounded or dead and then to attack enemy soldiers who approached him without hostile intent".¹¹⁰¹

¹⁰⁸⁹ Madagascar, *Military Manual* (1994), Fiche No. 6-O, § 14.

¹⁰⁹⁰ Netherlands, *Military Manual* (1993), p. IV-2.

¹⁰⁹¹ Netherlands, *Military Handbook* (1995), p. 7-40.

¹⁰⁹² New Zealand, *Military Manual* (1992), § 502(5) (land warfare) and § 713(2) (naval warfare).

¹⁰⁹³ New Zealand, *Military Manual* (1992), § 502(5), footnote 3.

¹⁰⁹⁴ Nigeria, *Military Manual* (1994), pp. 42 and 43, § 12(c).

¹⁰⁹⁵ Romania, *Soldiers' Manual* (1991), p. 35. ¹⁰⁹⁶ South Africa, *LOAC Manual* (1996), § 34(c).

¹⁰⁹⁷ Spain, *LOAC Manual* (1996), Vol. I, § 10.8.e.(1).

¹⁰⁹⁸ Spain, *LOAC Manual* (1996), Vol. I, §§ 3.3.b.(1), 5.3.c and 7.3.c.

¹⁰⁹⁹ Sweden, *IHL Manual* (1991), Section 3.2.1.1.b), p. 29.

¹¹⁰⁰ Switzerland, *Basic Military Manual* (1987), Article 39.

¹¹⁰¹ UK, *Military Manual* (1958), § 115, footnote 2, see also § 311, footnote 1.

1029. The US Air Force Pamphlet considers that:

Since situations of distress occur during times of armed conflict, as well as peace, and frequently suggest that the persons involved are *hors de combat*, feigning distress or death, wounds or sickness in order to resume hostilities constitutes perfidy in ground combat. However, a sick or wounded combatant does not commit perfidy by calling for and receiving medical aid even though he may intend immediately to resume fighting... In aerial warfare, it is forbidden to improperly use internationally recognized distress signals to lure the enemy into a false sense of security and then attack.¹¹⁰²

1030. The US Naval Handbook states that:

It is a violation of the law of armed conflict to kill, injure or capture the enemy... by feigning shipwreck, sickness, [or] wounds... A surprise attack by a person feigning shipwreck, sickness, or wounds undermines the protected status of those rendered incapable of combat... Such acts of perfidy are punishable war crimes.¹¹⁰³

1031. The YPA Military Manual of the SFRY (FRY) states that “feigning incapacitation by wounds or sickness” is an act of perfidy.¹¹⁰⁴

National Legislation

1032. Colombia’s Penal Code, in an article entitled “Perfidy”, imposes a criminal sanction on “anyone who, during an armed conflict and with intent to harm or attack the adversary, simulates the condition of a protected person”, including the wounded and sick.¹¹⁰⁵

1033. The Draft Amendments to the Penal Code of El Salvador, in an article entitled “Perfidy”, provide for a prison sentence for “anyone who, during an international or non-international armed conflict, with the view to harm or attack the adversary, simulates the status of a protected person”, including the wounded and sick.¹¹⁰⁶

1034. Under Ireland’s Geneva Conventions Act as amended, any “minor breach” of AP I, including violations of Article 37(1) AP I, is a punishable offence.¹¹⁰⁷

1035. Nicaragua’s Draft Penal Code, in an article entitled “Perfidy”, punishes “anyone who, during an international or internal armed conflict, with the view to harm or attack the adversary, simulates the status of a protected person”, including the wounded and sick.¹¹⁰⁸

¹¹⁰² US, *Air Force Pamphlet* (1976), § 8-6(a), see also § 8-3(a).

¹¹⁰³ US, *Naval Handbook* (1995), § 12.7.

¹¹⁰⁴ SFRY (FRY), *YPA Military Manual* (1988), § 104(2).

¹¹⁰⁵ Colombia, *Penal Code* (2000), Articles 135 and 143.

¹¹⁰⁶ El Salvador, *Draft Amendments to the Penal Code* (1998), Articles entitled “Perfidia” and “Ataque a personas protegidas”.

¹¹⁰⁷ Ireland, *Geneva Conventions Act as amended* (1962), Section 4(1) and (4).

¹¹⁰⁸ Nicaragua, *Draft Penal Code* (1999), Articles 449 and 452.

1036. Under Norway's Military Penal Code as amended, "anyone who contravenes or is accessory to the contravention of provisions relating to the protection of persons or property laid down in . . . the two additional protocols to [the Geneva] Conventions . . . is liable to imprisonment".¹¹⁰⁹

National Case-law

1037. No practice was found.

Other National Practice

1038. No practice was found.

III. Practice of International Organisations and Conferences

United Nations

1039. No practice was found.

Other International Organisations

1040. No practice was found.

International Conferences

1041. Commenting on Article 35 of draft AP I (now Article 37 AP I), a Working Group reporting to Committee III of the CDDH stated that "feigning death in order to kill an enemy once he turned his back would be perfidy".¹¹¹⁰

IV. Practice of International Judicial and Quasi-judicial Bodies

1042. No practice was found.

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

1043. To fulfil its task of disseminating IHL, the ICRC has delegates around the world teaching armed and security forces that "to pretend being incapacitated by wounds or sickness" constitutes an act of perfidy.¹¹¹¹

VI. Other Practice

1044. No practice was found.

¹¹⁰⁹ Norway, *Military Penal Code as amended* (1902), § 108(b).

¹¹¹⁰ CDDH, *Official Records*, Vol. XV, CDDH/III/338, 21 April–11 June 1976, p. 426.

¹¹¹¹ Frédéric de Mulinen, *Handbook on the Law of War for Armed Forces*, ICRC, Geneva, 1987, § 409(c).

Simulation of surrender

Note: For practice concerning the improper use of the white flag of truce which does not amount to perfidy, see *supra* section B of this chapter.

I. Treaties and Other Instruments

Treaties

1045. Article 37(1)(a) AP I lists “the feigning... of a surrender” as an act of perfidy. Article 37 AP I was adopted by consensus.¹¹¹²

1046. Under Article 85(3) AP I, “the perfidious use, in violation of Article 37, ... of ... protective signs recognized by the Conventions or this Protocol” is a grave breach of AP I. Article 85 AP I was adopted by consensus.¹¹¹³

1047. Article 21(1) of draft AP II submitted by the ICRC to the CDDH provided that “when carried out in order to commit or resume hostilities, ... the feigning... of a surrender” was considered as perfidy.¹¹¹⁴ However, this proposal was deleted from draft Article 21 adopted in Committee III of the CDDH.¹¹¹⁵

1048. Under Article 8(2)(b)(vii) of the 1998 ICC Statute, “making improper use of a flag of truce, ... resulting in death or serious personal injury” is a war crime in international armed conflicts.

Other Instruments

1049. Article 8 of the 1880 Oxford Manual prohibits the making of “treacherous attempts upon the life of an enemy; as for example... by feigning to surrender”.

1050. Paragraph 111(b) of the 1994 San Remo Manual states that “perfidious acts include the launching of an attack while feigning... surrender”.

1051. Pursuant to Article 20(b)(v) of the 1996 ILC Draft Code of Crimes against the Peace and Security of Mankind, “the perfidious use of... recognized protective signs” is a war crime.

1052. The 2000 UNTAET Regulation No. 2000/15 establishes panels with exclusive jurisdiction over serious criminal offences, including war crimes. According to Section 6(1)(b)(vii), “making improper use of a flag of truce, ... resulting in death or serious personal injury” is a war crime in international armed conflicts.

II. National Practice

Military Manuals

1053. Argentina’s Law of War Manual provides that “feigning the intent... to surrender” is an example of perfidy.¹¹¹⁶ It also states that “the perfidious

¹¹¹² CDDH, *Official Records*, Vol. VI, CDDH/SR.39, 25 May 1977, p. 103.

¹¹¹³ CDDH, *Official Records*, Vol. VI, CDDH/SR.44, 30 May 1977, p. 291.

¹¹¹⁴ CDDH, *Official Records*, Vol. I, Part Three, Draft Additional Protocols, June 1973, p. 39.

¹¹¹⁵ CDDH, *Official Records*, Vol. XV, CDDH/407/Rev.1, 17 March–10 June 1977, p. 502.

¹¹¹⁶ Argentina, *Law of War Manual* (1989), § 1.05(2)(1).

use...of...recognised protective signs" is a grave breach of AP I and a war crime.¹¹¹⁷

1054. Australia's *Commanders' Guide* provides that "acts which constitute perfidy include feigning of...an intent to...surrender".¹¹¹⁸ In a section entitled "Perfidy", it states that "it is unlawful to feign surrender for the purpose of inviting an enemy to lower his guard".¹¹¹⁹ The Guide further considers that "the following examples constitute grave breaches or serious war crimes likely to warrant institution of criminal proceedings: ... feigning surrender in order to obtain military advantage".¹¹²⁰

1055. Australia's *Defence Force Manual* stresses that "acts which constitute perfidy include feigning of...an intent to...surrender".¹¹²¹ It further considers that "the following examples constitute grave breaches or serious war crimes likely to warrant institution of criminal proceedings: ... feigning surrender in order to obtain military advantage".¹¹²²

1056. Belgium's *Teaching Manual for Officers* prohibits perfidy. For example, "feigning to surrender and then opening fire at the enemy who collects you as 'prisoner of war' is an aggravated act of perfidy if the white flag, which is a protective sign, is used".¹¹²³

1057. Belgium's *Teaching Manual for Soldiers* states that "using a white flag or feigning surrender in order to attack an adversary is strictly prohibited and constitutes a grave breach of the laws of war".¹¹²⁴

1058. Cameroon's *Instructors' Manual* provides that "feigning to surrender" is an example of perfidy.¹¹²⁵

1059. Canada's *LOAC Manual* states that "the following are examples of perfidy if a hostile act is committed while: ... feigning... to surrender".¹¹²⁶ It also considers that "feigning surrender of an aircraft and then firing on an unsuspecting adversary after such surrender was accepted" constitutes perfidy in air warfare.¹¹²⁷ It further identifies as a grave breach of AP I and a war crime the "perfidious use of... protective signs recognized by the Geneva Conventions or AP I".¹¹²⁸

1060. Colombia's *Directive on IHL* punishes "the perfidious use of... protective signs recognised under the law of war (the white flag... for example)".¹¹²⁹

¹¹¹⁷ Argentina, *Law of War Manual* (1989), § 8.03.

¹¹¹⁸ Australia, *Commanders' Guide* (1994), § 826(a) (naval warfare) and § 902(a) (land warfare).

¹¹¹⁹ Australia, *Commanders' Guide* (1994), § 505.

¹¹²⁰ Australia, *Commanders' Guide* (1994), § 1305(r).

¹¹²¹ Australia, *Defence Force Manual* (1994), § 703(a) (land warfare), see also § 636(b) (naval warfare) and § 910.

¹¹²² Australia, *Defence Force Manual* (1994), § 1315(r).

¹¹²³ Belgium, *Teaching Manual for Officers* (1994), Part I, Title II, p. 33.

¹¹²⁴ Belgium, *Teaching Manual for Soldiers* (undated), p. 15.

¹¹²⁵ Cameroon, *Instructors' Manual* (1992), p. 30, § 131.1, p. 63, § 234 and p. 90, § 222.

¹¹²⁶ Canada, *LOAC Manual* (1999), p. 6-2, § 9(a) (land warfare) and p. 7-2, § 17(a) (air warfare), see also p. 8-11, § 81(b) (naval warfare).

¹¹²⁷ Canada, *LOAC Manual* (1999), p. 7-2, § 18(b).

¹¹²⁸ Canada, *LOAC Manual* (1999), p. 16-2, § 8(a) and p. 16-3, § 16(f).

¹¹²⁹ Colombia, *Directive on IHL* (1993), Section III(D).

1061. Colombia's *Instructors' Manual* provides that "feigning surrender and then attacking is perfidy".¹¹³⁰

1062. Croatia's *LOAC Compendium* provides that the "perfidious use of distinctive protective signs" is a grave breach of the law of war and a war crime.¹¹³¹

1063. Croatia's *Commanders' Manual* states that "it is prohibited to feign a protected status by inviting the confidence of the enemy: . . . feigning surrender".¹¹³²

1064. Ecuador's *Naval Manual* states that "feigning surrender in order to lure the enemy into a trap is an act of perfidy".¹¹³³ It adds that "it is a violation of the law of armed conflict to kill, injure, or capture the enemy by false indication of an intent to surrender . . . Such [act] of perfidy [is a] punishable war [crime]".¹¹³⁴ In addition, the manual states that "the following acts constitute war crimes: . . . treacherous request for quarter (for example, feigning surrender in order to gain a military advantage)".¹¹³⁵

1065. France's *LOAC Summary Note* provides that "it is prohibited to feign a protected status to invite the confidence of the enemy (abuse of . . . the white flag)".¹¹³⁶ Furthermore, it notes that "the perfidious use of protected signs and signals" is a grave breach of the law of war and a war crime.¹¹³⁷

1066. France's *LOAC Teaching Note* states that the recourse to perfidy is prohibited, "notably the abuse of the white flag".¹¹³⁸

1067. France's *LOAC Manual* states that "using a protective sign to deceive the enemy and reach an operational goal constitutes an act of perfidy".¹¹³⁹ It specifies that "simulating surrender to deceive the enemy is an act of perfidy which is prohibited by the law of armed conflicts".¹¹⁴⁰ It further provides that "the perfidious use of any protective sign recognised by international law constitutes a war crime".¹¹⁴¹

1068. Germany's *Military Manual* states that "it is . . . prohibited . . . to feign surrender".¹¹⁴² It further provides that "grave breaches of international humanitarian law are in particular: . . . perfidious . . . use of recognized protective signs".¹¹⁴³

1069. Under Hungary's *Military Manual*, feigning surrender constitutes an example of perfidy.¹¹⁴⁴ It also states that the "perfidious use of distinctive protective signs" is a grave breach of the law of war and a war crime.¹¹⁴⁵

¹¹³⁰ Colombia, *Instructors' Manual* (1999), p. 32.

¹¹³¹ Croatia, *LOAC Compendium* (1991), p. 56.

¹¹³² Croatia, *Commanders' Manual* (1992), § 46.

¹¹³³ Ecuador, *Naval Manual* (1989), § 12.1.2.

¹¹³⁴ Ecuador, *Naval Manual* (1989), § 12.7.

¹¹³⁵ Ecuador, *Naval Manual* (1989), § 6.2.5(12).

¹¹³⁶ France, *LOAC Summary Note* (1992), § 4.4.

¹¹³⁷ France, *LOAC Summary Note* (1992), § 3.4.

¹¹³⁸ France, *LOAC Teaching Note* (2000), p. 3.

¹¹³⁹ France, *LOAC Manual* (2001), p. 62.

¹¹⁴⁰ France, *LOAC Manual* (2001), p. 105.

¹¹⁴¹ France, *LOAC Manual* (2001), p. 118.

¹¹⁴² Germany, *Military Manual* (1992), § 1019.

¹¹⁴³ Germany, *Military Manual* (1992), § 1209.

¹¹⁴⁴ Hungary, *Military Manual* (1992), p. 63.

¹¹⁴⁵ Hungary, *Military Manual* (1992), p. 90.

- 1070.** Indonesia's Military Manual provides that "it is prohibited to kill or injure the enemy by perfidy, such as . . . to misuse the flag of truce".¹¹⁴⁶
- 1071.** Referring to Israel's Law of War Booklet, the Report on the Practice of Israel states that the IDF "prohibits the resort to perfidy to kill, injure or capture an adversary. Therefore, the IDF does not feign intent to surrender."¹¹⁴⁷
- 1072.** Israel's Manual on the Laws of War gives the following example of perfidy: "It is forbidden to use a white flag for an inappropriate purpose (posing as persons surrendering . . . with a view to gaining a military advantage)."¹¹⁴⁸
- 1073.** Under Italy's IHL Manual, grave breaches of international conventions and protocols, including "the perfidious use . . . of international protective signs", constitute war crimes.¹¹⁴⁹
- 1074.** Italy's LOAC Elementary Rules Manual states that "it is prohibited to feign a protected status by inviting the confidence of the enemy: . . . feigning of surrender".¹¹⁵⁰
- 1075.** Kenya's LOAC Manual notes that "the feigning of an intent to surrender . . . [is an example] of treachery".¹¹⁵¹
- 1076.** Under Madagascar's Military Manual, feigning surrender is prohibited.¹¹⁵²
- 1077.** The Military Manual of the Netherlands states that AP I "gives a number of examples of treacherous behaviour: . . . feigning to surrender".¹¹⁵³
- 1078.** The Military Handbook of the Netherlands provides that it is a prohibited method of warfare "to perform treacherous acts (for example, feigning . . . to surrender and then suddenly resume fighting)".¹¹⁵⁴ It also states that "misuse of the white flag is treachery".¹¹⁵⁵
- 1079.** New Zealand's Military Manual provides that "the feigning . . . of a surrender" is an example of perfidy.¹¹⁵⁶ It states that "another example of perfidious conduct, although rare, would be surrendering an aircraft and then firing on an unsuspecting adversary after the surrender was accepted".¹¹⁵⁷ The manual further states that "perfidious use of . . . protective signs recognised by the [Geneva] Conventions or [AP I]" constitutes a grave breach of AP I and a war crime.¹¹⁵⁸

¹¹⁴⁶ Indonesia, *Military Manual* (1982), § 103.

¹¹⁴⁷ Report on the Practice of Israel, 1997, Chapter 2.4, referring to *Law of War Booklet* (1986), p. 8.

¹¹⁴⁸ Israel, *Manual on the Laws of War* (1998), p. 56.

¹¹⁴⁹ Italy, *IHL Manual* (1991), Vol. I, § 85.

¹¹⁵⁰ Italy, *LOAC Elementary Rules Manual* (1991), § 46.

¹¹⁵¹ Kenya, *LOAC Manual* (1997), Précis No. 3, p. 7.

¹¹⁵² Madagascar, *Military Manual* (1994), Fiche No. 6-O, § 14.

¹¹⁵³ Netherlands, *Military Manual* (1993), p. IV-2.

¹¹⁵⁴ Netherlands, *Military Handbook* (1995), p. 7-40.

¹¹⁵⁵ Netherlands, *Military Handbook* (1995), p. 7-36.

¹¹⁵⁶ New Zealand, *Military Manual* (1992), § 502(5) (land warfare) and § 713(2) (naval warfare).

¹¹⁵⁷ New Zealand, *Military Manual* (1992), § 611(2).

¹¹⁵⁸ New Zealand, *Military Manual* (1992), §§ 1701(1) and 1703(3)(f).

1080. Nigeria's Military Manual gives the following example of "perjury" (perfidy): "feigning surrender".¹¹⁵⁹

1081. Nigeria's Manual on the Laws of War considers that "feigning submission for the purpose of misleading the enemy" is an "illegitimate tactic".¹¹⁶⁰ It adds that "treacherous request for quarter" constitutes a war crime.¹¹⁶¹

1082. Under Romania's Soldiers' Manual, feigning surrender is an act of perfidy.¹¹⁶²

1083. South Africa's LOAC Manual, in a paragraph on perfidy, provides that "it is forbidden to feign surrender".¹¹⁶³ It states that "the perfidious use of . . . the white flag" is a grave breach of AP I and a war crime.¹¹⁶⁴ In addition, the manual provides that "treacherous requests for mercy" are also grave breaches of the law of war and war crimes.¹¹⁶⁵

1084. Spain's LOAC Manual states that "it is prohibited to feign a protected status by inviting the confidence of the enemy: . . . feigning of surrender".¹¹⁶⁶ Feigning surrender is an example of a perfidious act.¹¹⁶⁷ The manual also states that it is a grave breach and a war crime "to make a perfidious use of recognised protective signs".¹¹⁶⁸

1085. Switzerland's Basic Military Manual prohibits perfidy. Thus, it states that "it is notably forbidden . . . to feign surrender".¹¹⁶⁹ It considers the "perfidious use of . . . distinctive signs recognised by the [Geneva] Conventions or [AP I], in violation of Article 37 [AP I]," as a grave breach of AP I.¹¹⁷⁰

1086. The UK Military Manual, in connection with the requirements to be granted the status of combatant, notes in particular that irregular troops "should have been warned against the employment of treachery [and] improper conduct towards flags of truce".¹¹⁷¹ The manual states that "it would be treachery for a soldier . . . to pretend that he had surrendered and afterwards to open fire upon or attack an enemy who was treating him as *hors de combat* or a prisoner".¹¹⁷² It further specifies that "surrender must not be feigned in order to take the enemy at a disadvantage when he advances to secure his prisoners".¹¹⁷³ It also stresses that "abuse of a flag of truce constitutes gross perfidy and entitles the injured party to take reprisals or to try the offenders if captured".¹¹⁷⁴

¹¹⁵⁹ Nigeria, *Military Manual* (1994), pp. 42 and 43, § 12(b).

¹¹⁶⁰ Nigeria, *Manual on the Laws of War* (undated), § 14.

¹¹⁶¹ Nigeria, *Manual on the Laws of War* (undated), § 6.

¹¹⁶² Romania, *Soldiers' Manual* (1991), p. 35.

¹¹⁶³ South Africa, *LOAC Manual* (1996), § 34(c).

¹¹⁶⁴ South Africa, *LOAC Manual* (1996), §§ 37(d) and 41.

¹¹⁶⁵ South Africa, *LOAC Manual* (1996), §§ 39(b) and 41.

¹¹⁶⁶ Spain, *LOAC Manual* (1996), Vol. I, § 10.8.e.(1).

¹¹⁶⁷ Spain, *LOAC Manual* (1996), Vol. I, §§ 3.3.b.(1), 5.3.c and 7.3.c.

¹¹⁶⁸ Spain, *LOAC Manual* (1996), Vol. I, § 9.2.a.(2).

¹¹⁶⁹ Switzerland, *Basic Military Manual* (1987), Article 39.

¹¹⁷⁰ Switzerland, *Basic Military Manual* (1987), Article 193(1)(f).

¹¹⁷¹ UK, *Military Manual* (1958), § 95.

¹¹⁷² UK, *Military Manual* (1958), § 115, footnote 2.

¹¹⁷³ UK, *Military Manual* (1958), § 318.

¹¹⁷⁴ UK, *Military Manual* (1958), § 417.

Moreover, the manual states that “in addition to the ‘grave breaches’ of the 1949 [Geneva] Conventions, . . . the following are examples of punishable violations of the laws of war, or war crimes: . . . treacherous request for quarter”.¹¹⁷⁵

1087. The UK LOAC Manual considers that “the feigning of an intent to surrender” is an example of treachery.¹¹⁷⁶ It also states that “abuse of the white flag is treachery”.¹¹⁷⁷

1088. The US Field Manual provides that “it is improper to feign surrender so as to secure an advantage over the opposing belligerent thereby”.¹¹⁷⁸ It also stresses that “an individual or a party acts treacherously in displaying a white flag indicative of surrender as a ruse to permit attack upon the forces of the other belligerent”.¹¹⁷⁹ The manual further states that “in addition to the ‘grave breaches’ of the Geneva Conventions of 1949, the following acts are representative of violations of the law of war (‘war crimes’): . . . treacherous request for quarter”.¹¹⁸⁰

1089. The US Air Force Pamphlet considers the feigning of surrender as a perfidious act.¹¹⁸¹ It adds that “the use of a . . . white flag in order to deceive or mislead the enemy, or for any other purpose other than to . . . surrender, has long been recognized as an act of treachery . . . [This] expresses the customary and conventional law in this area.”¹¹⁸² The Pamphlet further provides that “in addition to the grave breaches of the Geneva Conventions of 1949, the following acts are representative of situations involving individual criminal responsibility: . . . treacherous request for quarter”.¹¹⁸³

1090. The US Instructor’s Guide notes that an “example of a treacherous act would be pretending to surrender in order to facilitate an attack upon an unsuspecting enemy. Such tactics are prohibited because they destroy the basis for the restoration of peace short of the complete destruction of one side or the other.”¹¹⁸⁴ It further provides that “in addition to the grave breaches of the Geneva Conventions, the following acts are further examples of war crimes: . . . pretending to surrender”.¹¹⁸⁵

1091. The US Naval Handbook states that “feigning surrender in order to lure the enemy into a trap is an act of perfidy”.¹¹⁸⁶ It further provides that “it is a violation of the law of armed conflict to kill, injure, or capture the enemy by false indication of an intent to surrender . . . Such [act] of perfidy [is a] punishable war

¹¹⁷⁵ UK, *Military Manual* (1958), § 626(a).

¹¹⁷⁶ UK, *LOAC Manual* (1981), Section 4, p. 12, § 2(a).

¹¹⁷⁷ UK, *LOAC Manual* (1981), Annex A, p. 46, § 5.

¹¹⁷⁸ US, *Field Manual* (1956), § 50.

¹¹⁷⁹ US, *Field Manual* (1956), § 467.

¹¹⁸⁰ US, *Field Manual* (1956), § 504(b).

¹¹⁸¹ US, *Air Force Pamphlet* (1976), § 8-3(a).

¹¹⁸² US, *Air Force Pamphlet* (1976), § 8-6(a).

¹¹⁸³ US, *Air Force Pamphlet* (1976), § 15-3(c)(3).

¹¹⁸⁴ US, *Instructor’s Guide* (1985), p. 8.

¹¹⁸⁵ US, *Instructor’s Guide* (1985), p. 13.

¹¹⁸⁶ US, *Naval Handbook* (1995), § 12.1.2.

[crime]."¹¹⁸⁷ In addition, the manual states that "the following acts are representative war crimes: . . . treacherous request for quarter (i.e., feigning surrender in order to gain a military advantage)".¹¹⁸⁸

1092. The YPA Military Manual of the SFRY (FRY) states that "feigning an intention to . . . surrender" is an act of perfidy.¹¹⁸⁹

National Legislation

1093. Argentina's Draft Code of Military Justice punishes any soldier who "uses . . . in a perfidious manner, the flag . . . of surrender".¹¹⁹⁰

1094. Australia's Geneva Conventions Act as amended provides that "a person who, in Australia or elsewhere, commits a grave breach . . . of [AP I] is guilty of an indictable offence".¹¹⁹¹

1095. Australia's ICC (Consequential Amendments) Act incorporates in the Criminal Code the war crimes defined in the 1998 ICC Statute, including "improper use of a flag of truce . . . in order to feign an intention to negotiate when there is no such intention on the part of the perpetrator . . . [and which] results in deaths or serious personal injury", in international armed conflicts.¹¹⁹²

1096. Azerbaijan's Criminal Code provides that "the misuse of the white flag, . . . which as a result caused death or serious injury to body of a victim," constitutes a war crime in international and non-international armed conflicts.¹¹⁹³

1097. Canada's Geneva Conventions Act as amended provides that "every person who, whether within or outside Canada, commits a grave breach [of AP I] . . . is guilty of an indictable offence".¹¹⁹⁴

1098. Canada's Crimes against Humanity and War Crimes Act provides that the war crimes defined in Article 8(2) of the 1998 ICC Statute are "crimes according to customary international law" and, as such, indictable offences under the Act.¹¹⁹⁵

1099. Colombia's Penal Code, in an article entitled "Perfidy", imposes a criminal sanction on "anyone who, during an armed conflict, with intent to harm or attack the adversary, . . . uses improperly . . . the white flag . . . of surrender".¹¹⁹⁶

1100. Congo's Genocide, War Crimes and Crimes against Humanity Act defines war crimes with reference to the categories of crimes defined in Article 8 of the 1998 ICC Statute.¹¹⁹⁷

¹¹⁸⁷ US, *Naval Handbook* (1995), § 12.7.

¹¹⁸⁸ US, *Naval Handbook* (1995), § 6.2.5(12).

¹¹⁸⁹ SFRY (FRY), *YPA Military Manual* (1988), § 104(1).

¹¹⁹⁰ Argentina, *Draft Code of Military Justice* (1998), Article 292, introducing a new Article 876(7) in the *Code of Military Justice as amended* (1951).

¹¹⁹¹ Australia, *Geneva Conventions Act as amended* (1957), Section 7(1).

¹¹⁹² Australia, *ICC (Consequential Amendments) Act* (2002), Schedule 1, § 268.41.

¹¹⁹³ Azerbaijan, *Criminal Code* (1999), Article 119(2).

¹¹⁹⁴ Canada, *Geneva Conventions Act as amended* (1985), Section 3(1).

¹¹⁹⁵ Canada, *Crimes against Humanity and War Crimes Act* (2000), Section 4(1) and (4).

¹¹⁹⁶ Colombia, *Penal Code* (2000), Article 143.

¹¹⁹⁷ Congo, *Genocide, War Crimes and Crimes against Humanity Act* (1998), Article 4.

1101. The Geneva Conventions and Additional Protocols Act of the Cook Islands punishes “any person who in the Cook Islands or elsewhere commits, or aids or abets or procures the commission by another person of, a grave breach . . . of [AP I]”.¹¹⁹⁸

1102. Cyprus’s AP I Act punishes “any person who, whatever his nationality, commits in the Republic or outside the Republic any grave breach of the provisions of the Protocol, or takes part or assists or incites another person in the commission of such a breach”.¹¹⁹⁹

1103. The Draft Amendments to the Penal Code of El Salvador, in an article entitled “Perfidy”, provide for a prison sentence for “anyone who, during an international or non-international armed conflict, with the view to harm or attack the adversary, . . . uses protective signs such as . . . the flag . . . of surrender”.¹²⁰⁰

1104. Ethiopia’s Penal Code punishes any abuse of the white flag, with intent to prepare or to commit hostile acts.¹²⁰¹

1105. Under Georgia’s Criminal Code, “the perfidious use of . . . protective signs and signals recognised by international humanitarian law” in an international or non-international armed conflict is a crime.¹²⁰²

1106. Ireland’s Geneva Conventions Act as amended provides that grave breaches of AP I are punishable offences.¹²⁰³ It adds that any “minor breach” of AP I, including violations of Article 37(1) AP I, is also a punishable offence.¹²⁰⁴

1107. Under Jordan’s Draft Military Criminal Code, “the perfidious use of . . . any . . . protective emblem” in time of armed conflict is a war crime.¹²⁰⁵

1108. Under the Draft Amendments to the Code of Military Justice of Lebanon, “the perfidious use of . . . any . . . protective sign provided for by the [Geneva] Conventions and [AP I]” constitutes a war crime.¹²⁰⁶

1109. New Zealand’s Geneva Conventions Act as amended provides that “any person who in New Zealand or elsewhere commits, or aids or abets or procures the commission by another person of, a grave breach . . . of [AP I] is guilty of an indictable offence”.¹²⁰⁷

1110. Under New Zealand’s International Crimes and ICC Act, war crimes include the crimes defined in Article 8(2)(b)(vii) of the 1998 ICC Statute.¹²⁰⁸

1111. Nicaragua’s Draft Penal Code, in an article entitled “Perfidy”, punishes “anyone who, during an international or internal armed conflict, with the

¹¹⁹⁸ Cook Islands, *Geneva Conventions and Additional Protocols Act* (2002), Section 5(1).

¹¹⁹⁹ Cyprus, *AP I Act* (1979), Section 4(1).

¹²⁰⁰ El Salvador, *Draft Amendments to the Penal Code* (1998), Article entitled “Perfidia”.

¹²⁰¹ Ethiopia, *Penal Code* (1957), Article 294(b).

¹²⁰² Georgia, *Criminal Code* (1999), Article 411(1)(f).

¹²⁰³ Ireland, *Geneva Conventions Act as amended* (1962), Section 3(1).

¹²⁰⁴ Ireland, *Geneva Conventions Act as amended* (1962), Section 4(1) and (4).

¹²⁰⁵ Jordan, *Draft Military Criminal Code* (2000), Article 41(A)(14).

¹²⁰⁶ Lebanon, *Draft Amendments to the Code of Military Justice* (1997), Article 146(14).

¹²⁰⁷ New Zealand, *Geneva Conventions Act as amended* (1958), Section 3(1).

¹²⁰⁸ New Zealand, *International Crimes and ICC Act* (2000), Section 11(2).

view to harm or attack the adversary, ... uses protective signs such as ... the flag ... of ... surrender".¹²⁰⁹

1112. Under Norway's Military Penal Code as amended, "anyone who contravenes or is accessory to the contravention of provisions relating to the protection of persons or property laid down in ... the two additional protocols to [the Geneva] Conventions ... is liable to imprisonment".¹²¹⁰

1113. Spain's Royal Ordinance for the Armed Forces states that "a combatant ... shall not display treacherously the white flag".¹²¹¹

1114. Spain's Penal Code punishes "anyone who, during an armed conflict, ... uses ... in a perfidious manner the flag ... of surrender".¹²¹²

1115. Tajikistan's Criminal Code punishes "the perfidious use of ... protective signs and signals recognised by international humanitarian law" in an international or internal armed conflict.¹²¹³

1116. Under Trinidad and Tobago's Draft ICC Act, it is a punishable offence to commit a war crime as defined in Article 8(2)(b)(vii) of the 1998 ICC Statute.¹²¹⁴

1117. The UK Geneva Conventions Act as amended punishes "any person, whatever his nationality, who, whether in or outside the United Kingdom, commits, or aids, abets or procures the commission by any other person of, a grave breach of ... [AP I]".¹²¹⁵

1118. Under the UK ICC Act, it is a punishable offence to commit a war crime as defined in Article 8(2)(b)(vii) of the 1998 ICC Statute.¹²¹⁶

1119. Under Yemen's Military Criminal Code, the "perfidious use of ... international protective emblems provided for in international conventions" is a war crime.¹²¹⁷

1120. Zimbabwe's Geneva Conventions Act as amended punishes "any person, whatever his nationality, who, whether in or outside Zimbabwe, commits any such grave breach of ... [AP I]".¹²¹⁸

National Case-law

1121. No practice was found.

Other National Practice

1122. At the Battle of Goose Green during the War in the South Atlantic, Argentine soldiers raised a white flag. As UK soldiers moved forward to

¹²⁰⁹ Nicaragua, *Draft Penal Code* (1999), Article 452.

¹²¹⁰ Norway, *Military Penal Code as amended* (1902), § 108(b).

¹²¹¹ Spain, *Royal Ordinance for the Armed Forces* (1978), Article 138.

¹²¹² Spain, *Penal Code* (1995), Article 612(6).

¹²¹³ Tajikistan, *Criminal Code* (1998), Article 403(1).

¹²¹⁴ Trinidad and Tobago, *Draft ICC Act* (1999), Section 5(1)(a).

¹²¹⁵ UK, *Geneva Conventions Act as amended* (1957), Section 1(1).

¹²¹⁶ UK, *ICC Act* (2001), Sections 50(1) and 51(1) (England and Wales) and Section 58(1) (Northern Ireland).

¹²¹⁷ Yemen, *Military Criminal Code* (1998), Article 21(5).

¹²¹⁸ Zimbabwe, *Geneva Conventions Act as amended* (1981), Section 3(1).

accept the surrender, they were fired on and killed from a neighbouring position, probably in the confusion.¹²¹⁹

1123. In 1992, in its final report to Congress on the conduct of the Gulf War, the US Department of Defense stated that:

Perfidious acts include the feigning of an intent to surrender . . .

[I]ndividual acts of perfidy did occur. On one occasion, Iraqi soldiers waved a white flag and laid down their weapons. When a Saudi Arabian patrol advanced to accept their surrender, it was fired upon by Iraqi forces hidden in buildings on either side of the street. During the same battle, an Iraqi officer approached Coalition forces with his hands in the air, indicating his intention to surrender. When near his would-be-captors, he drew a concealed pistol from his boot, fired, and was killed during the combat that followed.¹²²⁰

III. Practice of International Organisations and Conferences

1124. No practice was found.

IV. Practice of International Judicial and Quasi-judicial Bodies

1125. No practice was found.

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

1126. According to the ICRC Commentary on the Additional Protocols, “the perfidious use . . . of emblems, signs, signals or uniforms referred to in Article 37 . . . of the Protocol [including the flag of truce], for the purpose of killing, injuring or capturing an adversary, constitutes a grave breach under [Article 85(3)(f) AP I]”.¹²²¹

1127. To fulfil its task of disseminating IHL, the ICRC has delegates around the world teaching armed and security forces the rule that “to pretend surrender” is an act of perfidy.¹²²² Delegates also teach that “the perfidious use of the . . . distinctive signs marking specifically protected persons and

¹²¹⁹ Max Hastings and Simon Jenkins, *The Battle of the Falklands*, W. W. Norton & Company, London, 1983, p. 247; Geoffrey Best, *War and Law Since 1945*, Clarendon Press, Oxford, 1997, p. 292; Christopher Greenwood, Scope of Application of Humanitarian Law, in Dieter Fleck (ed.), *The Handbook of Humanitarian Law in Armed Conflicts*, Oxford University Press, Oxford, 1995, § 223; Martin Middlebrook, *Task Force: The Falklands War, 1982*, Penguin Books, 1988, pp. 269–270.

¹²²⁰ US, Department of Defense, Final Report to Congress on the Conduct of the Persian Gulf War, Appendix O, The Role of the Law of War, 10 April 1992, *ILM*, Vol. 31, 1992, p. 632.

¹²²¹ Yves Sandoz *et al.* (eds.), *Commentary on the Additional Protocols*, ICRC, Geneva, 1987, § 3499.

¹²²² Frédéric de Mulinen, *Handbook on the Law of War for Armed Forces*, ICRC, Geneva, 1987, § 409(b).

objects...[and of] other protected signs recognized by the law of war" constitutes a grave breach of the law of war.¹²²³

1128. In a working paper on war crimes submitted in 1997 to the Preparatory Committee for the Establishment of an International Criminal Court, the ICRC included "the perfidious use of the... protective signs and signals recognized by international humanitarian law", when committed in an international armed conflict, in its list of war crimes to be subject to the jurisdiction of the Court.¹²²⁴

VI. Other Practice

1129. No practice was found.

Simulation of an intention to negotiate under the white flag of truce

Note: For practice concerning the improper use of the white flag of truce which does not amount to perfidy, see *supra* section B of this chapter.

I. Treaties and Other Instruments

Treaties

1130. Article 37(1)(a) AP I lists "the feigning of an intent to negotiate under a flag of truce" as an act of perfidy. Article 37 AP I was adopted by consensus.¹²²⁵

1131. Under Article 85(3) AP I, "the perfidious use, in violation of Article 37, ... of... protective signs recognized by the Conventions or this Protocol" is a grave breach of AP I. Article 85(5) adds that "without prejudice to the application of the [Geneva] Conventions and of this Protocol, grave breaches of these instruments shall be regarded as war crimes". Article 85 AP I was adopted by consensus.¹²²⁶

1132. Article 21(1) of draft AP II submitted by the ICRC to the CDDH provided that "when carried out in order to commit or resume hostilities, ... the feigning... of a humanitarian negotiation" was considered as perfidy.¹²²⁷ However, this proposal was deleted from draft Article 21 adopted in Committee III of the CDDH.¹²²⁸

1133. Under Article 8(2)(b)(vii) of the 1998 ICC Statute, "making improper use of a flag of truce, ... resulting in death or serious personal injury" is a war crime in international armed conflicts.

¹²²³ Frédéric de Mulinen, *Handbook on the Law of War for Armed Forces*, ICRC, Geneva, 1987, § 779(a) and (b).

¹²²⁴ ICRC, Working paper on war crimes submitted to the Preparatory Committee for the Establishment of an International Criminal Court, New York, 14 February 1997, § 1(b)(vi).

¹²²⁵ CDDH, *Official Records*, Vol. VI, CDDH/SR.39, 25 May 1977, p. 103.

¹²²⁶ CDDH, *Official Records*, Vol. VI, CDDH/SR.44, 30 May 1977, p. 291.

¹²²⁷ CDDH, *Official Records*, Vol. I, Part Three, Draft Additional Protocols, June 1973, p. 39.

¹²²⁸ CDDH, *Official Records*, Vol. XV, CDDH/407/Rev.1, 17 March–10 June 1977, p. 502.

Other Instruments

1134. Article 114 of the 1863 Lieber Code states that:

If it be discovered, and fairly proved, that a flag of truce has been abused for surreptitiously obtaining military knowledge, the bearer of the flag thus abusing his sacred character is deemed a spy.

So sacred is the character of a flag of truce, and so necessary is its sacredness, that while its abuse is an especially heinous offense, great caution is requisite, on the other hand, in convicting the bearer of a flag of truce as a spy.

1135. Article 117 of the 1863 Lieber Code considers it “an act of bad faith, of infamy or fiendishness, to deceive the enemy by flags of protection”.

1136. Article 15 of the 1913 Oxford Manual of Naval War states that “methods . . . which involve treachery are forbidden. Thus it is forbidden . . . to make improper use of a flag of truce.”

1137. Pursuant to Article 20(b)(v) of the 1996 ILC Draft Code of Crimes against the Peace and Security of Mankind, “the perfidious use of . . . recognized protective signs” is a war crime.

1138. The 2000 UNTAET Regulation No. 2000/15 establishes panels with exclusive jurisdiction over serious criminal offences, including war crimes. According to Section 6(1)(b)(vii), “making improper use of a flag of truce, . . . resulting in death or serious personal injury” is a war crime in international armed conflicts.

*II. National Practice**Military Manuals*

1139. Argentina’s Law of War Manual (1969) provides especially for the prohibition of the improper use of the flag of truce, which is considered a breach of good faith. It states, however, that the use said to be “improper” applies only in combat operations.¹²²⁹

1140. Argentina’s Law of War Manual (1989) gives “simulating the intent to negotiate under a flag of parlementaires” as an example of perfidy.¹²³⁰ It also states that “the perfidious use . . . of . . . recognised protective signs” is a grave breach of AP I and a war crime.¹²³¹

1141. Australia’s Commanders’ Guide states that “acts which constitute perfidy include feigning of . . . an intent to negotiate under a flag of truce”.¹²³²

1142. Australia’s Defence Force Manual provides that “acts which constitute perfidy include feigning of . . . an intent to negotiate under a flag of truce”.¹²³³

¹²²⁹ Argentina, *Law of War Manual* (1969), § 1.017.

¹²³⁰ Argentina, *Law of War Manual* (1989), § 1.05(2)(1).

¹²³¹ Argentina, *Law of War Manual* (1989), § 8.03.

¹²³² Australia, *Commanders’ Guide* (1994), § 826(a) (naval warfare) and § 902(a) (land warfare).

¹²³³ Australia, *Defence Force Manual* (1994), § 703(a), see also § 910.

1143. Belgium's Law of War Manual states that "using the white flag in order to approach and attack" is an act of perfidy.¹²³⁴

1144. Cameroon's Instructors' Manual emphasises that "feigning to negotiate under the flag of parlementaires" is a perfidious act.¹²³⁵ Furthermore, the manual states that "abuse of the flag of parlementaires to surprise the enemy" is also an act of perfidy.¹²³⁶

1145. Canada's LOAC Manual provides that "the following are examples of perfidy if a hostile act is committed while: . . . feigning an intent to negotiate under a flag of truce".¹²³⁷ It also considers that "it is an abuse of the white flag to make use of it solely for the purpose of moving troops without interference by the adverse party".¹²³⁸ The manual further states that "perfidious use of . . . protective signs recognized by the Geneva Conventions or AP I" is a grave breach of AP I and a war crime.¹²³⁹

1146. Colombia's Directive on IHL punishes "the perfidious use of . . . protective signs recognised under the law of war (the white flag of parlementaires, for example)".¹²⁴⁰

1147. Croatia's LOAC Compendium provides that the "perfidious use of distinctive protective signs" is a grave breach and a war crime.¹²⁴¹

1148. Croatia's Commanders' Manual states that "it is prohibited to feign a protected status by inviting the confidence of the enemy: misuse of . . . the flag of truce".¹²⁴²

1149. Ecuador's Naval Manual provides that it is unlawful to use the flag of truce to gain a military advantage over the enemy. It adds that the "misuse of protective signs, signals and symbols . . . in order to injure, kill, or capture the enemy constitutes an act of perfidy".¹²⁴³

1150. France's LOAC Summary Note prohibits perfidy and stresses that "it is forbidden to feign a protected status to invite the confidence of the enemy (abuse of . . . white flag)".¹²⁴⁴ It also states that the "perfidious use of protected signs and signals" is a grave breach of the law of war and a war crime.¹²⁴⁵

1151. France's LOAC Teaching Note provides that "the recourse to perfidy is prohibited, notably the abuse of the white flag".¹²⁴⁶

¹²³⁴ Belgium, *Law of War Manual* (1983), p. 32.

¹²³⁵ Cameroon, *Instructors' Manual* (1992), p. 30, § 131.1 and p. 90, § 222, see also p. 63, § 234.

¹²³⁶ Cameroon, *Instructors' Manual* (1992), p. 149, § 531.1.

¹²³⁷ Canada, *LOAC Manual* (1999), p. 6-2, § 9(a) (land warfare), p. 7-2, § 17(a) (air warfare) and p. 8-11, § 81(a) (naval warfare).

¹²³⁸ Canada, *LOAC Manual* (1999), p. 14-1, § 8.

¹²³⁹ Canada, *LOAC Manual* (1999), p. 16-2, § 8(a) and p. 16-3, § 16(f).

¹²⁴⁰ Colombia, *Directive on IHL* (1993), Section III(D).

¹²⁴¹ Croatia, *LOAC Compendium* (1991), p. 56.

¹²⁴² Croatia, *Commanders' Manual* (1992), § 46.

¹²⁴³ Ecuador, *Naval Manual* (1989), § 12.2.

¹²⁴⁴ France, *LOAC Summary Note* (1992), § 4.4.

¹²⁴⁵ France, *LOAC Summary Note* (1992), § 3.4.

¹²⁴⁶ France, *LOAC Teaching Note* (2000), p. 3.

1152. France's LOAC Manual states that "using a protective sign in order to deceive the enemy and attain an operational goal constitutes an act of perfidy. In some cases, this may be a war crime. It is notably prohibited to feign an intention to negotiate under the cover of the flag of parlementaires."¹²⁴⁷ Moreover, the manual states that "the perfidious use of any protective sign provided for by international law constitutes a war crime".¹²⁴⁸

1153. Under Germany's Soldiers' Manual, "the feigning of the intention to negotiate under a flag of truce" constitutes a perfidious act.¹²⁴⁹

1154. Germany's Military Manual provides that "misusing the flag of truce constitutes perfidy and hence a violation of international law... The flag of truce is being misused, for instance, if soldiers approach an enemy position under the protection of the flag of truce in order to attack".¹²⁵⁰ The manual also states that "grave breaches of international humanitarian law are in particular: ... perfidious ... use of recognized protective signs".¹²⁵¹

1155. Hungary's Military Manual states that "to falsely claim protected status, thereby inviting the confidence of the enemy: e.g. misuse of: ... flag of truce" is an act of perfidy.¹²⁵² It further states that the "perfidious use of distinctive protective signs" is a grave breach of the law of war and a war crime.¹²⁵³

1156. Indonesia's Military Manual provides that "it is prohibited to kill or injure the enemy by perfidy, such as ... to misuse the flag of truce".¹²⁵⁴

1157. Referring to Israel's Law of War Booklet, the Report on the Practice of Israel states that the IDF "prohibits the resort to perfidy to kill, injure or capture an adversary. Therefore, the IDF does not feign intent to ... negotiate under a white flag."¹²⁵⁵

1158. Israel's Manual on the Laws of War gives the following example of perfidy: "It is forbidden to use a white flag for an inappropriate purpose (posing as persons ... seeking negotiations with a view to gaining a military advantage)."¹²⁵⁶

1159. Under Italy's IHL Manual, grave breaches of international conventions and protocols, including "the perfidious use... of international protective signs", constitute war crimes.¹²⁵⁷

¹²⁴⁷ France, *LOAC Manual* (2001), p. 62.

¹²⁴⁸ France, *LOAC Manual* (2001), p. 118, see also p. 115.

¹²⁴⁹ Germany, *Soldiers' Manual* (1991), p. 2.

¹²⁵⁰ Germany, *Military Manual* (1992), § 230, see also § 1019 (naval warfare).

¹²⁵¹ Germany, *Military Manual* (1992), § 1209.

¹²⁵² Hungary, *Military Manual* (1992), p. 63.

¹²⁵³ Hungary, *Military Manual* (1992), p. 90.

¹²⁵⁴ Indonesia, *Military Manual* (1982), § 103.

¹²⁵⁵ Report on the Practice of Israel, 1997, Chapter 2.4, referring to *Law of War Booklet* (1986), p. 8.

¹²⁵⁶ Israel, *Manual on the Laws of War* (1998), p. 56.

¹²⁵⁷ Italy, *IHL Manual* (1991), Vol. I, § 85.

1160. Italy's LOAC Elementary Rules Manual states that "it is prohibited to feign a protected status by inviting the confidence of the enemy: misuse of . . . the flag of truce".¹²⁵⁸

1161. Madagascar's Military Manual states that "it is prohibited to feign a protected status thereby inviting the confidence of the enemy", such as abuse of the white flag.¹²⁵⁹

1162. The Military Manual of the Netherlands states that API "gives a number of examples of treacherous behaviour: feigning intent to negotiate under the flag of parlementaires".¹²⁶⁰

1163. The Military Handbook of the Netherlands provides that "misuse of the white flag is treachery".¹²⁶¹

1164. New Zealand's Military Manual states that "the feigning of an intent to negotiate under a flag of truce" is an example of perfidy.¹²⁶² It also states that "perfidious use of . . . protective signs recognised by the [Geneva] Conventions or [AP I]" constitutes a grave breach of AP I and a war crime.¹²⁶³

1165. Nigeria's Military Manual gives the following example of "perjury" (perfidy): "Feigning an intent to negotiate under a flag of truce".¹²⁶⁴

1166. Nigeria's Manual on the Laws of War states that "it is forbidden to deceive the enemy by hoisting a white flag and have the enemy believe that a parlementaire is approaching them and thereby concealing an advance for attack".¹²⁶⁵

1167. Under Romania's Soldiers' Manual, "feigning an intent to negotiate under the cover of a flag" is an act of perfidy.¹²⁶⁶

1168. South Africa's LOAC Manual states that the misuse of any of the symbols of protection (including the white flag) constitutes an act of perfidy and a grave breach of the law of armed conflict.¹²⁶⁷ It also states that "perfidious use of . . . the white flag" is a grave breach of AP I and a war crime.¹²⁶⁸

1169. Spain's LOAC Manual states that "the improper use of the flag of parlementaires constitutes an act of perfidy. An abuse is committed when one takes advantage of the protection of the flag to approach the enemy and attack him by surprise."¹²⁶⁹ Likewise, "feigning the intent to negotiate under a flag of parlementaires" is regarded as an act of perfidy.¹²⁷⁰ The manual also provides that "it is prohibited to feign a protected status by inviting the confidence of the

¹²⁵⁸ Italy, *LOAC Elementary Rules Manual* (1991), § 46.

¹²⁵⁹ Madagascar, *Military Manual* (1994), Fiche No. 6-O, § 14.

¹²⁶⁰ Netherlands, *Military Manual* (1993), p. IV-2.

¹²⁶¹ Netherlands, *Military Handbook* (1995), p. 7-36.

¹²⁶² New Zealand, *Military Manual* (1992), § 502(5) (land warfare) and § 713(2) (naval warfare).

¹²⁶³ New Zealand, *Military Manual* (1992), §§ 1701(1) and 1703(3)(f).

¹²⁶⁴ Nigeria, *Military Manual* (1994), pp. 42 and 43, § 12(a).

¹²⁶⁵ Romania, *Manual on the Laws of War* (undated), § 24.

¹²⁶⁶ Romania, *Soldiers' Manual* (1991), p. 35.

¹²⁶⁷ South Africa, *LOAC Manual* (1996), § 34(c).

¹²⁶⁸ South Africa, *LOAC Manual* (1996), §§ 37(d) and 41.

¹²⁶⁹ Spain, *LOAC Manual* (1996), Vol. I, § 2.6.c.(1), see also § 7.5.c.

¹²⁷⁰ Spain, *LOAC Manual* (1996), Vol. I, §§ 3.3.b.(1) and 5.3.c, see also § 7.3.c.

enemy: misuse of . . . the flag of truce".¹²⁷¹ Moreover, the manual states that it is a grave breach and a war crime "to make a perfidious use . . . of . . . recognised protective signs".¹²⁷²

1170. Sweden's IHL Manual notes that "the feigning of an intent to negotiate under a flag of truce" is defined as perfidious conduct by Article 37 AP I.¹²⁷³

1171. Switzerland's Basic Military Manual forbids perfidy. Thus, "it is notably prohibited . . . to feign a desire to negotiate by misusing the flag of parlementaires".¹²⁷⁴ As an example of "murder by treason", the manual lists firing at the enemy while approaching them under the protection of a white flag.¹²⁷⁵ It also considers the "perfidious use of . . . distinctive signs recognised by the [Geneva] Conventions or [AP I], in violation of Article 37 [AP I]," as a grave breach of AP I.¹²⁷⁶

1172. The UK Military Manual, in connection with the requirements for being granted the status of combatant, notes in particular that irregular troops "should have been warned against the employment of treachery [and] improper conduct towards flags of truce".¹²⁷⁷ It considers it a legitimate ruse "to utilise an informal suspension of arms for the purpose of collecting wounded and dead . . . to execute movements unseen by the enemy". For instance, it notes an incident during the Russo-Japanese War of 1905, in which a group of Russians under the protection of the white flag and the red cross emblem advanced towards the Japanese army and asked for a suspension of arms to collect the wounded and the dead. It then used the occasion to withdraw completely.¹²⁷⁸ The manual condemns as unlawful the use of a "white flag for the purpose of making the enemy believe that a *parlementaire* is about to be sent when there is no such intention, and to carry out operations under the protection granted by the enemy to the pretended flag of truce".¹²⁷⁹ The manual emphasises that "abuse of a flag of truce constitutes gross perfidy and entitles the injured party to take reprisals or to try the offenders if captured".¹²⁸⁰

1173. The UK LOAC Manual provides that "abuse of the white flag is treachery".¹²⁸¹

1174. The US Field Manual states that "it is . . . an abuse of a flag of truce to carry out operations under the protection accorded by the enemy to it and those accompanying it".¹²⁸²

1175. The US Air Force Pamphlet states that:

The white flag has traditionally indicated a desire to communicate with the enemy . . . It raises expectations that the particular struggle is at an end or close to an

¹²⁷¹ Spain, *LOAC Manual* (1996), Vol. I, § 10.8.e.(1).

¹²⁷² Spain, *LOAC Manual* (1996), Vol. I, § 9.2.a.(2).

¹²⁷³ Sweden, *IHL Manual* (1991), Section 3.2.1.1.b, p. 29.

¹²⁷⁴ Switzerland, *Basic Military Manual* (1987), Article 39.

¹²⁷⁵ Switzerland, *Basic Military Manual* (1987), Article 18, commentary.

¹²⁷⁶ Switzerland, *Basic Military Manual* (1987), Article 193(1)(f).

¹²⁷⁷ UK, *Military Manual* (1958), § 95.

¹²⁷⁸ UK, *Military Manual* (1958), § 319, including footnote 1.

¹²⁷⁹ UK, *Military Manual* (1958), § 416. ¹²⁸⁰ UK, *Military Manual* (1958), § 417.

¹²⁸¹ UK, *LOAC Manual* (1981), Annex A, p. 46, § 5. ¹²⁸² US, *Field Manual* (1956), § 467.

end since the only proper use of the flag of truce or white flag in international law is to communicate to the enemy a desire to negotiate. Thus, the use of a flag of truce or white flag in order to deceive or mislead the enemy, or for any other purpose other than to negotiate . . . has long been recognized as an act of treachery . . . [This] expresses the customary and conventional law in this area.¹²⁸³

The Pamphlet also states that “in addition to the grave breaches of the Geneva Conventions of 1949, the following acts are representative of situations involving individual criminal responsibility: . . . treacherous request for . . . truce”.¹²⁸⁴

1176. The US Naval Handbook provides that it is unlawful to use the flag of truce to gain a military advantage over the enemy. It adds that “misuse of protective signs, signals and symbols . . . in order to injure, kill, or capture the enemy constitutes an act of perfidy”.¹²⁸⁵

1177. The YPA Military Manual of the SFRY (FRY) states that “feigning an intention to negotiate under a flag of truce” is an act of perfidy.¹²⁸⁶

National Legislation

1178. Argentina’s Draft Code of Military Justice punishes any soldier who “uses . . . in a perfidious manner, the flag of parlementaires”.¹²⁸⁷

1179. Australia’s Geneva Conventions Act as amended provides that “a person who, in Australia or elsewhere, commits a grave breach . . . of [AP I] is guilty of an indictable offence”.¹²⁸⁸

1180. Australia’s ICC (Consequential Amendments) Act incorporates in the Criminal Code the war crimes defined in the 1998 ICC Statute, including “improper use of a flag of truce . . . in order to feign an intention to negotiate when there is no such intention on the part of the perpetrator . . . [and which] results in deaths or serious personal injury”, in international armed conflicts.¹²⁸⁹

1181. Azerbaijan’s Criminal Code provides that “the misuse of the white flag, . . . which as a result caused death or serious injury to body of a victim,” constitutes a war crime in international and non-international armed conflicts.¹²⁹⁰

1182. Canada’s Geneva Conventions Act as amended provides that “every person who, whether within or outside Canada, commits a grave breach [of AP I] . . . is guilty of an indictable offence”.¹²⁹¹

1183. Canada’s Crimes against Humanity and War Crimes Act provides that the war crimes defined in Article 8(2) of the 1998 ICC Statute are “crimes

¹²⁸³ US, *Air Force Pamphlet* (1976), § 8-6(a)|2), see also § 8-3(a).

¹²⁸⁴ US, *Air Force Pamphlet* (1976), § 15-3(c)|3). ¹²⁸⁵ US, *Naval Handbook* (1995), § 12.2.

¹²⁸⁶ SFRY (FRY), *YPA Military Manual* (1988), § 104(1).

¹²⁸⁷ Argentina, *Draft Code of Military Justice* (1998), Article 292, introducing a new Article 876(7) in the *Code of Military Justice as amended* (1951).

¹²⁸⁸ Australia, *Geneva Conventions Act as amended* (1957), Section 7(1).

¹²⁸⁹ Australia, *ICC (Consequential Amendments) Act* (2002), Schedule 1, § 268.41.

¹²⁹⁰ Azerbaijan, *Criminal Code* (1999), Article 119(2).

¹²⁹¹ Canada, *Geneva Conventions Act as amended* (1985), Section 3(1).

according to customary international law" and, as such, indictable offences under the Act.¹²⁹²

1184. Colombia's Penal Code, in an article entitled "Perfidy", imposes a criminal sanction on "anyone who, during an armed conflict, with intent to harm or attack the adversary, . . . uses improperly . . . the white flag of parlementaires".¹²⁹³

1185. Congo's Genocide, War Crimes and Crimes against Humanity Act defines war crimes with reference to the categories of crimes defined in Article 8 of the 1998 ICC Statute.¹²⁹⁴

1186. The Geneva Conventions and Additional Protocols Act of the Cook Islands punishes "any person who in the Cook Islands or elsewhere commits, or aids or abets or procures the commission by another person of, a grave breach . . . of [AP I]".¹²⁹⁵

1187. Cyprus's AP I Act punishes "any person who, whatever his nationality, commits in the Republic or outside the Republic any grave breach of the provisions of the Protocol, or takes part or assists or incites another person in the commission of such a breach".¹²⁹⁶

1188. The Draft Amendments to the Penal Code of El Salvador, in an article entitled "Perfidy", provide for a prison sentence for "anyone who, during an international or non-international armed conflict, with the view to harm or attack the adversary, . . . uses protective signs such as . . . the flag of parlementaires or truce".¹²⁹⁷

1189. Ethiopia's Penal Code punishes any abuse of the white flag, with intent to prepare or to commit hostile acts.¹²⁹⁸

1190. Under Georgia's Criminal Code, "the perfidious use of . . . protective signs and signals recognised by international humanitarian law" in an international or non-international armed conflict is a crime.¹²⁹⁹

1191. Germany's Law Introducing the International Crimes Code punishes anyone who, in connection with an international or non-international armed conflict, "makes improper use . . . of the flag of truce, . . . thereby causing a person's death or serious injury".¹³⁰⁰

1192. Ireland's Geneva Conventions Act as amended provides that grave breaches of AP I are punishable offences.¹³⁰¹ It adds that any "minor breach" of AP I, including violations of Article 37(1) AP I, is also a punishable offence.¹³⁰²

¹²⁹² Canada, *Crimes against Humanity and War Crimes Act* (2000), Section 4(1) and (4).

¹²⁹³ Colombia, *Penal Code* (2000), Article 143.

¹²⁹⁴ Congo, *Genocide, War Crimes and Crimes against Humanity Act* (1998), Article 4.

¹²⁹⁵ Cook Islands, *Geneva Conventions and Additional Protocols Act* (2002), Section 5(1).

¹²⁹⁶ Cyprus, *AP I Act* (1979), Section 4(1).

¹²⁹⁷ El Salvador, *Draft Amendments to the Penal Code* (1998), Article entitled "Perfidia".

¹²⁹⁸ Ethiopia, *Penal Code* (1957), Article 294(b).

¹²⁹⁹ Georgia, *Criminal Code* (1999), Article 411(1)(f).

¹³⁰⁰ Germany, *Law Introducing the International Crimes Code* (2002), Article 1, § 10(2).

¹³⁰¹ Ireland, *Geneva Conventions Act as amended* (1962), Section 3(1).

¹³⁰² Ireland, *Geneva Conventions Act as amended* (1962), Section 4(1) and (4).

1193. Under Jordan's Draft Military Criminal Code, "the perfidious use of . . . any . . . protective emblem" in time of armed conflict is a war crime.¹³⁰³

1194. Under the Draft Amendments to the Code of Military Justice of Lebanon, "the perfidious use of . . . any . . . protective sign provided for by the [Geneva] Conventions and [AP I]" constitutes a war crime.¹³⁰⁴

1195. Under Mali's Penal Code, "using the flag of parlementaires . . . and thereby, causing loss of human lives or serious injuries" is a war crime in international armed conflicts.¹³⁰⁵

1196. Myanmar's Defence Services Act punishes any person who "treacherously . . . sends a flag of truce to the enemy".¹³⁰⁶

1197. New Zealand's Geneva Conventions Act as amended provides that "any person who in New Zealand or elsewhere commits, or aids or abets or procures the commission by another person of, a grave breach . . . of [AP I] is guilty of an indictable offence".¹³⁰⁷

1198. Under New Zealand's International Crimes and ICC Act, war crimes include the crimes defined in Article 8(2)(b)(vii) of the 1998 ICC Statute.¹³⁰⁸

1199. Nicaragua's Draft Penal Code, in an article entitled "Perfidy", punishes "anyone who, during an international or internal armed conflict, with the view to harm or attack the adversary, . . . uses protective signs such as . . . the flag . . . of truce".¹³⁰⁹

1200. Under Norway's Military Penal Code as amended, "anyone who contravenes or is accessory to the contravention of provisions relating to the protection of persons or property laid down in . . . the two additional protocols to [the Geneva] Conventions . . . is liable to imprisonment".¹³¹⁰

1201. Spain's Royal Ordinance for the Armed Forces provides that "the combatant . . . shall not display treacherously the white flag".¹³¹¹

1202. Spain's Penal Code punishes "anyone who, during an armed conflict . . . uses . . . in a perfidious manner the flag of parlementaires".¹³¹²

1203. Under Sweden's Penal Code as amended, misuse of flags of parlementaires or "the killing or injuring of an opponent by means of some other form of treacherous behaviour" constitutes a crime against international law.¹³¹³

¹³⁰³ Jordan, *Draft Military Criminal Code* (2000), Article 41(A)(14).

¹³⁰⁴ Lebanon, *Draft Amendments to the Code of Military Justice* (1997), Article 146(14).

¹³⁰⁵ Mali, *Penal Code* (2001), Article 31(i)(7).

¹³⁰⁶ Myanmar, *Defence Services Act* (1959), Section 32(f).

¹³⁰⁷ New Zealand, *Geneva Conventions Act as amended* (1958), Section 3(1).

¹³⁰⁸ New Zealand, *International Crimes and ICC Act* (2000), Section 11(2).

¹³⁰⁹ Nicaragua, *Draft Penal Code* (1999), Article 452.

¹³¹⁰ Norway, *Military Penal Code as amended* (1902), § 108(b).

¹³¹¹ Spain, *Royal Ordinance for the Armed Forces* (1978), Article 138.

¹³¹² Spain, *Penal Code* (1995), Article 612(6).

¹³¹³ Sweden, *Penal Code as amended* (1962), Chapter 22, § 6(2).

1204. Tajikistan's Criminal Code punishes "the perfidious use of . . . protective signs and signals recognised by international humanitarian law" in an international or internal armed conflict.¹³¹⁴

1205. Under Trinidad and Tobago's Draft ICC Act, it is a punishable offence to commit a war crime as defined in Article 8(2)(b)(vii) of the 1998 ICC Statute.¹³¹⁵

1206. The UK Geneva Conventions Act as amended punishes "any person, whatever his nationality, who, whether in or outside the United Kingdom, commits, or aids, abets or procures the commission by any other person of, a grave breach of . . . [AP I]".¹³¹⁶

1207. Under the UK ICC Act, it is a punishable offence to commit a war crime as defined in Article 8(2)(b)(vii) of the 1998 ICC Statute.¹³¹⁷

1208. Under Yemen's Military Criminal Code, the "perfidious use of . . . international protective emblems provided for in international conventions" is a war crime.¹³¹⁸

1209. Zimbabwe's Geneva Conventions Act as amended punishes "any person, whatever his nationality, who, whether in or outside Zimbabwe, commits any such grave breach of . . . [AP I]".¹³¹⁹

National Case-law

1210. No practice was found.

Other National Practice

1211. A training video on IHL produced by the UK Ministry of Defence emphasises that it constitutes treachery to fire under the cover of protection of the flag of truce.¹³²⁰

1212. In 1992, in its final report to Congress on the conduct of the Gulf War, the US Department of Defense stated that "perfidious acts include the feigning of an intent . . . to negotiate under a flag of truce".¹³²¹

III. Practice of International Organisations and Conferences

1213. No practice was found.

¹³¹⁴ Tajikistan, *Criminal Code* (1998), Article 403(1).

¹³¹⁵ Trinidad and Tobago, *Draft ICC Act* (1999), Section 5(1)(a).

¹³¹⁶ UK, *Geneva Conventions Act as amended* (1957), Section 1(1).

¹³¹⁷ UK, *ICC Act* (2001), Sections 50(1) and 51(1) (England and Wales) and Section 58(1) (Northern Ireland).

¹³¹⁸ Yemen, *Military Criminal Code* (1998), Article 21(5).

¹³¹⁹ Zimbabwe, *Geneva Conventions Act as amended* (1981), Section 3(1).

¹³²⁰ UK, Ministry of Defence, Training Video: The Geneva Conventions, 1986, Report on UK Practice, 1997, Chapter 2.2.

¹³²¹ US, Department of Defense, Final Report to Congress on the Conduct of the Persian Gulf War, Appendix O, The Role of the Law of War, 10 April 1992, *ILM*, Vol. 31, 1992, p. 632.

IV. Practice of International Judicial and Quasi-judicial Bodies

1214. No practice was found.

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

1215. According to the ICRC Commentary on the Additional Protocols, “the perfidious use . . . of emblems, signs, signals or uniforms referred to in Article 37 . . . of the Protocol [among which the flag of truce], for the purpose of killing, injuring or capturing an adversary, constitutes a grave breach under [Article 85(3)(f) AP I]”.¹³²²

1216. To fulfil its task of disseminating IHL, the ICRC has delegates around the world teaching armed and security forces that “to pretend an intent to negotiate under a flag of truce” is an act of perfidy.¹³²³ Delegates also teach that “the perfidious use of the . . . distinctive signs marking specifically protected persons and objects . . . [and of] other protected signs recognized by the law of war” constitutes a grave breach of the law of war.¹³²⁴

1217. In a working paper on war crimes submitted in 1997 to the Preparatory Committee for the Establishment of an International Criminal Court, the ICRC included “the perfidious use of the . . . protective signs and signals recognized by international humanitarian law”, when committed in an international armed conflict, in its list of war crimes to be subject to the jurisdiction of the Court.¹³²⁵

VI. Other Practice

1218. No practice was found.

Simulation of protected status by using the distinctive emblems of the Geneva Conventions

Note: For practice concerning the improper use of the distinctive emblems of the Geneva Conventions which does not amount to perfidy, see supra section C of this chapter.

¹³²² Yves Sandoz *et al.* (eds.), *Commentary on the Additional Protocols*, ICRC, Geneva, 1987, § 3499.

¹³²³ Frédéric de Mulinen, *Handbook on the Law of War for Armed Forces*, ICRC, Geneva, 1987, § 409(a).

¹³²⁴ Frédéric de Mulinen, *Handbook on the Law of War for Armed Forces*, ICRC, Geneva, 1987, § 779(a) and (b).

¹³²⁵ ICRC, Working paper on war crimes submitted to the Preparatory Committee for the Establishment of an International Criminal Court, New York, 14 February 1997, § 1(b)(vi).

I. Treaties and Other Instruments

Treaties

1219. Article 85(3)(f) AP I makes “the perfidious use . . . of the distinctive emblem of the red cross, red crescent or red lion and sun” a grave breach of AP I. Article 85(5) adds that “without prejudice to the application of the [Geneva] Conventions and of this Protocol, grave breaches of these instruments shall be regarded as war crimes”. Article 85 AP I was adopted by consensus.¹³²⁶

1220. Article 21(1) of draft AP II submitted by the ICRC to the CDDH provided that “when carried out in order to commit or resume hostilities, . . . the feigning of a situation of distress, notably through the misuse of an internationally recognized protective sign” was considered perfidy.¹³²⁷ However, this proposal was deleted from draft Article 21 adopted in Committee III of the CDDH.¹³²⁸

1221. Under Article 8(2)(b)(vii) of the 1998 ICC Statute, “making improper use of . . . the distinctive emblems of the Geneva Conventions, resulting in death or serious personal injury” is a war crime in international armed conflicts.

Other Instruments

1222. Article 15 of the 1913 Oxford Manual of Naval War states that “methods . . . which involve treachery are forbidden. Thus it is forbidden . . . to make improper use . . . of distinctive badges of the medical corps.”

1223. Paragraph 110 of the 1994 San Remo Manual provides that:

Warships and auxiliary vessels . . . are prohibited . . . at all times from actively simulating the status of:

- (a) hospital ships, small coastal rescue craft or medical transports;
- (b) vessels on humanitarian missions;

...

- (f) vessels entitled to be identified by the emblem of the red cross or red crescent.

1224. Paragraph 111(a) of the 1994 San Remo Manual states that perfidious acts include the launching of an attack while feigning exempt status.

1225. Pursuant to Article 20(b)(v) of the 1996 ILC Draft Code of Crimes against the Peace and Security of Mankind, “the perfidious use of the distinctive emblem of the red cross, red crescent or red lion and sun” is a war crime.

1226. The 2000 UNTAET Regulation No. 2000/15 establishes panels with exclusive jurisdiction over serious criminal offences, including war crimes. According to Section 6(1)(b)(vii), “making improper use of . . . the distinctive emblems of the Geneva Conventions, resulting in death or serious personal injury” is a war crime in international armed conflicts.

¹³²⁶ CDDH, *Official Records*, Vol. VI, CDDH/SR.44, 30 May 1977, p. 291.

¹³²⁷ CDDH, *Official Records*, Vol. I, Part Three, Draft Additional Protocols, June 1973, p. 39.

¹³²⁸ CDDH, *Official Records*, Vol. XV, CDDH/407/Rev.1, 17 March–10 June 1977, p. 502.

II. National Practice

Note: Many national instruments ensure the protection of the emblems of the red cross, red crescent and red lion and sun at all times, while others specifically address and criminalise the perfidious use of the emblems in times of armed conflict. Only the latter materials have been included here. For legislation on the misuse, abuse or improper use of the emblems which does not amount to perfidy, see *supra* section C of this chapter.

Military Manuals

1227. Under Argentina's Law of War Manual, "the perfidious use of the sign of the Red Cross or Red Crescent" constitutes a grave breach of AP I and a war crime.¹³²⁹

1228. Australia's Commanders' Guide, in a section entitled "Perfidy", states that "protection is afforded to . . . medical personnel . . . by providing them with special identification symbols. It is unlawful for soldiers and other lawful combatants to fraudulently use protected symbols or facilities to obtain immunity from attack."¹³³⁰

1229. Australia's Defence Force Manual states that:

Warships and auxiliary vessels . . . are prohibited . . . at all times from actively simulating the status of:

- a. hospital ships, small coastal rescue craft or medical transports;
- b. vessels on humanitarian missions; . . .
- f. vessels entitled to be identified by the emblem of the Red Cross or Red Crescent.

Perfidious acts include the launching of an attack while feigning:

- a. exempt . . . status.¹³³¹

1230. Belgium's Law of War Manual states that "using the red cross emblem to cover hostile acts" is an act of perfidy.¹³³²

1231. Belgium's Teaching Manual for Soldiers provides that "the use of the sign of the Red Cross to cover military operations constitutes a perfidy which is considered as a war crime".¹³³³

1232. Cameroon's Instructors' Manual states that "using the emblems of the Red Cross or Red Crescent to transport personnel or material intended for the war effort" is considered a perfidious act.¹³³⁴ It is also the case of "abuse of the signs of the red cross or red crescent".¹³³⁵

¹³²⁹ Argentina, *Law of War Manual* (1989), § 8.03.

¹³³⁰ Australia, *Commanders' Guide* (1994), § 504.

¹³³¹ Australia, *Defence Force Manual* (1994), §§ 635 and 636.

¹³³² Belgium, *Law of War Manual* (1983), p. 32.

¹³³³ Belgium, *Teaching Manual for Soldiers* (undated), p. 19.

¹³³⁴ Cameroon, *Instructors' Manual* (1992), p. 64, § 234.

¹³³⁵ Cameroon, *Instructors' Manual* (1992), p. 149, § 531.1.

1233. Canada's LOAC Manual states that "feigning . . . non-combatant status" is a perfidious act and that medical personnel of the armed forces are non-combatants.¹³³⁶ It also provides that "using false markings on military aircraft such as the markings of . . . medical aircraft" is an act of perfidy in air warfare.¹³³⁷ The manual further provides that "perfidious use of the distinctive emblem of the Red Cross or Red Crescent" constitutes a grave breach of AP I and a war crime.¹³³⁸

1234. Canada's Code of Conduct provides that "the use of the Red Cross to shield the movement of troops or ammunitions is . . . prohibited . . . Committing a hostile act under the cover of the protection provided by the distinctive emblem would constitute perfidy."¹³³⁹

1235. Colombia's Directive on IHL punishes:

the perfidious use of signs and signals, such as the distinctive signs which designate persons or objects specifically protected (. . . delegates of the International Committee of the Red Cross or other recognised humanitarian organisations), . . . [or of] distinctive signs used for the identification of the medical service.¹³⁴⁰

1236. Colombia's Basic Military Manual states that the use of the red cross emblem to hide armaments or to deceive the adversary is "a grave breach of IHL called perfidy".¹³⁴¹

1237. Croatia's LOAC Compendium provides that the "perfidious use of distinctive protective signs" is a grave breach of the law of war and a war crime.¹³⁴²

1238. Croatia's Commanders' Manual states that "it is prohibited to feign a protected status by inviting the confidence of the enemy: misuse of distinctive signs and signals".¹³⁴³

1239. The Military Manual of the Dominican Republic states that "it is a serious breach of the laws of war when soldiers use these signs [red cross, red crescent, red lion and sun and red star of David] to protect or hide military activities".¹³⁴⁴

1240. Ecuador's Naval Manual states that:

Misuse of protective signs, signals, and symbols . . . in order to injure, kill, or capture the enemy constitutes an act of perfidy. Such acts are prohibited because they undermine the effectiveness of protective signs, signals, and symbols and thereby jeopardize the safety of non-combatants and the immunity of protected structures

¹³³⁶ Canada, *LOAC Manual* (1999), p. 3-3, § 20, p. 6-2, § 9(c) (land warfare), p. 7-2, § 17(c) (air warfare) and p. 8-11, § 81(d) (naval warfare), see also p. 8-10, § 79(f) (prohibition of actively simulating the status of vessels entitled to be identified by the emblem of the red cross and red crescent).

¹³³⁷ Canada, *LOAC Manual* (1999), p. 7-2, § 18(a).

¹³³⁸ Canada, *LOAC Manual* (1999), p. 16-2, § 8(a) and p. 16-3, § 16(f).

¹³³⁹ Canada, *Code of Conduct* (2001), Rule 10, § 10.

¹³⁴⁰ Colombia, *Directive on IHL* (1993), Section III(D).

¹³⁴¹ Colombia, *Basic Military Manual* (1995), p. 26, see also p. 49.

¹³⁴² Croatia, *LOAC Compendium* (1991), p. 56.

¹³⁴³ Croatia, *Commanders' Manual* (1992), § 46.

¹³⁴⁴ Dominican Republic, *Military Manual* (1980), p. 5.

and activities. For example, using an ambulance or medical aircraft marked with the red cross or red crescent to carry armed combatants, weapons, or ammunition with which to attack or elude enemy forces is prohibited.¹³⁴⁵

1241. France's LOAC Summary Note prohibits perfidy and provides that "it is forbidden to feign a protected status to invite the confidence of the enemy (abuse of distinctive signs and signals such as the Red Cross...)"¹³⁴⁶ It also states that the "perfidious use of protected signs and signals" is a grave breach of the law of war and a war crime.¹³⁴⁷

1242. France's LOAC Teaching Note states that the recourse to perfidy is prohibited, "notably the abuse... of distinctive signs, such as the Red Cross".¹³⁴⁸

1243. France's LOAC Manual states that "the use of these insignia [red cross and red crescent] to deceive the enemy with a fraudulent intent is an act of perfidy. It is prohibited and constitutes a war crime when resulting in death or serious injury".¹³⁴⁹ It further states that the camouflage of a military activity in a relief operation, such as using an ambulance to permit the passage of combatants through enemy lines or using the red cross to lure the enemy into an ambush, is to be regarded as a war crime.¹³⁵⁰ Generally, the manual considers that using a protective sign to deceive the enemy and reach an operational goal constitutes an act of perfidy, while "the perfidious use of any protective sign recognised by international law constitutes a war crime".¹³⁵¹

1244. Germany's Military Manual states that "the perfidious use of the distinctive emblem [red cross or red crescent] is explicitly prohibited and constitutes a grave breach of international law".¹³⁵²

1245. Under Hungary's Military Manual, the misuse of distinctive signs is an act of perfidy.¹³⁵³ It also states that the "perfidious use of distinctive protective signs" is a grave breach of the law of war and a war crime.¹³⁵⁴

1246. Referring to Israel's Law of War Booklet, the Report on the Practice of Israel states that the IDF "prohibits the resort to perfidy to kill, injure or capture an adversary. Therefore, the IDF does not... make unlawful use of protected emblems."¹³⁵⁵

1247. Israel's Manual on the Laws of War gives the following examples of perfidy: "it is forbidden to pose as... Red Cross personnel or use [this]

¹³⁴⁵ Ecuador, *Naval Manual* (1989), § 12.2.

¹³⁴⁶ France, *LOAC Summary Note* (1992), § 4.4.

¹³⁴⁷ France, *LOAC Summary Note* (1992), § 3.4.

¹³⁴⁸ France, *LOAC Teaching Note* (2000), p. 3.

¹³⁴⁹ France, *LOAC Manual* (2001), p. 46.

¹³⁵⁰ France, *LOAC Manual* (2001), pp. 62 and 94.

¹³⁵¹ France, *LOAC Manual* (2001), pp. 62 and 118, see also p. 115.

¹³⁵² Germany, *Military Manual* (1992), § 640, see also § 1209.

¹³⁵³ Hungary, *Military Manual* (1992), p. 63.

¹³⁵⁴ Hungary, *Military Manual* (1992), p. 90.

¹³⁵⁵ Report on the Practice of Israel, 1997, Chapter 2.4, referring to *Law of War Booklet* (1986), p. 8.

organization's uniform, flag and emblem . . . It is prohibited to misuse the emblems of medical personnel (a cross, crescent or red shield of David)."¹³⁵⁶

1248. Italy's IHL Manual states that grave breaches of international conventions and protocols, including "the perfidious use . . . of international protective signs", constitute war crimes.¹³⁵⁷

1249. Italy's LOAC Elementary Rules Manual states that "it is prohibited to feign a protected status by inviting the confidence of the enemy: misuse of distinctive signs".¹³⁵⁸

1250. Kenya's LOAC Manual states that "feigning non-combatant status" is an example of treachery.¹³⁵⁹ It specifies that medical and religious personnel of the armed forces are to be regarded as non-combatants.¹³⁶⁰

1251. Madagascar's Military Manual states that "it is prohibited to feign a protected status thereby inviting the confidence of the enemy", such as the abuse of distinctive signs.¹³⁶¹

1252. The Military Manual of the Netherlands states that "treachery means misusing the protection given by the law of war, for example misusing the Red Cross . . . [AP I] gives a number of examples of treacherous behaviour: . . . feigning to possess the status of civilian or non combatant (for example medical personnel or the personnel of the Red Cross)."¹³⁶²

1253. New Zealand's Military Manual states that "the use of false markings on military aircraft such as the markings of . . . medical aircraft . . . is the prime example of perfidious conduct in air warfare and is prohibited".¹³⁶³ It also states that "perfidious use of the distinctive emblem of the red cross, crescent or lion and sun" constitutes a grave breach of AP I and a war crime.¹³⁶⁴

1254. Nigeria's Military Manual gives the following example of "perjury" (perfidy): "Making improper use of the emblem of the Red Cross or red crescent."¹³⁶⁵

1255. Under Romania's Soldiers' Manual, "feigning the status of a protected person by abusing the signs and emblems of the International Red Cross" is an act of perfidy.¹³⁶⁶

1256. South Africa's LOAC Manual states that "it is forbidden . . . to fight while under the protection of the red cross or red crescent emblem". It is considered as perfidy and a grave breach of the law of armed conflict.¹³⁶⁷ The manual

¹³⁵⁶ Israel, *Manual on the Laws of War* (1998), pp. 56 and 57.

¹³⁵⁷ Italy, *IHL Manual* (1991), Vol. I, § 85.

¹³⁵⁸ Italy, *LOAC Elementary Rules Manual* (1991), § 46.

¹³⁵⁹ Kenya, *LOAC Manual* (1997), Précis No. 3, p. 7.

¹³⁶⁰ Kenya, *LOAC Manual* (1997), Précis No. 2, p. 9.

¹³⁶¹ Madagascar, *Military Manual* (1994), Fiche No. 6-O, § 14.

¹³⁶² Netherlands, *Military Manual* (1993), p. IV-2.

¹³⁶³ New Zealand, *Military Manual* (1992), § 611(2).

¹³⁶⁴ New Zealand, *Military Manual* (1992), §§ 1701(1) and 1703(3)(f).

¹³⁶⁵ Nigeria, *Military Manual* (1994), pp. 42 and 43, § 12(f).

¹³⁶⁶ Romania, *Soldiers' Manual* (1991), p. 35.

¹³⁶⁷ South Africa, *LOAC Manual* (1996), § 34(c).

also states that “perfidious use of the red cross or red crescent emblem . . . in violation of Article 37 [AP I]” is a grave breach of AP I and a war crime.¹³⁶⁸

1257. Spain’s LOAC Manual states that “it is prohibited to feign a protected status by inviting the confidence of the enemy: misuse of distinctive signs and signals”.¹³⁶⁹ It also states that it is a grave breach of the law of war and a war crime “to make a perfidious use of the distinctive sign of the Red Cross”.¹³⁷⁰

1258. Sweden’s IHL Manual provides that “abuse of the distinctive emblem of the International Red Cross with perfidious intent is explicitly listed as perfidy and a gross infringement of international humanitarian law”.¹³⁷¹

1259. Switzerland’s Basic Military Manual states that the “perfidious use of the distinctive sign of the Red Cross, Red Crescent . . . in violation of Article 37 AP I” constitutes a grave breach of AP I.¹³⁷²

1260. The UK Military Manual states that “abuse of the distinctive sign for the purpose of offensive military action is a violation both of [GC I], and of the laws of war in general”.¹³⁷³

1261. The UK LOAC Manual states that the “feigning of non-combatant status” is an example of treachery.¹³⁷⁴ It specifies that “medical personnel, chaplains and civilians accompanying the armed forces are non-combatants”.¹³⁷⁵

1262. The US Field Manual gives the following examples of “improper use of the emblem”:

using a hospital or other building accorded such protection as an observation post or military office or depot; firing from a building or tent displaying the emblem of the Red Cross; using a hospital train or airplane to facilitate the escape of combatants; displaying the emblem on vehicles containing ammunition or other non-medical stores; and in general cloaking acts of hostility.¹³⁷⁶

1263. The US Air Force Pamphlet provides that:

Medical aircraft cannot retain status as protected medical aircraft during any flight in which they engage in any activity other than the transportation of patients and medical personnel or medical equipment and supplies. Use of the red cross during such a mission would be perfidious and unlawful.¹³⁷⁷

The Pamphlet also states that “the feigning by combatants of civilian, non-combatant status” is a perfidious act.¹³⁷⁸ It specifies that medical and religious personnel of the armed forces are non-combatants.¹³⁷⁹

¹³⁶⁸ South Africa, *LOAC Manual* (1996), §§ 37(d) and 41.

¹³⁶⁹ Spain, *LOAC Manual* (1996), Vol. I, § 10.8.e.(1).

¹³⁷⁰ Spain, *LOAC Manual* (1996), Vol. I, § 9.2.a.(2).

¹³⁷¹ Sweden, *IHL Manual* (1991), Section 3.2.1.1.b, p. 29.

¹³⁷² Switzerland, *Basic Military Manual* (1987), Article 193(1)(f).

¹³⁷³ UK, *Military Manual* (1958), § 379.

¹³⁷⁴ UK, *LOAC Manual* (1981), Section 4, p. 12, § 2(a).

¹³⁷⁵ UK, *LOAC Manual* (1981), Section 3, p. 10, § 8(a).

¹³⁷⁶ US, *Field Manual* (1956), § 55.

¹³⁷⁷ US, *Air Force Pamphlet* (1976), § 2-6(e).

¹³⁷⁸ US, *Air Force Pamphlet* (1976), § 8-3(a).

¹³⁷⁹ US, *Air Force Pamphlet* (1976), § 3-4(c).

1264. The US Soldier's Manual states that "it is a serious breach of the laws of war when soldiers use these signs [red cross, red crescent and red shield of David] to protect or hide military activities".¹³⁸⁰

1265. The US Instructor's Guide states that:

The law of war prohibits treacherous acts. For example, there were occasions in World War II when the Nazis improperly identified buildings as hospitals and certain areas as protected areas. They really used the buildings or areas for direct military purposes such as observation posts, troop billets, defensive positions, or ammunition storage . . . Such tactics are prohibited because they destroy the basis for the restoration of peace short of the complete destruction of one side or the other.¹³⁸¹

The manual also states that "in addition to the grave breaches of the Geneva Conventions, the following acts are further examples of war crimes: . . . misusing the Red Cross emblem such as using a medical evacuation helicopter to transport combat troops".¹³⁸²

1266. The US Naval Handbook states that:

Misuse of protective signs, signals, and symbols . . . in order to injure, kill, or capture the enemy constitutes an act of perfidy. Such acts are prohibited because they undermine the effectiveness of protective signs, signals, and symbols and thereby jeopardize the safety of noncombatants and the immunity of protected structures and activities. For example, using an ambulance or medical aircraft marked with the red cross or red crescent to carry armed combatants, weapons, or ammunition with which to attack or elude enemy forces is prohibited.¹³⁸³

National Legislation

1267. Argentina's Draft Code of Military Justice punishes any soldier who "uses . . . in a perfidious manner, the protective or distinctive signs established and recognised in international treaties to which the Argentine Republic is a party, especially the distinctive signs of the red cross and red crescent".¹³⁸⁴

1268. Australia's Geneva Conventions Act as amended provides that "a person who, in Australia or elsewhere, commits a grave breach . . . of [AP I] is guilty of an indictable offence".¹³⁸⁵

1269. Australia's ICC (Consequential Amendments) Act incorporates in the Criminal Code the war crimes defined in the 1998 ICC Statute, including, when committed in international armed conflicts:

improper use of the distinctive emblems of the Geneva Conventions . . .

[when] the perpetrator uses the emblem for combatant purposes to invite the confidence of an adversary in order to lead him or her to believe that the perpetrator

¹³⁸⁰ US, *Soldier's Manual* (1984), p. 7. ¹³⁸¹ US, *Instructor's Guide* (1985), p. 8.

¹³⁸² US, *Instructor's Guide* (1985), p. 13. ¹³⁸³ US, *Naval Handbook* (1995), § 12.2.

¹³⁸⁴ Argentina, *Draft Code of Military Justice* (1998), Article 292, introducing a new Article 876(5) in the *Code of Military Justice as amended* (1951).

¹³⁸⁵ Australia, *Geneva Conventions Act as amended* (1957), Section 7(1).

is entitled to protection, or that the adversary is obliged to accord protection to the perpetrator, with intent to betray that confidence . . .

[and when] the perpetrator's conduct results in death or serious personal injury.¹³⁸⁶

1270. Azerbaijan's Criminal Code provides that "the perfidious use in time of war of the flags and signs of the red cross and red crescent or of the colours of medical transport units" constitutes a war crime in international and non-international armed conflicts.¹³⁸⁷

1271. Belgium's Law concerning the Repression of Grave Breaches of the Geneva Conventions and their Additional Protocols as amended provides that "the perfidious use of the distinctive emblem of the red cross" constitutes a crime under international law.¹³⁸⁸

1272. Bolivia's Emblem Law states that:

Any person who has wilfully committed, or given the order to commit, acts which have caused the death or serious injury to the body or health of an adversary by making perfidious use of the Emblem of the Red Cross or of a distinctive signal, i.e., having invited the good faith of this adversary, with the intent to betray that good faith, to make him believe that he is entitled to receive or obliged to accord the protection provided by the rules of International Humanitarian Law, has committed a war crime.¹³⁸⁹

1273. Canada's Geneva Conventions Act as amended provides that "every person who, whether within or outside Canada, commits a grave breach [of AP I] . . . is guilty of an indictable offence".¹³⁹⁰

1274. Canada's Crimes against Humanity and War Crimes Act provides that the war crimes defined in Article 8(2) of the 1998 ICC Statute are "crimes according to customary international law" and, as such, indictable offences under the Act.¹³⁹¹

1275. Colombia's Penal Code, in an article entitled "Perfidy", imposes a criminal sanction on "anyone who, during an armed conflict, with intent to harm or attack the adversary, . . . uses improperly signs of protection such as the Red Cross or the Red Crescent".¹³⁹²

1276. Congo's Genocide, War Crimes and Crimes against Humanity Act defines war crimes with reference to the categories of crimes defined in Article 8 of the 1998 ICC Statute.¹³⁹³

1277. The Geneva Conventions and Additional Protocols Act of the Cook Islands punishes "any person who in the Cook Islands or elsewhere commits,

¹³⁸⁶ Australia, *ICC (Consequential Amendments) Act* (2002), Schedule 1, § 268.44.

¹³⁸⁷ Azerbaijan, *Criminal Code* (1999), Article 119(1).

¹³⁸⁸ Belgium, *Law concerning the Repression of Grave Breaches of the Geneva Conventions and their Additional Protocols as amended* (1993), Article 1(3)(16).

¹³⁸⁹ Bolivia, *Emblem Law* (2002), Article 11.

¹³⁹⁰ Canada, *Geneva Conventions Act as amended* (1985), Section 3(1).

¹³⁹¹ Canada, *Crimes against Humanity and War Crimes Act* (2000), Section 4(1) and (4).

¹³⁹² Colombia, *Penal Code* (2000), Article 143.

¹³⁹³ Congo, *Genocide, War Crimes and Crimes against Humanity Act* (1998), Article 4.

or aids or abets or procures the commission by another person of, a grave breach . . . of [AP I]" .¹³⁹⁴

1278. Costa Rica's Emblem Law punishes:

any person who, inviting the good faith of the adversary with intent to make him believe that he is entitled to protection of his physical integrity or his life or that he is obliged to accord protection in conformity with International Humanitarian Law, uses, or orders to be used, perfidiously the protective emblem.¹³⁹⁵

1279. Cyprus's AP I Act punishes "any person who, whatever his nationality, commits in the Republic or outside the Republic any grave breach of the provisions of the Protocol, or takes part or assists or incites another person in the commission of such a breach".¹³⁹⁶

1280. The Draft Amendments to the Penal Code of El Salvador, in an article entitled "Perfidy", provide for a prison sentence for "anyone who, during an international or non-international armed conflict, with the view to harm or attack the adversary, . . . uses protective signs such as the red cross or the red crescent".¹³⁹⁷

1281. El Salvador's Emblem Law punishes "anyone who uses the emblem for perfidious purposes, in accordance with Article 37 . . . of [the 1977] Additional Protocol I".¹³⁹⁸

1282. Ethiopia's Penal Code punishes the abuse of the emblems or insignia of the red cross, red crescent or red lion and sun, "with intent to prepare or to commit hostile acts".¹³⁹⁹

1283. Under Georgia's Criminal Code, "the perfidious use of the distinctive sign of the red cross and red crescent" in an international or non-international armed conflict is a crime.¹⁴⁰⁰

1284. Germany's Law Introducing the International Crimes Code punishes anyone who, in connection with an international or non-international armed conflict, "makes improper use of the distinctive emblems of the Geneva Conventions, . . . thereby causing a person's death or serious injury".¹⁴⁰¹

1285. Guatemala's Emblem Law punishes "anyone who, inviting the good faith of the adversary, with the intent to induce him to believe that he is entitled to the protection conferred by international humanitarian law, uses the protective emblem [of the red cross] in a perfidious manner".¹⁴⁰²

¹³⁹⁴ Cook Islands, *Geneva Conventions and Additional Protocols Act* (2002), Section 5(1).

¹³⁹⁵ Costa Rica, *Emblem Law* (2000), Article 8.

¹³⁹⁶ Cyprus, *AP I Act* (1979), Section 4(1).

¹³⁹⁷ El Salvador, *Draft Amendments to the Penal Code* (1998), Article entitled "Perfidia".

¹³⁹⁸ El Salvador, *Emblem Law* (2000), Article 15.

¹³⁹⁹ Ethiopia, *Penal Code* (1957), Article 294.

¹⁴⁰⁰ Georgia, *Criminal Code* (1999), Article 411(1)(f).

¹⁴⁰¹ Germany, *Law Introducing the International Crimes Code* (2002), Article 1, § 10(2).

¹⁴⁰² Guatemala, *Emblem Law* (1997), Article 12.

1286. Ireland's Geneva Conventions Act as amended provides that grave breaches of AP I are punishable offences.¹⁴⁰³

1287. Jordan's Draft Emblem Law states that:

Without prejudice to the penal provisions in force, any individual who, in time of war, intentionally uses, or orders to be used, in a perfidious manner, the emblem of the red crescent or red cross, or any other distinctive emblem so as to cause death or serious injury to body or health shall be considered a war criminal and shall be imprisoned. . . . Perfidious use means to induce the adversary to believe that he is entitled to, or obliged to accord, the protection provided for under international humanitarian law.¹⁴⁰⁴

1288. Under Jordan's Draft Military Criminal Code, "the perfidious use of the distinctive emblem of the red crescent and of the red cross" in time of armed conflict is a war crime.¹⁴⁰⁵

1289. Kyrgyzstan's Emblem Law provides that:

Anyone who intentionally has committed, or ordered to be committed, acts which cause death or serious injury to body or health of an adversary by using the emblem of the red crescent or red cross or a distinctive signal by having recourse to perfidy, has committed a war crime and shall be responsible in conformity with the legislation of the Kyrgyz Republic.¹⁴⁰⁶

1290. Under the Draft Amendments to the Code of Military Justice of Lebanon, "the perfidious use of the distinctive emblem of the red crescent or red cross" constitutes a war crime.¹⁴⁰⁷

1291. Liechtenstein's Emblem Law punishes "whoever misuses the sign or the protection of the red cross for the preparation or the execution of hostilities".¹⁴⁰⁸

1292. Under Mali's Penal Code, "using . . . the distinctive signs provided for by the Geneva Conventions, and thereby, causing loss of human lives or serious injuries" is a war crime in international armed conflicts.¹⁴⁰⁹

1293. Moldova's Emblem Law provides that "the perfidious use of the emblem of the red cross as a protective device in time of armed conflict is considered as a war crime and shall be punished in conformity with the criminal legislation".¹⁴¹⁰

1294. Moldova's Penal Code punishes the "perfidious use of the Red Cross emblem, as well as of the distinctive signs as protective elements during an armed conflict, provided that this has caused: a) a grave injury to body or health; b) death of a person".¹⁴¹¹

¹⁴⁰³ Ireland, *Geneva Conventions Act as amended* (1962), Section 3(1).

¹⁴⁰⁴ Jordan, *Draft Emblem Law* (1997), Article 15.

¹⁴⁰⁵ Jordan, *Draft Military Criminal Code* (2000), Article 41(A)(14).

¹⁴⁰⁶ Kyrgyzstan, *Emblem Law* (2000), Article 10.

¹⁴⁰⁷ Lebanon, *Draft Amendments to the Code of Military Justice* (1997), Article 146(14).

¹⁴⁰⁸ Liechtenstein, *Emblem Law* (1957), Article 8.

¹⁴⁰⁹ Mali, *Penal Code* (2001), Article 31(i)(7).

¹⁴¹⁰ Moldova, *Emblem Law* (1999), Article 17(1).

¹⁴¹¹ Moldova, *Penal Code* (2002), Article 392.

1295. Under the International Crimes Act of the Netherlands, it is a crime, during an international armed conflict, to commit “the following acts, when they are committed intentionally and in violation of the relevant provisions of Additional Protocol (I) and cause death or serious injury to body or health: . . . the perfidious use . . . of the distinctive emblem of the red cross or red crescent”.¹⁴¹²

1296. New Zealand’s Geneva Conventions Act as amended provides that “any person who in New Zealand or elsewhere commits, or aids or abets or procures the commission by another person of, a grave breach . . . of [AP I] is guilty of an indictable offence”.¹⁴¹³

1297. Under New Zealand’s International Crimes and ICC Act, war crimes include the crimes defined in Article 8(2)(b)(vii) of the 1998 ICC Statute.¹⁴¹⁴

1298. Nicaragua’s Draft Penal Code, in an article entitled “Perfidy”, punishes “anyone who, during an international or internal armed conflict, with the view to harm or attack the adversary, . . . uses protective signs such as the red cross or red crescent”.¹⁴¹⁵

1299. Nicaragua’s Emblem Law provides that:

Any person who, intentionally and inviting the good faith of the adversary, leading him to believe that he has the right to, or the obligation to accord, the protection provided for under the rules of international humanitarian law by using the emblem of the Red Cross or of a distinctive signal in a perfidious manner, has committed, or given the order to commit, acts which cause the death or seriously injure the body or health of an adversary, shall be punished in accordance with the criminal legislation in force.¹⁴¹⁶

1300. According to Niger’s Penal Code as amended, “using perfidiously the distinctive sign of the red cross or of the red crescent”, protected under the 1949 Geneva Conventions and their Additional Protocols of 1977, is a war crime.¹⁴¹⁷

1301. Under Norway’s Military Penal Code as amended, “anyone who contravenes or is accessory to the contravention of provisions relating to the protection of persons or property laid down in . . . the two additional protocols to [the Geneva] Conventions . . . is liable to imprisonment”.¹⁴¹⁸

1302. Spain’s Penal Code punishes “anyone who, during an armed conflict . . . uses . . . in a perfidious manner the protective or distinctive signs, emblems or signals established and recognised under international treaties to which Spain is a party, in particular the distinctive signs of the Red Cross and Red Crescent”.¹⁴¹⁹

¹⁴¹² Netherlands, *International Crimes Act* (2003), Article 5(2)(c)(vi).

¹⁴¹³ New Zealand, *Geneva Conventions Act as amended* (1958), Section 3(1).

¹⁴¹⁴ New Zealand, *International Crimes and ICC Act* (2000), Section 11(2).

¹⁴¹⁵ Nicaragua, *Draft Penal Code* (1999), Article 452.

¹⁴¹⁶ Nicaragua, *Emblem Law* (2002), Article 12.

¹⁴¹⁷ Niger, *Penal Code as amended* (1961), Article 208.3(16).

¹⁴¹⁸ Norway, *Military Penal Code as amended* (1902), § 108(b).

¹⁴¹⁹ Spain, *Penal Code* (1995), Article 612(4).

1303. Under Sweden's Penal Code as amended, the misuse of emblems of medical aid (red cross) or "the killing or injuring of an opponent by means of some other form of treacherous behaviour" constitutes a crime against international law.¹⁴²⁰

1304. Switzerland's Military Criminal Code as amended punishes "anyone who abuses the emblem or the protection of the Red Cross, Red Crescent, Red Lion and Sun...to prepare or commit hostile acts" in time of armed conflict.¹⁴²¹

1305. Tajikistan's Criminal Code punishes "the perfidious use of the distinctive sign of the red cross and red crescent" in an international or internal armed conflict.¹⁴²²

1306. Togo's Emblem Law punishes "any person who, intentionally, shall have committed, or ordered to be committed, acts which have caused death or serious injury to body or health of an adversary by using in a perfidious way, the emblem of the Red Cross or Red Crescent or a distinctive signal". It adds that "the perfidious use of the emblem constitutes a grave breach of the Geneva Conventions and their Additional Protocols and is considered as a war crime".¹⁴²³

1307. Under Trinidad and Tobago's Draft ICC Act, it is a punishable offence to commit a war crime as defined in Article 8(2)(b)(vii) of the 1998 ICC Statute.¹⁴²⁴

1308. The UK Geneva Conventions Act as amended punishes "any person, whatever his nationality, who, whether in or outside the United Kingdom, commits, or aids, abets or procures the commission by any other person of, a grave breach of...[AP I]".¹⁴²⁵

1309. Under the UK ICC Act, it is a punishable offence to commit a war crime as defined in Article 8(2)(b)(vii) of the 1998 ICC Statute.¹⁴²⁶

1310. Under Yemen's Military Criminal Code, the "perfidious use of the distinctive emblem of the Yemeni Red Crescent" is a war crime.¹⁴²⁷

1311. Under Yemen's Emblem Law, "any person who has used the emblem, with perfidious intent, in time of war, so as to cause death or serious injury to body or health of any person, or has ordered such use, shall be punished by the sanction defined in the laws in force".¹⁴²⁸

1312. Zimbabwe's Geneva Conventions Act as amended punishes "any person, whatever his nationality, who, whether in or outside Zimbabwe, commits any such grave breach of...[AP I]".¹⁴²⁹

¹⁴²⁰ Sweden, *Penal Code as amended* (1962), Chapter 22, § 6(2).

¹⁴²¹ Switzerland, *Military Criminal Code as amended* (1927), Article 110.

¹⁴²² Tajikistan, *Criminal Code* (1998), Article 403(1).

¹⁴²³ Togo, *Emblem Law* (1999), Article 16.

¹⁴²⁴ Trinidad and Tobago, *Draft ICC Act* (1999), Section 5(1)(a).

¹⁴²⁵ UK, *Geneva Conventions Act as amended* (1957), Section 1(1).

¹⁴²⁶ UK, *ICC Act* (2001), Sections 50(1) and 51(1) (England and Wales) and Section 58(1) (Northern Ireland).

¹⁴²⁷ Yemen, *Military Criminal Code* (1998), Article 21(5).

¹⁴²⁸ Yemen, *Emblem Law* (1999), Article 12.

¹⁴²⁹ Zimbabwe, *Geneva Conventions Act as amended* (1981), Section 3(1).

National Case-law

1313. In the *Hagendorf case* before the US Intermediate Military Government Court at Dachau in 1946, the accused, a German soldier, was charged with having “wrongfully used the Red Cross emblem in a combat zone by firing a weapon at American soldiers from an enemy ambulance displaying such emblem”. The accused was found guilty.¹⁴³⁰

Other National Practice

1314. On the basis of replies by army officers to a questionnaire, the Report on the Practice of Rwanda states that treachery is prohibited. According to the report, this may consist in the improper use of the signs of the red cross or red crescent. The report gives as examples of treachery the transportation of weapons and ammunition in an ambulance and the use of a hospital displaying the distinctive emblem as an ammunition dump.¹⁴³¹

1315. In 1992, in its final report to Congress on the conduct of the Gulf War, the US Department of Defense stated that “perfidious acts include . . . the feigning of protected status through improper use of the Red Cross or Red Crescent distinctive emblem”.¹⁴³²

*III. Practice of International Organisations and Conferences**United Nations*

1316. In 1994, in its final report on grave breaches of the Geneva Conventions and other violations of IHL committed in the former Yugoslavia, the UN Commission of Experts Established pursuant to Security Council Resolution 789 (1992) considered that “the *Hagendorf case* . . . in which a German soldier was convicted for abusing the Red Cross emblem by firing at American soldiers from an ambulance, might constitute a useful precedent. In that case, however, the accused was captured at the time of the incident.”¹⁴³³

Other International Organisations

1317. No practice was found.

International Conferences

1318. No practice was found.

¹⁴³⁰ US, Intermediate Military Government Court at Dachau, *Hagendorf case*, Judgement, 9 August 1946.

¹⁴³¹ Report on the Practice of Rwanda, 1997, Replies by army officers to a questionnaire, Chapter 2.6.

¹⁴³² US, Department of Defense, Final Report to Congress on the Conduct of the Persian Gulf War, Appendix O, The Role of the Law of War, 10 April 1992, *ILM*, Vol. 31, 1992, p. 632.

¹⁴³³ UN Commission of Experts Established pursuant to Security Council Resolution 780 (1992), Final report, Annex VI.B, UN Doc. S/1994/674/Add.2 (Vol. III), 28 December 1994, § 85.

IV. Practice of International Judicial and Quasi-judicial Bodies

1319. No practice was found.

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

1320. To fulfil its task of disseminating IHL, the ICRC has delegates around the world teaching armed and security forces that “the perfidious use of the... distinctive signs marking specifically protected persons and objects... [and of] distinctive signals used for identification of medical service” constitutes a grave breach of the law of war.¹⁴³⁴

1321. In a press release issued in 1985, the ICRC reported that a car loaded with explosives was set off by its driver near a check-point in southern Lebanon. According to witnesses, the car was bearing the red cross emblem. The ICRC stated “the use of the protective emblem of the Red Cross for indiscriminate killing and wounding is a doubly detestable act which the International Committee of the Red Cross (ICRC) condemns”.¹⁴³⁵

1322. The 1996 ICRC Model Law concerning the Use and Protection of the Emblem of the Red Cross or Red Crescent provides that:

Anyone who has wilfully committed, or has given the order to commit, acts resulting in the death of, or causing serious injury to the body or health of, an adversary by making perfidious use of the red cross or red crescent emblem or a distinctive signal, has committed a war crime and shall be punished by imprisonment for a period of... years.

Perfidious use means appealing to the good faith of the adversary, with the intention to deceive him and make him believe that he was entitled to receive or was obliged to confer the protection provided for by the rules of international humanitarian law.¹⁴³⁶

1323. In a working paper on war crimes submitted in 1997 to the Preparatory Committee for the Establishment of an International Criminal Court, the ICRC included “the perfidious use of the distinctive emblem of the red cross or red crescent”, when committed in an international armed conflict, in its list of war crimes to be subject to the jurisdiction of the Court.¹⁴³⁷

VI. Other Practice

1324. In 1987, an article published in the French newspaper *Le Monde* discussed an incident in which the counterrevolutionary forces in Nicaragua had

¹⁴³⁴ Frédéric de Mulinen, *Handbook on the Law of War for Armed Forces*, ICRC, Geneva, 1987, § 779(a) and (c).

¹⁴³⁵ ICRC, Press Release No. 1509, South Lebanon: The red cross emblem used for a bombing attack, 16 July 1985.

¹⁴³⁶ ICRC, Model Law concerning the Use and Protection of the Emblem of the Red Cross or Red Crescent, Article 11, *IRRC*, No. 313, 1996, p. 486.

¹⁴³⁷ ICRC, Working paper on war crimes submitted to the Preparatory Committee for the Establishment of an International Criminal Court, New York, 14 February 1997, § 1(b)(vi).

allegedly used a helicopter bearing the emblem of the red cross to carry military supplies. The ICRC was reported in the article as stating that the red cross emblem may only be used by the medical services of the belligerent forces to provide protection for the wounded and sick and for the persons providing care for them. The use of a vehicle marked with the red cross emblem to transport soldiers, weapons or other military equipment was described in the article as “a grave breach of the rules of international humanitarian law”.¹⁴³⁸

Simulation of protected status by using the United Nations emblem or uniform

Note: *For practice concerning the improper use of the United Nations emblem or uniform which does not amount to perfidy, see supra section D of this chapter.*

I. Treaties and Other Instruments

Treaties

1325. Article 37(1)(d) AP I lists “the feigning of protected status by the use of signs, emblems or uniforms of the United Nations” as an act of perfidy. Article 37 AP I was adopted by consensus.¹⁴³⁹

1326. Under Article 85(3) AP I, “the perfidious use, in violation of Article 37, of . . . protective signs recognized by the Geneva Conventions or this Protocol” is a grave breach of AP I. Article 85(5) adds that “without prejudice to the application of the [Geneva] Conventions and of this Protocol, grave breaches of these instruments shall be regarded as war crimes”. Article 85 AP I was adopted by consensus.¹⁴⁴⁰

1327. Under Article 8(2)(b)(vii) of the 1998 ICC Statute, “making improper use . . . of the flag or of the military insignia and uniform . . . of the United Nations, . . . resulting in death or serious personal injury” is a war crime in international armed conflicts.

Other Instruments

1328. Paragraph 110(d) of the 1994 San Remo Manual provides that “warships and auxiliary vessels . . . are prohibited . . . at all times from actively simulating the status of . . . vessels protected by the United Nations flag”. Paragraph 111(a) states that “perfidious acts include the launching of an attack while feigning . . . protected United Nations status”.

1329. Pursuant to Article 20(b)(v) of the 1996 ILC Draft Code of Crimes against the Peace and Security of Mankind, “the perfidious use of . . . recognized protective signs” is a war crime.

¹⁴³⁸ Isabelle Vichniac, Violation of the Rules of Humanitarian Law? Red Cross Warns Against Contras' use of its Emblem for Military Purposes, *Le Monde*, 19 June 1987.

¹⁴³⁹ CDDH, *Official Records*, Vol. VI, CDDH/SR.39, 25 May 1977, p. 103.

¹⁴⁴⁰ CDDH, *Official Records*, Vol. VI, CDDH/SR.44, 30 May 1977, p. 291.

1330. The 2000 UNTAET Regulation No. 2000/15 establishes panels with exclusive jurisdiction over serious criminal offences, including war crimes. According to Section 6(1)(b)(vii), “making improper use . . . of the flag or of the military insignia and uniform . . . of the United Nations, . . . resulting in death or serious personal injury” is a war crime in international armed conflicts.

II. National Practice

Military Manuals

1331. Argentina’s Law of War Manual provides that it is an example of perfidy “to make use of the signs, emblems or uniforms of the United Nations . . . so as to simulate a protected status”.¹⁴⁴¹ It adds that “the perfidious use of . . . recognised protective signs” is a grave breach of AP I and a war crime.¹⁴⁴²

1332. Australia’s Commanders’ Guide stresses that “acts which constitute perfidy include feigning of . . . protected status by the use of protective symbols, signs, emblems or uniforms of the United Nations”.¹⁴⁴³

1333. Australia’s Defence Force Manual provides that “acts which constitute perfidy include feigning of . . . protected status by the use of protective symbols, signs, emblems or uniforms of the United Nations”.¹⁴⁴⁴

1334. Cameroon’s Instructors’ Manual provides that “feigning having a protected status by using signs, emblems or uniforms of the United Nations” is an example of perfidy.¹⁴⁴⁵

1335. Canada’s LOAC Manual provides that “the following are examples of perfidy if a hostile act is committed while: . . . feigning protected status by the use of signs, emblems or uniforms of the United Nations”.¹⁴⁴⁶ It also considers it an act of perfidy in air warfare if a hostile act is committed while “using false markings on military aircraft such as the markings of . . . United Nations aircraft”.¹⁴⁴⁷ The manual further states that “perfidious use of . . . protective signs recognized by the Geneva Conventions or API” constitutes a grave breach of AP I and a war crime.¹⁴⁴⁸

1336. Colombia’s Directive on IHL considers “the perfidious use of . . . protective signs recognised under the law of war” as a punishable offence.¹⁴⁴⁹

1337. Croatia’s LOAC Compendium provides that the “perfidious use of distinctive protective signs” is a grave breach of the law of war and a war crime.¹⁴⁵⁰

¹⁴⁴¹ Argentina, *Law of War Manual* (1989), § 1.05(2)(4).

¹⁴⁴² Argentina, *Law of War Manual* (1989), § 8.03.

¹⁴⁴³ Australia, *Commanders’ Guide* (1994), § 826(d) (naval warfare) and § 902(d) (land warfare).

¹⁴⁴⁴ Australia, *Defence Force Manual* (1994), § 703(d) (land warfare), see also §§ 635(d) and 636(a) (naval warfare).

¹⁴⁴⁵ Cameroon, *Instructors’ Manual* (1992), pp. 63 and 64, § 234.

¹⁴⁴⁶ Canada, *LOAC Manual* (1999), p. 6-2, § 9(d) (land warfare), see also p. 7-2, § 17(d) (air warfare) and p. 8-11, § 81(e) (naval warfare).

¹⁴⁴⁷ Canada, *LOAC Manual* (1999), p. 7-2, § 18(a).

¹⁴⁴⁸ Canada, *LOAC Manual* (1999), p. 16-2, § 8(a) and p. 16-3, § 16(f).

¹⁴⁴⁹ Colombia, *Directive on IHL* (1993), Section III(D).

¹⁴⁵⁰ Croatia, *LOAC Compendium* (1991), p. 56.

1338. Croatia's Commanders' Manual states that "it is prohibited to feign a protected status by inviting the confidence of the enemy: misuse of distinctive signs".¹⁴⁵¹

1339. France's LOAC Summary Note prohibits perfidy, and states that "it is forbidden to feign a protected status by inviting the confidence of the enemy (abuse of distinctive signs and signals . . .)".¹⁴⁵² It also states that the "perfidious use of protected signs and signals" is a grave breach of the law of war and a war crime.¹⁴⁵³

1340. France's LOAC Manual provides that "using a protective sign to deceive the enemy and reach an operational goal constitutes an act of perfidy".¹⁴⁵⁴ It specifies that the use of UN emblems and uniforms with the view to commit hostile acts is criminalised.¹⁴⁵⁵ Generally, it considers that "the perfidious use of any protective sign recognised by international law constitutes a war crime".¹⁴⁵⁶

1341. Germany's Military Manual provides that "grave breaches of international humanitarian law are in particular: . . . perfidious . . . use of recognized protective signs".¹⁴⁵⁷

1342. Hungary's Military Manual gives as an example of perfidy "to falsely claim protected status, thereby inviting the confidence of the enemy", *inter alia*, by using the UN flag.¹⁴⁵⁸ The manual also states that the "perfidious use of distinctive protective signs" is a grave breach of the law of war and a war crime.¹⁴⁵⁹

1343. Referring to Israel's Law of War Booklet, the Report on the Practice of Israel states that the IDF "prohibits the resort to perfidy to kill, injure or capture an adversary. Therefore, the IDF does not . . . make unlawful use of protected emblems or uniforms."¹⁴⁶⁰

1344. Israel's Manual on the Laws of War states, as an example of perfidious conduct, that "it is prohibited to pose as U.N. . . . personnel or use [UN] uniform, flag and emblems".¹⁴⁶¹

1345. Under Italy's IHL Manual, grave breaches of international conventions and protocols, including "the perfidious use . . . of international protective signs", constitute war crimes.¹⁴⁶²

1346. Italy's LOAC Elementary Rules Manual states that "it is prohibited to feign a protected status by inviting the confidence of the enemy: misuse of distinctive signs".¹⁴⁶³

¹⁴⁵¹ Croatia, *Commanders' Manual* (1992), § 46.

¹⁴⁵² France, *LOAC Summary Note* (1992), § 4.4.

¹⁴⁵³ France, *LOAC Summary Note* (1992), § 3.4.

¹⁴⁵⁴ France, *LOAC Manual* (2001), p. 62. ¹⁴⁵⁵ France, *LOAC Manual* (2001), p. 115.

¹⁴⁵⁶ France, *LOAC Manual* (2001), p. 118, see also p. 115.

¹⁴⁵⁷ Germany, *Military Manual* (1992), § 1209.

¹⁴⁵⁸ Hungary, *Military Manual* (1992), p. 63. ¹⁴⁵⁹ Hungary, *Military Manual* (1992), p. 90.

¹⁴⁶⁰ Report on the Practice of Israel, 1997, Chapter 2.4, referring to *Law of War Booklet* (1986), p. 8.

¹⁴⁶¹ Israel, *Manual on the Laws of War* (1998), p. 56.

¹⁴⁶² Italy, *IHL Manual* (1991), Vol. I, § 85.

¹⁴⁶³ Italy, *LOAC Elementary Rules Manual* (1991), § 46.

1347. The Military Manual of the Netherlands states that AP I “gives a number of examples of treacherous behaviour: feigning to possess a protected position by using signs, emblems or uniforms of the United Nations”.¹⁴⁶⁴

1348. New Zealand’s Military Manual provides that “the following acts are examples of perfidy: . . . the feigning of protected status by the use of signs, emblems or uniforms of the United Nations”.¹⁴⁶⁵ It also states that “the use of false markings on military aircraft such as the markings of . . . United Nations aircraft . . . is the prime example of perfidious conduct in air warfare and is prohibited”.¹⁴⁶⁶ It further states that “perfidious use of . . . protective signs recognised by the [Geneva] Conventions or [AP I]” constitutes a grave breach of AP I and a war crime.¹⁴⁶⁷

1349. Nigeria’s Military Manual gives the following example of “perjury” (perfidy): “feigning protection status by the use of signs, emblems or uniforms of the UN”.¹⁴⁶⁸

1350. Under Romania’s Soldiers’ Manual, “feigning the status of a protected person by abusing the signs and emblems of . . . the UN” is an act of perfidy.¹⁴⁶⁹

1351. South Africa’s LOAC Manual provides that “grave breaches of the law of war are regarded as war crimes”.¹⁴⁷⁰

1352. Spain’s LOAC Manual considers “feigning to possess a protected status by using the signs, emblems or uniforms of the United Nations” as an example of perfidy.¹⁴⁷¹ It also states that “it is prohibited to feign a protected status by inviting the confidence of the enemy: misuse of distinctive signs”.¹⁴⁷² It also states that it is a grave breach of the law of war and a war crime “to make a perfidious use . . . of . . . recognised protective signs”.¹⁴⁷³

1353. Sweden’s IHL Manual emphasises that, pursuant to Article 37 AP I, “the feigning of protected . . . status . . . of a member of the armed forces . . . of the United Nations” constitutes a perfidious conduct.¹⁴⁷⁴

1354. Switzerland’s Basic Military Manual considers the “perfidious use of . . . distinctive signs recognised by the [Geneva] Conventions or [AP I], in violation of Article 37 [AP I]”, as a grave breach of AP I.¹⁴⁷⁵

1355. The YPA Military Manual of the SFRY (FRY) states that feigning protected status by using UN symbols, emblems, signs or uniforms is an act of perfidy.¹⁴⁷⁶

¹⁴⁶⁴ Netherlands, *Military Manual* (1993), p. IV-2.

¹⁴⁶⁵ New Zealand, *Military Manual* (1992), § 502(5) (land warfare) and § 713(2) (naval warfare), see also § 1905.

¹⁴⁶⁶ New Zealand, *Military Manual* (1992), § 611(2).

¹⁴⁶⁷ New Zealand, *Military Manual* (1992), §§ 1701(1) and 1703(3)(f).

¹⁴⁶⁸ Nigeria, *Military Manual* (1994), pp. 42 and 43, § 12(e).

¹⁴⁶⁹ Romania, *Soldiers’ Manual* (1991), p. 35. ¹⁴⁷⁰ South Africa, *LOAC Manual* (1996), § 41.

¹⁴⁷¹ Spain, *LOAC Manual* (1996), Vol. I, § 3.3.b.(1), see also § 5.3.c.

¹⁴⁷² Spain, *LOAC Manual* (1996), Vol. I, § 10.8.e.(1).

¹⁴⁷³ Spain, *LOAC Manual* (1996), Vol. I, § 9.2.a.(2).

¹⁴⁷⁴ Sweden, *IHL Manual* (1991), Section 3.2.1.1.b, p. 29.

¹⁴⁷⁵ Switzerland, *Basic Military Manual* (1987), Article 193(1)(f).

¹⁴⁷⁶ SFRY (FRY), *YPA Military Manual* (1988), § 104(3).

National Legislation

1356. Argentina's Draft Code of Military Justice punishes any soldier who "uses . . . in a perfidious manner, the flag, uniform, insignia or distinctive emblem . . . of the United Nations".¹⁴⁷⁷

1357. Australia's Geneva Conventions Act as amended provides that "a person who, in Australia or elsewhere, commits a grave breach . . . of [AP I] is guilty of an indictable offence".¹⁴⁷⁸

1358. Australia's ICC (Consequential Amendments) Act incorporates in the Criminal Code the war crimes defined in the 1998 ICC Statute, including "improper use of a flag, insignia or uniform of the United Nations . . . [when] the perpetrator's conduct results in death or serious personal injury", in international armed conflicts.¹⁴⁷⁹

1359. Azerbaijan's Criminal Code provides that "the misuse of . . . the flag, the sign or clothes of the United Nations, . . . which as a result caused death or serious injury to body of a victim" constitutes a war crime in international and non-international armed conflicts.¹⁴⁸⁰

1360. Canada's Geneva Conventions Act as amended provides that "every person who, whether within or outside Canada, commits a grave breach [of AP I] . . . is guilty of an indictable offence".¹⁴⁸¹

1361. Canada's Crimes against Humanity and War Crimes Act provides that the war crimes defined in Article 8(2) of the 1998 ICC Statute are "crimes according to customary international law" and, as such, indictable offences under the Act.¹⁴⁸²

1362. Colombia's Penal Code, in an article entitled "Perfidy", imposes a criminal sanction on "anyone who, during an armed conflict, with intent to harm or attack the adversary, . . . uses improperly . . . the flag of the United Nations or of other intergovernmental organisations".¹⁴⁸³

1363. Congo's Genocide, War Crimes and Crimes against Humanity Act defines war crimes with reference to the categories of crimes defined in Article 8 of the 1998 ICC Statute.¹⁴⁸⁴

1364. The Geneva Conventions and Additional Protocols Act of the Cook Islands punishes "any person who in the Cook Islands or elsewhere commits, or aids or abets or procures the commission by another person of, a grave breach . . . of [AP I]".¹⁴⁸⁵

¹⁴⁷⁷ Argentina, *Draft Code of Military Justice* (1998), Article 292, introducing a new Article 876(6) in the *Code of Military Justice as amended* (1951).

¹⁴⁷⁸ Australia, *Geneva Conventions Act as amended* (1957), Section 7(1).

¹⁴⁷⁹ Australia, *ICC (Consequential Amendments) Act* (2002), Schedule 1, § 268.43.

¹⁴⁸⁰ Azerbaijan, *Criminal Code* (1999), Article 119(2).

¹⁴⁸¹ Canada, *Geneva Conventions Act as amended* (1985), Section 3(1).

¹⁴⁸² Canada, *Crimes against Humanity and War Crimes Act* (2000), Section 4(1) and (4).

¹⁴⁸³ Colombia, *Penal Code* (2000), Article 143.

¹⁴⁸⁴ Congo, *Genocide, War Crimes and Crimes against Humanity Act* (1998), Article 4.

¹⁴⁸⁵ Cook Islands, *Geneva Conventions and Additional Protocols Act* (2002), Section 5(1).

1365. Cyprus's AP I Act punishes "any person who, whatever his nationality, commits in the Republic or outside the Republic any grave breach of the provisions of the Protocol, or takes part or assists or incites another person in the commission of such a breach".¹⁴⁸⁶

1366. The Draft Amendments to the Penal Code of El Salvador, in an article entitled "Perfidy", provide for a prison sentence for "anyone who, during an international or non-international armed conflict, with the view to harm or attack the adversary, ... uses ... the flag of the United Nations or international organisations; the flags, uniforms or insignia ... of military or police detachments of the United Nations".¹⁴⁸⁷

1367. Under Ethiopia's Penal Code, it is a punishable offence to abuse any "protective device recognized in public international law, ... with intent to prepare or to commit hostile acts".¹⁴⁸⁸

1368. Under Georgia's Criminal Code, "the perfidious use of ... protective signs and signals recognised by international humanitarian law" in an international or non-international armed conflict is a crime.¹⁴⁸⁹

1369. Germany's Law Introducing the International Crimes Code punishes anyone who, in connection with an international or non-international armed conflict, "makes improper use ... of the flag ... or of the uniform ... of the United Nations, thereby causing a person's death or serious injury".¹⁴⁹⁰

1370. Ireland's Geneva Conventions Act as amended provides that grave breaches of AP I are punishable offences.¹⁴⁹¹ It adds that any "minor breach" of AP I, including violations of Article 37(1) AP I, is also a punishable offence.¹⁴⁹²

1371. Under Jordan's Draft Military Criminal Code, "the perfidious use of ... any ... protective emblem" in time of armed conflict is a war crime.¹⁴⁹³

1372. Under the Draft Amendments to the Code of Military Justice of Lebanon, "the perfidious use of ... any ... protective sign provided for by the [Geneva] Conventions and [AP I]" constitutes a war crime.¹⁴⁹⁴

1373. Lithuania's Criminal Code as amended considers that the improper use of emblems of international organisations is a war crime.¹⁴⁹⁵

1374. Under Mali's Penal Code, "using ... the flag or military insignia or uniform ... of the United Nations Organisation, ... and thereby, causing loss of human lives or serious injuries" is a war crime in international armed conflicts.¹⁴⁹⁶

¹⁴⁸⁶ Cyprus, *AP I Act* (1979), Section 4(1).

¹⁴⁸⁷ El Salvador, *Draft Amendments to the Penal Code* (1998), Article entitled "Perfidia".

¹⁴⁸⁸ Ethiopia, *Penal Code* (1957), Article 294(b).

¹⁴⁸⁹ Georgia, *Criminal Code* (1999), Article 411(1)(f).

¹⁴⁹⁰ Germany, *Law Introducing the International Crimes Code* (2002), Article 1, § 10(2).

¹⁴⁹¹ Ireland, *Geneva Conventions Act as amended* (1962), Section 3(1).

¹⁴⁹² Ireland, *Geneva Conventions Act as amended* (1962), Section 4(1) and (4).

¹⁴⁹³ Jordan, *Draft Military Criminal Code* (2000), Article 41(A)(14).

¹⁴⁹⁴ Lebanon, *Draft Amendments to the Code of Military Justice* (1997), Article 146(14).

¹⁴⁹⁵ Lithuania, *Criminal Code as amended* (1961), Article 344.

¹⁴⁹⁶ Mali, *Penal Code* (2001), Article 31(i)(7).

1375. New Zealand's Geneva Conventions Act as amended provides that "any person who in New Zealand or elsewhere commits, or aids or abets or procures the commission by another person of, a grave breach . . . of [AP I] is guilty of an indictable offence".¹⁴⁹⁷

1376. Under New Zealand's International Crimes and ICC Act, war crimes include the crimes defined in Article 8(2)(b)(vii) of the 1998 ICC Statute.¹⁴⁹⁸

1377. Nicaragua's Draft Penal Code, in an article entitled "Perfidy", punishes "anyone who, during an international or internal armed conflict, with the view to harm or attack the adversary, . . . uses . . . the flag of the United Nations or international organisations; . . . the flags, uniforms or insignia . . . of military or police detachments of the United Nations".¹⁴⁹⁹

1378. Under Norway's Military Penal Code as amended, "anyone who contravenes or is accessory to the contravention of provisions relating to the protection of persons or property laid down in . . . the two additional protocols to [the Geneva] Conventions . . . is liable to imprisonment".¹⁵⁰⁰

1379. Spain's Royal Ordinance for the Armed Forces states that "the combatant . . . shall not display treacherously the flag . . . of international organisations".¹⁵⁰¹

1380. Spain's Penal Code punishes "anyone who, during an armed conflict . . . uses . . . in a perfidious manner the flag, uniform, insignia or distinctive emblem . . . of the United Nations".¹⁵⁰²

1381. Under Sweden's Penal Code as amended, the misuse of the insignia of the UN or "the killing or injuring of an opponent by means of *some other form of treacherous behaviour*" constitutes a crime against international law.¹⁵⁰³ (emphasis added)

1382. Tajikistan's Criminal Code punishes "the perfidious use of . . . protective signs and signals recognised by international humanitarian law" in an international or internal armed conflict.¹⁵⁰⁴

1383. Under Trinidad and Tobago's Draft ICC Act, it is a punishable offence to commit a war crime as defined in Article 8(2)(b)(vii) of the 1998 ICC Statute.¹⁵⁰⁵

1384. The UK Geneva Conventions Act as amended punishes "any person, whatever his nationality, who, whether in or outside the United Kingdom, commits, or aids, abets or procures the commission by any other person of, a grave breach of . . . [AP I]".¹⁵⁰⁶

¹⁴⁹⁷ New Zealand, *Geneva Conventions Act as amended* (1958), Section 3(1).

¹⁴⁹⁸ New Zealand, *International Crimes and ICC Act* (2000), Section 11(2).

¹⁴⁹⁹ Nicaragua, *Draft Penal Code* (1999), Article 452.

¹⁵⁰⁰ Norway, *Military Penal Code as amended* (1902), § 108(b).

¹⁵⁰¹ Spain, *Royal Ordinance for the Armed Forces* (1978), Article 138.

¹⁵⁰² Spain, *Penal Code* (1995) Article 612(5).

¹⁵⁰³ Sweden, *Penal Code as amended* (1962), Chapter 22, § 6(2).

¹⁵⁰⁴ Tajikistan, *Criminal Code* (1998), Article 403(1).

¹⁵⁰⁵ Trinidad and Tobago, *Draft ICC Act* (1999), Section 5(1)(a).

¹⁵⁰⁶ UK, *Geneva Conventions Act as amended* (1957), Section 1(1).

1385. Under the UK ICC Act, it is a punishable offence to commit a war crime as defined in Article 8(2)(b)(vii) of the 1998 ICC Statute.¹⁵⁰⁷

1386. Under Yemen's Military Criminal Code, the "perfidious use of... international protective emblems provided for in international conventions" is a war crime.¹⁵⁰⁸

1387. Zimbabwe's Geneva Conventions Act as amended punishes "any person, whatever his nationality, who, whether in or outside Zimbabwe, commits any such grave breach of... [AP I]".¹⁵⁰⁹

National Case-law

1388. No practice was found.

Other National Practice

1389. No practice was found.

III. Practice of International Organisations and Conferences

United Nations

1390. In 1994, in its final report on grave breaches of the Geneva Conventions and other violations of IHL committed in the former Yugoslavia, the UN Commission of Experts Established pursuant to Security Council Resolution 780 (1992) considered that:

If it can be established that named individuals in the [Bosnian Serb army] used or authorized the use of vehicles which carried UN markings, this could be viewed as perfidious conduct and, if persons were killed or wounded as a result of this action, a grave breach of [AP I] could be established.¹⁵¹⁰

Other International Organisations

1391. No practice was found.

International Conferences

1392. At the CDDH, Committee III reported that "the misuse of United Nations signs, emblems or uniforms would be perfidious in cases where the United Nations and its personnel enjoyed a neutral protected status, but not, of course, in situations where the United Nations forces were involved as combatants in a conflict".¹⁵¹¹

¹⁵⁰⁷ UK, *ICC Act* (2001), Sections 50(1) and 51(1) (England and Wales) and Section 58(1) (Northern Ireland).

¹⁵⁰⁸ Yemen, *Military Criminal Code* (1998), Article 21(5).

¹⁵⁰⁹ Zimbabwe, *Geneva Conventions Act as amended* (1981), Section 3(1).

¹⁵¹⁰ UN Commission of Experts Established pursuant to Security Council Resolution 780 (1992), Final report, Annex VI.B, UN Doc. S/1994/674/Add.2 (Vol. III), 28 December 1994, § 85.

¹⁵¹¹ CDDH, *Official Records*, Vol. XV, CDDH/III/236/Rev.1, 21 April–11 June 1976, p. 382, § 18.

IV. Practice of International Judicial and Quasi-judicial Bodies

1393. No practice was found.

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

1394. According to the ICRC Commentary on the Additional Protocols, “the perfidious use... of emblems, signs, signals or uniforms referred to in Article 37... of the Protocol [among which the UN emblem], for the purpose of killing, wounding or capturing an adversary, constitutes a grave breach under [Article 85(3)(f) AP I]”.¹⁵¹²

1395. To fulfil its task of disseminating IHL, the ICRC has delegates around the world teaching armed and security forces that “to pretend having protected status by the use of flags, emblems or uniforms of the United Nations” is an act of perfidy.¹⁵¹³ Delegates also teach that “the perfidious use of the... distinctive signs marking specifically protected persons and objects... [and of] other protected signs recognized by the law of war” constitutes a grave breach of the law of war.¹⁵¹⁴

1396. In a working paper on war crimes submitted in 1997 to the Preparatory Committee for the Establishment of an International Criminal Court, the ICRC included “the perfidious use of the... protective signs and signals recognized by international humanitarian law”, when committed in an international armed conflict, in its list of war crimes to be subject to the jurisdiction of the Court.¹⁵¹⁵

VI. Other Practice

1397. No practice was found.

Simulation of protected status by using other internationally recognised emblems

Note: *For practice concerning the improper use of other internationally recognised emblems which does not amount to perfidy, see supra section E of this chapter.*

¹⁵¹² Yves Sandoz *et al.* (eds.), *Commentary on the Additional Protocols*, ICRC, Geneva, 1987, § 3499.

¹⁵¹³ Frédéric de Mulinen, *Handbook on the Law of War for Armed Forces*, ICRC, Geneva, 1987, § 409(e).

¹⁵¹⁴ Frédéric de Mulinen, *Handbook on the Law of War for Armed Forces*, ICRC, Geneva, 1987, § 779(a) and (b).

¹⁵¹⁵ ICRC, Working paper on war crimes submitted to the Preparatory Committee for the Establishment of an International Criminal Court, New York, 14 February 1997, § 1(b)(vi).

I. Treaties and Other Instruments

Treaties

1398. Under Article 85(3)(f) AP I, “the perfidious use, in violation of Article 37, of . . . protective signs recognized by the Conventions or this Protocol” is a grave breach of AP I. Article 85 AP I was adopted by consensus.¹⁵¹⁶

Other Instruments

1399. Pursuant to Article 20(b)(v) of the 1996 ILC Draft Code of Crimes against the Peace and Security of Mankind, “the perfidious use of . . . recognized protective signs” is a war crime.

II. National Practice

Military Manuals

1400. Argentina’s Law of War Manual provides that “the perfidious use of . . . recognised protective signs” is a grave breach of AP I and a war crime.¹⁵¹⁷

1401. Australia’s Commanders’ Guide, in a section entitled “Perfidy”, states that “protection is afforded to . . . civil defence workers . . . and PW by providing them with special identification symbols. It is unlawful for soldiers and other lawful combatants to fraudulently use protected symbols . . . in order to obtain immunity from attack.”¹⁵¹⁸

1402. Canada’s LOAC Manual provides that “the perfidious use of . . . protective signs recognized by the Geneva Conventions or AP I” constitutes a grave breach of AP I and a war crime.¹⁵¹⁹

1403. Colombia’s Directive on IHL punishes “the perfidious use of . . . protective signs recognised under the law of war . . . [or of] the distinctive signs used for the identification . . . of civil defence”.¹⁵²⁰

1404. Croatia’s LOAC Compendium provides that the “perfidious use of distinctive protective signs” is a grave breach of the law of war and a war crime.¹⁵²¹

1405. Croatia’s Commanders’ Manual states that “it is prohibited to feign a protected status by inviting the confidence of the enemy: misuse of distinctive signs”.¹⁵²²

1406. Ecuador’s Naval Manual states that “misuse of protective signs, signals and symbols in order to injure, kill, or capture the enemy constitutes an act of perfidy”.¹⁵²³

¹⁵¹⁶ CDDH, *Official Records*, Vol. VI, CCDH/SR.44, 30 May 1977, p. 291.

¹⁵¹⁷ Argentina, *Law of War Manual* (1989), § 8.03.

¹⁵¹⁸ Australia, *Commanders’ Guide* (1994), § 504.

¹⁵¹⁹ Canada, *LOAC Manual* (1999), p. 16-2, § 8(a) and p. 16-3, § 16(f).

¹⁵²⁰ Colombia, *Directive on IHL* (1993), Section III(D).

¹⁵²¹ Croatia, *LOAC Compendium* (1991), p. 56.

¹⁵²² Croatia, *Commanders’ Manual* (1992), § 46.

¹⁵²³ Ecuador, *Naval Manual* (1989), § 12.2.

1407. France's LOAC Summary Note prohibits perfidy and states that "it is forbidden to feign a protected status by inviting the confidence of the enemy (abuse of distinctive signs and signals . . .)".¹⁵²⁴ It also states that the "perfidious use of protected signs and signals" is a grave breach of the law of war and a war crime.¹⁵²⁵

1408. France's LOAC Manual states that "using a protective sign to deceive the enemy and reach an operational goal constitutes an act of perfidy".¹⁵²⁶ It further provides that "the perfidious use of any protective sign recognised by international law constitutes a war crime".¹⁵²⁷

1409. Germany's Military Manual provides that "grave breaches of international humanitarian law are in particular: . . . the perfidious . . . use of recognized protective signs".¹⁵²⁸

1410. Hungary's Military Manual states that the "perfidious use of distinctive protective signs" is a grave breach and a war crime.¹⁵²⁹

1411. Referring to Israel's Law of War Booklet, the Report on the Practice of Israel states that the IDF "prohibits the resort to perfidy to kill, injure or capture an adversary. Therefore, the IDF does not . . . make unlawful use of protected emblems".¹⁵³⁰

1412. Italy's IHL Manual provides that grave breaches of international conventions and protocols, among which "the perfidious use . . . of symbols of international protection" constitute war crimes.¹⁵³¹

1413. Italy's LOAC Elementary Rules Manual states that "it is prohibited to feign a protected status by inviting the confidence of the enemy: misuse of distinctive signs".¹⁵³²

1414. New Zealand's Military Manual provides that "the perfidious use of . . . protective signs recognised by the [Geneva] Conventions or [AP I]" constitutes a grave breach of AP I and a war crime.¹⁵³³

1415. South Africa's LOAC Manual regards the misuse of symbols of protection (such as those of civil defence, cultural property and installations containing dangerous forces) as perfidious and as constituting a grave breach of the law of war and a war crime.¹⁵³⁴

1416. Spain's LOAC Manual states that "it is prohibited to feign a protected status by inviting the confidence of the enemy: misuse of distinctive signs".¹⁵³⁵

¹⁵²⁴ France, *LOAC Summary Note* (1992), § 4.4.

¹⁵²⁵ France, *LOAC Summary Note* (1992), § 3.4.

¹⁵²⁶ France, *LOAC Manual* (2001), p. 62.

¹⁵²⁷ France, *LOAC Manual* (2001), p. 118.

¹⁵²⁸ Germany, *Military Manual* (1992), § 1209.

¹⁵²⁹ Hungary, *Military Manual* (1992), p. 90.

¹⁵³⁰ Report on the Practice of Israel, 1997, Chapter 2.4, referring to *Law of War Booklet* (1986), p. 8.

¹⁵³¹ Italy, *IHL Manual* (1991), Vol. I, § 85.

¹⁵³² Italy, *LOAC Elementary Rules Manual* (1991), § 46.

¹⁵³³ New Zealand, *Military Manual* (1992), §§ 1701(1) and 1703(3)(f).

¹⁵³⁴ South Africa, *LOAC Manual* (1996), §§ 34(c) and 41.

¹⁵³⁵ Spain, *LOAC Manual* (1996), Vol. I, § 10.8.e.(1).

It adds that it is a grave breach and a war crime “to make a perfidious use . . . of . . . recognised protective signs”.¹⁵³⁶

1417. Sweden’s IHL Manual states that “abuse of international emergency signals with perfidious intent may also be viewed as an example of perfidy”.¹⁵³⁷

1418. Switzerland’s Basic Military Manual considers the “perfidious use of . . . distinctive signs recognised by the [Geneva] Conventions or [AP I]”, as a grave breach of AP I.¹⁵³⁸

1419. The US Naval Handbook states that “misuse of protective signs, signals and symbols . . . in order to injure, kill, or capture the enemy constitutes an act of perfidy”.¹⁵³⁹

National Legislation

1420. Argentina’s Draft Code of Military Justice punishes any soldier who “uses . . . in a perfidious manner, the protective or distinctive signs established and recognised in international treaties to which the Argentine Republic is a party”.¹⁵⁴⁰

1421. Australia’s Geneva Conventions Act as amended provides that “a person who, in Australia or elsewhere, commits a grave breach . . . of [AP I] is guilty of an indictable offence”.¹⁵⁴¹

1422. Canada’s Geneva Conventions Act as amended provides that “every person who, whether within or outside Canada, commits a grave breach [of AP I] . . . is guilty of an indictable offence”.¹⁵⁴²

1423. Colombia’s Penal Code, in an article entitled “Perfidy”, imposes a criminal sanction on “anyone who, during an armed conflict, with intent to harm or attack the adversary, . . . uses improperly . . . signs of protection provided for in international treaties ratified by Colombia”.¹⁵⁴³

1424. The Geneva Conventions and Additional Protocols Act of the Cook Islands punishes “any person who in the Cook Islands or elsewhere commits, or aids or abets or procures the commission by another person of, a grave breach . . . of [AP I]”.¹⁵⁴⁴

1425. Cyprus’s AP I Act punishes “any person who, whatever his nationality, commits in the Republic or outside the Republic any grave breach of the provisions of the Protocol, or takes part or assists or incites another person in the commission of such a breach”.¹⁵⁴⁵

¹⁵³⁶ Spain, *LOAC Manual* (1996), Vol. I, § 9.2.a.(2).

¹⁵³⁷ Sweden, *IHL Manual* (1991), Section 3.2.1.1.b, p. 29.

¹⁵³⁸ Switzerland, *Basic Military Manual* (1987), Article 193(1)(f).

¹⁵³⁹ US, *Naval Handbook* (1995), § 12.2.

¹⁵⁴⁰ Argentina, *Draft Code of Military Justice* (1998), Article 292, introducing a new Article 876(5) in the *Code of Military Justice as amended* (1951).

¹⁵⁴¹ Australia, *Geneva Conventions Act as amended* (1957), Section 7(1).

¹⁵⁴² Canada, *Geneva Conventions Act as amended* (1985), Section 3(1).

¹⁵⁴³ Colombia, *Penal Code* (2000), Article 143.

¹⁵⁴⁴ Cook Islands, *Geneva Conventions and Additional Protocols Act* (2002), Section 5(1).

¹⁵⁴⁵ Cyprus, *AP I Act* (1979), Section 4(1).

1426. The Draft Amendments to the Penal Code of El Salvador, in an article entitled “Perfidy”, provide for a prison sentence for “anyone who, during an international or non-international armed conflict, with the view to harm or attack the adversary, . . . uses . . . other protective signs provided for in international treaties ratified by the State of El Salvador”.¹⁵⁴⁶

1427. Ethiopia’s Penal Code punishes the abuse of any “protective device recognized in public international law, . . . with intent to prepare or to commit hostile acts”.¹⁵⁴⁷

1428. Under Georgia’s Criminal Code, “the perfidious use of . . . protective signs and signals recognised by international humanitarian law” in an international or non-international armed conflict is a crime.¹⁵⁴⁸

1429. Ireland’s Geneva Conventions Act as amended provides that grave breaches of AP I are punishable offences.¹⁵⁴⁹

1430. Under Jordan’s Draft Military Criminal Code, “the perfidious use of . . . any . . . protective emblem” in time of armed conflict is a war crime.¹⁵⁵⁰

1431. Under the Draft Amendments to the Code of Military Justice of Lebanon, “the perfidious use of . . . any . . . protective sign provided for by the [Geneva] Conventions and [AP I]” constitutes a war crime.¹⁵⁵¹

1432. Under the International Crimes Act of the Netherlands, it is a crime, during an international armed conflict, to commit “the following acts, when they are committed intentionally and in violation of the relevant provisions of Additional Protocol (I) and cause death or serious injury to body or health: . . . the perfidious use . . . of . . . protective emblems recognised by the Geneva Conventions or Additional Protocol (I)”.¹⁵⁵²

1433. New Zealand’s Geneva Conventions Act as amended provides that “any person who in New Zealand or elsewhere commits, or aids or abets or procures the commission by another person of, a grave breach . . . of [AP I] is guilty of an indictable offence”.¹⁵⁵³

1434. Nicaragua’s Draft Penal Code, in an article entitled “Perfidy”, punishes “anyone who, during an international or internal armed conflict, with the view to harm or attack the adversary, . . . uses . . . protective signs defined in international treaties ratified by the State of Nicaragua”.¹⁵⁵⁴

1435. Under Norway’s Military Penal Code as amended, “anyone who contravenes or is accessory to the contravention of provisions relating to the protection of persons or property laid down in . . . the two additional protocols to [the Geneva] Conventions . . . is liable to imprisonment”.¹⁵⁵⁵

¹⁵⁴⁶ El Salvador, *Draft Amendments to the Penal Code* (1998), Article entitled “Perfidia”.

¹⁵⁴⁷ Ethiopia, *Penal Code* (1957), Article 294(b).

¹⁵⁴⁸ Georgia, *Criminal Code* (1999), Article 411(1)(f).

¹⁵⁴⁹ Ireland, *Geneva Conventions Act as amended* (1962), Section 3(1).

¹⁵⁵⁰ Jordan, *Draft Military Criminal Code* (2000), Article 41(A)(14).

¹⁵⁵¹ Lebanon, *Draft Amendments to the Code of Military Justice* (1997), Article 146(14).

¹⁵⁵² Netherlands, *International Crimes Act* (2003), Article 5(2)(c)(vi).

¹⁵⁵³ New Zealand, *Geneva Conventions Act as amended* (1958), Section 3(1).

¹⁵⁵⁴ Nicaragua, *Draft Penal Code* (1999), Article 452.

¹⁵⁵⁵ Norway, *Military Penal Code as amended* (1902), § 108(b).

1436. Spain's Penal Code punishes "anyone who, during an armed conflict . . . uses . . . in a perfidious manner the protective or distinctive signs, emblems or signals established and recognised under international treaties to which Spain is a party".¹⁵⁵⁶

1437. Under Sweden's Penal Code as amended, the misuse of the sign for civil defence and other internationally recognised emblems or "the killing or injuring of an opponent by means of *some other form of treacherous behaviour*" constitutes a crime against international law.¹⁵⁵⁷ (emphasis added)

1438. Switzerland's Military Criminal Code as amended punishes "anyone who abuses . . . the emblem of cultural property . . . to prepare or commit hostile acts" in time of armed conflict.¹⁵⁵⁸

1439. Tajikistan's Criminal Code punishes "the perfidious use of . . . protective signs and signals recognised by international humanitarian law" in an international or internal armed conflict.¹⁵⁵⁹

1440. The UK Geneva Conventions Act as amended punishes "any person, whatever his nationality, who, whether in or outside the United Kingdom, commits, or aids, abets or procures the commission by any other person of, a grave breach of . . . [AP I]".¹⁵⁶⁰

1441. Under Yemen's Military Criminal Code, the "perfidious use of . . . international protective emblems provided for in international conventions" is a war crime.¹⁵⁶¹

1442. Zimbabwe's Geneva Conventions Act as amended punishes "any person, whatever his nationality, who, whether in or outside Zimbabwe, commits any such grave breach of . . . [AP I]".¹⁵⁶²

National Case-law

1443. No practice was found.

Other National Practice

1444. No practice was found.

III. Practice of International Organisations and Conferences

United Nations

1445. No practice was found.

Other International Organisations

1446. No practice was found.

¹⁵⁵⁶ Spain, *Penal Code* (1995), Article 612(4).

¹⁵⁵⁷ Sweden, *Penal Code as amended* (1962), Chapter 22, § 6(2).

¹⁵⁵⁸ Switzerland, *Military Criminal Code as amended* (1927), Article 110.

¹⁵⁵⁹ Tajikistan, *Criminal Code* (1998), Article 403(1).

¹⁵⁶⁰ UK, *Geneva Conventions Act as amended* (1957), Section 1(1).

¹⁵⁶¹ Yemen, *Military Criminal Code* (1998), Article 21(5).

¹⁵⁶² Zimbabwe, *Geneva Conventions Act as amended* (1981), Section 3(1).

International Conferences

1447. According to the report of the Working Group to Committee III of the CDDH, Article 37 AP I “limit[s] itself to a brief list of particularly clear examples [of perfidious acts]. Examples that were debatable or involved borderline cases were avoided.”¹⁵⁶³

IV. Practice of International Judicial and Quasi-judicial Bodies

1448. No practice was found.

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

1449. To fulfil its task of disseminating IHL, the ICRC has delegates around the world teaching armed and security forces that “the perfidious use of the . . . distinctive signs marking specifically protected persons and objects; . . . [of] other protected signs recognized by the law of war; . . . [and of] distinctive signals used for identification of medical service and civil defence” constitutes a grave breach of the law of war.¹⁵⁶⁴

1450. In a working paper on war crimes submitted in 1997 to the Preparatory Committee for the Establishment of an International Criminal Court, the ICRC included “the perfidious use of the . . . protective signs and signals recognized by international humanitarian law”, when committed in an international armed conflict, in its list of war crimes to be subject to the jurisdiction of the Court.¹⁵⁶⁵

VI. Other Practice

1451. No practice was found.

Simulation of civilian status*I. Treaties and Other Instruments**Treaties*

1452. Article 37(1)(c) AP I lists “the feigning of civilian, non-combatant status” as an act of perfidy. Article 37 AP I was adopted by consensus.¹⁵⁶⁶

1453. Article 21(1) of draft AP II submitted by the ICRC to the CDDH provided that “when carried out in order to commit or resume hostilities, . . . the

¹⁵⁶³ CDDH, *Official Records*, Vol. XV, CDDH/III/338, 21 April–11 June 1976, p. 426.

¹⁵⁶⁴ Frédéric de Mulinen, *Handbook on the Law of War for Armed Forces*, ICRC, Geneva, 1987, § 779.

¹⁵⁶⁵ ICRC, Working paper on war crimes submitted to the Preparatory Committee for the Establishment of an International Criminal Court, New York, 14 February 1997, § 1(b)(vi).

¹⁵⁶⁶ CDDH, *Official Records*, Vol. VI, CDDH/SR.39, 25 May 1977, p. 103.

feigning, before an attack, of non-combatant status" was considered as perfidy.¹⁵⁶⁷ However, this proposal was deleted from draft Article 21 adopted in Committee III of the CDDH.¹⁵⁶⁸

Other Instruments

1454. Paragraph 110(c) of the 1994 San Remo Manual provides that "warships and auxiliary vessels... are prohibited... at all times from actively simulating the status of... vessels carrying civilian passengers". Paragraph 111(a) states that "perfidious acts include the launching of an attack while feigning... civilian... status".

II. National Practice

Military Manuals

1455. Argentina's Law of War Manual states that "feigning the condition of a civilian non-combatant person" is an example of perfidy.¹⁵⁶⁹

1456. Australia's Commanders' Guide, in a section entitled "Perfidy", states that "combatants wearing civilian clothing in battle... violate LOAC and diminish the enemy's ability to... distinguish civilians".¹⁵⁷⁰ The manual adds that "acts which constitute perfidy include feigning of... civilian, non-combatant status".¹⁵⁷¹

1457. Australia's Defence Force Manual states that "acts which constitute perfidy include feigning of... civilian or noncombatant status".¹⁵⁷²

1458. Belgium's Law of War Manual provides that "feigning having civilian or non-combatant status" is a perfidious act.¹⁵⁷³

1459. Cameroon's Instructors' Manual stresses that "feigning civilian or non-combatant status" is an example of perfidy.¹⁵⁷⁴

1460. Canada's LOAC Manual provides that "the following are examples of perfidy if a hostile act is committed while:... feigning civilian, non-combatant status".¹⁵⁷⁵ It also considers it an act of perfidy in air warfare if a hostile act is committed while "using false markings on military aircraft such as the markings of civil aircraft".¹⁵⁷⁶

1461. Ecuador's Naval Manual states that illegal combatants may be denied prisoner-of-war status, tried and punished. It also specifies that "it is a

¹⁵⁶⁷ CDDH, *Official Records*, Vol. I, Part Three, Draft Additional Protocols, June 1973, p. 39.

¹⁵⁶⁸ CDDH, *Official Records*, Vol. XV, CDDH/407/Rev.1, 17 March–10 June 1977, p. 502.

¹⁵⁶⁹ Argentina, *Law of War Manual* (1989), § 1.05(2)(3).

¹⁵⁷⁰ Australia, *Commanders' Guide* (1994), § 507.

¹⁵⁷¹ Australia, *Commanders' Guide* (1994), § 826(c) (naval warfare) and § 902(c) (land warfare).

¹⁵⁷² Australia, *Defence Force Manual* (1994), § 703(c) (land warfare), see also §§ 635(c) and 636(a) (naval warfare).

¹⁵⁷³ Belgium, *Law of War Manual* (1983), p. 32.

¹⁵⁷⁴ Cameroon, *Instructors' Manual* (1992), p. 30, § 131.1, p. 63, § 234 and p. 90, § 222.

¹⁵⁷⁵ Canada, *LOAC Manual* (1999), p. 6-2, § 9(c) (land warfare), p. 7-2, § 17(c) (air warfare) and p. 8-11, § 81(d) (naval warfare).

¹⁵⁷⁶ Canada, *LOAC Manual* (1999), p. 7-2, § 18(a).

violation of the law of armed conflict to kill, injure, or capture the enemy by false indication of . . . civilian status . . . Attacking enemy forces while posing as a civilian puts all civilians at hazard. Such acts of perfidy are punishable as war crimes."¹⁵⁷⁷

1462. France's LOAC Manual prohibits the simulation of non-combatant status.¹⁵⁷⁸

1463. Indonesia's Military Manual provides that "it is prohibited to kill or injure the enemy by perfidy, such as to pretend to be a non-combatant".¹⁵⁷⁹

1464. Israel's Manual on the Laws of War provides several examples of perfidious acts. Notably, it states that "it is forbidden to pose as non-combatant civilians. When the arena of warfare does not yield a clear picture as to who is a civilian and who is a disguised combatant, civilians will be ultimately harmed."¹⁵⁸⁰

1465. Under Italy's LOAC Elementary Rules Manual, "it is prohibited to feign to belong to a protected category to invite the confidence of the enemy".¹⁵⁸¹

1466. Kenya's LOAC Manual states that "feigning non-combatant status" is an example of treachery.¹⁵⁸²

1467. The Military Manual of the Netherlands states that API "gives a number of examples of treacherous behaviour: feigning to possess the status of civilian or noncombatant".¹⁵⁸³

1468. New Zealand's Military Manual provides that "the following acts are examples of perfidy: . . . the feigning of civilian, noncombatant status".¹⁵⁸⁴ It also states that "the use of civilian aircraft or vessels to transport military cargo would not be perfidious unless it involved an intent to betray the confidence of the enemy, in which case it would be a war crime".¹⁵⁸⁵ The manual adds that "the use of false markings on military aircraft such as the markings of civil aircraft . . . is the prime example of perfidious conduct in air warfare and is prohibited".¹⁵⁸⁶

1469. Nigeria's Military Manual gives the following example of "perjury" (perfidy): "feigning civilian or non-combatant status".¹⁵⁸⁷

1470. Nigeria's Manual on the Laws of War states that the "use of civilian clothing . . . by troops engaged in a battle" is a war crime.¹⁵⁸⁸

¹⁵⁷⁷ Ecuador, *Naval Manual* (1989), §§ 12.7 and 12.7.1.

¹⁵⁷⁸ France, *LOAC Manual* (2001), p. 115.

¹⁵⁷⁹ Indonesia, *Military Manual* (1982), § 103.

¹⁵⁸⁰ Israel, *Manual on the Laws of War* (1998), p. 57.

¹⁵⁸¹ Italy, *LOAC Elementary Rules Manual* (1991), § 46.

¹⁵⁸² Kenya, *LOAC Manual* (1997), Précis No. 3, p. 7.

¹⁵⁸³ Netherlands, *Military Manual* (1993), p. IV-2.

¹⁵⁸⁴ New Zealand, *Military Manual* (1992), § 502(5) (land warfare) and § 713(2) (naval warfare).

¹⁵⁸⁵ New Zealand, *Military Manual* (1992), § 502(6).

¹⁵⁸⁶ New Zealand, *Military Manual* (1992), § 611(2).

¹⁵⁸⁷ Nigeria, *Military Manual* (1994), pp. 42 and 43, § 12(d).

¹⁵⁸⁸ Nigeria, *Manual on the Laws of War* (undated), § 6.

1471. Under Romania's Soldiers' Manual, "feigning civilian or non-combatant status" is an act of perfidy.¹⁵⁸⁹

1472. South Africa's LOAC Manual gives as an example of perfidy the prohibition "to feign civilian non-combatant status".¹⁵⁹⁰ The manual also considers the "use of civilian clothing by troops to conceal their military character during battle" to be a grave breach of the law of war and a war crime.¹⁵⁹¹

1473. Spain's LOAC Manual provides that simulating the status of a civilian person or non-combatant is an example of a perfidious act.¹⁵⁹²

1474. Sweden's IHL Manual mentions, as an example of perfidious conduct, "the feigning of protected civilian status".¹⁵⁹³

1475. The UK Military Manual describes as treacherous the use of false assurances followed by firing, noting that this "device is often accompanied by the use of enemy uniforms or civilian clothing".¹⁵⁹⁴ Furthermore, the manual states "in addition to the 'grave breaches' of the 1949 [Geneva] Conventions, . . . the following are examples of punishable violations of the laws of war, or war crimes: . . . use of civilian clothing . . . by troops engaged in battle".¹⁵⁹⁵

1476. The UK LOAC Manual states that the "feigning of non-combatant status" is an example of treachery.¹⁵⁹⁶

1477. According to the US Field Manual, the use of civilian clothing by troops to conceal their military character during battle is an act for which a combatant would lose his right to be treated as a prisoner of war.¹⁵⁹⁷ The manual also states that "in addition to the 'grave breaches' of the Geneva Conventions of 1949, the following acts are representative of violations of the law of war ('war crimes'): . . . use of civilian clothing by troops to conceal their military character during battle".¹⁵⁹⁸

1478. According to the US Air Force Pamphlet, the use of civilian clothing by troops to conceal their military character during battle is an act for which a combatant would lose his right to be treated as a prisoner of war.¹⁵⁹⁹ The Pamphlet further emphasises that "in addition to the grave breaches of the Geneva Conventions of 1949, the following acts are representative of situations involving individual criminal responsibility: . . . intentional use of civilian clothing to conceal military identity during battle".¹⁶⁰⁰ In respect of air warfare, it states that:

¹⁵⁸⁹ Romania, *Soldiers' Manual* (1991), p. 35.

¹⁵⁹⁰ South Africa, *LOAC Manual* (1996), § 34(c).

¹⁵⁹¹ South Africa, *LOAC Manual* (1996), §§ 39(f) and 41.

¹⁵⁹² Spain, *LOAC Manual* (1996), Vol. I, § 3.3.b.(1) and § 5.3.c, see also § 7.3.c.

¹⁵⁹³ Sweden, *IHL Manual* (1991), Section 3.2.1.1.b, p. 29.

¹⁵⁹⁴ UK, *Military Manual* (1958), § 311, footnote 1.

¹⁵⁹⁵ UK, *Military Manual* (1958), § 626(f).

¹⁵⁹⁶ UK, *LOAC Manual* (1981), Section 4, p. 12, § 2(a).

¹⁵⁹⁷ US, *Field Manual* (1956), § 74.

¹⁵⁹⁸ US, *Field Manual* (1956), § 504(g).

¹⁵⁹⁹ US, *Air Force Pamphlet* (1976), § 7-2.

¹⁶⁰⁰ US, *Air Force Pamphlet* (1976), § 15-3(c)(6).

Aircrew members do customarily wear uniforms because flight suits fully qualify as uniforms when they are so distinctive in character as to distinguish the wearer from the civilian population . . . In that connection, the prohibition of perfidy, such as disguising oneself as a civilian in order to engage hostilities, . . . is applicable.¹⁶⁰¹

It also provides that, generally speaking, “disguising combatants in civilian clothing in order to commit hostilities constitutes perfidy”.¹⁶⁰² This is also the case of the “feigning by combatants of civilian, noncombatant status”.¹⁶⁰³

1479. The US Instructor’s Guide notes that “in addition to the grave breaches of the Geneva Conventions, the following acts are further examples of war crimes: . . . using civilian clothing to conceal military identity during battle”.¹⁶⁰⁴

1480. The US Naval Handbook states that illegal combatants may be denied prisoner-of-war status, tried and punished. It also stipulates that “it is a violation of the law of armed conflict to kill, injure, or capture the enemy by false indication of . . . civilian status . . . Attacking enemy forces while posing as a civilian puts all civilians at hazard. Such acts of perfidy are punishable as war crimes.”¹⁶⁰⁵

National Legislation

1481. Colombia’s Penal Code, in an article entitled “Perfidy”, imposes a criminal sanction on “anyone who, during an armed conflict and with intent to harm or attack the adversary, simulates the condition of a protected person”, which includes civilians.¹⁶⁰⁶

1482. The Draft Amendments to the Penal Code of El Salvador, in an article entitled “Perfidy”, provide for a prison sentence for “anyone who, during an international or non-international armed conflict, with the view to harm or attack the adversary, simulates the status of a protected person”.¹⁶⁰⁷

1483. Under Ireland’s Geneva Conventions Act as amended, any “minor breach” of AP I, including violations of Article 37(1) AP I, is a punishable offence.¹⁶⁰⁸

1484. Nicaragua’s Draft Penal Code, in an article entitled “Perfidy”, punishes “anyone who, during an international or internal armed conflict, with the view to harm or attack the adversary, simulates the status of a protected person”.¹⁶⁰⁹

1485. Under Norway’s Military Penal Code as amended, “anyone who contravenes or is accessory to the contravention of provisions relating to the

¹⁶⁰¹ US, *Air Force Pamphlet* (1976), § 7-3(a).

¹⁶⁰² US, *Air Force Pamphlet* (1976), § 8-6(a).

¹⁶⁰³ US, *Air Force Pamphlet* (1976), § 8-3(a).

¹⁶⁰⁴ US, *Instructor’s Guide* (1985), p. 13.

¹⁶⁰⁵ US, *Naval Handbook* (1995), §§ 12.7. and 12.7.1.

¹⁶⁰⁶ Colombia, *Penal Code* (2000), Articles 135 and 143.

¹⁶⁰⁷ El Salvador, *Draft Amendments to the Penal Code* (1998), Article entitled “Perfidia”.

¹⁶⁰⁸ Ireland, *Geneva Conventions Act as amended* (1962), Section 4(1) and (4).

¹⁶⁰⁹ Nicaragua, *Draft Penal Code* (1999), Article 452.

protection of persons or property laid down in . . . the two additional protocols to [the Geneva] Conventions . . . is liable to imprisonment".¹⁶¹⁰

National Case-law

1486. In 1995, in a decision concerning the constitutionality of AP II, Colombia's Constitutional Court stated that "the feigning of civilian status to injure, kill or capture an adversary constitutes an act of perfidy which is prohibited by the rules of international humanitarian law, as clearly stipulated in Article 37 of [AP I]". The Court held that, while AP II does not contain rules on perfidy in situations of non-international armed conflict:

that does not mean that it is authorized, since the treaty must be interpreted in the light of all the humanitarian principles. As stated in the Taormina Declaration, the prohibition of perfidy is one of the general rules governing the conduct of hostilities that applies in non-international armed conflicts.¹⁶¹¹

1487. In the *Swarka case* before an Israeli Military Court in 1974, the defendants had entered Israel from Egypt and launched rockets on a civilian settlement. When brought to trial, they claimed that they were entitled to POW status under Article 4 GC III, since they were soldiers in the Egyptian regular army and had committed the actions on the orders of their commander. The Prosecutor argued that they could not benefit from POW status since they wore civilian clothes when they carried out their operations. The Court observed that neither the 1907 HR nor the Geneva Conventions required that members of regular forces had to wear uniforms at the time of capture to be entitled to their protection. However, it considered that "it would be quite illogical to regard the duty of wearing uniform (in the sense of a distinctive sign) as imposed only on the quasi-military units referred to in Article 4(A)(2) [GC III] and not on soldiers of regular military forces". It concluded that the defendants were to be prosecuted as saboteurs.¹⁶¹²

1488. In 1968, the Judicial Committee of the Privy Council (UK) heard the appeals of two members of the Indonesian armed forces who had entered a non-military building in Singapore – which at the time formed part of Malaysia – wearing civilian clothes and had planted a bag containing explosives. The ensuing explosion had caused two deaths, and the accused had been convicted of murder and sentenced to death. The Privy Council held that members of armed forces who committed acts of sabotage in territory under the control of opposing forces, when dressed in civilian clothes both at the time of the acts of sabotage and when arrested, were not entitled to be treated on capture as prisoners of war under the Geneva Conventions but were subject to trial and punishment.¹⁶¹³

¹⁶¹⁰ Norway, *Military Penal Code as amended (1902)*, § 108(b).

¹⁶¹¹ Colombia, Constitutional Court, *Constitutional Case No. C-225/95*, Judgement, 18 May 1995.

¹⁶¹² Israel, Military Court, *Swarka case*, Judgement, 1974.

¹⁶¹³ Malaysia, Judicial Committee of the Privy Council (UK), *Ali case*, Judgement, 29 July 1968.

1489. In the *Nwaoga case* before the Supreme Court of Nigeria in 1972, the appellant and two officers of the rebel Biafran army disguised in civilian clothes went to a town under the control of federal troops and killed an unarmed person. The appellant was convicted for murder. The Court held that rebels must not feign civilian status while engaging in military operations and that, in these circumstances (operation in disguise, not in the rebel army uniform but in plain clothes, thus appearing to be members of the peaceful private population), the appellant was liable to punishment under the Criminal Code since the “deliberate and intentional killing of an unarmed person living peacefully inside the Federal territory . . . is a crime against humanity, and even if committed during a civil war is in violation of the domestic law of the country, and must be punished”.¹⁶¹⁴

1490. In 1942, in the *Quirin case* in which German saboteurs had entered the US in civilian clothing, the US Supreme Court held that:

Each petitioner, in circumstances which gave him the status of an enemy belligerent, passed our military and naval lines, in civilian dress and with hostile purpose. The offense [under the laws of war] was complete when with that purpose they entered – or, having so entered, they remained upon – our territory in time of war without uniform or other appropriate means of identification.¹⁶¹⁵

Other National Practice

1491. At the CDDH, the representative of Algeria stated that the inclusion of “the disguising of combatants in civilian clothing” as an example of perfidy “seemed to be difficult to accept, since it did not take into account certain situations, particularly guerrilla operations. His delegation would therefore be inclined to endorse the Indonesian amendment . . . proposing the deletion of that paragraph.”¹⁶¹⁶ However, Algeria finally agreed upon paragraph 1(c) of Article 35 of draft AP I (now Article 37) in supporting the view of Vietnam stated below.¹⁶¹⁷

1492. According to the Report on the Practice of Algeria, the policy followed by Algerian combatants during the war of independence was summarised in the maxim “Djellaba le jour, uniforme la nuit” (“Djellaba by day, uniform by night”).¹⁶¹⁸

1493. At the CDDH, Egypt, commenting on Article 44 AP I, stated that the right of the guerrilla fighter to be considered as a lawful combatant “did not release regular combatants from their obligation to wear their uniform

¹⁶¹⁴ Nigeria, Supreme Court, *Nwaoga case*, Judgement, 3 March 1972.

¹⁶¹⁵ US, Supreme Court, *Quirin case*, Judgement, 31 July 1942, and Extended Opinion, 29 October 1942.

¹⁶¹⁶ Algeria, Statement at the CDDH, *Official Records*, Vol. XIV, CDDH/III/SR.28, 4 March 1975, p. 262, § 13.

¹⁶¹⁷ CDDH, *Official Records*, Vol. XV, CDDH/III/SR.47, 31 May 1976, p. 86, § 5.

¹⁶¹⁸ Report on the Practice of Algeria, 1997, Chapter 2.6, referring to *El Moudjahid*, Vol. 2, p. 381.

during military operations, failing which they would be committing an act of perfidy".¹⁶¹⁹

1494. At the CDDH, Indonesia proposed deleting paragraph 1(c) of Article 35 of draft AP I (now Article 37).¹⁶²⁰ This proposal was the expression of the fear that paragraph 1(c) could be misused to punish combatants who would otherwise be entitled to the status of prisoner of war. However, Indonesia finally agreed upon paragraph 1(c) of Article 35 of draft AP I (now Article 37) following the same reasoning as the one of Vietnam stated below.¹⁶²¹

1495. At the final plenary meeting of the CDDH, the Israeli delegation declared that "Israel regards [Article 37 AP I], and in particular its paragraph 1(c), as an essential and basic provision. It reaffirms the fundamental distinction made in customary law between combatants and non-combatants."¹⁶²²

1496. At the CDDH, the Philippines, having in mind guerrilla warfare, supported the amendments proposed by Indonesia and Vietnam to delete paragraph 1(c) of Article 35 of draft AP I (now Article 37) because "it would be basically unjust to brand the wearing of civilian clothing by a combatant as perfidy when such circumstances were brought about by the superior military strength of the aggressor".¹⁶²³ However, the Philippines finally agreed upon paragraph 1(c) following the same reasoning as the one of Vietnam stated below.¹⁶²⁴

1497. At the CDDH, Romania supported the amendments of Indonesia and Vietnam proposing the deletion of paragraph 1(c) of Article 35 of draft AP I (now Article 37), "since the act covered by the provision could not be regarded as a typical case of perfidy".¹⁶²⁵ However, Romania finally agreed upon paragraph 1(c) following the same reasoning as the one of Vietnam stated below.¹⁶²⁶

1498. US practice since the Second World War has refused prisoner-of-war treatment to enemy combatants captured in civilian clothing while not carrying their arms openly. During the Vietnam War, the US policy was to consider that all combatants captured during military operations were to be accorded prisoner-of-war status, while terrorists, spies and saboteurs were not.¹⁶²⁷

1499. In 1989, in a memorandum of law, the Judge Advocate General of the US Department of the Army stated that:

¹⁶¹⁹ Egypt, Statement at the CDDH, *Official Records*, Vol. XV, CDDH/III/SR.55, 22 April 1977, p. 160, § 28.

¹⁶²⁰ Indonesia, Proposal of amendment to Article 35 of draft AP I submitted to the CDDH, *Official Records*, Vol. III, CDDH/III/232, 25 February 1975, p. 164.

¹⁶²¹ CDDH, *Official Records*, Vol. XV, CDDH/III/SR.47, 31 May 1976, pp. 85 and 86, § 4.

¹⁶²² Israel, Statement at the CDDH, *Official Records*, Vol. VI, CDDH/SR.39, 25 May 1977, p. 115.

¹⁶²³ Philippines, Statement at the CDDH, *Official Records*, Vol. XIV, CDDH/III/SR.28, 4 March 1975, p. 265, §§ 25 and 26.

¹⁶²⁴ CDDH, *Official Records*, Vol. XV, CDDH/III/SR.47, 31 May 1976, pp. 85 and 86, § 4.

¹⁶²⁵ Romania, Statement at the CDDH, *Official Records*, Vol. XIV, CDDH/III/SR.28, 4 March 1975, p. 270, § 52.

¹⁶²⁶ CDDH, *Official Records*, Vol. XV, CDDH/III/SR.47, 31 May 1976, pp. 85 and 86, § 4.

¹⁶²⁷ George S. Prugh, *Law at War: Vietnam 1964-1973*, Department of the Army, Vietnam Studies, Washington D.C., 1975, p. 66.

Traditionally, soldiers have an obligation to wear uniforms to distinguish themselves from the civilian population. Law-of-war sources prior to World War II suggested that the prohibition on killing or wounding “treacherously” referred to soldiers disguising themselves as civilians in order to approach an enemy force and carry out a surprise attack. That concept was thrown into disarray during World War II by the reliance on partisans by all parties to that conflict. While frequently characterized as an assassination, the 27 May 1942 ambush of SS General Reinhard Heydrich by British SOE [Special Operations Executive]-trained Czechoslovakian partisans is representative of the practice of each party to the conflict employing organized resistance units to carry out attacks against military units and personnel of an occupying power.

Reliance upon organized partisan forces changed state practice and, accordingly, the law of war. Coordinated British and U.S. revisions of their respective post-World War II law of war manuals reflected this change. For example, the following . . . italicized . . . sentence was added to paragraph 31 [of the US Field Manual]:

[Article 23(b) of the 1907 HR] is construed as prohibiting assassination . . . *It does not, however, preclude attacks on individual soldiers or officers of the enemy whether in the zone of hostilities, occupied territory, or elsewhere.*

The annotations to [the manual] state that the [italicised] sentence was inserted “so as not to foreclose activity by resistance movements, paratroops, and other belligerents who may attack individual persons”. The deliberate decision by many nations to employ surrogate guerrilla forces in lieu of or in connection with conventional military units to fight a succession of guerrilla wars since 1945 has served to raise further doubts regarding the traditional rule.

While state practice suggests that the employment of partisans is lawful, that is, would not constitute assassination, a question remains regarding the donning of civilian clothing by conventional forces personnel for the purpose of killing enemy combatants. However, in the one known case of such practice during World War II, a British officer who successfully entered a German headquarters dressed in civilian attire and killed the commanding general was decorated rather than punished for his efforts.¹⁶²⁸ [emphasis in original]

1500. According to the Report on US Practice, the *opinio juris* of the US is that:

Customary international law does not . . . prohibit belligerents from using saboteurs, secret agents or other irregular forces feigning civilian status to attack legitimate military targets. Wear of civilian clothing during an attack, or during a spying or sabotage mission behind enemy lines, may subject combatants to punishment if captured by the enemy.¹⁶²⁹

1501. At the CDDH, Vietnam proposed deleting paragraph 1(c) of Article 35 of draft AP I (now Article 37).¹⁶³⁰ It stated that ill-armed peoples of Asia, Africa and Latin America, fighting either to defend their independence or to exercise their right of self-determination,

¹⁶²⁸ US, Department of the Army, Office of the Judge Advocate General, Memorandum of Law: Executive Order 12333 and Assassination, 2 November 1989, *The Army Lawyer*, Pamphlet 27-50-204, December 1989, p. 6.

¹⁶²⁹ Report on US Practice, 1997, Chapter 2.4.

¹⁶³⁰ Vietnam, Proposal of amendment to Article 35 of draft AP I submitted to the CDDH, *Official Records*, Vol. III, CDDH/III/236, 25 February 1975, p. 165.

lacked the necessary means to provide uniforms for members of their national forces or their rural and urban militia. To regard that state of affairs as perfidy would be to legislate against nations defending their right to self-determination. Logically speaking, the question was not one of perfidy, since that implied the intention to betray an adversary's good faith.¹⁶³¹

Vietnam finally agreed upon Article 35 of draft AP I, after the introduction of the saving clause under Article 44(3) AP I, whereby the wearing of civilian clothes does not amount to perfidy when combatants fulfil the conditions to be recognised as legitimate combatants (in situations where the combatant cannot distinguish themselves from the civilian population, they retain their combatant status, provided that they carry their arms openly during each military engagement, and during such time as they are visible to the adversary while they are engaged in military deployment preceding the launching of an attack in which they are to participate).¹⁶³²

III. Practice of International Organisations and Conferences

1502. No practice was found.

IV. Practice of International Judicial and Quasi-judicial Bodies

1503. In the interlocutory appeal in the *Tadić case* in 1995, the ICTY, referring to the *Nwaoga case*, stated that:

State practice shows that general principles of customary international law have evolved with regard to internal armed conflict also in areas relating to methods of warfare. In addition to what has been stated above, with regard to the ban on attacks on civilians in the theatre of hostilities, mention can be made of the prohibition of perfidy. Thus, for instance, in a case brought before Nigerian courts, the Supreme Court of Nigeria held that rebels must not feign civilian status while engaging in military operations.¹⁶³³

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

1504. To fulfil its task of disseminating IHL, the ICRC has delegates around the world teaching armed and security forces that "to pretend being a civilian or non-combatant" is an act of perfidy.¹⁶³⁴

¹⁶³¹ Vietnam, Statement at the CDDH, *Official Records*, Vol. XIV, CDDH/III/SR.28, 4 March 1975, p. 260, § 7.

¹⁶³² Vietnam, Statement at the CDDH, *Official Records*, Vol. XV, CDDH/III/SR.47, 31 May 1976, p. 86, § 5.

¹⁶³³ ICTY, *Tadić case*, Interlocutory Appeal, 2 October 1995, § 125.

¹⁶³⁴ Frédéric de Mulinen, *Handbook on the Law of War for Armed Forces*, ICRC, Geneva, 1987, § 409(d).

VI. Other Practice

1505. No practice was found.

Simulation of protected status by using flags or military emblems, insignia or uniforms of neutral or other States not party to the conflict

Note: For practice concerning the use of flags or military emblems, insignia or uniforms of neutral or other States not party to the conflict which does not amount to perfidy, see *supra* section G of this chapter.

I. Treaties and Other Instruments

Treaties

1506. Article 37(1)(d) AP I lists “the feigning of protected status by the use of signs, emblems or uniforms . . . of neutral or other States not Parties to the conflict” as an act of perfidy. Article 37 AP I was adopted by consensus.¹⁶³⁵

1507. Under Article 85(3)(f) AP I, “the perfidious use, in violation of Article 37, . . . of . . . protective signs recognized by the Conventions or this Protocol” is a grave breach of AP I. Article 85(5) adds that “without prejudice to the application of the [Geneva] Conventions and of this Protocol, grave breaches of these instruments shall be regarded as war crimes”. Article 85 AP I was adopted by consensus.¹⁶³⁶

Other Instruments

1508. Paragraph 111(a) of the 1994 San Remo Manual states that “perfidious acts include the launching of an attack while feigning . . . neutral . . . status”.

II. National Practice

Military Manuals

1509. Argentina’s Law of War Manual states that “making use of signs, emblems or uniforms . . . of neutral states or other states which are not parties to the conflict, so as to simulate a protected status” is an example of perfidy.¹⁶³⁷

1510. Australia’s Commander’s Guide stresses that “acts which constitute perfidy include feigning of . . . protected status by the use of protective symbols, signs, emblems or uniforms . . . of neutral or other States not involved in the conflict”.¹⁶³⁸ In a section entitled “Perfidy”, the manual also states that “it is illegal to use in battle emblems, markings or clothing of a neutral . . .

¹⁶³⁵ CDDH, *Official Records*, Vol. VI, CDDH/SR.39, 25 May 1977, p. 103.

¹⁶³⁶ CDDH, *Official Records*, Vol. VI, CDDH/SR.44, 30 May 1977, p. 291.

¹⁶³⁷ Argentina, *Law of War Manual* (1989), § 1.05(2)(4).

¹⁶³⁸ Australia, *Commanders’ Guide* (1994), § 826(d) (naval warfare) and § 902(d) (land warfare).

Combatants . . . pretending to be a member of a neutral nation violate LOAC and diminish the enemy's ability to identify neutrals."¹⁶³⁹

1511. Australia's Defence Force Manual provides that "acts which constitute perfidy include feigning of . . . protected status by the use of protective symbols, signs, emblems or uniforms . . . of neutral or other states not involved in the conflict".¹⁶⁴⁰

1512. Belgium's Law of War Manual states that "opening fire wearing the uniform . . . of neutral forces" is an act of perfidy.¹⁶⁴¹

1513. Cameroon's Instructors' Manual notes that "feigning to have a protected status by using signs, emblems or uniforms . . . of neutral States or States not parties to the conflict" is an example of perfidy.¹⁶⁴²

1514. Canada's LOAC Manual provides that "the following are examples of perfidy if a hostile act is committed while: . . . feigning protected status by the use of signs, emblems or uniforms . . . of neutral or other states not parties to the conflict".¹⁶⁴³

1515. France's LOAC Manual states that the use of the emblems or uniforms of third States for hostile purposes is criminalised.¹⁶⁴⁴

1516. The Military Manual of the Netherlands states that API "gives a number of examples of treacherous behaviour: feigning to possess a protected position by using signs, emblems or uniforms . . . of States which are not parties to the conflict".¹⁶⁴⁵

1517. New Zealand's Military Manual provides that "the following acts are examples of perfidy: . . . the feigning of protected status by the use of signs, emblems or uniforms . . . of neutral or other States not Parties to the conflict".¹⁶⁴⁶

1518. Nigeria's Military Manual gives the following example of "perjury" (perfidy): "feigning protection status by the use of signs, emblems or uniforms . . . of a neutral [state] or state not being a party to the conflict".¹⁶⁴⁷

1519. Under Romania's Soldiers' Manual, "feigning the status of a protected person by abusing the signs and emblems of . . . neutral States or States which are not party to the conflict" is an act of perfidy.¹⁶⁴⁸

1520. Spain's LOAC Manual provides that "simulating possession of a protected status by using signs, emblems or uniforms . . . of neutral States or other States which are not Parties to the conflict" is an example of perfidy.¹⁶⁴⁹

¹⁶³⁹ Australia, *Commanders' Guide* (1994), § 507.

¹⁶⁴⁰ Australia, *Defence Force Manual* (1994), § 703(d).

¹⁶⁴¹ Belgium, *Law of War Manual* (1983), p. 32.

¹⁶⁴² Cameroon, *Instructors' Manual* (1992), pp. 63 and 64, § 234.

¹⁶⁴³ Canada, *LOAC Manual* (1999), p. 6-2, § 9(d) (land warfare), p. 7-2, § 17(d) (air warfare) and p. 8-11, § 81(e) (naval warfare).

¹⁶⁴⁴ France, *LOAC Manual* (2001), p. 115.

¹⁶⁴⁵ Netherlands, *Military Manual* (1993), p. IV-2.

¹⁶⁴⁶ New Zealand, *Military Manual* (1992), § 502(5) (land warfare) and § 713(2) (naval warfare).

¹⁶⁴⁷ Nigeria, *Military Manual* (1994), pp. 42 and 43, § 12(e).

¹⁶⁴⁸ Romania, *Soldiers' Manual* (1991), p. 35.

¹⁶⁴⁹ Spain, *LOAC Manual* (1996), Vol. I, § 3.3.b.(1), see also § 5.3.c.

1521. Sweden's IHL Manual considers as an example of perfidious conduct "the feigning of protected status... of a member of the armed forces of a neutral state".¹⁶⁵⁰

1522. Switzerland's Basic Military Manual prohibits perfidy. Thus, "it is notably forbidden... to abuse a protected status by using signs, emblems or uniforms... of nations not involved in the conflict".¹⁶⁵¹

1523. The YPA Military Manual of the SFRY (FRY) states that feigning a protected status by the use of symbols, signs, emblems or uniforms of neutral States or other States not parties to the conflict is an act of perfidy.¹⁶⁵²

National Legislation

1524. Argentina's Draft Code of Military Justice punishes any soldier who "uses... in a perfidious manner, the flag, uniform, insignia or distinctive emblem of neutral States... or of other States which are not parties to the conflict".¹⁶⁵³

1525. Australia's Geneva Conventions Act as amended provides that "a person who, in Australia or elsewhere, commits a grave breach... of [AP I] is guilty of an indictable offence".¹⁶⁵⁴

1526. Canada's Geneva Conventions Act as amended provides that "every person who, whether within or outside Canada, commits a grave breach [of AP I]... is guilty of an indictable offence".¹⁶⁵⁵

1527. Colombia's Penal Code, in an article entitled "Perfidy", imposes a criminal sanction on "anyone who, during an armed conflict, with intent to harm or attack the adversary... uses improperly... flags or uniforms of neutral States".¹⁶⁵⁶

1528. The Geneva Conventions and Additional Protocols Act of the Cook Islands punishes "any person who in the Cook Islands or elsewhere commits, or aids or abets or procures the commission by another person of, a grave breach... of [AP I]".¹⁶⁵⁷

1529. Cyprus's AP I Act punishes "any person who, whatever his nationality, commits in the Republic or outside the Republic any grave breach of the provisions of the Protocol, or takes part or assists or incites another person in the commission of such a breach".¹⁶⁵⁸

1530. The Draft Amendments to the Penal Code of El Salvador, in an article entitled "Perfidy", provide for a prison sentence for "anyone who, during

¹⁶⁵⁰ Sweden, *IHL Manual* (1991), Section 3.2.1.1.b, p. 29.

¹⁶⁵¹ Switzerland, *Basic Military Manual* (1987), Article 39.

¹⁶⁵² SFRY (FRY), *YPA Military Manual* (1988), § 104(3).

¹⁶⁵³ Argentina, *Draft Code of Military Justice* (1998), Article 292, introducing a new Article 876(6) in the *Code of Military Justice as amended* (1951).

¹⁶⁵⁴ Australia, *Geneva Conventions Act as amended* (1957), Section 7(1).

¹⁶⁵⁵ Canada, *Geneva Conventions Act as amended* (1985), Section 3(1).

¹⁶⁵⁶ Colombia, *Penal Code* (2000), Article 143.

¹⁶⁵⁷ Cook Islands, *Geneva Conventions and Additional Protocols Act* (2002), Section 5(1).

¹⁶⁵⁸ Cyprus, *AP I Act* (1979), Section 4(1).

an international or non-international armed conflict, with the view to harm or attack the adversary, . . . uses . . . the flags, uniforms or insignia of neutral States".¹⁶⁵⁹

1531. Ireland's Geneva Conventions Act as amended provides that grave breaches of AP I are punishable offences.¹⁶⁶⁰ It adds that any "minor breach" of AP I, including violations of Article 37(1) AP I, is also a punishable offence.¹⁶⁶¹

1532. New Zealand's Geneva Conventions Act as amended provides that "any person who in New Zealand or elsewhere commits, or aids or abets or procures the commission by another person of, a grave breach . . . of [AP I] is guilty of an indictable offence".¹⁶⁶²

1533. Nicaragua's Draft Penal Code, in an article entitled "Perfidy", punishes "anyone who, during an international or internal armed conflict, with the view to harm or attack the adversary, . . . uses . . . flags, uniforms or insignia of neutral countries".¹⁶⁶³

1534. Under Norway's Military Penal Code as amended, "anyone who contravenes or is accessory to the contravention of provisions relating to the protection of persons or property laid down in . . . the two additional protocols to [the Geneva] Conventions . . . is liable to imprisonment".¹⁶⁶⁴

1535. Spain's Penal Code punishes "anyone who, during an armed conflict . . . uses . . . in a perfidious manner the flag, uniform, insignia or distinctive emblem of neutral States . . . or of other States which are not parties to the conflict".¹⁶⁶⁵

1536. The UK Geneva Conventions Act as amended punishes "any person, whatever his nationality, who, whether in or outside the United Kingdom, commits, or aids, abets or procures the commission by any other person of, a grave breach of . . . [AP I]".¹⁶⁶⁶

1537. Zimbabwe's Geneva Conventions Act as amended punishes "any person, whatever his nationality, who, whether in or outside Zimbabwe, commits any such grave breach of . . . [AP I]".¹⁶⁶⁷

National Case-law

1538. No practice was found.

Other National Practice

1539. No practice was found.

¹⁶⁵⁹ El Salvador, *Draft Amendments to the Penal Code* (1998), Article entitled "Perfidia".

¹⁶⁶⁰ Ireland, *Geneva Conventions Act as amended* (1962), Section 3(1).

¹⁶⁶¹ Ireland, *Geneva Conventions Act as amended* (1962), Section 4(1) and (4).

¹⁶⁶² New Zealand, *Geneva Conventions Act as amended* (1958), Section 3(1).

¹⁶⁶³ Nicaragua, *Draft Penal Code* (1999), Article 452.

¹⁶⁶⁴ Norway, *Military Penal Code as amended* (1902), § 108(b).

¹⁶⁶⁵ Spain, *Penal Code* (1995) Article 612(5).

¹⁶⁶⁶ UK, *Geneva Conventions Act as amended* (1957), Section 1(1).

¹⁶⁶⁷ Zimbabwe, *Geneva Conventions Act as amended* (1981), Section 3(1).

III. Practice of International Organisations and Conferences

1540. No practice was found.

IV. Practice of International Judicial and Quasi-judicial Bodies

1541. No practice was found.

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

1542. The ICRC Commentary on the Additional Protocols states that:

The perfidious use . . . of emblems, signs, signals or uniforms referred to in Article 37 . . . of the Protocol [among which the signs, emblems or uniforms of neutral States or other States not parties to the conflict], for the purpose of killing, injuring or capturing an adversary, constitutes a grave breach under [Article 85(3)(f) AP I].¹⁶⁶⁸

1543. To fulfil its task of disseminating IHL, the ICRC has delegates around the world teaching armed and security forces that “to pretend having protected status by the use of flags, emblems or uniforms . . . of neutral States” is an act of perfidy.¹⁶⁶⁹ Delegates also teach that “the perfidious use of the . . . distinctive signs marking specifically protected persons and objects . . . [and of] other protected signs recognized by the law of war” constitutes a grave breach of the law of war.¹⁶⁷⁰

1544. In a working paper on war crimes submitted in 1997 to the Preparatory Committee for the Establishment of an International Criminal Court, the ICRC included “the perfidious use of the . . . protective signs and signals recognized by international humanitarian law”, when committed in an international armed conflict, in its list of war crimes to be subject to the jurisdiction of the Court.¹⁶⁷¹

VI. Other Practice

1545. No practice was found.

¹⁶⁶⁸ Yves Sandoz *et al.* (eds.), *Commentary on the Additional Protocols*, ICRC, Geneva, 1987, § 3499.

¹⁶⁶⁹ Frédéric de Mulinen, *Handbook on the Law of War for Armed Forces*, ICRC, Geneva, 1987, § 409(e).

¹⁶⁷⁰ Frédéric de Mulinen, *Handbook on the Law of War for Armed Forces*, ICRC, Geneva, 1987, § 779(a) and (b).

¹⁶⁷¹ ICRC, Working paper on war crimes submitted to the Preparatory Committee for the Establishment of an International Criminal Court, New York, 14 February 1997, § 1(b)(vi).

COMMUNICATION WITH THE ENEMY

A. Non-Hostile Contacts between the Parties to the Conflict (practice relating to Rule 66)	§§ 1–153
General	§§ 1–48
Use of the white flag of truce	§§ 49–92
Definition of parlementaires	§§ 93–122
Refusal to receive parlementaires	§§ 123–153
B. Inviolability of Parlementaires (practice relating to Rule 67)	§§ 154–233
C. Precautions while Receiving Parlementaires (practice relating to Rule 68)	§§ 234–287
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Detention of parlementaires	§§ 261–287
D. Loss of Inviolability of Parlementaires (practice relating to Rule 69)	§§ 288–314

Note: This chapter deals with practice concerning communication on the battlefield for humanitarian or military purposes. Practice regarding political negotiations to resolve a conflict is excluded from this study.

A. Non-Hostile Contacts between the Parties to the Conflict

General

Note: For practice concerning local arrangements concluded for the evacuation of the wounded, sick and shipwrecked, see Chapter 34, section A. For practice concerning the conclusion of an agreement to suspend combat with the intention of attacking by surprise the adversary relying on it, see Chapter 18, section H.

I. Treaties and Other Instruments

Treaties

1. No practice was found.

Other Instruments

2. Under Paragraph II(2) of the 1992 Agreement No. 3 on the ICRC Plan of Action between the Parties to the Conflict in Bosnia and Herzegovina, the ICRC requests that all parties accept their responsibilities and take essential measures, such as to “negotiate, organize and respect truces in areas where humanitarian activities are conducted and inform the population accordingly through the media”.

*II. National Practice**Military Manuals*

3. Argentina’s Law of War Manual provides that “the observation of the principle of good faith must be constant and unflinching in dealings with the enemy”.¹

4. Under Belgium’s Field Regulations, “it is prohibited to enter in contact with the enemy, except with deserters, the wounded and parlementaires”.²

5. Belgium’s Law of War Manual states that:

Relations between military commanders in the field of operations are necessary . . . for military or humanitarian purposes . . .

It is indispensable that, from both sides, these relations [intercourse between belligerents] be marked by the most scrupulous good faith and that no party takes any advantage from these relations that the other party does not intend to concede.³

6. Burkina Faso’s Disciplinary Regulations states that it is prohibited for a combatant “to enter in contact with the enemy”.⁴

7. Cameroon’s Disciplinary Regulations states that it is prohibited for a combatant “to enter in contact with the enemy”.⁵

8. Canada’s LOAC Manual provides that “negotiations between belligerent commanders may be conducted by intermediaries known as parlementaires. The wish to negotiate by parlementaires is frequently indicated by the raising of a white flag, but any other method of communication such as radios may be employed.”⁶

9. Congo’s Disciplinary Regulations states that it is prohibited for a combatant “to enter in contact with the enemy”.⁷

10. Croatia’s Commanders’ Manual states that:

Local interruptions of combat and other arrangements can be concluded between opposing forces. At lower levels, such arrangements can be very simple and concluded orally: voice, radio, bearer of a white flag (flag of truce). At higher levels

¹ Argentina, *Law of War Manual* (1969), § 1.017.

² Belgium, *Field Regulations* (1964), § 21.

³ Belgium, *Law of War Manual* (1983), p. 40.

⁴ Burkina Faso, *Disciplinary Regulations* (1994), Article 33(3).

⁵ Cameroon, *Disciplinary Regulations* (1975), Article 28.

⁶ Canada, *LOAC Manual* (1999), p. 14-1, § 3.

⁷ Congo, *Disciplinary Regulations* (1986), Article 30(3).

and for longer lasting interruptions of combat, written agreements shall be concluded.⁸

11. France's Disciplinary Regulations as amended states that it is prohibited for a combatant "to enter in contact with the enemy".⁹

12. Germany's Military Manual states that "a cessation of hostilities is regularly preceded by negotiations with the adversary. In the area of operations the parties to the conflict frequently use parlementaires for this purpose."¹⁰ The manual adds that:

Apart from detaching parlementaires, the parties to a conflict may also communicate with each other through the intermediary of Protecting Powers. Protecting Powers are neutral or other states not parties to the conflict which safeguard the rights and interests of a party to the conflict and those of its nationals vis-à-vis an adverse party to the conflict... Particularly the International Committee of the Red Cross may act as a so-called substitute... if the parties to the conflict cannot agree upon the designation of a Protecting Power...

A cease-fire is defined as a temporary interruption of military operations which is limited to a specific area and will normally be agreed upon between the local commanders. It shall regularly serve humanitarian purposes, in particular searching for and collecting the wounded and the shipwrecked, rendering first aid to these persons, and removing civilians.¹¹

13. Hungary's Military Manual stresses that non-hostile contacts with the enemy may be "direct or through an intermediary", for information, warning, summons, local arrangements or the creation of neutralised zones.¹²

14. Italy's IHL Manual notes that specific agreements to be executed on the battlefield may be concluded by parlementaires.¹³

15. Italy's LOAC Elementary Rules Manual provides that:

Local interruptions of combat and other arrangements can be concluded between opposing forces. At lower levels, such arrangements can be very simple and concluded orally: voice, radio, bearer of a white flag (flag of truce). At higher levels and for longer lasting interruptions of combat, written agreements shall be concluded.¹⁴

16. Kenya's LOAC Manual states that:

It is within the legal competence of an officer to arrange a temporary cease-fire for a specific and limited purpose, for example, to permit the collection or evacuation of the wounded. Any such action should be reported to the higher authority. Absolute good faith is required in all such dealings [the arrangement of a cease-fire] with the enemy.¹⁵

⁸ Croatia, *Commanders' Manual* (1992), § 80.

⁹ France, *Disciplinary Regulations as amended* (1975), Article 9(3).

¹⁰ Germany, *Military Manual* (1992), § 222.

¹¹ Germany, *Military Manual* (1992), §§ 231 and 232.

¹² Hungary, *Military Manual* (1992), p. 79.

¹³ Italy, *IHL Manual* (1991), Vol. I, § 51.

¹⁴ Italy, *LOAC Elementary Rules Manual* (1991), § 80.

¹⁵ Kenya, *LOAC Manual* (1997), Précis No. 4, p. 5.

17. South Korea's Operational Law Manual states that, instead of the white flag, radio communications or messages dropped from aircraft may be used to start negotiations.¹⁶

18. Lebanon's Army Regulations forbids communication by combatants with the enemy.¹⁷

19. Madagascar's Military Manual mentions non-belligerent contacts with the enemy through intermediaries such as protecting powers or the ICRC.¹⁸ It also states that:

Local cease-fires and other agreements may be concluded between the opposing forces. At inferior levels, such agreements may be very simple and concluded orally: voice, radio or bearer of a white flag (flag of parlementaires). At superior levels and for long term cease-fires, written agreements are to be concluded.¹⁹

20. The Military Handbook of the Netherlands emphasises that "only a commander may decide to negotiate with the adverse party".²⁰

21. New Zealand's Military Manual provides that:

Even between the belligerent armies direct contact may sometimes be necessary [for instance to arrange for the collection of the dead or exchange of the wounded] but relations between the belligerent forces are confined to mainly military matters. Occasionally, such relations, for example, the arrangement of a local truce or surrender, may involve political considerations but in view of radio and similar means of communication these matters tend nowadays to be taken up on an inter-government level, avoiding actual negotiations between belligerent commanders.

...

Negotiations between belligerent commanders are normally conducted, at least in the first instance, by intermediaries known as *parlementaires*. The wish to negotiate by *parlementaires* is frequently indicated by the raising of a white flag but any other method of communication, eg by radio, may be employed.

...

Any agreement made by belligerent commanders must be scrupulously adhered to... As between combatants, the most usual purpose of contact is to arrange for an armistice or truce, whether for a specific purpose or more generally. Whatever the nature of the arrangement it must be entered into and carried out in good faith.

...

Agreements between belligerents permitting activities between them which are inconsistent with belligerent status are known as cartels. Such an arrangement is voidable by either Party on proof of breach of its terms by the other.

... In addition to any other agreements that may be made between the belligerents or commanders in the field, the Geneva Conventions and AP I contain a number of

¹⁶ South Korea, *Operational Law Manual* (1996), p. 179.

¹⁷ Lebanon, *Army Regulations* (1971), § 15.

¹⁸ Madagascar, *Military Manual* (1994), Fiche No. 7-SO, § C.

¹⁹ Madagascar, *Military Manual* (1994), Fiche No. 7-O, § 32, see also Fiche No. 9-SO, § C.

²⁰ Netherlands, *Military Handbook* (1995), p. 7-40.

provisions recognizing that in the special circumstances specified in these treaties agreements between belligerents may be desirable or necessary.²¹

22. Nigeria's Manual on the Laws of War states that "the conduct of war and the wish to restore peace sometimes require intercourse between the belligerents".²²

23. Spain's LOAC Manual notes that the belligerents may conclude special oral agreements on specific questions, such as agreements to allow the search for the wounded or for the flight of a medical aircraft over a small zone controlled by the enemy. Those simple low-level arrangements may be concluded by radio or by bearer of a white flag. Higher-level agreements must be concluded in writing (e.g. the establishment of demilitarised zones, or the flight of a medical aircraft over a large zone controlled by the enemy).²³ The manual adds that:

A truce is defined as a temporary interruption of military operations, limited to a specific area and usually concluded between local commanders. It shall regularly serve a humanitarian purpose, to facilitate the removal, the exchange and transport of wounded left on the battlefield, for the evacuation or exchange of wounded and sick from a besieged area, and for the passage of medical and religious personnel and medical equipment on their way to such areas.

...

In addition to parlementaires, the parties in conflict may communicate through the mediation of the Protecting Powers...

If the parties in conflict have not agreed upon the designation of a Protecting Power, the ICRC, or any other impartial and efficient organisation, may act as a "substitute"

...

One of the most usual missions of the military observers taking part in peacekeeping operations is to act as intermediaries between the parties to the conflict to facilitate the negotiation and implementation of local agreements.²⁴

24. Switzerland's Basic Military Manual provides that "military commanders of both sides may, within the bounds of their authority, contact each other directly in their respective operation zones".²⁵

25. The UK Military Manual states that:

It is on occasions unavoidable – and often convenient – for commanders to open direct communication with the enemy for military purposes. Furthermore, humanity and convenience may at times induce them for special reasons to relax the general prohibition of intercourse between belligerents.

...

It is essential that in such non-hostile relations the most scrupulous good faith should be observed by both parties, and that no advantage be taken which is not intended to be given by the enemy.²⁶

²¹ New Zealand, *Military Manual* (1992), §§ 405, including footnote 11, 406(1), 407(1) and (2) and 411.

²² Nigeria, *Manual on the Laws of War* (undated), § 24.

²³ Spain, *LOAC Manual* (1996), Vol. I, §§ 2.6.a and 10.8.f.(3).

²⁴ Spain, *LOAC Manual* (1996), Vol. I, §§ 2.6.b.(1) and 2.6.c.(2)–(4).

²⁵ Switzerland, *Basic Military Manual* (1987), Article 12(1).

²⁶ UK, *Military Manual* (1958), §§ 386 and 387.

The manual also provides that:

There is nothing in [Articles 32–34 of the 1907 HR] which indicates that a white flag is the only method whereby one belligerent may signify to the other its desire to open communications. In modern conditions of warfare wireless messages and loud-speakers are also used as a means of conveying the wish of one belligerent to communicate with the other.²⁷

The manual further emphasises that:

A suspension of arms is essentially a military convention of very short duration, concluded between commanders of armies, or detachments in order to arrange some local matter of urgency: most frequently to bury the dead, or to collect and succour the wounded, or, occasionally, to exchange prisoners, to permit conferences.

...

A cartel, in the wider sense of the term, is issued to signify a convention concluded between belligerents for the purpose of permitting certain kinds of non-hostile intercourse which would otherwise be prevented by the conditions of war. For instance, communication by post, trade in certain commodities, and the like, may be agreed upon by a cartel. In its strictly military sense, however, a cartel means an agreement for the exchange of prisoners of war.²⁸

26. The UK LOAC Manual states that:

It is within the legal competence of an officer to arrange for a temporary cease-fire for a specific and limited purpose, for example to permit the collection or evacuation of the wounded... Absolute good faith is required in all such dealings [the arrangement of a cease-fire] with the enemy.²⁹

27. The US Field Manual states that "absolute good faith with the enemy must be observed as a rule of conduct".³⁰ It also provides that:

One belligerent may communicate with another directly by radio, through parlementaires, or in a conference, and indirectly through a Protecting Power, a third State other than a Protecting Power, or the International Committee of the Red Cross

...

It is absolutely essential in all nonhostile relations that the most scrupulous good faith shall be observed by both parties, and that no advantage not intended to be given by the adversary shall be taken.

...

In current practice, radio messages to the enemy and messages dropped by aircraft are becoming increasingly important as a prelude to conversations between representatives of belligerent forces.

...

In its narrower sense, a cartel is an agreement entered into by belligerents for the exchange of prisoners of war. In its broader sense, it is any convention concluded between belligerents for the purpose of arranging or regulating certain kinds of

²⁷ UK, *Military Manual* (1958), § 394, footnote 2.

²⁸ UK, *Military Manual* (1958), §§ 420 and 497.

²⁹ UK, *LOAC Manual* (1981), Section 4, p. 17, § 18.

³⁰ US, *Field Manual* (1956), § 49.

nonhostile intercourse otherwise prohibited by reason of the existence of the war. Both parties to a cartel are in honor bound to observe its provisions with the most scrupulous care, but it is voidable by either party upon definite proof that it has been intentionally violated in an important particular by the other party.³¹

National Legislation

28. Under Lebanon's Code of Military Justice, communication with the enemy by combatants is a punishable offence.³²

29. The US Uniform Code of Military Justice punishes "any person . . . who communicates or corresponds with or holds any intercourse with the enemy, either directly or indirectly".³³

National Case-law

30. No practice was found.

Other National Practice

31. According to the Report on the Practice of Colombia, government practice has been to express publicly its willingness to enter into a dialogue with opposing armed groups for humanitarian reasons or to start negotiations.³⁴ During the takeover of the embassy of the Dominican Republic by the M-19 in 1980, direct contacts were established through the mediation of the Red Cross and of one of the detained ambassadors. The hostages were ultimately released and the guerrillas were allowed to leave the country.³⁵ Likewise, during the takeover of the Palacio de Justicia in 1985, direct communications were established by phone between the leader of the armed opposition group and an officer of the national police, although without success. In the meantime, military operations were not suspended.³⁶

32. The Report on the Practice of Egypt gives armistice and cease-fire agreements with Israel as examples of negotiation with the enemy.³⁷

33. According to the Report on the Practice of Russia, Georgia appealed to "the authority of the leader of the autonomous Republic of Adzharia, who negotiated directly with the Abkhaz authorities" to obtain the release of prisoners.³⁸

³¹ US, *Field Manual* (1956), §§ 452, 453, 458 and 469.

³² Lebanon, *Code of Military Justice* (1968), Article 124(2).

³³ US, *Uniform Code of Military Justice* (1950), Article 104(2).

³⁴ Report on the Practice of Colombia, 1998, Chapter 2.2.

³⁵ Report on the Practice of Colombia, 1998, Chapter 2.2, referring to Miguel A. Afanador Ulloa, *Amnistías e indultos: la historia reciente, 1948-1992*, Administrative Department of the Public Service of Colombia, Ed. Guadalupe Ltd., Santafé de Bogotá, 1993, p. 75.

³⁶ Colombia, Cundinamarca Administrative Court, *Case No. 4010*, Intervention by the Minister of Agriculture, Cabinet record, 7 November 1985, Record of evidence; Cundinamarca Administrative Court, *Case No. 4010*, Attestation by the Cabinet, 6 November 1985, Record of evidence.

³⁷ Report on the Practice of Egypt, 1997, Chapter 2.2.

³⁸ Report on the Practice of Russia, 1997, Chapter 2.2.

34. Jordan has negotiated several temporary cease-fire agreements with the Palestinian resistance. The Report on the Practice of Jordan mentions two of them concluded in 1970.³⁹

35. According to the Report on the Practice of the Philippines, "government troops are directed to negotiate with the rebels in cases of armed confrontation".⁴⁰ The report also notes that, owing to the guerrilla nature of the conflict, negotiations between government troops and the armed opposition are usually carried out through third parties (local political and religious leaders). Cease-fires are, for example, negotiated to prevent economic disturbances or during Christian holiday celebrations.⁴¹

36. On the basis of replies by army officers to a questionnaire, the Report on the Practice of Rwanda mentions the use of the telephone and the sending of intermediaries, such as neutral civilian emissaries with a written authorisation (the ICRC, OAU, NGOs, religious leaders, journalists or members of peace-keeping forces), as means of communication between the parties in battlefield negotiations.⁴²

37. On the basis of a meeting with an army lawyer, the Report on UK Practice comments that negotiation with the enemy "is a tricky area now" owing to the practicalities of fast-paced modern warfare.⁴³

38. According to a memorandum of a legal adviser of the US Department of State in 1975, the President, as Commander-in-Chief of the armed forces, has the constitutional authority to conclude armistices and other agreements relating to the military security of the US.⁴⁴

39. The Report on US Practice states that:

The need to seek express authority to negotiate an agreement with the enemy . . . has been reinforced by the erosion, since the end of World War II, of distinctions between political agreements, such as peace treaties, and purely military agreements, such as truces and armistices . . . [The Air Force Pamphlet] noted that the practice of concluding peace treaties had become rare, and that armistices had often become

³⁹ Report on the Practice of Jordan, 1997, Chapter 2.2, referring to Cease-fire Agreement between the Jordanian Government and the Palestinian Resistance Movement, 7 July 1970; Cairo Agreement between the Jordanian Government and the Palestinian Resistance Movement, 27 September 1970.

⁴⁰ Report on the Practice of Philippines, 1997, Chapter 2.2.

⁴¹ Report on the Practice of Philippines, 1997, Chapter 2.2, referring to Romy Elusfa, CHR Stung by AFP Rejection, *Today*, 12 April 1997; Ali G. Macabalang and Cena de Guzman, Gov't, MILF Reach Accord on Dam Dispute, *Manila Bulletin*, 30 January 1995; Farm Pact Forged with MILF Bared, *Manila Bulletin*, 10 June 1996; Aris R. Ilagan, AFP Optimistic on Truce with NPA: Holiday Ceasefire on, *Manila Bulletin*, 25 December 1993.

⁴² Report on the Practice of Rwanda, 1997, Replies by army officers to a questionnaire, Chapter 2.2.

⁴³ Report on UK Practice, 1997, Meeting with an army lawyer, 18 July 1997, Chapter 2.2.

⁴⁴ US, Legal Adviser to the Department of State, Memorandum of Law on the authority of the US President to enter into international agreements pursuant to his independent constitutional powers, 31 October 1975, reprinted in Eleanor C. McDowell, *Digest of United States Practice in International Law, 1975*, Department of State Publication 8865, Washington, D.C., 1976, pp. 314-315.

functional substitutes for peace treaties. The term "cease fire" was increasingly used for agreements that would once have been designated armistices.

...

Modern combat conditions may also make it more difficult to communicate directly with an enemy armed force.

...

US commanders have little inherent authority to negotiate with the enemy, and unauthorized communications with the enemy may be a military offense. The practice of the United States no longer recognizes any clear category of agreements as purely military without political overtones.⁴⁵

40. The Report on the Practice of the SFRY (FRY) notes that, during the conflicts in the former Yugoslavia, there were no large military operations in Slovenia that could have triggered negotiations with the enemy on the battlefield and that "it is hardly realistic that traditional requirements of the international law of warfare would have been respected" in the conflict in Croatia. The report concludes that the *opinio juris* of the SFRY (FRY) "is, beyond any doubt, that a legal possibility exists to contact the enemy on the battlefield".⁴⁶

41. According to the Report on the Practice of Zimbabwe, it is the opinion of the Judge Advocate General of the Defence Forces of Zimbabwe that, although there is no actual practice, "both the traditional and modern methods [of communication] are likely to be acceptable".⁴⁷

42. In 1987, an army officer of a State asked the ICRC to act as an intermediary in order that he might enter into communication with the leader of an armed opposition group to settle questions regarding the behaviour of troops.⁴⁸

43. In 1988, negotiations between a government and an armed opposition group through governmental militiamen paved the way for the orderly withdrawal of the governmental forces and the arrival of the armed opposition group.⁴⁹

44. In 1992, the authorities of a State responded positively to a request by a civil association close to an armed opposition group for a meeting on the protection of the civilian population. The ICRC was asked to organise the meeting.⁵⁰ In 1994, the Ministry of Foreign Affairs proposed that a communication line be established between the parties by satellite phone. The phone of the armed opposition group was to be located on the ICRC premises. The ICRC emphasised that its premises should then be respected and protected, even if combatants of the armed opposition group were present.⁵¹

III. Practice of International Organisations and Conferences

45. No practice was found.

⁴⁵ Report on US Practice, 1997, Chapter 2.2. (The report notes that general armistices often include political provisions, and therefore require high-level approval.)

⁴⁶ Report on the Practice of the SFRY (FRY), 1997, Chapter 2.2.

⁴⁷ Report on the Practice of Zimbabwe, 1998, Chapter 2.2.

⁴⁸ ICRC archive document. ⁴⁹ ICRC archive document.

⁵⁰ ICRC archive document. ⁵¹ ICRC archive document.

IV. Practice of International Judicial and Quasi-judicial Bodies

46. No practice was found.

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

47. To fulfil its task of disseminating IHL, the ICRC has delegates around the world teaching armed and security forces that:

Contacts between opposing armed forces can be taken at any time by the commanders concerned. They can be established by all available technical means.

...

When direct contacts between commanders or contacts through bearers of flag of truce or similar persons are not possible, commanders may also ask for cooperation from the Protecting Power or from intermediaries such as the International Committee of the Red Cross.

Commanders of opposing armed forces may conclude agreements at any time. Such agreements shall not adversely affect the situation of war victims as defined by international treaties.

Very local, short term or urgent agreements can be concluded orally (e.g. local agreements for the search of wounded after combat action, isolated overflight of a small enemy controlled area by medical aircraft).

Long lasting and large scale agreements need to be concluded in writing (e.g. neutralized zones, non-defended localities, overflight of a large enemy controlled area by medical aircraft, agreement for the evacuation of a besieged area). For such agreements, inspiration can be taken from detailed provisions foreseen by the law of war (e.g. hospital zones, demilitarized and non-defended zones and localities).⁵²

VI. Other Practice

48. No practice was found.

Use of the white flag of truce

Note: *For practice concerning the carrying of the white flag of truce by a parlementaire, see the definition of a parlementaire in the following subsection. For practice concerning the use of the white flag of truce as an indication of a wish to surrender, see also Chapter 15, section B. For practice concerning the abuse, misuse or improper use of the white flag of truce, see Chapter 18, section B. For practice concerning the perfidious use of the white flag of truce, see Chapter 18, section I.*

I. Treaties and Other Instruments

49. No practice was found.

⁵² Frédéric de Mulinen, *Handbook on the Law of War for Armed Forces*, ICRC, Geneva, 1987, §§ 539 and 541–544.

II. National Practice

Military Manuals

50. According to Australia's Commanders' Guide, "it is important to note that a white flag represents an expression of a desire to negotiate; it is not necessarily an indication of intent to surrender or enter into a cease-fire".⁵³

51. Australia's Defence Force Manual notes that "customary international law recognises the white flag as symbolising a request to cease-fire, negotiate, or surrender. An adversary displaying a white flag should be permitted the opportunity to surrender, or to communicate a request for cease-fire or negotiation."⁵⁴

52. Belgium's Law of War Manual expressly recognises the white flag as the flag of parlementaires.⁵⁵

53. Belgium's Teaching Manual for Soldiers recognises "the white flag of parlementaires (used for negotiation or surrender)".⁵⁶ It states that "this flag is actually recognised as the signal of a request for suspension of operations to enter into negotiations or to surrender".⁵⁷

54. Benin's Military Manual recognises the "white flag (flag of parlementaires used for negotiations and surrender)".⁵⁸

55. Cameroon's Instructors' Manual mentions "the flag of parlementaires or white flag for temporary suspension of combat".⁵⁹ The white flag is defined as the flag of parlementaires and the flag of surrendering combatants.⁶⁰

56. Canada's LOAC Manual notes that "personnel bearing a white flag are indicating a desire to negotiate or surrender".⁶¹

57. Canada's Code of Conduct stresses that "the showing of a white flag is not necessarily an expression of an intent to surrender. Furthermore, it is not necessarily applicable to all opposing forces in an area. The white flag can also mean that opposing forces wish to temporarily cease hostilities to talk or negotiate."⁶²

58. Colombia's Soldiers' Manual recognises "the white flag, which means surrender, parlementaire, negotiation and spirit of conciliation".⁶³

59. Under the Military Manual of the Dominican Republic, displaying a white flag is, *inter alia*, a manner of expressing a wish to surrender.⁶⁴

⁵³ Australia, *Commanders' Guide* (1994), § 505.

⁵⁴ Australia, *Defence Force Manual* (1994), § 910.

⁵⁵ Belgium, *Law of War Manual* (1983), Annex 2, No. 6.

⁵⁶ Belgium, *Teaching Manual for Soldiers* (undated), p. 9, see also p. 10.

⁵⁷ Belgium, *Teaching Manual for Soldiers* (undated), p. 15.

⁵⁸ Benin, *Military Manual* (1995), Fascicule I, p. 15.

⁵⁹ Cameroon, *Instructors' Manual* (1992), p. 37, § 144.2 and p. 61, § 232.2.

⁶⁰ Cameroon, *Instructors' Manual* (1992), pp. 38, 62 and 146.

⁶¹ Canada, *LOAC Manual* (1999), p. 4-5, § 45.

⁶² Canada, *Code of Conduct* (2001), Rule 5, § 3.

⁶³ Colombia, *Soldiers' Manual* (1999), p. 28.

⁶⁴ Dominican Republic, *Military Manual* (1980), p. 6.

60. Ecuador's Naval Manual emphasises that "customary international law recognizes the white flag as symbolising a request to cease-fire, negotiate, or surrender".⁶⁵

61. France's LOAC Manual recognises the "white flag or flag of parlementaires".⁶⁶

62. Germany's Soldiers' Manual recognises the white flag as the flag of parlementaires and the flag of surrendering combatants.⁶⁷

63. Germany's Military Manual states that parlementaires "make themselves known by a white flag".⁶⁸

64. Germany's IHL Manual recognises the white flag as the flag of parlementaires.⁶⁹

65. Italy's LOAC Elementary Rules Manual recognises the "white flag (flag of parlementaires used for negotiations and surrender)".⁷⁰

66. Kenya's LOAC Manual provides that "the white flag or flag of truce indicates no more than an intention to enter into negotiations with the enemy. It does not necessarily mean a wish to surrender."⁷¹

67. South Korea's Operational Law Manual stresses that it is the expression of surrender for a soldier or a unit to display a white flag. It is also generally used for initiating negotiations.⁷²

68. Madagascar's Military Manual states that the white flag is a means of contacting the enemy.⁷³

69. The Military Manual of the Netherlands provides that the white flag "indicates that the party who displays the flag wants to negotiate... In addition, the white flag is also accepted as a usual indication of surrender."⁷⁴

70. The Military Handbook of the Netherlands states that "displaying the white flag means that one wants to negotiate with the adverse party (for example about a cease-fire) or that one wants to surrender".⁷⁵

71. New Zealand's Military Manual provides that "the wish to negotiate by *parlementaires* is frequently indicated by the raising of a white flag... *Parlementaires* normally operate under a flag of truce."⁷⁶ The manual adds that the white flag is deployed:

1. When a person is authorised by one Party to enter into communications with the adverse Party; if used, the white flag should be carried by the parlementaire or an accompanying individual so as to be clearly visible.

⁶⁵ Ecuador, *Naval Manual* (1989), § 11.10.4. ⁶⁶ France, *LOAC Manual* (2001), p. 61.

⁶⁷ Germany, *Soldiers' Manual* (1991), p. 6.

⁶⁸ Germany, *Military Manual* (1992), § 223, see also Appendix 1/2.

⁶⁹ Germany, *IHL Manual* (1996), Appendix 1/2, No. 11.

⁷⁰ Italy, *LOAC Elementary Rules Manual* (1991), p. 29.

⁷¹ Kenya, *LOAC Manual* (1997), Précis No. 4, p. 4.

⁷² South Korea, *Operational Law Manual* (1996), p. 179.

⁷³ Madagascar, *Military Manual* (1994), Fiche No. 9-SO, § C.

⁷⁴ Netherlands, *Military Manual* (1993), p. IV-4.

⁷⁵ Netherlands, *Military Handbook* (1995), p. 7-40, see also p. 7-37.

⁷⁶ New Zealand, *Military Manual* (1992), § 406(1) and (2).

2. If an element of the armed forces wishes to surrender to an adverse Party a white flag, when held so as to be clearly visible, may be utilized to facilitate a peaceful surrender.⁷⁷

72. Nigeria's Manual on the Laws of War notes that:

The hoisting of a white flag means that a belligerent wishes to communicate with the enemy, either for the purpose of surrender or for some other purposes. Hoisting the white flag by a small number of soldiers usually [expresses] the wish to surrender; in the case of a large unit it is usually the expression of a wish to conduct negotiations.⁷⁸

73. The Code of Ethics of the Philippines stresses that the white flag of truce is a "worldwide custom used to signal the temporary cessation of hostilities between warring parties".⁷⁹

74. South Africa's LOAC Manual provides that "a white flag designates a truce, a request to negotiate or an indication of surrender".⁸⁰

75. Togo's Military Manual recognises the "white flag (flag of parlementaires used for negotiations and surrender)".⁸¹

76. The UK Military Manual states that:

From time immemorial a white flag has been used as a signal by an armed force which wishes to open communications with the enemy. This is the only meaning which the flag possesses in international law. The hoisting of a white flag, therefore, means in itself nothing else than one party is asked whether it will receive a communication from the other. It may indicate merely that the party which hoists it wishes to make an arrangement for the suspension of arms for some purpose; but it may also mean that the party wishes to negotiate for surrender. Everything depends on the circumstances and conditions of the particular case. For instance, in practice, the white flag has come to indicate surrender if hoisted by individual soldiers or a small party in the course of an action. Great vigilance is always necessary, for the question in every case is whether the hoisting of the white flag was authorised by the commander.⁸²

77. The UK LOAC Manual provides that "the white flag, or flag of truce, indicates no more than an intention to enter into negotiations with the enemy. It does not necessarily mean a wish to surrender."⁸³

78. The US Field Manual notes that:

In the past, the normal means of initiating negotiations between belligerents has been the display of a white flag . . .

The white flag, when used by troops, indicates a desire to communicate with the enemy. The hoisting of a white flag has no other signification in international

⁷⁷ New Zealand, *Military Manual* (1992), Annex B, § B44.

⁷⁸ Nigeria, *Manual on the Laws of War* (undated), § 24.

⁷⁹ Philippines, *Code of Ethics* (1991), Article 5, Section 2(4.5).

⁸⁰ South Africa, *LOAC Manual* (1996), § 23, see also § 37(d).

⁸¹ Togo, *Military Manual* (1996), Fascicule I, p. 16.

⁸² UK, *Military Manual* (1958), § 394.

⁸³ UK, *LOAC Manual* (1981), Section 4, p. 16, § 10.

law. It may indicate that the party hoisting it desires to open communication with a view to an armistice or a surrender. If hoisted in action by an individual soldier or a small party, it may signify merely the surrender of that soldier or party. It is essential, therefore, to determine with reasonable certainty that the flag is shown by actual authority of the enemy commander before basing important action upon that assumption.⁸⁴

79. The US Air Force Pamphlet states that:

The white flag has traditionally indicated a desire to communicate with the enemy and may indicate more particularly, depending upon the situation, a willingness to surrender. It raises expectations that the particular struggle is at an end or close to an end since the only proper use of the flag of truce or white flag is to communicate to the enemy a desire to negotiate.⁸⁵

80. The US Naval Handbook emphasises that “customary international law recognizes the white flag as symbolizing a request to cease-fire, negotiate, or surrender”.⁸⁶

81. The YPA Military Manual of the SFRY (FRY) provides that “the white flag is the sign of a parlementaire and indicates the wish of a party to the conflict to enter into contact with the other side through the intermediary of the person carrying such flag”.⁸⁷

National Legislation

82. No practice was found.

National Case-law

83. No practice was found.

Other National Practice

84. The Report on the Practice of Botswana considers the flag of truce as a traditional method to communicate with the enemy.⁸⁸

85. The Report on the Practice of China states that, “as far as communication with the enemy is concerned, China follows the traditional way of raising white flags”.⁸⁹

86. The Report on the Practice of Malaysia states that “the use of white flag is acknowledged as a sign of ceasing hostilities”.⁹⁰

⁸⁴ US, *Field Manual* (1956), § 458.

⁸⁵ US, *Air Force Pamphlet* (1976), § 8-6a.

⁸⁶ US, *Naval Handbook* (1995), § 11.9.5.

⁸⁷ SFRY (FRY), *YPA Military Manual* (1988), § 119, commentary.

⁸⁸ Report on the Practice of Botswana, 1998, Chapter 2.2.

⁸⁹ Report on the Practice of China, 1997, Chapter 2.2.

⁹⁰ Report on the Practice of Malaysia, 1997, Answers to additional questions on Chapter 2.2.

87. On the basis of replies by army officers to a questionnaire, the Report on the Practice of Rwanda states that the flag of truce may be used to negotiate with the enemy on the battlefield.⁹¹

88. A training video produced by the UK Ministry of Defence emphasises that the white flag is protective and that it only indicates a wish to negotiate, not to surrender.⁹²

III. Practice of International Organisations and Conferences

89. No practice was found.

IV. Practice of International Judicial and Quasi-judicial Bodies

90. No practice was found.

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

91. To fulfil its task of disseminating IHL, the ICRC has delegates around the world teaching armed and security forces that the “white flag (flag of truce) [is] used for negotiations and surrender”.⁹³

VI. Other Practice

92. No practice was found.

Definition of parlementaires

I. Treaties and Other Instruments

Treaties

93. Article 32 of the 1899 HR states that “an individual is considered as a parlementaire who is authorized by one of the belligerents to enter into communication with the other, and who carries a white flag”.

94. Article 32 of the 1907 HR states that “a person is regarded as a parlementaire who has been authorized by one of the belligerents to enter into communication with the other, and who advances bearing a white flag”.

⁹¹ Report on the Practice of Rwanda, 1997, Replies by army officers to a questionnaire, Chapter 2.2.

⁹² UK, Ministry of Defence, Training Video: The Geneva Conventions, 1986, Report on UK Practice, 1997, Chapter 2.2.

⁹³ Frédéric de Mulinen, *Handbook on the Law of War for Armed Forces*, ICRC, Geneva, 1987, § 963.

Other Instruments

95. Article 43 of the 1874 Brussels Declaration provides that “a person is regarded as a parlementaire who has been authorized by one of the belligerents to enter into communication with the other, and who advances bearing a white flag”.

96. Article 27 of the 1880 Oxford Manual states that “a person is regarded as a parlementaire who has been authorized by one of the belligerents to enter into communication with the other, and who advances bearing a white flag”.

97. Article 45 of the 1913 Oxford Manual of Naval War provides that “a ship authorized by one of the belligerents to enter into a parley with the other and carrying a white flag is considered a cartel ship”.

*II. National Practice**Military Manuals*

98. Argentina’s Law of War Manual defines a parlementaire as “an individual authorised by one of the belligerents to enter into communication with the other and who advances bearing a white flag”.⁹⁴

99. Belgium’s Field Regulations defines a parlementaire as a person “who has been authorised by one of the belligerents to enter into communication with the other, and who advances bearing a white flag”.⁹⁵

100. Belgium’s Law of War Manual defines a parlementaire as “the person authorised by a belligerent to enter into communication with the adversary and who advances bearing a white flag (at night a white light)”.⁹⁶

101. Belgium’s Teaching Manual for Officers states that “a parlementaire is a person who advances bearing a white flag, in order to negotiate”.⁹⁷

102. Cameroon’s Disciplinary Regulations provides that “any person who advances without weapons and displaying the white flag shall be considered as a parlementaire”.⁹⁸

103. Under Canada’s LOAC Manual, parlementaires are intermediaries by whom negotiations between belligerent commanders may be conducted.⁹⁹

104. Germany’s Military Manual states that:

A cessation of hostilities is regularly preceded by negotiations with the adversary. In the area of operations the parties to the conflict frequently use parlementaires for this purpose . . . Parlementaires are persons authorized by one party to the conflict to enter into negotiations with the adversary.¹⁰⁰

⁹⁴ Argentina, *Law of War Manual* (1969), § 6.001.

⁹⁵ Belgium, *Field Regulations* (1964), § 22.

⁹⁶ Belgium, *Law of War Manual* (1983), p. 40.

⁹⁷ Belgium, *Teaching Manual for Officers* (1994), Part I, Title II, p. 25.

⁹⁸ Cameroon, *Disciplinary Regulations* (1975), Article 30.

⁹⁹ Canada, *LOAC Manual* (1999), p. 14-1, § 3.

¹⁰⁰ Germany, *Military Manual* (1992), §§ 222 and 223.

The manual adds that “defectors or members of friendly forces taken prisoner by the adversary have no status as parlementaires nor as persons accompanying parlementaires”.¹⁰¹

105. Italy’s IHL Manual defines a parlementaire as:

a person authorised by a military belligerent authority to enter into direct communication with the enemy; the scope of his powers is usually to conclude specific agreements to be executed on the battlefield. The parlementaire . . . must advance bearing a visible distinctive sign consisting of a white flag.¹⁰²

The manual adds that the authorisation for a parlementaire to enter into negotiations must be in writing.¹⁰³ It further emphasises the importance of the use of parlementaires in the context of peacekeeping operations, not only for the safeguard of human life, but also to prevent or rapidly put an end to possible incidents, especially those involving the use of arms.¹⁰⁴

106. The Military Manual of the Netherlands defines a parlementaire as “a person who has been authorised by one of the belligerents to enter into negotiations with the other party and who advances bearing a white flag”.¹⁰⁵

107. New Zealand’s Military Manual notes that “negotiations between belligerent commanders are normally conducted, at least in the first instance, by intermediaries known as parlementaires . . . Parlementaires normally operate under a flag of truce.”¹⁰⁶

108. Nigeria’s Manual on the Laws of War states that “the usual agents in non-hostile intercourse between belligerents are known as parlementaires. The parlementaires must carry a white flag . . . [and] an authorisation in writing signed by the sending commander.”¹⁰⁷

109. Spain’s Field Regulations provides that a parlementaire is “the official sent to the enemy with formal orders and powers to negotiate agreements, capitulations; to request suspension of arms, truce or armistice; to present claims or observations about violations of agreements”.¹⁰⁸

110. Spain’s LOAC Manual defines parlementaires as “the persons authorised by one of the parties to enter into negotiations with the adversary, and who advances bearing a white flag”.¹⁰⁹

111. Switzerland’s Basic Military Manual defines a parlementaire as a person “who is authorised by one of the belligerents to enter into communication with the other and who advances bearing a white flag”.¹¹⁰

112. The UK Military Manual emphasises that “the usual agents in the non-hostile intercourse of belligerent armies are known as *parlementaires*”.¹¹¹ It also states that:

¹⁰¹ Germany, *Military Manual* (1992), § 225. ¹⁰² Italy, *IHL Manual* (1991), Vol. I, § 51.

¹⁰³ Italy, *IHL Manual* (1991), Vol. I, § 52. ¹⁰⁴ Italy, *IHL Manual* (1991), Vol. I, § 60.

¹⁰⁵ Netherlands, *Military Manual* (1993), p. IV-4.

¹⁰⁶ New Zealand, *Military Manual* (1992), § 406(1) and (2).

¹⁰⁷ Nigeria, *Manual on the Laws of War* (undated), § 24.

¹⁰⁸ Spain, *Field Regulations* (1882), § 901. ¹⁰⁹ Spain, *LOAC Manual* (1996), Vol. I, § 2.6.c.(1).

¹¹⁰ Switzerland, *Basic Military Manual* (1987), Article 13.

¹¹¹ UK, *Military Manual* (1958), § 389.

A person to be regarded as a *parlementaire* must be authorised by one of the belligerents to enter into communication with the other and must present himself under cover of a white flag. The authorisation [for a *parlementaire* to enter into negotiations] should be in writing and be signed by the sending commander.¹¹²

113. The US Field Manual provides that *parlementaires* are “agents employed by commanders to go in person within the enemy lines for the purpose of communicating or negotiating openly and directly with the enemy commander”.¹¹³ It states that “a person is regarded as a *parlementaire* who has been authorized by one of the belligerents to enter into communication with the other and who advances bearing a white flag”.¹¹⁴ Moreover, “*parlementaires* must be duly authorized in a written instrument signed by the commander of the forces”.¹¹⁵

114. The YPA Military Manual of the SFRY (FRY) defines a *parlementaire* as “a person who is authorised by one party to the conflict to enter into communication in its name with another party in order to negotiate a specific question or to deliver a message”.¹¹⁶ It provides that “a *parlementaire* can be escorted by other persons”, such as an interpreter.¹¹⁷ It also states that “a *parlementaire* or a person in his escort is required to carry the white flag of *parlementaires*”.¹¹⁸ In addition, “a *parlementaire* should have a written authorisation of the person in charge for making contact with the representative of the enemy side”.¹¹⁹

National Legislation

115. Italy’s Law of War Decree as amended defines a *parlementaire* as “a person authorised by military authority to enter into direct communication with the enemy. The *parlementaire* must be provided with a document proving his status and powers and must advance with a white flag.”¹²⁰

116. The commentary on the Penal Code as amended of the SFRY (FRY) states that “a *parlementaire* is a person who, under authorisation by one Party to the war or armed conflict, conveys a message to another Party”.¹²¹

National Case-law

117. No practice was found.

Other National Practice

118. No practice was found.

¹¹² UK, *Military Manual* (1958), § 393.

¹¹³ US, *Field Manual* (1956), § 459.

¹¹⁴ US, *Field Manual* (1956), § 460.

¹¹⁵ US, *Field Manual* (1956), § 462.

¹¹⁶ SFRY (FRY), *YPA Military Manual* (1988), § 116.

¹¹⁷ SFRY (FRY), *YPA Military Manual* (1988), § 118.

¹¹⁸ SFRY (FRY), *YPA Military Manual* (1988), § 119.

¹¹⁹ SFRY (FRY), *YPA Military Manual* (1988), § 123.

¹²⁰ Italy, *Law of War Decree as amended* (1938), Article 67.

¹²¹ SFRY (FRY), *Penal Code as amended* (1976), commentary on Article 149.

III. Practice of International Organisations and Conferences

119. No practice was found.

IV. Practice of International Judicial and Quasi-judicial Bodies

120. No practice was found.

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

121. No practice was found.

VI. Other Practice

122. No practice was found.

Refusal to receive parlementaires*I. Treaties and Other Instruments**Treaties*

123. Article 33 of the 1899 HR stipulates that “the chief to whom a parlementaire is sent is not obliged to receive him in all circumstances”.

124. Article 33 of the 1907 HR stipulates that “the commander to whom a parlementaire is sent is not in all cases obliged to receive him”.

Other Instruments

125. According to Article 44 of the 1874 Brussels Declaration, “the commander to whom a parlementaire is sent is not in all cases and under all conditions obliged to receive him . . . He may likewise declare beforehand that he will not receive parlementaires during a certain period.”

126. Article 29 of the 1880 Oxford Manual states that “the commander to whom a parlementaire is sent is not in all cases obliged to receive him”.

127. Article 45 of the 1913 Oxford Manual of Naval War provides that “the commanding officer to whom a cartel ship is sent is not obliged to receive it under all circumstances”.

*II. National Practice**Military Manuals*

128. Argentina’s Law of War Manual provides that “the commander to whom a parlementaire is sent is not obliged to receive him at all times”.¹²²

¹²² Argentina, *Law of War Manual* (1969), § 6.002.

129. Belgium's Law of War Manual provides that "the chief to whom a parlementaire is sent is not obliged to receive him in all circumstances". It also states that it is prohibited for commanders to decide *a priori* that they will not receive parlementaires.¹²³

130. Belgium's Teaching Manual for Officers states that the parlementaire "does not necessarily have to be received by the adverse party".¹²⁴

131. Canada's LOAC Manual states that "there is no obligation upon the adverse party to receive a parlementaire".¹²⁵

132. Germany's Military Manual provides that "the commander to whom a parlementaire is sent is not in all cases obliged to receive him".¹²⁶

133. Italy's IHL Manual provides that it can be declared that no parlementaires will be received for a certain period of time. Such a policy may also be adopted as a reprisal measure.¹²⁷ However, a parlementaire must be received, unless particular circumstances do not permit it.¹²⁸

134. Kenya's LOAC Manual provides that "there is no obligation to receive a flag party and it may be sent back".¹²⁹

135. The Military Manual of the Netherlands provides that "a commander to whom a parlementaire is sent is not obliged to receive him".¹³⁰

136. New Zealand's Military Manual provides that "there is no obligation upon the adverse Party to receive a *parlementaire*".¹³¹

137. Nigeria's Manual on the Laws of War provides that "the force commander (of the other side) is not obliged to receive the parlementaire".¹³²

138. Spain's Field Regulations states that a commander may refuse to receive a parlementaire only if it would result in an immediate and manifest prejudice to operations or if it appears to be a dilatory manoeuvre.¹³³

139. Spain's LOAC Manual provides that "the commander to whom a parlementaire is sent is not obliged to receive him in every case".¹³⁴

140. Switzerland's Basic Military Manual states that "the commander to whom a parlementaire is sent is not obliged to receive him".¹³⁵

141. The UK Military Manual affirms that:

The commander to whom a *parlementaire* is sent is not obliged to receive him in every case. There may be a movement in progress the success of which depends on secrecy, or owing to the state of the defences, it may be considered undesirable to allow an envoy to approach a besieged locality. In direct contrast, however, to a

¹²³ Belgium, *Law of War Manual* (1983), p. 40.

¹²⁴ Belgium, *Teaching Manual for Officers* (1994), Part I, Title II, p. 25.

¹²⁵ Canada, *LOAC Manual* (1999), p. 14-1, § 5.

¹²⁶ Germany, *Military Manual* (1992), § 226.

¹²⁷ Italy, *IHL Manual* (1991), Vol. I, § 55.

¹²⁸ Italy, *IHL Manual* (1991), Vol. I, § 54.

¹²⁹ Kenya, *LOAC Manual* (1997), Précis No. 4, p. 4.

¹³⁰ Netherlands, *Military Manual* (1993), p. IV-4.

¹³¹ New Zealand, *Military Manual* (1992), § 406(3).

¹³² Nigeria, *Manual on the Laws of War* (undated), § 24.

¹³³ Spain, *Field Regulations* (1882), § 903.

¹³⁴ Spain, *LOAC Manual* (1996), Vol. I, § 2.6.c.(1).

¹³⁵ Switzerland, *Basic Military Manual* (1987), Article 14.

former rule, it is now no longer permissible – except in cases of reprisals for abuses of the flag of truce – for a belligerent to declare beforehand, even for a stated period, that he will not receive *parlementaires*.¹³⁶

142. The UK LOAC Manual provides that “there is no obligation to receive a flag party which may be sent back”.¹³⁷

143. The US Field Manual provides that “the commander to whom a parlementaire is sent is not in all cases obliged to receive him”.¹³⁸ It adds that “the present rule is that a belligerent may not declare beforehand, even for a specified period – except in case of reprisal for abuses of the flag of truce – that he will not receive parlementaires. An unnecessary repetition of visits need not be allowed.”¹³⁹

144. The YPA Military Manual of the SFRY (FRY) provides that:

The party to the conflict to which a parlementaire is sent is not obliged to receive him in any case.

It is forbidden for the parties to the conflict to announce [beforehand] that they will not receive a parlementaire . . .

It is allowed to refuse to receive a parlementaire in order for him not to see or find out something about movements or regrouping of troops or the like. It is also allowed to refuse to receive a parlementaire as a measure of reprisals, if the party that sends the parlementaire had previously abused the flag of parlementaires.¹⁴⁰

National Legislation

145. Italy’s Law of War Decree as amended stipulates that “the commander of the operating force is not obliged to receive a parlementaire in all circumstances”.¹⁴¹

National Case-law

146. No practice was found.

Other National Practice

147. No practice was found.

III. Practice of International Organisations and Conferences

United Nations

148. No practice was found.

Other International Organisations

149. No practice was found.

¹³⁶ UK, *Military Manual* (1958), § 398.

¹³⁷ UK, *LOAC Manual* (1981), Section 4, p. 16, § 10.

¹³⁸ US, *Field Manual* (1956), § 463.

¹³⁹ US, *Field Manual* (1956), § 464.

¹⁴⁰ SFRY (FRY), *YPA Military Manual* (1988), § 125.

¹⁴¹ Italy, *Law of War Decree as amended* (1938), Article 68.

International Conferences

150. The Report of the Second Commission of the 1899 Hague Peace Conference stated that Article 33 of the 1899 HR “deals with the right that every belligerent has . . . to refuse to receive a parlementaire . . . All these rules conform to the necessities and customs of war.” The Second Commission also took the position that “the principles of the law of nations do not permit a belligerent ever to declare, even for a limited time, that he will not receive flags of truce”.¹⁴² According to Levie, this would mean that, “while a commander may refuse, in a specific case, to receive a parlementaire, perhaps because he believes that it is merely an attempt to gain time, he may not state it as a general policy”.¹⁴³

IV. Practice of International Judicial and Quasi-judicial Bodies

151. No practice was found.

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

152. To fulfil its task of disseminating IHL, the ICRC has delegates around the world teaching armed and security forces that “the commander is not in all circumstances obliged to receive a bearer of flag of truce or similar persons”.¹⁴⁴

VI. Other Practice

153. No practice was found.

B. Inviolability of Parlementaires*I. Treaties and Other Instruments**Treaties*

154. Article 32 of the 1899 HR provides that a parlementaire “has a right to inviolability, as well as the trumpeter, bugler, or drummer, the flag-bearer and the interpreter who may accompany him”.

155. Article 32 of the 1907 HR provides that a parlementaire “has the right to inviolability, as well as the trumpeter, bugler or drummer, the flag-bearer and the interpreter who may accompany him”.

¹⁴² James B. Scott (ed.), *The Reports of the Hague Conferences of 1899 and 1907*, Clarendon Press, Oxford, 1917, p. 147.

¹⁴³ Howard S. Levie (ed.), *The Code of International Armed Conflict*, Vol. I, Oceana Publications Inc., London/Rome/New York, 1986, p. 155.

¹⁴⁴ Frédéric de Mulinen, *Handbook on the Law of War for Armed Forces*, ICRC, Geneva, 1987, § 540.

Other Instruments

156. Article 43 of the 1874 Brussels Declaration provides that a parlementaire “shall have a right to inviolability, as well as the trumpeter (bugler or drummer) and the flag-bearer who accompany him”.

157. Articles 27 and 28 of the 1880 Oxford Manual provide that a parlementaire “has the right to inviolability . . . He may be accompanied by a bugler or a drummer, by a colour-bearer, and, if need be, by a guide and interpreter, who also are entitled to inviolability.”

158. Article 45 of the 1913 Oxford Manual of Naval War provides that “ships called cartel ships, which act as bearers of a flag of truce, may not be seized while fulfilling their mission, even if they belong to the navy”. Article 65 deals with parlementaires and states that “the personnel of cartel ships is inviolable”.

159. Paragraphs 47 and 48 of the 1994 San Remo Manual provide that cartel vessels “are exempt from attack”, but “only if they (a) are innocently employed in their normal role; (b) submit to identification and inspection when required; and (c) do not intentionally hamper the movement of combatants and obey orders to stop or move out of the way when required”. According to Paragraphs 136 and 137, cartel vessels are also “exempt from capture”, under the same conditions as for the exemption from attack, provided that, in addition, they “do not commit acts harmful to the enemy”.

*II. National Practice**Military Manuals*

160. Argentina’s Law of War Manual provides that a parlementaire “has the right to inviolability, like the bugler, trumpeter, drummer, colour bearer and the interpreter accompanying him”.¹⁴⁵

161. Australia’s Commanders’ Guide provides that “the following examples constitute grave breaches or serious war crimes likely to warrant institution of criminal proceedings: . . . firing upon flags of truce”.¹⁴⁶

162. Australia’s Defence Force Manual states that “the following examples constitute grave breaches or serious war crimes likely to warrant institution of criminal proceedings: . . . firing upon flags of truce”.¹⁴⁷ It also provides that “an adversary displaying a white flag should be permitted the opportunity . . . to communicate a request for cease-fire or negotiation”.¹⁴⁸

163. Belgium’s Law of War Manual states that “the parlementaire whose conduct is correct has the right to absolute inviolability. This applies also to those

¹⁴⁵ Argentina, *Law of War Manual* (1969), § 6.001.

¹⁴⁶ Australia, *Commanders’ Guide* (1994), § 1305(q), see also § 840 (protection of cartel ships).

¹⁴⁷ Australia, *Defence Force Manual* (1994), § 1315(q), see also § 644 (protection of cartel ships).

¹⁴⁸ Australia, *Defence Force Manual* (1994), § 910.

accompanying him (trumpeter, bugler or drummer, colour bearer, interpreter, driver)."¹⁴⁹

164. Belgium's Teaching Manual for Officers emphasises that "the person of the parlementaire is inviolable".¹⁵⁰

165. Burkina Faso's Disciplinary Regulations provides that, under the laws and customs of war, it is prohibited "to attack or retain prisoner a parlementaire displaying the white flag".¹⁵¹

166. Cameroon's Disciplinary Regulations provides that, under the laws and customs of war, a "parlementaire enjoys an absolute immunity and it is prohibited to attack him or retain him prisoner".¹⁵²

167. Canada's LOAC Manual states that:

A parlementaire may be accompanied by other personnel agreed upon by the commanders involved . . .

The adverse party does not have to cease combat. The belligerent may not fire upon the parlementaire, white flag or party. The parlementaire and those who are in his or her party are entitled to complete inviolability, so long as they do nothing to abuse this protection, or to take advantage of their protected position.¹⁵³

Furthermore, the manual stresses that "during the withdrawal and return to the parlementaire's own lines, the parlementaire continues to enjoy inviolability and may not be attacked".¹⁵⁴ It also notes that "to fire intentionally upon the white flag carried by a parlementaire is a war crime".¹⁵⁵ Lastly, it states that "the following vessels of an adverse party shall not be attacked: . . . vessels granted safe conduct by agreement between parties to the conflict (e.g. vessels carrying PWs . . .)".¹⁵⁶

168. Congo's Disciplinary Regulations provides that, under the laws and customs of war, it is prohibited "to attack or retain prisoner a parlementaire displaying the white flag".¹⁵⁷

169. Ecuador's Naval Manual states that "enemy forces displaying a white flag should be permitted an opportunity . . . to communicate a request for cease-fire or negotiation".¹⁵⁸ It also states that "the following acts constitute war crimes: . . . firing on flags of truce".¹⁵⁹

¹⁴⁹ Belgium, *Law of War Manual* (1983), p. 40.

¹⁵⁰ Belgium, *Teaching Manual for Officers* (1994), Part I, Title II, p. 25.

¹⁵¹ Burkina Faso, *Disciplinary Regulations* (1994), Article 35(2).

¹⁵² Cameroon, *Disciplinary Regulations* (1975), Article 30.

¹⁵³ Canada, *LOAC Manual* (1999), p. 14-1, §§ 4 and 5.

¹⁵⁴ Canada, *LOAC Manual* (1999), p. 14-1, § 9.

¹⁵⁵ Canada, *LOAC Manual* (1999), p. 14-1, § 6.

¹⁵⁶ Canada, *LOAC Manual* (1999), p. 4-9, § 94(c), see also pp. 7-6 and 7-7, § 60(c) (air warfare) and p. 8-6, § 41(c) (naval warfare).

¹⁵⁷ Congo, *Disciplinary Regulations* (1986), Article 32(2).

¹⁵⁸ Ecuador, *Naval Manual* (1989), § 11.10.4.

¹⁵⁹ Ecuador, *Naval Manual* (1989), § 6.2.5(11), see also § 8.2.3 (protection of cartel ships).

170. France's Disciplinary Regulations as amended provides that, under international conventions, it is prohibited "to attack or retain prisoner a parlementaire displaying the white flag".¹⁶⁰

171. France's LOAC Manual emphasises that the law of armed conflict provides "special protection" for parlementaires.¹⁶¹

172. Germany's Military Manual provides that:

Parlementaires and the persons accompanying them, e.g. drivers and interpreters, have a right to inviolability . . .

When entering the territory of the adversary, parlementaires and the persons accompanying them shall not be taken prisoner or detained. The principle of inviolability shall apply until they have safely returned to friendly territory. It does not require the adverse party to completely cease fire in a sector where a parlementaire arrives.¹⁶²

173. Italy's IHL Manual provides that a person who "intends to receive a parlementaire must suspend fire locally, for the time necessary for communication and for the return of the parlementaire and the persons accompanying him to their own lines".¹⁶³ It further states that "the parlementaire recognised as such, the persons accompanying him and the related means of transportation (on land, in the air or at sea) are inviolable for the whole time necessary to the accomplishment of their mission".¹⁶⁴ The manual mentions the flag bearer, bugler, drummer and interpreter as the persons who may accompany a parlementaire.¹⁶⁵

174. Kenya's LOAC Manual states that "bearers of a white flag of truce must be respected".¹⁶⁶ It adds that "the flag may not be attacked and, on completion of [a flag party's] mission, must be allowed to return to its own lines".¹⁶⁷

175. South Korea's Military Regulation 187 provides that firing on the white flag is a war crime.¹⁶⁸

176. Mali's Army Regulations provides that, under the laws and customs of war, it is prohibited "to attack or retain prisoner a parlementaire displaying the white flag".¹⁶⁹

177. The Military Manual of the Netherlands states that:

A parlementaire has the right to inviolability . . . [The white flag] indicates that the party who displays the flag wants to negotiate. This party must cease fire. The other party has no obligation to cease fire. However, the parlementaire and any person who may accompany him (e.g. an interpreter) may not be fired upon.¹⁷⁰

¹⁶⁰ France, *Disciplinary Regulations as amended* (1975), Article 9 bis (2).

¹⁶¹ France, *LOAC Manual* (2001), p. 95.

¹⁶² Germany, *Military Manual* (1992), §§ 223 and 224, see also § 1034 (protection of cartel ships).

¹⁶³ Italy, *IHL Manual* (1991), Vol. I, § 56. ¹⁶⁴ Italy, *IHL Manual* (1991), Vol. I, § 53.

¹⁶⁵ Italy, *IHL Manual* (1991), Vol. I, § 51.

¹⁶⁶ Kenya, *LOAC Manual* (1997), Précis No. 2, p. 15.

¹⁶⁷ Kenya, *LOAC Manual* (1997), Précis No. 4, p. 4.

¹⁶⁸ South Korea, *Military Regulation 187* (1991), Article 4.2.

¹⁶⁹ Mali, *Army Regulations* (1979), Article 36.

¹⁷⁰ Netherlands, *Military Manual* (1993), p. IV-4.

178. The Military Handbook of the Netherlands emphasises that “the party which displays the [white] flag has to cease fire. The other party does not have to do so. But, the *parlementaire* and the soldiers who accompany him (for example an interpreter) may not be attacked.”¹⁷¹

179. New Zealand’s Military Manual provides that “a *parlementaire* and accompanying trumpeter, bugler, (or drummer), flag bearer and interpreter are all protected in the case of an authorized communication made under the protection of a white flag”.¹⁷² It specifies that:

The belligerent to whom a *parlementaire* is being despatched does not have to cease combat, although he may not fire upon the *parlementaire*, his flag or those with him. Since the adverse Party may continue combat, the *parlementaire* should cross during a lull in the fighting or should seek some other moment for making his journey, or travel by a route that reduces any risk to himself or those with him. The *parlementaire* and those with him are entitled to complete inviolability, so long as they do nothing to abuse this protection or to take advantage of their protected position . . .

To fire intentionally upon the white flag carried by a *parlementaire* is a war crime . . . No offence is committed if the *parlementaire* or those with him are injured accidentally, or even if the white flag he carries is fired upon inadvertently . . .

During the period that the *parlementaire* is conducting his negotiations the conflict continues and both sides are entitled to reinforce or take such other combat actions as they consider necessary . . . During his withdrawal and return to his own lines, the *parlementaire* continues to enjoy inviolability and may not be attacked.¹⁷³

180. Nigeria’s Manual on the Laws of War provides that:

The *parlementaire* must carry a white flag while advancing towards the enemy lines thus he and his party will have the privilege of immunity. Nevertheless, in order to prevent unnecessary dangers, the *parlementaire* should choose a safe and convenient route of approach to the enemy.¹⁷⁴

The manual also states that “firing on a white flag” is a war crime.¹⁷⁵

181. The Soldier’s Rules of the Philippines includes the following order: “Respect all persons and objects bearing . . . the white flag of truce.”¹⁷⁶

182. The Joint Circular on Adherence to IHL and Human Rights of the Philippines provides that “members of the AFP and PNP shall respect all persons and objects bearing . . . the White Flag of Truce”.¹⁷⁷

¹⁷¹ Netherlands, *Military Handbook* (1995), p. 7-40, see also p. 7-36.

¹⁷² New Zealand, *Military Manual* (1992), Annex B, § B45, see also §§ 638 and 718 (protection of cartel ships).

¹⁷³ New Zealand, *Military Manual* (1992), § 406(3), (4) and (6), see also Annex B, §§ B44 and B45.

¹⁷⁴ Nigeria, *Manual on the Laws of War* (undated), § 24.

¹⁷⁵ Nigeria, *Manual on the Laws of War* (undated), § 6.

¹⁷⁶ Philippines, *Soldier’s Rules* (1989), § 10.

¹⁷⁷ Philippines, *Joint Circular on Adherence to IHL and Human Rights* (1991), § 2a(5).

183. Under Russia's Military Manual, it is a prohibited method of warfare "to kill parlementaires and persons accompanying them".¹⁷⁸

184. Senegal's Disciplinary Regulations provides that, under the laws and customs of war, it is prohibited "to attack or retain prisoner a parlementaire displaying the white flag".¹⁷⁹

185. Under South Africa's LOAC Manual, "firing on . . . a flag of truce" is qualified as a "grave breach" and a war crime.¹⁸⁰

186. Spain's Field Regulations states that "the person of the parlementaire is inviolable".¹⁸¹ It adds that in a combat situation, fire must not be stopped when a parlementaire approaches, until superior orders have been given to do so.¹⁸²

187. Spain's LOAC Manual provides that:

Parlementaires and persons accompanying them are inviolable. When entering an area controlled by the adverse party, the parlementaires and those accompanying them must not be taken prisoner or detained . . . and they must adopt appropriate measures for their return to take place in secure conditions. The presence of parlementaires and the beginning of negotiations is not in itself a sufficient reason to alter the course of operations.¹⁸³

188. Switzerland's Military Manual provides that "the parlementaire (negotiator) and his escort with the white flag shall not be attacked".¹⁸⁴

189. Switzerland's Basic Military Manual stipulates that the parlementaire "has the right to inviolability, as well as the persons accompanying him (interpreter, driver, pilot)".¹⁸⁵ It further states that "mistreating, insulting or retaining unlawfully an enemy parlementaire" is a war crime.¹⁸⁶

190. The UK Military Manual provides that "whilst performing their duties, and provided that their conduct is correct, [parlementaires] are entitled to complete inviolability".¹⁸⁷ It stresses that:

When a white flag is hoisted the other side need not necessarily cease fire.

...

Fire must not be directed intentionally on the person carrying the white flag or on persons near him. If, however, the persons near a flag of truce which is exhibited during an engagement are unintentionally killed or wounded, no breach of the law of war is committed. It is for the *parlementaire* to wait until there is a propitious moment, or to make a detour to avoid a dangerous zone.¹⁸⁸

The manual further states that "in addition to the 'grave breaches' of the 1949 [Geneva] Conventions . . . the following are examples of punishable violations

¹⁷⁸ Russia, *Military Manual* (1990), § 5(d).

¹⁷⁹ Senegal, *Disciplinary Regulations* (1990), Article 34(2).

¹⁸⁰ South Africa, *LOAC Manual* (1996), §§ 39(e) and 41.

¹⁸¹ Spain, *Field Regulations* (1882), § 902.

¹⁸² Spain, *Field Regulations* (1882), § 904.

¹⁸³ Spain, *LOAC Manual* (1996), Vol. I, § 2.6.c.(1).

¹⁸⁴ Switzerland, *Military Manual* (1984), p. 18.

¹⁸⁵ Switzerland, *Basic Military Manual* (1987), Article 13.

¹⁸⁶ Switzerland, *Basic Military Manual* (1987), Article 200(2)(h).

¹⁸⁷ UK, *Military Manual* (1958), § 391, see also § 498 (protection of cartel ships).

¹⁸⁸ UK, *Military Manual* (1958), §§ 395 and 396.

of the laws of war, or war crimes: . . . firing on a flag of truce".¹⁸⁹ Furthermore, "the *parlementaire* should be permitted to retire and return with the same formalities and precautions as on his arrival".¹⁹⁰ The manual also states that:

The number of persons who may accompany the *parlementaire* to the enemy's line, unless special authorisation for additional ones is given, is limited to three; a trumpeter, bugler, or drummer, a flagbearer, and an interpreter. These are entitled to the same inviolability as the envoy himself.

...

In modern warfare the *parlementaire* will presumably be an officer in an armoured vehicle flying a white flag, accompanied by his driver, wireless and loudspeaker operator, and interpreter.¹⁹¹

191. The UK LOAC Manual states that:

The white flag, or flag of truce, indicates no more than an intention to enter into negotiations with the enemy . . . The party showing the white flag must stop firing and if so the other party must do likewise . . . The flag party may not be attacked and on completion of its mission must be allowed to return to its own lines. The [1907 HR] provide for the flag party to consist of the envoy, flag bearer, interpreter and trumpeter, bugler or drummer. In modern warfare the latter may be replaced by a radio operator and the flag party may well travel in a vehicle flying the white flag.¹⁹²

192. The US Field Manual states that:

[A parlementaire] has the right to inviolability, as well as the trumpeter, bugler or drummer, the flag-bearer and the interpreter who may accompany him.

...

Fire should not be intentionally directed on parlementaires or those accompanying them. If, however, the parlementaires or those near them present themselves during an engagement and are killed or wounded, it furnishes no ground for complaint. It is the duty of the parlementaire to select a propitious moment for displaying his flag, such as during the intervals of active operations, and to avoid the dangerous zones by making a detour.¹⁹³

The manual further states that "in addition to the 'grave breaches' of the Geneva Conventions of 1949, the following acts are representative of violations of the law of war ('war crimes'): . . . firing on the flag of truce".¹⁹⁴

193. The US Air Force Pamphlet provides that "in addition to the grave breaches of the Geneva Conventions of 1949, the following acts are representative of situations involving individual criminal responsibility: . . . deliberate firing on . . . the flag of truce".¹⁹⁵

¹⁸⁹ UK, *Military Manual* (1958), § 626(d).

¹⁹⁰ UK, *Military Manual* (1958), § 411.

¹⁹¹ UK, *Military Manual* (1958), § 400, including footnote 2.

¹⁹² UK, *LOAC Manual* (1981), Section 4, p. 16, § 10.

¹⁹³ US, *Field Manual* (1956), §§ 460 and 461.

¹⁹⁴ US, *Field Manual* (1956), § 504(e). ¹⁹⁵ US, *Air Force Pamphlet* (1976), § 15-3c(3).

194. The US Instructor's Guide states that "in addition to the grave breaches of the Geneva Conventions, the following acts are further examples of war crimes: . . . firing on the flag of truce".¹⁹⁶

195. The US Naval Handbook stipulates that "enemy forces displaying a white flag should be permitted an opportunity . . . to communicate a request for cease-fire or negotiation".¹⁹⁷ It adds that "the following acts are representative war crimes: . . . firing on flags of truce".¹⁹⁸

196. The YPA Military Manual of the SFRY (FRY) provides that "the party that receives a parlementaire does not need to cease fire in the direction of the parlementaire's arrival, but must not fire on the parlementaire and his escort".¹⁹⁹ It adds that "a parlementaire and the persons in his escort are entitled to total inviolability. During the execution of the duty of parlementaire, they cannot be kept as prisoners of war."²⁰⁰

National Legislation

197. Argentina's Code of Military Justice as amended punishes "anyone who offends a parlementaire in words or in deeds".²⁰¹

198. Argentina's Draft Code of Military Justice punishes any soldier who "infringes upon the inviolability of, or retains unlawfully, a parlementaire or any person who accompanies him".²⁰² The Draft Code only refers to parlementaires protected under the 1899 Hague Convention (II).²⁰³

199. Under the Criminal Code of the Federation of Bosnia and Herzegovina, whoever "insults, maltreats or detains the bearer of the flag of truce or his/her escort, or prevents them from returning, or in any other way violates their privilege of inviolability" commits a war crime.²⁰⁴ The Criminal Code of the Republika Srpska contains the same provision.²⁰⁵

200. Chile's Code of Military Justice punishes anyone "who, without any provocation, offends a parlementaire in words or in deeds".²⁰⁶

201. Under Croatia's Criminal Code, whoever "insults, maltreats or restrains an intermediary or his escort or prevents their return or in some other way infringes their inviolability" commits a war crime.²⁰⁷

¹⁹⁶ US, *Instructor's Guide* (1985), p. 13. ¹⁹⁷ US, *Naval Handbook* (1995), § 11.9.5.

¹⁹⁸ US, *Naval Handbook* (1995), § 6.2.5(11), see also § 8.2.3 (protection of cartel ships).

¹⁹⁹ SFRY (FRY), *YPA Military Manual* (1988), § 124.

²⁰⁰ SFRY (FRY), *YPA Military Manual* (1988), § 129.

²⁰¹ Argentina, *Code of Military Justice as amended* (1951), Article 746.

²⁰² Argentina, *Draft Code of Military Justice* (1998), Article 292, introducing a new Article 876(7) in the *Code of Military Justice as amended* (1951).

²⁰³ Argentina, *Draft Code of Military Justice* (1998), Article 288, introducing a new Article 872(5) in the *Code of Military Justice as amended* (1951).

²⁰⁴ Bosnia and Herzegovina, Federation, *Criminal Code* (1998), Article 161.

²⁰⁵ Bosnia and Herzegovina, Republika Srpska, *Criminal Code* (2000), Article 440.

²⁰⁶ Chile, *Code of Military Justice* (1925), Article 261(4).

²⁰⁷ Croatia, *Criminal Code* (1997), Article 164.

- 202.** The Code of Military Justice of the Dominican Republic punishes any soldier “who offends a parlementaire in words or in deeds”.²⁰⁸
- 203.** Ecuador’s National Civil Police Penal Code punishes any member of the National Civil Police “who attacks parlementaires or seriously offends parlementaires”.²⁰⁹
- 204.** El Salvador’s Code of Military Justice punishes any “soldier who, in time of war, . . . offends a parlementaire in words or in deeds”.²¹⁰
- 205.** Under Estonia’s Penal Code, “a person who kills, tortures or causes health damage to . . . a parlementaire or a person accompanying such person” commits a war crime.²¹¹
- 206.** Ethiopia’s Penal Code punishes “whosoever maltreats, threatens, insults or unjustifiably detains an enemy bearing a flag of truce, or an enemy negotiator, or any person accompanying him”.²¹²
- 207.** Under Hungary’s Criminal Code as amended, “the person who insults, illegally restrains the parlementaire of the enemy or his companion, or otherwise applies violence against him” is guilty, upon conviction, of a war crime.²¹³
- 208.** Italy’s Law of War Decree as amended provides that the person who “receives a parlementaire must suspend fire locally, during the communication, and give the parlementaire and all persons accompanying him the time necessary to return to their own lines”.²¹⁴ It further states that “the parlementaire, as well as the bugler or drummer, the flag bearer and the interpreter accompanying him, are inviolable for the whole time necessary to the accomplishment of their mission”.²¹⁵
- 209.** Under Mexico’s Penal Code as amended, “the violation of the immunity of a parlementaire or the immunity granted under a safe-conduct” is a punishable offence.²¹⁶
- 210.** Mexico’s Code of Military Justice as amended punishes “anyone who offends in words or in deeds the parlementaire of an enemy”.²¹⁷
- 211.** Nicaragua’s Military Penal Code punishes any soldier who “offends in words or in deeds or unlawfully retains a parlementaire, or the bugler, trumpeter, drummer, flag-bearer or interpreter accompanying him”.²¹⁸
- 212.** Peru’s Code of Military Justice provides that it is a punishable offence for a soldier “to offend a parlementaire in words or in deeds” in time of war.²¹⁹

²⁰⁸ Dominican Republic, *Code of Military Justice* (1953), Article 201(3).

²⁰⁹ Ecuador, *National Civil Police Penal Code* (1960), Article 117(7).

²¹⁰ El Salvador, *Code of Military Justice* (1934), Article 69(4).

²¹¹ Estonia, *Penal Code* (2001), § 102.

²¹² Ethiopia, *Penal Code* (1957), Article 295.

²¹³ Hungary, *Criminal Code as amended* (1978), Section 163(1).

²¹⁴ Italy, *Law of War Decree as amended* (1938), Article 69.

²¹⁵ Italy, *Law of War Decree as amended* (1938), Article 67.

²¹⁶ Mexico, *Penal Code as amended* (1931), Article 148(III).

²¹⁷ Mexico, *Code of Military Justice as amended* (1933), Article 214.

²¹⁸ Nicaragua, *Military Penal Code* (1996), Article 50(2).

²¹⁹ Peru, *Code of Military Justice* (1980), Article 95(7).

213. Under Slovenia's Penal Code, whoever "insults a parlementaire or his escort, maltreats or detains him, prevent his return or otherwise infringes upon his inviolability" commits a war crime.²²⁰

214. Spain's Royal Ordinance for the Armed Forces provides that it is prohibited to attack and retain parlementaires.²²¹

215. Spain's Military Criminal Code punishes any soldier who "offends in words or in deeds or unduly retains a parlementaire or the persons who accompany him".²²²

216. Spain's Penal Code punishes "anyone who, during an armed conflict, . . . infringes on the inviolability of, or retains unduly, a parlementaire or any person who accompanies him".²²³ The Penal Code only refers to parlementaires protected under the 1899 Hague Convention (II).²²⁴

217. Switzerland's Military Criminal Code as amended punishes "anyone who mistreats, insults or unduly detains a parlementaire or a person accompanying him" in time of armed conflict.²²⁵

218. Venezuela's Code of Military Justice as amended punishes "those who make an attempt on the lives of parlementaires or offend them".²²⁶

219. Venezuela's Revised Penal Code punishes any individual, whether a national or not, who, "during a war of Venezuela against another nation, violates . . . the principles observed by civilised peoples in time of war, such as respect for . . . the white flag [and] parlementaires".²²⁷

220. Under the Penal Code as amended of the SFRY (FRY), whoever "insults, harasses or detains a parlementaire or his escort or prevents their return, or who violates their immunity" commits a war crime.²²⁸

National Case-law

221. No practice was found.

Other National Practice

222. The Report on the Practice of China recalls the occasion during the Chinese civil war when the Chairman of the Chinese Communist Party met the leader of the Nationalist government in Chongqing (the Nationalist capital) to negotiate a truce and a settlement to the conflict. The negotiations were unsuccessful, but the Communist delegation's safety was guaranteed.²²⁹

²²⁰ Slovenia, *Penal Code* (1994), Article 381.

²²¹ Spain, *Royal Ordinance for the Armed Forces* (1978), Article 138.

²²² Spain, *Military Criminal Code* (1985), Article 75(2).

²²³ Spain, *Penal Code* (1995), Article 612(6). ²²⁴ Spain, *Penal Code* (1995), Article 608(5).

²²⁵ Switzerland, *Military Criminal Code as amended* (1927), Article 114.

²²⁶ Venezuela, *Code of Military Justice as amended* (1998), Article 474(13).

²²⁷ Venezuela, *Revised Penal Code* (2000), Article 156(1).

²²⁸ SFRY (FRY), *Penal Code as amended* (1976), Article 149.

²²⁹ Report on the Practice of China, 1997, Chapter 2.2.

223. According to the Report on the Practice of Colombia, it has been Colombia's usual practice to issue a presidential decree suspending orders for the capture of the persons designated as negotiators by armed opposition groups. For example, a decree was issued in May 1997 to suspend the orders of capture of the designated negotiators for the release of 60 soldiers captured by an armed opposition movement.²³⁰

224. According to the Report on the Practice of the Philippines, government forces are instructed to respect the white flag of truce at all times.²³¹

225. A training video produced by the UK Ministry of Defence emphasises that the white flag or flag of truce must be respected and must not be attacked.²³²

226. In 1951, in the 27th Report of the UN Command Operations in Korea to the UN Security Council, the US reported the following incidents:

On 9 August, General Nam Il, through his Liaison Officer, claimed that the United Nations Command had violated its guarantees by attacking a Communist vehicle plainly marked with white cloth and carrying a white flag. The sole guarantee ever given by United Nations Command Liaison Officer with regard to aircraft refraining from the attack of the Communists delegations' vehicles was contingent upon their being properly marked and upon prior notification being given of the time and route of their movement. The latter specification had not been complied with and United Nations aircraft did machine gun the truck. The United Nations Command cannot accept the risk of its forces entailed in refraining from attacks on any vehicles observed in rear of the battle zone except those reported by the Communist delegation as being in the service of the delegation. On 14 August, the Communists complained of a like incident. They have been informed again that the United Nations Command provides no immunity for vehicles unless the time and route of movement have been communicated to the United Nations Command.²³³

227. On the basis of the US position with regard to the incidents described in the 27th Report of the UN Command Operations in Korea to the UN Security Council in 1951, the Report on US Practice states that:

In principle, parlementaires advancing under a white flag should be respected, but in practice advance arrangements should be made to ensure respect for them. While within their own lines, they cannot rely solely on the white flag to protect them or their vehicles from air attack or other indirect fire.²³⁴

²³⁰ Report on the Practice of Colombia, 1998, Chapter 2.2, referring to Decree No. 1397, 26 May 1997.

²³¹ Report on the Practice of Philippines, 1997, Chapter 2.2.

²³² UK, Ministry of Defence, Training Video: The Geneva Conventions, 1986, Report on UK Practice, 1997, Chapter 2.2.

²³³ US, 27th Report of the UN Command Operations in Korea to the Security Council, covering the period 1–15 August 1951, annexed to Note dated 15 October 1951 to the UN Secretary-General, UN Doc. S/2377, 16 October 1951, reprinted in Marjorie M. Whiteman, *Digest of International Law*, Vol. 10, Department of State Publication 8367, Washington, D.C., 1968, p. 398.

²³⁴ Report on US Practice, 1997, Chapter 2.2.

*III. Practice of International Organisations and Conferences**United Nations*

228. In 1991, the Special Rapporteur of the UN Commission on Human Rights for Afghanistan reported that members of an armed opposition group had placed mines on the path used by returning officials who, on their own initiative, had tried to act as intermediaries in negotiations for a cease-fire between governmental troops and opposition groups.²³⁵

Other International Organisations

229. No practice was found.

International Conferences

230. No practice was found.

IV. Practice of International Judicial and Quasi-judicial Bodies

231. No practice was found.

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

232. To fulfil its task of disseminating IHL, the ICRC has delegates around the world teaching armed and security forces that “bearers of a white flag (flag of truce) or other persons specially ordered to enter in contact with the enemy shall be respected”.²³⁶

VI. Other Practice

233. No practice was found.

C. Precautions while Receiving Parlementaires**General***I. Treaties and Other Instruments**Treaties*

234. Article 33 of the 1899 HR provides that the chief who receives a parlementaire “can take all steps necessary to prevent the parlementaire taking advantage of his mission to obtain information”.

²³⁵ UN Commission on Human Rights, Special Rapporteur on the Situation of Human Rights in Afghanistan, Report, UN Doc. E/CN.4/1991/31, 28 January 1991, § 67.

²³⁶ Frédéric de Mulinen, *Handbook on the Law of War for Armed Forces*, ICRC, Geneva, 1987, § 540.

235. Article 33 of the 1907 HR provides that the commander who receives a parlementaire “may take all the necessary steps to prevent the parlementaire taking advantage of his mission to obtain information”.

Other Instruments

236. Article 44 of the 1874 Brussels Declaration provides that “it is lawful for [a commander] to take all the necessary steps to prevent the parlementaire taking advantage of his stay within the radius of the enemy’s position to the prejudice of the latter”.

237. Article 30 of the 1880 Oxford Manual provides that “the commander who receives a parlementaire has a right to take all the necessary steps to prevent the presence of the enemy within his lines from being prejudicial to him”.

238. Article 45 of the 1913 Oxford Manual of Naval War provides that the commanding officer to whom a cartel ship is sent “can take all measures necessary to prevent the cartel ship from profiting by its mission to obtain information”.

II. National Practice

Military Manuals

239. Argentina’s Law of War Manual provides that a commander “may adopt all necessary measures to prevent the parlementaire from taking advantage of his mission to collect information”.²³⁷

240. Belgium’s Field Regulations states that “all precautions must be taken to avoid parlementaires obtaining information”.²³⁸

241. Belgium’s Law of War Manual provides that the commander may “take measures (e.g. blindfolding) to prevent the parlementaire from taking advantage of his mission to collect information”.²³⁹

242. Canada’s LOAC Manual notes that:

The belligerent to whom a parlementaire is proceeding may take all steps necessary to protect the safety of the belligerent’s position, and prevent the parlementaire from taking advantage of the visit to secure information. The adverse party may therefore prescribe the route to be taken by the parlementaire, employ blindfolds, limit the size of the party, or take similar action.²⁴⁰

243. Germany’s Military Manual provides that “it is permissible to take all necessary precautions (e.g. blindfolding) to prevent the parlementaire from taking advantage of his mission to obtain information”.²⁴¹

244. Italy’s IHL Manual provides that “the commander who receives [a parlementaire] shall take all required precautions to prevent him from acquiring

²³⁷ Argentina, *Law of War Manual* (1969), § 6.002. ²³⁸ Belgium, *Field Regulations* (1964), § 22.

²³⁹ Belgium, *Law of War Manual* (1983), p. 41. ²⁴⁰ Canada, *LOAC Manual* (1999), p. 14-1, § 7.

²⁴¹ Germany, *Military Manual* (1992), § 227.

information of military character". Measures to prevent the presence of a parlementaire from being prejudicial can include blindfolding.²⁴²

245. New Zealand's Military Manual states that:

The belligerent to whom a *parlementaire* is proceeding may take all steps necessary to protect the safety of his position or unit and to prevent the *parlementaire* from taking advantage of his visit to secure information. The adverse Party may prescribe the route to be taken by the *parlementaire* or may bind his eyes, may limit the size of the party or take similar action.²⁴³

246. Nigeria's Manual on the Laws of War provides that "the force commander (of the other side) . . . may take security measures to prevent the parlementaire from abusing his privileges for spying".²⁴⁴

247. Spain's LOAC Manual states that "the commander to whom a parlementaire is sent . . . may take, in all cases, the measures necessary to prevent the parlementaire from taking advantage of his mission to obtain information".²⁴⁵

248. Switzerland's Basic Military Manual provides that "the commander to whom a parlementaire is sent . . . may take all measures necessary to prevent the parlementaire from taking advantage of his mission to obtain information".²⁴⁶

249. The UK Military Manual states that:

All measures necessary to prevent the *parlementaire* from taking advantage of his mission to obtain information are allowable. Care should be taken to prevent him and his attendants from communication with anyone except the persons nominated to receive him. If permission is given for the *parlementaire* to enter the position for the purpose of negotiation, or if the officer in command of the position or post, or any superior officer, thinks it desirable for any special reason to send him to the rear, he should be blindfolded, and taken to the destination by a circuitous route.²⁴⁷

250. The US Field Manual provides that "the commander to whom a parlementaire is sent . . . may take all the necessary steps to prevent the parlementaire taking advantage of his mission to obtain information".²⁴⁸

251. The YPA Military Manual of the SFRY (FRY) provides that:

A party that receives a parlementaire must define the time and the place where he will be received. Those conditions must not be humiliating for the parlementaire

...

When the parlementaire is received, he is escorted to the commander in charge of receiving him. On this occasion, all measures should be taken so that the parlementaire does not make any contact with an unauthorised person or sees or finds out

²⁴² Italy, *IHL Manual* (1991), Vol. I, § 57.

²⁴³ New Zealand, *Military Manual* (1992), § 406(5).

²⁴⁴ Nigeria, *Manual on the Laws of War* (undated), § 24.

²⁴⁵ Spain, *LOAC Manual* (1996), Vol. I, § 2.6.c.(1).

²⁴⁶ Switzerland, *Basic Military Manual* (1987), Article 14.

²⁴⁷ UK, *Military Manual* (1958), § 410. ²⁴⁸ US, *Field Manual* (1956), § 463.

things that are military secrets . . . If military interest requires so, the parlementaire may be blindfolded while escorted.²⁴⁹

National Legislation

252. Italy's Law of War Decree as amended states that "the commander who receives the parlementaire shall take all necessary measures to prevent him from acquiring information of military character".²⁵⁰

National Case-law

253. No practice was found.

Other National Practice

254. No practice was found.

III. Practice of International Organisations and Conferences

United Nations

255. No practice was found.

Other International Organisations

256. No practice was found.

International Conferences

257. The Report of the Second Commission of the 1899 Hague Peace Conference stated that Article 33 of the 1899 HR "deals with the right that every belligerent has . . . to take measures necessary in order to prevent [a parlementaire] from profiting by his mission to get information . . . All these rules conform to the necessities and customs of war."²⁵¹

IV. Practice of International Judicial and Quasi-judicial Bodies

258. No practice was found.

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

259. To fulfil its task of disseminating IHL, the ICRC has delegates around the world teaching armed and security forces that a commander "may impose safety measures (e.g. blindfolding)" with regard to a parlementaire.²⁵²

²⁴⁹ SFRY (FRY), *YPA Military Manual* (1988), §§ 127 and 128.

²⁵⁰ Italy, *Law of War Decree as amended* (1938), Article 71.

²⁵¹ James B. Scott (ed.), *The Reports of the Hague Conferences of 1899 and 1907*, Clarendon Press, Oxford, 1917, p. 147.

²⁵² Frédéric de Mulinen, *Handbook on the Law of War for Armed Forces*, ICRC, Geneva, 1987, § 540.

VI. *Other Practice*

260. No practice was found.

Detention of parlementaires

I. Treaties and Other Instruments

Treaties

261. Article 33 of the 1899 HR provides that “in case of abuse [a chief to whom a parlementaire is sent] has the right to detain the parlementaire temporarily”.

262. Article 33 of the 1907 HR provides that, “in case of abuse [a commander to whom a parlementaire is sent] has the right to detain the parlementaire temporarily”.

Other Instruments

263. Article 44 of the 1874 Brussels Declaration states that “if the parlementaire has rendered himself guilty of . . . an abuse of confidence [taking advantage of his stay within the radius of the enemy’s position to the prejudice of the latter], [the commander] has the right to detain him temporarily”.

264. Article 31 of the 1880 Oxford Manual provides that “if a parlementaire abuses the trust reposed in him he may be temporarily detained”.

265. Article 45 of the 1913 Oxford Manual of Naval War provides that “in case it abuses its privileges, [the commanding officer to whom a cartel ship is sent] has the right to hold the cartel ship temporarily”.

II. National Practice

Military Manuals

266. Argentina’s Law of War Manual states that “in case of abuse [of his position] by the parlementaire, he may be temporarily detained”.²⁵³

267. Belgium’s Field Regulations provides that a parlementaire can be detained temporarily if he/she has collected information.²⁵⁴

268. Belgium’s Law of War Manual states that “the commander who receives a parlementaire . . . may retain him temporarily, if the parlementaire takes unfair advantage of his mission”.²⁵⁵

269. Canada’s LOAC Manual provides that:

If the parlementaire remains within enemy lines after being ordered to withdraw, he loses his inviolability and may be made a PW. Detention may occur if the parlementaire has abused the position of parlementaire, for example, by collecting

²⁵³ Argentina, *Law of War Manual* (1969), § 6.002.

²⁵⁴ Belgium, *Field Regulations* (1964), § 22.

²⁵⁵ Belgium, *Law of War Manual* (1983), p. 41.

information covertly. It is not an abuse of the position for the *parlementaire*, however, to report on observations made.²⁵⁶

270. Germany's Military Manual states that:

A *parlementaire* may be temporarily detained if he has accidentally acquired information the disclosure of which to the adversary would jeopardize the success of a current or impending operation of the friendly armed forces. In this case, the *parlementaire* may be detained until the operation has been completed.²⁵⁷

271. Italy's IHL Manual provides that, if information of a military character has unintentionally come to the knowledge of a *parlementaire*, he/she can be detained for the time the disclosure of information would be dangerous. Moreover, "the same measure applies to a *parlementaire* who, during his mission, has intentionally collected information".²⁵⁸ The manual also stresses that if *parlementaires* present themselves without an authorisation in writing, the military authority can retain them by adopting the necessary security measures and request instructions to commanding superiors. These superiors have the possibility of retaining accredited *parlementaires* if they have other "equivalent" elements on which to rely.²⁵⁹

272. New Zealand's Military Manual states that:

If the *parlementaire* stays within enemy lines after being ordered to withdraw he loses his inviolability and may be made a prisoner of war. He may similarly be detained and tried if there is prima facie evidence that he has abused his position as a *parlementaire*, for example by collecting information surreptitiously. It is not an abuse of his position for the *parlementaire* to report back anything he may have observed.²⁶⁰

273. Nigeria's Manual on the Laws of War states that the "*parlementaire* can be arrested if he abuses his privileges or succeeds unintentionally in gathering information that may be of benefit to the enemy".²⁶¹

274. Spain's LOAC Manual provides that a commander may temporarily detain a *parlementaire* if he/she abuses his/her condition.²⁶²

275. Switzerland's Basic Military Manual provides that "the commander to whom a *parlementaire* is sent . . . has the right, in case of abuse, to retain him temporarily".²⁶³

276. The UK Military Manual states that:

A commander has the right to detain a *parlementaire* temporarily if the latter abuses his position. In addition, a commander has, by a customary rule of international

²⁵⁶ Canada, *LOAC Manual* (1999), p. 14-1, § 9.

²⁵⁷ Germany, *Military Manual* (1992), § 228.

²⁵⁸ Italy, *IHL Manual* (1991), Vol. I, § 58.

²⁵⁹ Italy, *IHL Manual* (1991), Vol. I, § 52.

²⁶⁰ New Zealand, *Military Manual* (1992), § 406(7).

²⁶¹ Nigeria, *Manual on the Laws of War* (undated), § 24.

²⁶² Spain, *LOAC Manual* (1996), Vol. I, 2.6.c.(1).

²⁶³ Switzerland, *Basic Military Manual* (1987), Article 14, see also Article 15, commentary.

law, the right to retain a *parlementaire* so long as circumstances require, if the latter has seen anything, knowledge of which might have adverse consequences for the receiving forces, or if his departure would coincide with movements of troops whose destination or employment he might guess.²⁶⁴

277. The US Field Manual states that:

In case of abuse, [the commander to whom a *parlementaire* is sent] has the right to detain the *parlementaire* temporarily.

...

In addition to the right of detention for abuse of his position, a *parlementaire* may be detained in case he has seen anything or obtained knowledge which may be detrimental to the enemy, or if his departure would reveal information on the movement of troops. He should be detained only so long as circumstances imperatively demand, and information should be sent at once to his commander as to such detention, as well as of any other action taken against him or against his party.²⁶⁵

278. The YPA Military Manual of the SFRY (FRY) provides that:

A *parlementaire* or the persons escorting him can be temporarily detained if they have seen, without abusing the mission of *parlementaire*, something or collected information that could cause damage to the party receiving the *parlementaire* or if they could discover the movement of troops during return.

The *parlementaire* and his escort will be detained only as long as that information could cause damage to the side that received them.²⁶⁶

National Legislation

279. Italy's Law of War Decree as amended states that a *parlementaire* may be temporarily detained if military information has unintentionally come to his/her knowledge.²⁶⁷

National Case-law

280. No practice was found.

Other National Practice

281. No practice was found.

III. Practice of International Organisations and Conferences

United Nations

282. No practice was found.

²⁶⁴ UK, *Military Manual* (1958), § 412. ²⁶⁵ US, *Field Manual* (1956), §§ 463 and 465.

²⁶⁶ SFRY (FRY), *YPA Military Manual* (1988), § 132.

²⁶⁷ Italy, *Law of War Decree as amended* (1938), Article 72.

Other International Organisations

283. No practice was found.

International Conferences

284. The Report of the Second Commission of the 1899 Hague Peace Conference stated that Article 33 of the 1899 HR “deals with the right that every belligerent has . . . to detain [a parlementaire] in case of abuse. All these rules conform to the necessities and customs of war.”²⁶⁸

IV. Practice of International Judicial and Quasi-judicial Bodies

285. No practice was found.

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

286. To fulfil its task of disseminating IHL, the ICRC has delegates around the world teaching armed and security forces that a commander “may retain . . . [the bearer of a white flag or similar persons] temporarily”.²⁶⁹

VI. Other Practice

287. No practice was found.

D. Loss of Inviolability of Parlementaires

I. Treaties and Other Instruments

Treaties

288. Article 34 of the 1899 HR provides that “the parlementaire loses his rights of inviolability if it is proved beyond doubt that he has taken advantage of his privileged position to provoke or commit an act of treason”.

289. Article 34 of the 1907 HR provides that “the parlementaire loses his rights of inviolability if it is proved in a clear and incontestable manner that he has taken advantage of his privileged position to provoke or commit an act of treason”.

Other Instruments

290. Article 45 of the 1874 Brussels Declaration states that “the parlementaire loses his rights of inviolability if it is proved in a clear and incontestable manner

²⁶⁸ James B. Scott (ed.), *The Reports of the Hague Conferences of 1899 and 1907*, Clarendon Press, Oxford, 1917, p. 147.

²⁶⁹ Frédéric de Mulinen, *Handbook on the Law of War for Armed Forces*, ICRC, Geneva, 1987, § 540.

that he has taken advantage of his privileged position to provoke or commit an act of treason".

291. Article 31 of the 1880 Oxford Manual states that "if it be proved that [a parlementaire] has taken advantage of his privileged position to abet a treasonable act, he forfeits his right to inviolability".

292. Article 45 of the 1913 Oxford Manual of Naval War provides that "a cartel ship loses its rights of inviolability if it is proved, positively and unexceptionably, that the commander has profited by the privileged position of his vessel to provoke or to commit a treacherous act".

293. Article 65 of the 1913 Oxford Manual of Naval War deals with parlementaires and states that the personnel of a cartel ship loses its rights of inviolability "if it is proved in a clear and incontestable manner that it has taken advantage of its privileged position to provoke or commit an act of treason".

II. National Practice

Military Manuals

294. Argentina's Law of War Manual provides that "the parlementaire loses his right to inviolability if there is concrete and decisive evidence that he has taken advantage of his privileged situation to commit or provoke an act of treason".²⁷⁰

295. Belgium's Teaching Manual for Officers states that "the search for information, the fact of provoking or committing an act of treason under the cover of [a parlementaire's] mission induces the loss of his rights".²⁷¹

296. Canada's LOAC Manual states that a "parlementaire and those who are in his or her party are entitled to complete inviolability, so long as they do nothing to abuse this protection, or to take advantage of their protected position [for example, by collecting information covertly]".²⁷²

297. Germany's Military Manual provides that:

The parlementaire loses his right of inviolability if it is proved in an incontestable manner that he has taken advantage of his privileged position to provoke or commit an act of treason . . . Such a case of misuse, which implies the right to detain the parlementaire . . . exists if the latter has committed acts contrary to international law and to the detriment of the adversary during his mission. This includes particularly the following activities:

- gathering intelligence beyond the observations he inevitably makes when accomplishing his mission;
- acts of sabotage;
- inducing soldiers of the adverse party to collaborate in collecting intelligence;
- instigating soldiers of the adverse party to refuse to do their duty;

²⁷⁰ Argentina, *Law of War Manual* (1969), § 6.003.

²⁷¹ Belgium, *Teaching Manual for Officers* (1994), Part I, Title II, p. 25.

²⁷² Canada, *LOAC Manual* (1999), p. 14-1, § 5.

- encouraging soldiers of the adverse party to desert; and
- organizing espionage in the territory of the adverse party.²⁷³

298. Italy's IHL Manual provides that the *parlementaire* who continues to advance, or does not withdraw after having been ordered to do so, loses the status of inviolability after sufficient time to withdraw has been given.²⁷⁴

The manual further states that if "the *parlementaire* takes advantage of his privileged position to accomplish or attempt to accomplish acts of treason, he loses the right to inviolability and can be punished according to wartime penal law".²⁷⁵

299. New Zealand's Military Manual states that:

The *parlementaire* and those with him are entitled to complete inviolability, so long as they do nothing to abuse this protection or to take advantage of their protected position . . .

When ordered to withdraw, the *parlementaire* must be given a reasonable time in which to do so. If he fails to withdraw, he loses his inviolability and may be fired upon.²⁷⁶

300. According to Spain's Field Regulations, *parlementaires* lose their inviolability and may be subject to severe punishment if they are "caught while collecting information or notes; violating in any manner the laws and customs of war . . . instigating prisoners to revolt; or inducing in any manner the populations to rise against the occupation army".²⁷⁷

301. Spain's LOAC Manual states that:

The *parlementaire* loses his inviolability if it is proved in an incontestable manner that he has taken advantage of his privileged situation to provoke or commit acts of treason, such as:

- Acts of sabotage.
- Inducing enemy soldiers to collect intelligence.
- Instigating enemy soldiers to refuse to do their duty.
- Encouraging soldiers to desert.
- Influencing negatively their morale.
- Organising espionage in enemy territory.²⁷⁸

302. Switzerland's Basic Military Manual states that "the *parlementaire* loses his right to inviolability if it is proven in a positive and incontestable manner that he has taken advantage of his privileged position to provoke or commit an act of treason".²⁷⁹

303. The UK Military Manual provides that, "if signalled or ordered to retire, [a *parlementaire*] must do so at once. If he does not do so within reasonable

²⁷³ Germany, *Military Manual* (1992), § 229.

²⁷⁴ Italy, *IHL Manual* (1991), Vol. I, § 54.

²⁷⁵ Italy, *IHL Manual* (1991), Vol. I, § 58.

²⁷⁶ New Zealand, *Military Manual* (1992), § 406(3) and (7).

²⁷⁷ Spain, *Field Regulations* (1882), § 902.

²⁷⁸ Spain, *LOAC Manual* (1996), Vol. I, § 2.6.c.(1).

²⁷⁹ Switzerland, *Basic Military Manual* (1987), Article 15.

time he loses his inviolability."²⁸⁰ The manual further states that "a *parlementaire* loses his right of inviolability if it is proved beyond any doubt that he has taken advantage of his privileged position to provoke or commit an act of treachery".²⁸¹

304. The US Field Manual states that "the *parlementaire* loses his right of inviolability if it is proved in a clear and incontestable manner that he has taken advantage of his privileged position to provoke or commit an act of treachery".²⁸²

305. The YPA Military Manual of the SFRY (FRY) provides that:

A *parlementaire* or the persons in his escort can be court-martialled if they do not respect the conditions determined by the commander who receives the *parlementaire* and that the *parlementaire* or the commander who sends him had accepted, if it is clear and incontestable that they used their privileged position to collect information of military nature, or if the other side sends them for perfidious purposes, with intent of its troops to do military actions under the protection of the white flag, and they know of that intent.²⁸³

National Legislation

306. Ecuador's National Civil Police Penal Code provides that "parlementaires shall lose their character [of inviolability] if they abuse their condition to commit acts in favour of the armed forces of the enemy nation".²⁸⁴

307. Italy's Law of War Decree as amended states that a *parlementaire* who continues to advance, or does not withdraw after having been ordered to do so, loses the status of inviolability after sufficient time to withdraw has been given.²⁸⁵ The Decree also states that a *parlementaire* who "takes advantage of his privileged position to commit acts of treason loses his right to inviolability".²⁸⁶

308. The commentary on the Penal Code as amended of the SFRY (FRY) provides that "if [a *parlementaire*] abuses [his] duty (in order to perform espionage, to try to film positions or to establish contact with other persons in order to recruit them, etc.), he is no longer entitled to immunity".²⁸⁷

National Case-law

309. No practice was found.

²⁸⁰ UK, *Military Manual* (1958), § 405.

²⁸¹ UK, *Military Manual* (1958), § 413.

²⁸² US, *Field Manual* (1956), § 466.

²⁸³ SFRY (FRY), *YPA Military Manual* (1988), § 131.

²⁸⁴ Ecuador, *National Civil Police Penal Code* (1960), Article 117(7).

²⁸⁵ Italy, *Law of War Decree as amended* (1938), Article 70.

²⁸⁶ Italy, *Law of War Decree as amended* (1938), Article 72.

²⁸⁷ SFRY (FRY), *Penal Code as amended* (1976), commentary on Article 149.

Other National Practice

310. No practice was found.

III. Practice of International Organisations and Conferences

311. No practice was found.

IV. Practice of International Judicial and Quasi-judicial Bodies

312. No practice was found.

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

313. To fulfil its task of disseminating IHL, the ICRC has delegates around the world teaching armed and security forces that bearers of a white flag “may not take advantage of their mission for intelligence purpose[s]”.²⁸⁸

VI. Other Practice

314. No practice was found.

²⁸⁸ Frédéric de Mulinen, *Handbook on the Law of War for Armed Forces*, ICRC, Geneva, 1987, § 540.

PART IV

USE OF WEAPONS

GENERAL PRINCIPLES ON THE USE OF WEAPONS

- A. Weapons of a Nature to Cause Superfluous Injury or Unnecessary Suffering (practice relating to Rule 70) §§ 1–261
- B. Weapons That Are by Nature Indiscriminate (practice relating to Rule 71) §§ 262–404
- C. Use of Prohibited Weapons §§ 405–461

A. Weapons of a Nature to Cause Superfluous Injury or Unnecessary Suffering

I. Treaties and Other Instruments

Treaties

1. The 1868 St. Petersburg Declaration provides that:

Considering:

That the progress of civilization should have the effect of alleviating as much as possible the calamities of war;

That the only legitimate object which States should endeavour to accomplish during war is to weaken the military forces of the enemy;

That for this purpose it is sufficient to disable the greatest possible number of men;

That this object would be exceeded by the employment of arms which uselessly aggravate the sufferings of disabled men, or render their death inevitable;

That the employment of such arms would, therefore, be contrary to the laws of humanity;

...

The Contracting or Acceding Parties reserve to themselves to come hereafter to an understanding whenever a precise proposition shall be drawn up in view of future improvements which science may effect in the armament of troops, in order to maintain the principles which they have established, and to conciliate the necessities of war with the laws of humanity.

2. The 1899 Hague Declaration concerning Asphyxiating Gases specifies that the contracting States are “inspired by the sentiments which found expression in the [1868] Declaration of St. Petersburg”.

3. The 1899 Hague Declaration concerning Expanding Bullets specifies that the contracting States are “inspired by the sentiments which found expression in the [1868] Declaration of St. Petersburg”.

4. Article 23(e) of the 1899 HR provides that it is “especially prohibited . . . to employ arms, projectiles, or material of a nature to cause superfluous injury”.

5. Article 23(e) of the 1907 HR provides that “it is especially forbidden . . . to employ arms, projectiles, or material calculated to cause unnecessary suffering”.

6. Article 35(2) AP I provides that “it is prohibited to employ weapons, projectiles and material and methods of warfare of a nature to cause superfluous injury or unnecessary suffering”. Article 35 AP I was adopted by consensus.¹

7. Article 20(2) of draft AP II submitted by the ICRC to the CDDH provided that “it is forbidden to employ weapons, projectiles, and material and methods of combat of a nature to cause superfluous injury or unnecessary suffering”.² This proposal was adopted by consensus in Committee III of the CDDH.³ Eventually, however, it was deleted in the plenary, after having been rejected by 25 votes in favour, 19 against and 33 abstentions.⁴

8. The preamble to the 1980 CCW provides that the States parties have based themselves “on the principle that prohibits the employment in armed conflicts of weapons, projectiles and material and methods of warfare of a nature to cause superfluous injury or unnecessary suffering”.

9. Upon ratification of the 1980 CCW, France stated that:

With reference to the scope of application defined in article 1 of the Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons, . . . it will apply the provisions of the Convention and its three Protocols to all armed conflicts referred to in articles 2 and 3 common to the Geneva Conventions of 12 August 1949.⁵

10. Upon accession to the 1980 CCW, Israel stated that:

With reference to the scope of application defined in article 1 of the Convention, the Government of the State of Israel will apply the provisions of the Convention and those annexed Protocols to which Israel has agreed to become bound to all armed conflicts involving regular forces of States referred to in article 2 common to the Geneva Conventions of 12 August 1949, as well as to all armed conflicts referred to in article 3 common to the Geneva Conventions of 12 August 1949.⁶

11. Upon signature of the 1980 CCW, Romania affirmed “once again its decision to act, together with other States, to ensure the prohibition or restriction of all conventional weapons which are excessively injurious”.⁷

¹ CDDH, *Official Records*, Vol. VI, CDDH/SR.39, 25 May 1977, p. 101.

² CDDH, *Official Records*, Vol. I, Part Three, Draft Additional Protocols, June 1973, p. 39.

³ CDDH, *Official Records*, Vol. XV, CDDH/III/SR.49, 4 June 1976, p. 107, § 2.

⁴ CDDH, *Official Records*, Vol. VII, CDDH/SR.51, 3 June 1977, p. 114.

⁵ France, Reservations made upon ratification of the CCW, 4 March 1988.

⁶ Israel, Declarations and understandings made upon accession to the CCW, 22 March 1995, § (a).

⁷ Romania, Declaration made upon signature of the CCW, 8 April 1982, § 5.

12. Upon ratification of the 1980 CCW, the US declared that:

With reference to the scope of application defined in article 1 of the Convention, . . . the United States will apply the provisions of the Convention, Protocol I, and Protocol II to all armed conflicts referred to in articles 2 and 3 common to the Geneva Conventions for the Protection of War Victims of August 12, 1949.⁸

13. Article 6(2) of the 1980 Protocol II to the CCW provides that “it is prohibited in all circumstances to use any booby-trap which is designed to cause superfluous injury or unnecessary suffering”.

14. Upon acceptance of the 1995 Protocol IV to the CCW, Sweden declared that:

Sweden has since long strived for explicit prohibition of the use of blinding laser which would risk causing permanent blindness to soldiers. Such an effect, in Sweden’s view is contrary to the principle of international law prohibiting means and methods of warfare which cause unnecessary suffering.⁹

15. Article 3(3) of the 1996 Amended Protocol II to the CCW provides that “it is prohibited in all circumstances to use any mine, booby-trap or other device which is designed or of a nature to cause superfluous injury or unnecessary suffering”.

16. According to the preamble to the 1997 Ottawa Convention, States parties based their agreement on various principles of IHL, including “the principle that prohibits the employment in armed conflicts of weapons, projectiles and materials and methods of warfare of a nature to cause superfluous injury or unnecessary suffering”.

17. Pursuant to Article 8(2)(b)(xx) of the 1998 ICC Statute, the following constitutes a war crime in international armed conflicts:

employing weapons, projectiles and material and methods of warfare which are of a nature to cause superfluous injury or unnecessary suffering . . . provided that such weapons, projectiles and material and methods of warfare are the subject of a comprehensive prohibition and are included in an annex to this Statute.

18. Upon signature of the 1998 ICC Statute, Egypt stated that it understood Article 8 of the Statute as follows:

The provisions of the Statute with regard to the war crimes referred to in article 8 in general and article 8, paragraph 2(b) in particular shall apply irrespective of the means by which they were perpetrated or the type of weapon used, including nuclear weapons, which . . . cause unnecessary damage, in contravention of international humanitarian law.¹⁰

19. In 2001, States parties decided to amend Article 1 of the 1980 CCW governing its scope as follows:

⁸ US, Declaration made upon ratification of the CCW, 24 March 1995.

⁹ Sweden, Declaration made upon acceptance of Protocol IV to the CCW, 15 January 1997.

¹⁰ Egypt, Declarations made upon signature of the 1998 ICC Statute, 26 December 2000, § 4(a).

1. This Convention and its annexed Protocols shall apply in the situations referred to in Article 2 common to the Geneva Conventions of 12 August 1949 for the Protection of War Victims, including any situation described in paragraph 4 of Article I of Additional Protocol I to these Conventions [international armed conflicts].
2. This Convention and its annexed Protocols shall also apply, in addition to situations referred to in paragraph 1 of this Article, to situations referred to in Article 3 common to the Geneva Conventions of 12 August 1949 [non-international armed conflicts]. This Convention and its annexed Protocols shall not apply to situations of internal disturbances and tensions, such as riots, isolated and sporadic acts of violence, and other acts of a similar nature, as not being armed conflicts.

Other Instruments

20. Article 16 of the 1863 Lieber Code states that “military necessity does not admit of cruelty – that is, the infliction of suffering for the sake of suffering”.

21. Article 16(2) of the 1913 Oxford Manual of Naval War provides that “it is forbidden . . . to employ arms, projectiles, or materials calculated to cause unnecessary suffering”.

22. Based on several documents supplying evidence of outrages committed during the First World War, the 1919 Report of the Commission on Responsibility lists violations of the laws and customs of war which should be subject to criminal prosecution, including the “use of . . . inhuman appliances”.

23. Paragraph 2 of the 1990 Basic Principles on the Use of Force and Firearms by Law Enforcement Officials provides that:

Governments and law enforcement agencies should develop a range of means as broad as possible and equip law enforcement officials with various types of weapons and ammunition that would allow for a differentiated use of force and firearms. These should include the development of non-lethal incapacitating weapons for use in appropriate situations, with a view to increasingly restraining the application of means capable of causing death or injury to persons. For the same purpose, it should also be possible for law enforcement officials to be equipped with self-defensive equipment such as shields, helmets, bullet-proof vests and bullet-proof means of transportation, in order to decrease the need to use weapons of any kind.

24. Paragraph 11(c) of the 1990 Basic Principles on the Use of Force and Firearms by Law Enforcement Officials provides that “rules and regulations on the use of firearms by law enforcement officials should include guidelines that . . . prohibit the use of those firearms and ammunition that cause unwarranted injury or present an unwarranted risk”.

25. Paragraph 6 of the 1991 Memorandum of Understanding on the Application of IHL between Croatia and the SFRY requires that hostilities be conducted in accordance with Article 35(2) AP I and the 1980 Protocol II to the CCW.

26. Paragraph 2.5 of the 1992 Agreement on the Application of IHL between the Parties to the Conflict in Bosnia and Herzegovina requires that hostilities

be conducted in accordance with Article 35(2) AP I and the 1980 Protocol II to the CCW.

27. Article 3 of the 1993 ICTY Statute provides that:

The International Tribunal shall have the power to prosecute persons violating the laws or customs of war. Such violations shall include, but not be limited to:

- (a) employment of poisonous weapons or other weapons calculated to cause unnecessary suffering.

28. Paragraph 42(a) of the 1994 San Remo Manual states that “it is forbidden to employ methods or means of warfare which are of a nature to cause superfluous injury or unnecessary suffering”.

29. Pursuant to Article 20(e)(i) of the 1996 ILC Draft Code of Crimes against the Peace and Security of Mankind, “employment of . . . weapons calculated to cause unnecessary suffering” is a war crime.

30. Section 6.4 of the 1999 UN Secretary-General’s Bulletin provides that “the United Nations force is prohibited from using weapons or methods of combat of a nature to cause unnecessary suffering”.

31. The 2000 UNTAET Regulation No. 2000/15 establishes panels with exclusive jurisdiction over serious criminal offences, including war crimes. According to Section 6(1)(b)(xx), “employing weapons, projectiles and material and methods of warfare which are of a nature to cause superfluous injury or unnecessary suffering” constitutes a war crime in international armed conflicts.

II. National Practice

Military Manuals

32. Argentina’s Law of War Manual (1969) states that “the use of weapons, projectiles or material which can cause unnecessary suffering” is especially prohibited. It adds that “the projectiles and weapons covered by this prohibition shall be determined solely by the common practice of States to refrain from using certain means of warfare in recognition that they cause such suffering”.¹¹

33. Argentina’s Law of War Manual (1989) provides that “the use of weapons, projectiles, materials and methods of warfare of a nature to cause superfluous injury or unnecessary suffering is prohibited”.¹²

34. Australia’s Commanders’ Guide states that “some weapons and weapons systems are totally prohibited. These blanket prohibitions, which may be traced to treaty or customary international law, are justified on the grounds that the subject weapons are either indiscriminate in their effect or cause unnecessary suffering.”¹³ It adds that “both chemical and biological weapons are prohibited because they cause unnecessary suffering and may affect the civilian population

¹¹ Argentina, *Law of War Manual* (1969), § 1.008(1).

¹² Argentina, *Law of War Manual* (1989), § 1.04(2).

¹³ Australia, *Commanders’ Guide* (1994), § 304.

in an indiscriminate fashion".¹⁴ Likewise, munitions which produce fragments undetectable by X-ray machines and hollow point weapons are prohibited based upon the principle of unnecessary suffering.¹⁵ The Guide also provides that "it is prohibited to employ weapons, projectiles, materiel and methods of warfare of a nature to cause superfluous injury or unnecessary suffering... Use of the following types of weapons is prohibited: a. weapons calculated to cause unnecessary suffering."¹⁶ With respect to weapons which are deemed as legal, the Guide states that "all legal weapons are limited in the way in which they may be used. Specifically, no weapons may be used... in such a way as to cause unnecessary suffering."¹⁷

35. Australia's Defence Force Manual provides that:

The principle of unnecessary suffering forbids the use of means and methods of warfare which are calculated to cause suffering which is excessive in the circumstances. It has also been expressed as the infliction of suffering, injury or destruction not actually necessary for the accomplishment of legitimate military objectives.¹⁸

The manual adds that:

Weapons, projectiles, materials and means of warfare which cause unnecessary suffering are not permissible, that is, when the practical effect is to cause injury or suffering which is out of proportion to the military effectiveness of the weapon, projectile, material or means. Limitations on the use of weapons fall into two broad categories, namely:

- a. prohibited weapons, and
- b. the illegal use of lawful weapons.

...

Weapon use will be unlawful under LOAC when it breaches the principle of proportionality by causing unnecessary injury or suffering.¹⁹

The manual further states that "some weapons and weapons systems are totally prohibited. These blanket prohibitions, which may be traced to treaty or customary international law are justified on the grounds that the subject weapons are either indiscriminate in their effect or cause unnecessary suffering."²⁰ In this respect, the manual prohibits the use of "weapons calculated or modified to cause unnecessary suffering".²¹ Likewise, "both chemical and biological weapons are prohibited because they cause unnecessary suffering and may affect the civilian population in an indiscriminate fashion".²² With

¹⁴ Australia, *Commanders' Guide* (1994), § 306.

¹⁵ Australia, *Commanders' Guide* (1994), §§ 308 and 309.

¹⁶ Australia, *Commanders' Guide* (1994), §§ 930 and 932(a).

¹⁷ Australia, *Commanders' Guide* (1994), § 311.

¹⁸ Australia, *Defence Force Manual* (1994), § 207.

¹⁹ Australia, *Defence Force Manual* (1994), §§ 401 and 402.

²⁰ Australia, *Defence Force Manual* (1994), § 404.

²¹ Australia, *Defence Force Manual* (1994), § 405.

²² Australia, *Defence Force Manual* (1994), § 414.

respect to weapons which are deemed as legal, the manual states that “all legal weapons are limited in the way in which they may be used. Specifically, no weapons may be used . . . in such a way as to cause unnecessary injury or suffering.”²³ With respect to booby-traps, the manual states that “those that are used must not be designed to cause unnecessary injury or suffering.”²⁴

36. Belgium’s Law of War Manual provides that the use of weapons or means and methods of warfare which render death inevitable or cause unnecessary suffering is illegal.²⁵

37. Belgium’s Teaching Manual for Officers defines the concept of unnecessary suffering as “suffering . . . that needlessly adds to that already inflicted on the enemy to render him *hors de combat*”. It provides that “it is prohibited to use weapons for the purpose of causing superfluous injury rather than for their military effectiveness”.²⁶

38. Belgium’s Teaching Manual for Soldiers states that “combatants must refrain from causing superfluous injury or unnecessary suffering to persons and unnecessary damage to property”.²⁷

39. Benin’s Military Manual states that “it is prohibited to resort to weapons or methods of warfare of a nature to cause unnecessary losses or superfluous injury”.²⁸

40. Bosnia and Herzegovina’s Military Instructions states that “it is prohibited to use weapons which cause excessive suffering”.²⁹

41. Burkina Faso’s Disciplinary Regulations states that, under the laws and customs of war, it is prohibited “to use any means [of warfare] that causes unnecessary suffering and damage”.³⁰

42. Cameroon’s Disciplinary Regulations provides that, under the laws and customs of war, it is prohibited “to use any means [of warfare] that causes unnecessary suffering and damage”.³¹

43. Cameroon’s Instructors’ Manual provides that “it is prohibited to employ weapons of a nature to cause . . . superfluous injury”.³²

44. Canada’s LOAC Manual states that “weapons, projectiles, materials and means of warfare that cause superfluous injury or unnecessary suffering are prohibited”.³³ It adds that “weapons, projectiles, material or means of warfare

²³ Australia, *Defence Force Manual* (1994), § 415.

²⁴ Australia, *Defence Force Manual* (1994), § 428, see also § 431 (air warfare).

²⁵ Belgium, *Law of War Manual* (1983), p. 37.

²⁶ Belgium, *Teaching Manual for Officers* (1994), p. 36, § 17(1).

²⁷ Belgium, *Teaching Manual for Soldiers* (undated), p. 11.

²⁸ Benin, *Military Manual* (1995), Fascicule II, p. 5.

²⁹ Bosnia and Herzegovina, *Military Instructions* (1992), Item 11, § 1.

³⁰ Burkina Faso, *Disciplinary Regulations* (1994), Article 35(2).

³¹ Cameroon, *Disciplinary Regulations* (1975), Article 32.

³² Cameroon, *Instructors’ Manual* (1992), p. 95, § I.

³³ Canada, *LOAC Manual* (1999), p. 5-1, § 2, see also p. 5-2, § 10.

must not cause injury or suffering which is out of proportion to its military effectiveness".³⁴ As regards lawful weapons, it states that "legal weapons are limited in the way in which they may be used. Specifically, no weapons may be used . . . in such a way as to cause superfluous injury or unnecessary suffering."³⁵ The manual further provides that "employing arms or other weapons that are calculated to cause unnecessary suffering" constitutes a war crime.³⁶

45. Canada's Code of Conduct instructs CF personnel: "Do not alter your weapons or ammunition to increase suffering."³⁷ It goes on to say that:

The use of weapons or ammunition that cause unnecessary suffering is unlawful . . .

...

When force is used, suffering is likely to result. However, the infliction of unnecessary suffering is prohibited. "Unnecessary suffering" refers to infliction of injuries or suffering beyond what is required to achieve the military aim.

...

Remember that even lawful weapons cannot be used in a manner that causes unnecessary suffering.³⁸

46. Colombia's Circular on Fundamental Rules of IHL provides that "using weapons or methods of warfare which can cause superfluous injury or unnecessary suffering is prohibited".³⁹

47. Colombia's Basic Military Manual states that employing weapons which "cause unnecessary and indiscriminate, extensive, lasting and serious damage to people" is prohibited.⁴⁰

48. Congo's Disciplinary Regulations provides that, under the laws and customs of war, it is prohibited "to use any means [of warfare] that causes unnecessary suffering and damage".⁴¹

49. Croatia's LOAC Compendium considers as a prohibited method of warfare the "use of means and methods of combat resulting in unnecessary suffering".⁴²

50. Croatia's Commanders' Manual states that "weapons causing unnecessary suffering may not be used".⁴³

51. The Military Manual of the Dominican Republic instructs troops: "Remember that any method of warfare which causes unnecessary injury or suffering is prohibited." It adds that "the law of war does not allow you to alter your weapons in order to cause unnecessary injury or suffering to the enemy".⁴⁴

³⁴ Canada, *LOAC Manual* (1999), p. 5-1, § 3.

³⁵ Canada, *LOAC Manual* (1999), p. 5-3, § 32.

³⁶ Canada, *LOAC Manual* (1999), p. 16-3, § 20(e).

³⁷ Canada, *Code of Conduct* (2001), Rule 3.

³⁸ Canada, *Code of Conduct* (2001), Rule 3, §§ 1, 5 and 6.

³⁹ Colombia, *Circular on Fundamental Rules of IHL* (1992), § 6.

⁴⁰ Colombia, *Basic Military Manual* (1995), pp. 49-50.

⁴¹ Congo, *Disciplinary Regulations* (1986), Article 32(2).

⁴² Croatia, *LOAC Compendium* (1991), p. 40.

⁴³ Croatia, *Commanders' Manual* (1992), § 45.

⁴⁴ Dominican Republic, *Military Manual* (1980), p. 5.

52. Ecuador's Naval Manual provides that:

It is a fundamental tenet of the law of armed conflict that the right of nations engaged in armed conflict to choose methods or means of warfare is not unlimited. This rule of law is expressed in the prohibition of the employment of weapons, material, and methods of warfare that are designed to cause superfluous injury or unnecessary suffering.

...

Antipersonnel weapons are designed to kill or disable enemy combatants and are lawful notwithstanding the death, pain, and suffering they inflict. Weapons which cause superfluous injury or unnecessary suffering are, however, prohibited because the degree of pain, the severity of the injuries and the certainty of death they entail are clearly out of all proportion to the military advantage sought. Poisoned projectiles and dum-dum bullets belong in this category since the small military advantage that may be derived from their use guarantees death due to poisoning or to the expanding effect of soft-nosed or unjacketed lead bullets.

Similarly, using materials that are difficult to detect or undetectable by field X-ray equipment, such as glass or clear plastic, as the injuring mechanism in military ammunition is prohibited, since they unnecessarily inhibit the treatment of wounds.⁴⁵

53. France's Disciplinary Regulations as amended provides that it is prohibited "to use any means [of warfare] that causes unnecessary suffering and damage".⁴⁶

54. France's LOAC Summary Note states that "it is prohibited to use... weapons... of a nature to cause unnecessary losses or excessive suffering".⁴⁷

55. France's LOAC Teaching Note states that, "owing to their inhumane nature or to their excessive traumatic effect", the use of poison, chemical weapons, biological and bacteriological weapons, dum-dum bullets or other projectiles with expanding heads, anti-personnel mines, weapons that injure by non-detectable fragments, blinding laser weapons, and torpedoes without self-destruction mechanisms "is totally prohibited by the law of armed conflicts".⁴⁸

56. France's LOAC Manual states that, "owing to their inhuman nature or to their excessive traumatic effect", the use of poison, chemical weapons, biological and bacteriological weapons, dum-dum bullets or other projectiles with expanding heads, anti-personnel mines, weapons that injure by non-detectable fragments, blinding laser weapons, and torpedoes without self-destruction mechanisms "is totally prohibited by the law of armed conflicts".⁴⁹

57. Germany's Soldiers' Manual provides that "it is prohibited to use means or methods of warfare which are intended or of a nature to cause superfluous injuries or unnecessary suffering (e.g. dum-dum bullets)".⁵⁰

⁴⁵ Ecuador, *Naval Manual* (1989), §§ 9.1 and 9.1.1.

⁴⁶ France, *Disciplinary Regulations as amended* (1975), Article 9 bis (2).

⁴⁷ France, *LOAC Summary Note* (1992), § 4. ⁴⁸ France, *LOAC Teaching Note* (2000), p. 6.

⁴⁹ France, *LOAC Manual* (2001), p. 54, see also p. 97.

⁵⁰ Germany, *Soldiers' Manual* (1991), p. 5.

58. Germany's Military Manual states that:

It is particularly prohibited to employ means or methods which are intended or of a nature:

- to cause superfluous injury or unnecessary suffering...

...

"Superfluous injury" or "unnecessary suffering" is caused by the use of means... of combat whose presumable harm would definitely be excessive in relation to the lawful military advantage intended.

...

In the 1868 St. Petersburg Declaration the use of explosive and incendiary projectiles under 400 grammes was prohibited, since these projectiles were deemed to cause disproportionately severe injuries to soldiers, which is not necessary for putting them out of action...

...

It is prohibited to use bullets which expand or flatten easily in the human body (e.g. dum-dum bullets)... This applies also to the use of shotguns, since shot causes similar suffering unjustified from the military point of view.⁵¹

59. Germany's IHL Manual states that "it is prohibited, in particular, to employ means or methods of warfare, which are intended to or of a nature to cause superfluous injury or unnecessary suffering".⁵² The manual further states that:

International humanitarian law prohibits the use of a number of means of warfare which are of a nature to violate the principle of humanity and to cause unnecessary suffering, e.g.

- bullets which easily expand or flatten in the human body, so-called dum-dum bullets,
- weapons whose primary effect is to injure by fragments which in the human body escape detection by X-rays, e.g. plastic or glass ammunition,
- explosive traps, when used in the form of an apparently harmless portable object, e.g. disguised as children's toys,
- bacteriological means of warfare, e.g. substances which cause disease,
- chemical means of warfare, e.g. poisonous gases.⁵³

60. Hungary's Military Manual includes, as a "basic rule", the obligation to "avoid unnecessary suffering, excessive damage and the use of more force than required to overpower the enemy". It also considers as a prohibited method of warfare the "use of means and methods of combat resulting in unnecessary suffering".⁵⁴**61.** According to Indonesia's Air Force Manual, it is prohibited to employ weapons which cause unnecessary suffering.⁵⁵**62.** With reference to Israel's Law of War Booklet, the Report on the Practice of Israel states that "Israel and the IDF accept and comply with the provisions

⁵¹ Germany, *Military Manual* (1992), §§ 401, 402 and 406–407, see also § 415.

⁵² Germany, *IHL Manual* (1996), § 302. ⁵³ Germany, *IHL Manual* (1996), § 305.

⁵⁴ Hungary, *Military Manual* (1992), pp. 59 and 64.

⁵⁵ Indonesia, *Air Force Manual* (1990), § 15(b)(5).

of customary international law in relation to the prohibitions and restrictions on the use of weapons" which cause superfluous and unnecessary suffering.⁵⁶

63. Israel's Manual on the Laws of War states that "since St. Petersburg, there have been several universally accepted rules regarding weapons: . . . Weapons causing needless suffering are prohibited."⁵⁷

64. Italy's IHL Manual provides that "the use of means and methods of warfare of a nature to cause . . . superfluous injuries and unnecessary suffering is prohibited".⁵⁸

65. Italy's LOAC Elementary Rules Manual states that "weapons causing unnecessary suffering may not be used".⁵⁹

66. Kenya's LOAC Manual provides that "it is prohibited to employ weapons, projectiles and methods and materials of warfare of a nature to cause superfluous injury".⁶⁰

67. South Korea's Operational Law Manual states that weapons which cause unnecessary suffering are prohibited.⁶¹

68. Madagascar's Military Manual states that "weapons causing unnecessary suffering shall not be used".⁶²

69. Mali's Army Regulations provides that, under the laws and customs of war, it is prohibited "to use any means [of warfare] that causes unnecessary suffering and damage".⁶³

70. Morocco's Disciplinary Regulations provides that, under the laws and customs of war, it is prohibited "to use any means [of warfare] that causes unnecessary suffering and damage".⁶⁴

71. The Military Manual of the Netherlands states that parties to an armed conflict "may not use means (weapons, projectiles and substances) and methods which cause unnecessary suffering or superfluous injury". The manual gives dum-dum bullets, serrated-edged bayonets or weapons injuring by non-detectable fragments are examples of such means of warfare.⁶⁵

72. The Military Handbook of the Netherlands states that "means which cause unnecessary suffering with respect to the objective (elimination of the enemy) may not be used". It gives as examples of such means of warfare: "poison and poisoned weapons, dum-dum bullets, serrated-edged bayonets, weapons whose primary effect is to injure by fragments which cannot be detectable by X-ray, booby-traps attached to the Red Cross Emblem, wounded or dead person, [and] medical objects or toys".⁶⁶

⁵⁶ Report on the Practice of Israel, 1997, Chapter 3.1, referring to *Law of War Booklet* (1986), p. 11.

⁵⁷ Israel, *Manual on the Laws of War* (1998), p. 11. ⁵⁸ Italy, *IHL Manual* (1991), Vol. I, § 7.

⁵⁹ Italy, *LOAC Elementary Rules Manual* (1991), § 45.

⁶⁰ Kenya, *LOAC Manual* (1997), Précis No. 2, p. 2.

⁶¹ South Korea, *Operational Law Manual* (1996), p. 129.

⁶² Madagascar, *Military Manual* (1994), Fiche No. 6-O, § 13.

⁶³ Mali, *Army Regulations* (1979), Article 36.

⁶⁴ Morocco, *Disciplinary Regulations* (1974), Article 25(2).

⁶⁵ Netherlands, *Military Manual* (1993), pp. IV-1 and IV-7.

⁶⁶ Netherlands, *Military Handbook* (1995), pp. 7-36 and 7-39.

73. New Zealand's Military Manual provides that:

It is prohibited to employ weapons, projectiles and material of a nature to cause superfluous injury or unnecessary suffering. A weapon causes unnecessary suffering when in practice it inevitably causes injury or suffering disproportionate to its military effectiveness. In determining the military effectiveness of a weapon one looks at the primary purpose for which it was designed.⁶⁷

The manual further states that:

Examples of such weapons include such weapons as lances with a barbed head, irregularly-shaped bullets, projectiles filled with broken glass, and the like. The scoring of the surface of bullets, the filing off of the end of their hard case, and the smearing on them of any substance likely to inflame a wound, are also prohibited. Generally speaking, weapons which are agreed to cause unnecessary suffering are home-made weapons or unofficial modifications of weapons issued through normal channels.⁶⁸

Lastly, the manual states that "employing arms or other weapons which are calculated to cause unnecessary suffering" constitutes a war crime.⁶⁹

74. Nigeria's Military Manual states that it is prohibited "to employ arms, projectiles or material aimed at causing unnecessary suffering".⁷⁰ It further states that:

The basic principles are that every commander has the right to choose the means and methods of the type of warfare to be executed, to avoid unnecessary suffering and damage to men and material... The principle of avoiding unnecessary suffering and damage prohibits all forms of violence that are not required for the over-powering of the enemy.⁷¹

75. Nigeria's Manual on the Laws of Wars states that "it is expressly forbidden to use arms, projectiles or materials calculated to cause unnecessary suffering".⁷²

76. Nigeria's Soldier's Code of Conduct provides that it is prohibited "to employ arms, projectiles or material aimed at causing unnecessary suffering".⁷³

77. Romania's Soldier's Manual states that "the rules of humanitarian law prohibit causing unnecessary losses and excessive suffering to the adversary".⁷⁴

78. Russia's Military Manual provides that:

Prohibited means of warfare are the various weapons of an indiscriminate character and/or those that cause unnecessary suffering:

⁶⁷ New Zealand, *Military Manual* (1992), § 509(2) (land warfare) and § 616(2) (air warfare), see also §§ 510(1)(a) and 707(2) (naval warfare).

⁶⁸ New Zealand, *Military Manual* (1992), § 510(1)(a), footnote 44, see also § 1704(2)(e), footnote 37.

⁶⁹ New Zealand, *Military Manual* (1992), § 1704(2)(e).

⁷⁰ Nigeria, *Military Manual* (1994), pp. 39–40, § 5(1)(iv).

⁷¹ Nigeria, *Military Manual* (1994), p. 42, § 11.

⁷² Nigeria, *Manual on the Laws of War* (undated), § 11.

⁷³ Nigeria, *Soldiers' Code of Conduct* (undated), § 12(e).

⁷⁴ Romania, *Soldier's Manual* (1991), p. 34.

- a) bullets that expand or flatten easily in the human body;
- b) projectiles used with the only purpose to spread asphyxiating or poisonous gases;
- c) projectiles weighing less than 400 grammes, which are either explosive or charged with fulminating or inflammable substances;
- d) poisons or poisoned weapons;
- e) asphyxiating, poisonous or other similar gases and bacteriological means;
- f) bacteriological (biological) and toxin weapons;
- g) environmental modification techniques having widespread, long-term or serious effects as means of destruction, damage or injury;
- h) all types of weapons of an indiscriminate character or that cause excessive injury or suffering.⁷⁵

79. Senegal's Disciplinary Regulations provides that, under the laws and customs of war, it is prohibited "to use any means [of warfare] that causes unnecessary suffering and damage".⁷⁶

80. South Africa's LOAC Manual states that:

A basic principle of the LOAC is the prevention of unnecessary suffering. The test in relation to a particular weapon is whether the suffering occasioned by its use is needless, superfluous, or grossly disproportionate to the advantage gained.

- i. Weapons which are calculated to cause unnecessary suffering are illegal per se. Such weapons include barbed spears, dum-dum bullets, weapons filled with glass and weapons that inflame wounds.
- ii. Legal weapons may not be used in a manner which cause unnecessary suffering.⁷⁷

81. Spain's LOAC Manual states that "the right to choose means and methods of warfare is limited by the principle according to which unnecessary suffering and superfluous injury shall be avoided".⁷⁸ It further states that "weapons causing unnecessary suffering may not be used".⁷⁹

82. Sweden's IHL Manual considers the "prohibition of methods or means of warfare which cause superfluous injury or unnecessary suffering", as contained in Article 35(2) AP I, as a customary rule of international law.⁸⁰ It further states that, according to the criteria given in the St. Petersburg Declaration and in the 1907 Hague Convention (IV),

Weapons shall be considered particularly inhuman if they:

- cause unnecessary suffering or superfluous damage, or
- have indiscriminate effects, meaning that the weapon effects strike military objectives and civilian persons without any distinction.

⁷⁵ Russia, *Military Manual* (1990), § 6.

⁷⁶ Senegal, *Disciplinary Regulations* (1990), Article 34(2).

⁷⁷ South Africa, *LOAC Manual* (1996), § 34(f).

⁷⁸ Spain, *LOAC Manual* (1996), Vol. I, § 2.3.b.(3).

⁷⁹ Spain, *LOAC Manual* (1996), Vol. I, § 10.8.e.(1).

⁸⁰ Sweden, *IHL Manual* (1991), Section 2.2.3, p. 18.

These criteria have been used in all arms limitation negotiations in recent years.⁸¹

83. Switzerland's Basic Military Manual states that belligerents "must not use weapons, projectiles, toxic gases or means of combat that cause unnecessary suffering".⁸²

84. Togo's Military Manual states that "it is prohibited to resort to weapons or methods of warfare of a nature to cause unnecessary losses or superfluous injury".⁸³

85. The UK Military Manual stresses that:

It is expressly forbidden to employ arms, projectiles or material calculated to cause unnecessary suffering. Under this heading may be included such weapons as lances with a barbed head, irregularly-shaped bullets, projectiles filled with broken glass, and the like. The scoring of the surface of bullets, the filing off of the end of their hard case, and the smearing on them of any substance likely to inflame a wound, are also prohibited.

...

The prohibition is not, however, intended to apply to the use of explosives contained in mines, aerial torpedoes and hand-grenades. The use of flame throwers and napalm bombs when directed against military targets is lawful. However, their use against personnel is contrary to the law of war in so far as it is calculated to cause unnecessary suffering.⁸⁴

86. The UK LOAC Manual states that "the following are prohibited in *international* armed conflict: . . . d. arms, projectiles or material intended to cause excessive injury or suffering".⁸⁵ (emphasis in original)

87. The US Field Manual states that:

It is especially forbidden to employ arms, projectiles, or material calculated to cause unnecessary suffering.

What weapons cause "unnecessary injury" can only be determined in light of the practice of States in refraining from the use of a given weapon because it is believed to have that effect . . . Usage, has, however, established the illegality of the use of lances with barbed heads, irregular-shaped bullets, and projectiles filled with glass, the use of any substance on bullets that would tend unnecessarily to inflame a wound inflicted by them, and the scoring of the surface or the filing off of the ends of the hard cases of bullets.⁸⁶

88. The US Air Force Pamphlet provides that:

It is forbidden to employ weapons, projectiles, and material and methods of warfare of a nature to cause superfluous injury or unnecessary suffering. This rule is a matter of customary international law . . .

The rule prohibiting the use of weapons causing unnecessary suffering or superfluous injury is firmly established in international law . . . This prohibition against

⁸¹ Sweden, *IHL Manual* (1991), Section 3.3.1, pp. 78–79.

⁸² Switzerland, *Basic Military Manual* (1987), Article 17.

⁸³ Togo, *Military Manual* (1996), Fascicule II, p. 5.

⁸⁴ UK, *Military Manual* (1958), § 110 and footnote 1.

⁸⁵ UK, *LOAC Manual* (1981), Section 5, p. 20, § 1(d).

⁸⁶ US, *Field Manual* (1956), § 34.

unnecessary suffering is a concrete expression of the general principles of proportionality and humanity. The rule reflects interests of combatants in avoiding needless suffering. Weapons are lawful, within the meaning of the prohibition against unnecessary suffering, so long as the foreseeable injury and suffering associated with wounds caused by such weapons are not disproportionate to the necessary military use of the weapon in terms of factors such as effectiveness against particular targets and available alternative weapons. What weapons or methods of warfare cause *unnecessary suffering*, and hence are unlawful *per se*, is best determined in the light of the practice of states. All weapons cause suffering. The critical factor in the prohibition against unnecessary suffering is whether the suffering is needless or disproportionate to the military advantages secured by the weapon, not the degree of suffering itself. International agreements may give specific content to the principle in the form of specific agreements to refrain from the use of particular weapons or methods of warfare. Thus, international law has condemned dum dum or exploding bullets because of types of injuries and inevitability of death.⁸⁷ [emphasis in original]

The Pamphlet also states that “the long-standing customary prohibition against poison is based on their uncontrolled character and the inevitability of death or permanent disability”.⁸⁸ It further adds that “a new weapon or method of warfare may be illegal, *per se*, if it is restricted by international law including treaty or international custom . . . [T]he legality of new weapons . . . is determined by whether the weapon’s effects violate the rule against unnecessary suffering.”⁸⁹

89. The US Air Force Commander’s Handbook states that:

Weapons that cause unnecessary suffering or superfluous injury are prohibited. Note that the degree of suffering is not the principal issue; the true test is whether the suffering is needless or disproportionate to the military advantage expected from the use of the weapon.

- (1) Thus, poisoned bullets are felt to cause unnecessary suffering since a person injured by modern military ammunition will ordinarily be placed out of the fighting by that alone; there is very little military advantage to be gained [by] making sure of the death of wounded persons through poison since they will be out of the battle when the poison takes effect.
- (2) Similarly, using clear glass as the injuring mechanism in an explosive projectile or bomb is prohibited, since glass is difficult for surgeons to detect in a wound and impedes treatment.⁹⁰

90. The US Soldier’s Manual stresses that “the law of war does not allow you to alter your weapons in order to cause unnecessary injury or suffering to the enemy”.⁹¹

91. The US Instructor’s Guide states that:

The customary law of war and the [1907] Hague Regulations . . . limit the weapons the armed force can use. Under the Hague Regulations, the employment of arms, material, or projectiles designed to cause unnecessary suffering is prohibited. These

⁸⁷ US, *Air Force Pamphlet* (1976), § 6-3(b)(1) and (2). ⁸⁸ US, *Air Force Pamphlet* (1976), § 6-4f.

⁸⁹ US, *Air Force Pamphlet* (1976), 6-7(a).

⁹⁰ US, *Air Force Commander’s Handbook* (1980), § 6-2a.

⁹¹ US, *Soldier’s Manual* (1984), p. 11, see also p. 10.

principles have outlawed irregular-shaped bullets such as dum-dum bullets, projectiles filled with glass, and any substances or projectiles that would tend to inflame a wound. [The US] Field Manual 27-10 states, in paragraph 34, that whether weapons cause unnecessary injury "... can only be determined in the light of the practice of the States in refraining from the use of a given weapon because it is believed to have that effect" ...

It is possible... for a soldier to violate the law of war by misusing an issued weapon or using it at the wrong time or in the wrong place. An example of misusing a legitimate weapon would be cutting off the tip of a bullet. When the bullet hits someone, it expands and leaves a gaping wound. Such bullets cause unnecessary suffering and are forbidden. This misuse of a legitimate weapon is a crime for which you can be prosecuted.⁹²

92. The US Operational Law Handbook states that "using weapons which cause unnecessary suffering" is "expressly prohibited by the law of war and [is] not excusable on the basis of military necessity".⁹³

93. The US Naval Handbook provides that:

It is a fundamental tenet of the law of armed conflict that the right of nations engaged in armed conflict to choose methods or means of warfare is not unlimited. This rule of law is expressed in the concept that the employment of weapons, material, and methods of warfare that are designed to cause superfluous injury or unnecessary suffering is prohibited.

...

Antipersonnel weapons are designed to kill or disable enemy combatants and are lawful notwithstanding the death, pain, and suffering they inflict. Weapons that are designed to cause unnecessary suffering or superfluous injury are, however, prohibited because the degree of pain or injury, or the certainty of death they produce is needlessly or clearly disproportionate to the military advantage to be gained by their use. Poisoned projectiles and small arms ammunition intended to cause superfluous injury or unnecessary suffering fall into this category. Similarly, using materials that are difficult to detect or undetectable by field x-ray equipment, such as glass or clear plastic, as the injuring mechanism in military ammunition is prohibited, since they unnecessarily inhibit the treatment of wounds.⁹⁴

94. The YPA Military Manual of the SFRY (FRY) prohibits the use of weapons and material that cause unnecessary suffering. A commentary on this prohibition states that it concerns weapons causing "suffering disproportionate to the military objective achieved" and gives the example of dum-dum bullets.⁹⁵

National Legislation

95. Argentina's Draft Code of Military Justice punishes "any soldier who, on the occasion of an armed conflict, uses or orders to be used methods or means of combat ... designed to cause unnecessary suffering or superfluous injury".⁹⁶

⁹² US, *Instructor's Guide* (1985), p. 7.

⁹³ US, *Operational Law Handbook* (1993), p. Q-182, § (i).

⁹⁴ US, *Naval Handbook* (1995), §§ 9.1 and 9.1.1.

⁹⁵ SFRY (FRY), *YPA Military Manual* (1988), § 96.

⁹⁶ Argentina, *Draft Code of Military Justice* (1998), Article 290, introducing a new Article 874 in the *Code of Military Justice as amended* (1951).

96. Azerbaijan's Criminal Code provides that the "use of methods and means of warfare which can cause serious damage" constitutes a war crime in international and non-international armed conflicts.⁹⁷

97. The Criminal Code of Belarus provides that "the use of means or methods of warfare which can be considered as causing excessive traumatic effects" is a war crime.⁹⁸

98. Under Burundi's Draft Law on Genocide, Crimes against Humanity and War Crimes, the following constitutes a war crime in international armed conflicts: "employing weapons, projectiles, materials and methods of combat which are of a nature to cause superfluous injury or unnecessary suffering . . . provided that such weapons, projectiles, material and methods of combat are the subject of a comprehensive prohibition".⁹⁹

99. Canada's Crimes against Humanity and War Crimes Act provides that the war crimes defined in Article 8(2) of the 1998 ICC Statute are "crimes according to customary international law" and, as such, indictable offences under the Act.¹⁰⁰

100. China's Law Governing the Trial of War Criminals provides that "employment of inhuman weapons" constitutes a war crime.¹⁰¹

101. Colombia's Decree on the Control of Firearms, Ammunition and Explosives states that firearms which have undergone substantial modification in manufacture or origin to make them more deadly are prohibited.¹⁰²

102. Colombia's Penal Code imposes a criminal sanction on "anyone who, during an armed conflict, uses means and methods of warfare . . . whose aim is to cause unnecessary suffering and loss or superfluous injury".¹⁰³

103. Congo's Genocide, War Crimes and Crimes against Humanity Act defines war crimes with reference to the categories of crimes defined in Article 8 of the 1998 ICC Statute.¹⁰⁴

104. Under Georgia's Criminal Code, any war crime provided for by the 1998 ICC Statute, which is not explicitly mentioned in the Code, such as "employing weapons, projectiles and material . . . which are of a nature to cause superfluous injury or unnecessary suffering" in international armed conflicts, is a crime.¹⁰⁵

105. Under Ireland's Geneva Conventions Act as amended, any "minor breach" of AP I, including violations of Article 35 AP I, is a punishable offence.¹⁰⁶

⁹⁷ Azerbaijan, *Criminal Code* (1999), Article 116(1).

⁹⁸ Belarus, *Criminal Code* (1999), Article 136(1).

⁹⁹ Burundi, *Draft Law on Genocide, Crimes against Humanity and War Crimes* (2001), Article 4(B)(s).

¹⁰⁰ Canada, *Crimes against Humanity and War Crimes Act* (2000), Section 4(1) and (4).

¹⁰¹ China, *Law Governing the Trial of War Criminals* (1946), Article 3(13).

¹⁰² Colombia, *Decree on the Control of Firearms, Ammunition and Explosives* (1993), Article 14(b).

¹⁰³ Colombia, *Penal Code* (2000), Article 142.

¹⁰⁴ Congo, *Genocide, War Crimes and Crimes against Humanity Act* (1998), Article 4.

¹⁰⁵ Georgia, *Criminal Code* (1999), Article 413(d).

¹⁰⁶ Ireland, *Geneva Conventions Act as amended* (1962), Section 4(1) and (4).

106. Italy's Law of War Decree as amended provides that "superfluous suffering shall not be inflicted on the enemy".¹⁰⁷

107. Under Mali's Penal Code, "employing weapons, projectiles, materials and methods of warfare which are of a nature to cause superfluous injury or unnecessary suffering . . . provided that such means are the subject of a comprehensive prohibition" is a war crime in international armed conflicts.¹⁰⁸

108. The Definition of War Crimes Decree of the Netherlands includes the "use of . . . inhuman appliances" in its list of war crimes.¹⁰⁹

109. Under New Zealand's International Crimes and ICC Act, war crimes include the crimes defined in Article 8(2)(b)(xx) of the 1998 ICC Statute.¹¹⁰

110. Nicaragua's Military Penal Code punishes any soldier "who employs or orders the employment of weapons or means and methods of warfare . . . designed to cause unnecessary suffering or superfluous injury".¹¹¹

111. Under Norway's Military Penal Code as amended, "anyone who contravenes or is accessory to the contravention of provisions relating to the protection of persons or property laid down in . . . the two additional protocols to [the Geneva] Conventions . . . is liable to imprisonment".¹¹²

112. Spain's Military Criminal Code punishes "any soldier who uses, or orders the use of, means or methods of combat which are prohibited or destined to cause unnecessary suffering or superfluous injury".¹¹³

113. Spain's Penal Code punishes "anyone who, during an armed conflict, uses, or orders to be used, methods or means of combat which are prohibited or destined to cause unnecessary suffering or superfluous injury".¹¹⁴

114. Under Trinidad and Tobago's Draft ICC Act, it is a punishable offence to commit a war crime as defined in Article 8(2)(b)(xx) of the 1998 ICC Statute.¹¹⁵

115. Under the UK ICC Act, it is a punishable offence to commit a war crime as defined in Article 8(2)(b)(xx) of the 1998 ICC Statute.¹¹⁶

116. Under the US War Crimes Act as amended, violations of Article 23(e) of the 1907 HR are war crimes.¹¹⁷

117. Venezuela's Code of Military Justice as amended punishes "those who make use of weapons or means that unnecessarily increase the suffering of the persons attacked".¹¹⁸

¹⁰⁷ Italy, *Law of War Decree as amended* (1938), Article 35.

¹⁰⁸ Mali, *Penal Code* (2001), Article 31(i)(20).

¹⁰⁹ Netherlands, *Definition of War Crimes Decree* (1946), Article 1.

¹¹⁰ New Zealand, *International Crimes and ICC Act* (2000), Section 11(2).

¹¹¹ Nicaragua, *Military Penal Code* (1996), Article 51.

¹¹² Norway, *Military Penal Code as amended* (1902), § 108(b).

¹¹³ Spain, *Military Criminal Code* (1985), Article 70.

¹¹⁴ Spain, *Penal Code* (1995), Article 610.

¹¹⁵ Trinidad and Tobago, *Draft ICC Act* (1999), Section 5(1)(a).

¹¹⁶ UK, *ICC Act* (2001), Sections 50(1) and 51(1) (England and Wales) and Section 58(1) (Northern Ireland).

¹¹⁷ US, *War Crimes Act as amended* (1996), Section 2441(c)(2).

¹¹⁸ Venezuela, *Code of Military Justice as amended* (1998), Article 474(5).

118. Under the Penal Code as amended of the SFRY (FRY), the use of, or the order to use, "means or methods of combat prohibited under the rules of international law, during a war or an armed conflict" is a war crime. The commentary on this provision states that "the following weapons and means of combat are considered to be prohibited: . . . weapons, ammunition and materials that cause unnecessary suffering".¹¹⁹

National Case-law

119. In the *Military Junta case* in 1985, Argentina's National Court of Appeals, with reference to Articles 22 and 23 of the 1907 HR, mentioned the prohibition on the use of weapons, projectiles or material which cause "unnecessary damage" to enemies. It also referred to the opinion of some writers, according to whom unnecessary harm to the enemy or to the civilian population is prohibited.¹²⁰

120. In the *Shimoda case* in 1963, Japan's District Court of Tokyo quoted the 1868 St. Petersburg Declaration and Article 23(e) of the 1907 HR, and also referred to the 1899 Hague Declaration concerning Asphyxiating Gases. The Court held, however, that "the use of a certain weapon, great as its inhuman result may be, need not be prohibited by international law if it has a great military effect".¹²¹

Other National Practice

121. In 1974, during discussions in the Ad Hoc Committee on Conventional Weapons established by the CDDH, the representative of Australia stated that:

41. On the question of weapons that might cause unnecessary suffering, humanitarian principles in weapons design, which Australia wished to see universally accepted, should not be selectively disadvantageous to any country. One factor that should be kept in mind was the differing capacity of countries to maintain high technology or capital-intensive defensive weapons systems, as opposed to manpower-intensive defensive weapons systems at a relatively lower level of technology. It must not be assumed that high-technology sophisticated weapons, if correctly used, were necessarily more inhumane than simpler weapons . . .
42. His delegation felt that there might have been a tendency in recent studies to place undue emphasis on unnecessary suffering as manifested in wounds of a complex or serious nature, and perhaps in that way to lose sight of the initial and basic St. Petersburg principle that it was better to wound than to kill an enemy combatant. The Committee should consider whether, from the point of view of the soldier involved, it was doing him a service if it fell into the error of giving preference to weapons that tended to kill cleanly, rather than to weapons that wounded, but did not kill.¹²²

¹¹⁹ SFRY (FRY), *Penal Code as amended* (1976), Article 148(1) and commentary.

¹²⁰ Argentina, National Court of Appeals, *Military Junta case*, Judgement, 9 December 1985.

¹²¹ Japan, District Court of Tokyo, *Shimoda case*, Judgement, 7 December 1963.

¹²² Australia, Statement at the CDDH, *Official Records*, Vol. XVI, CDDH/IV/SR.1, 13 March 1974, pp. 15-16, §§ 41-42.

122. In a memorandum in 1991, Australia's Department of Foreign Affairs and Trade stated that:

The wide ban on weapons which cause superfluous injury (Article 35(2)) has to be read in conjunction with the Convention on the Prohibition on the Use of Certain Conventional Weapons Which May be Deemed to be Excessively Injurious or to have Indiscriminate Effects. This Convention specifically lists such weapons which are prohibited. Australia became a party to this Convention in 1984. In the light of the Convention a reservation on this ground is unnecessary.¹²³

123. In its oral pleadings before the ICJ in the *Nuclear Weapons case* in 1995, Australia stated that:

One of the most fundamental and longest-standing humanitarian principles is the prohibition on employing weapons or methods of warfare of a nature to cause unnecessary losses or suffering. Yet while this principle has remained constant, its practical application has not and will not. The suffering inflicted by a particular type of weapon may be accepted as "necessary" in one age, but condemned as unnecessary in another. Such changes in the dictates of public conscience may have a number of causes. Advances in technology or changes in methods of warfare may provide alternatives to the use of weapons of that type. Or it may be that in a later age the level of suffering in warfare which the international community is prepared to tolerate is lower than the level which it tolerated previously.¹²⁴

124. In 1997, during a debate in the First Committee of the UN General Assembly, Austria stated that excessively injurious weapons must be banned, since humanitarian aspects must override others.¹²⁵

125. In 1974, during discussions in the Ad Hoc Committee on Conventional Weapons established by the CDDH, Brazil stated that:

In principle, all available weapons could cause unnecessary suffering . . . depending on how they were used. There were good humanitarian reasons for the international community to agree at least on restricting the use of incendiary weapons against targets which were not exclusively military.¹²⁶

126. In 1973, in its comment on the UN Secretary-General's report on napalm and other incendiary weapons and all aspects of their possible use, Canada stated that:

Broadly, there should be concern with the use of all types of weapons in ways which could cause unnecessary suffering . . . [F]or this reason, the protocols additional to the Geneva Conventions of 1949 which are currently being prepared under the

¹²³ Australia, Department of Foreign Affairs and Trade, File: 1710/10/3/1, 13 February 1991, § 6.

¹²⁴ Australia, Oral pleadings before the ICJ, *Nuclear Weapons case*, 30 October 1995, Verbatim Record CR 95/22, pp. 39–40.

¹²⁵ Austria, Statement before the First Committee of the UN General Assembly, UN Doc. A/C.1/32/PV.13, 29 September 1977, p. 28.

¹²⁶ Brazil, Statement at the CDDH, *Official Records*, Vol. XVI, CDDH/IV/SR.2, 14 March 1974, p. 18, § 7.

auspices of the International Committee of the Red Cross in close co-operation with the United Nations General Assembly, should reaffirm the existing principles and rules of conventional and customary international law of armed conflicts which apply generally to the choice and use of weapons by States in armed conflict and are contained, *inter alia*, in the Hague Declaration [concerning Asphyxiating Gases] of 1899, the Hague Conventions of 1907 and the Geneva [Gas] Protocol of 1925.¹²⁷

127. In 1991, in a legal report concerning the withdrawal of its reservation to the 1925 Geneva Gas Protocol, Chile stated that “the prohibition of the use of arms, projectiles or material calculated to cause unnecessary suffering . . . is considered to be a norm of international customary law and hence to be binding on all States, whether or not they are party to the relevant Convention”.¹²⁸

128. The Report on the Practice of China, referring to a declaration by the delegation of China at the CCW Conference in 1980, notes that China often calls weapons of a nature to cause unnecessary suffering or superfluous injury “inhumane weapons”. It adds that China has always been in favour of a total ban on these weapons and of further restrictions on their use, and that it has always made efforts to achieve the prohibition or restrictions on the use of certain inhumane conventional weapons.¹²⁹

129. At the Second Review Conference of States Parties to the CCW in 2001, China declared that “the impermissibility of using means of warfare that caused excessive injuries . . . had become a universally accepted principle”.¹³⁰

130. In 1975, during discussions in the Ad Hoc Committee on Conventional Weapons established by the CDDH, the representative of Colombia stated that:

8. . . . His government . . . supported all measures for the prohibition or limitation of the use of conventional weapons likely to cause unnecessary injury . . .
9. . . . His Government was opposed to the use of napalm and incendiary weapons. In view of the suffering inflicted on the victims, nothing could justify their use. Similarly, the use of high velocity small-calibre projectiles designed to cause excessive injury should be absolutely forbidden. Such weapons were indeed comparable to explosive bullets or dum-dum bullets.¹³¹

¹²⁷ Canada, Comments on the report of the UN Secretary-General on napalm and other incendiary weapons and all aspects of their possible use, UN Doc. A/9207/Add.1, 17 December 1973, p. 3.

¹²⁸ Chile, Ministry of Foreign Affairs, Memorandum Reservado No. 430/91, Santiago, 17 June 1991, §§ 3 and 6.

¹²⁹ Report on the Practice of China, 1997, Chapter 3.1, referring to Address to the Plenary Session of the UN Meeting on the Prohibition or Restrictions on Certain Conventional Weapons, 10 October 1980, *Selected Documents of the Chinese Delegation to the United Nations*, World Knowledge Press, Beijing, 1980, p. 265.

¹³⁰ China, Statement at the Second Review Conference of States Parties to the CCW, Geneva, 11–21 December 2001, UN Doc. CCW/CONF.II/SR.2, 16 January 2002, § 41.

¹³¹ Colombia, Statement at the CDDH, *Official Records*, Vol. XVI, CDDH/IV/SR.14, 5 March 1975, p. 132, §§ 8–9.

131. In 1977, during a debate in the First Committee of the UN General Assembly, Colombia advocated the elimination of “weapons of mass destruction, chemical and bacteriological weapons, incendiary weapons and all those weapons that are capable of bringing about the most horrifying suffering”.¹³²

132. In 1977, during a debate in the First Committee of the UN General Assembly, Cyprus stated that napalm caused unnecessary suffering.¹³³

133. In its written statement submitted to the ICJ in the *Nuclear Weapons case* in 1995, Ecuador stated that “the use of nuclear weapons contradicts the humanitarian dispositions against the use of warlike artifacts that provoke cruel and unnecessary sufferings to its victims”.¹³⁴

134. In 1974, during discussions in the Ad Hoc Committee on Conventional Weapons established by the CDDH, Egypt stressed that it was “still in favour of complete prohibition of the use of all weapons that might cause unnecessary suffering . . . The main object was to humanize war as far as possible by imposing a certain discipline on belligerents.”¹³⁵

135. In its written statement submitted to the ICJ in the *Nuclear Weapons case* in 1995, Egypt stated that:

19. The prohibition against the use of weapons which render death inevitable or cause unnecessary suffering: “The right of belligerents to the conflict to adopt means of injuring the enemy is not unlimited.” [reference is made to Article 22 of the 1907 HR] This rule imposes on the belligerents the obligation to refrain from cruel and treacherous behaviour. As far as weapons are concerned, since the nineteenth century this humanitarian principle has been embodied in two rules: one forbids the use of poisons, while the other prohibits the use of weapons capable of causing superfluous injuries . . .

20. 20. The laws of the Hague [reference is made to Article 23(e) of the 1907 HR] and Geneva [reference is made to Article 35(2) AP I] provide that it is especially forbidden to employ weapons, projectiles and material and methods of warfare of a nature to cause superfluous injury or unnecessary suffering. It goes without saying that the enormous blast waves, air blasts, fires, residual nuclear radiation or radioactive fallout, electromagnetic impulses and thermal radiation, which are primary effects of the use of nuclear weapons, cause extensive “unnecessary suffering”.¹³⁶

136. In its written statement submitted to the ICJ in the *Nuclear Weapons case* in 1995, France stated that:

¹³² Colombia, Statement before the First Committee of the UN General Assembly, UN Doc. A/C.1/32/PV.21, 5 October 1977, p. 11.

¹³³ Cyprus, Statement before the First Committee of the UN General Assembly, UN Doc. A/C.1/32/PV.44, 24 October 1977, p. 17.

¹³⁴ Ecuador, Written statement submitted to the ICJ, *Nuclear Weapons case*, 20 June 1995, p. 2, § D.

¹³⁵ Egypt, Statement at the CDDH, *Official Records*, Vol. XVI, CDDH/IV/SR.6, 22 March 1974, p. 49, § 12.

¹³⁶ Egypt, Written statement submitted to the ICJ, *Nuclear Weapons case*, 20 June 1995, pp. 12–13, §§ 19 and 20.

The supporters of that theory [according to which the law of armed conflicts would contain legal rules from which a prohibition of the use of nuclear weapons could be deduced] base themselves . . . on various rules or principles enunciated in [AP I], and specifically “the prohibition to employ weapons, projectiles and material and methods of warfare of a nature to cause superfluous injury or unnecessary suffering” (art. 35, para.2) . . .

The French Government formally rejects this reasoning . . . Besides the fact that it is not according to this procedure that the prohibitions concerning the use of arms are traditionally established, this method is random, and cannot in any case lead to the result aimed at by its authors.

The theory put forward supposes that it is established . . . that all the rules mentioned . . . correspond with customary principles recognized as such and . . . that the exact content of these principles is defined.

However, this content . . . has been the object, and still is the object, of doctrinal discussions.

With regard to this, the French government must again underline that the principles of international customary law applicable in armed conflict cannot be searched in [AP I] . . . If one cannot deny that certain provisions of the protocol find their inspiration in the principles of international customary law, it is obvious that others constitute a development.

...

The general practice in the field of the prohibition or the regulation of armament is to proceed by conventions . . .

Indeed, the regulation of the use of a weapon supposes precise rules which cannot be established other than by specific conventions.¹³⁷

137. Following the adoption by consensus of Article 33 of Draft AP I (now Article 35 AP I), France stated that it “went beyond the strict confines of humanitarian law and in fact regulated the law of war” and had “direct implications for the defence and security of States”. Therefore, it stated that it would have abstained if the article had not been adopted by consensus.¹³⁸

138. The instructions given to the French armed forces for the conduct of Opération Mistral, simulating a military operation under the right of self-defence or a mandate of the UN Security Council, state that “it is prohibited to employ methods or weapons which are of a nature to cause unnecessary losses or excessive suffering”.¹³⁹

139. According to the Report on the Practice of France, the French Minister of Foreign Affairs stated in an interview in 1999 that France considered Article 35 AP I to have become customary.¹⁴⁰

140. At the CDDH, in an explanation of vote concerning Article 33 draft AP I, the FRG stated that it had joined in the consensus on Article 33 of draft AP I

¹³⁷ France, Written statement submitted to the ICJ, *Nuclear Weapons case*, 20 June 1995, pp. 40–45, §§ 28–30; see also Written statement submitted to the ICJ, *Nuclear Weapons (WHO) case*, June 1994, pp. 29–31, § 26.

¹³⁸ France, Statement at the CDDH, *Official Records*, Vol. VI, CDDH/SR.39, 25 March 1977, p. 101, § 55.

¹³⁹ France, *Etat-major de la Force d’Action Rapide, Ordres pour l’Opération Mistral*, 1995, Section 6, § 65.

¹⁴⁰ Report on the Practice of France, 1999, Chapter 3.1.

(now Article 35 AP I) “with the understanding that paragraphs 1 and 2 reaffirm customary international law”.¹⁴¹

141. In 1970, during a debate in the Third Committee of the UN General Assembly on Resolution 2677 (XXIV) which emphasised the need to “secure the full observance of human rights applicable in all armed conflicts” and called upon “all parties to any armed conflict to observe the rules laid down in the Hague Conventions of 1899 and 1907, the Geneva [Gas] Protocol of 1925 . . . and other humanitarian rules applicable in armed conflicts”, India sought to change “all armed conflicts” in the second preambular paragraph to “armed conflicts”. Being unsuccessful, it then stated that it construed the expression “all armed conflicts” to denote all international armed conflicts.¹⁴²

142. In 1976, during discussions in the Ad Hoc Committee on Conventional Weapons established by the CDDH, India stated that it was

happy to note that all the delegations agreed in recognizing the need to avoid unnecessary suffering and that the differences of opinion concerned solely the extent to which countries were prepared to restrict their choice of that type of weapon for their defense, in order to avoid unnecessary suffering to civilians and combatants.¹⁴³

143. At the CDDH, India stated that it had agreed to join in the consensus on Article 33 of draft AP I (now Article 35),

with the understanding that the basic rules contained in this article will apply to all categories of weapons, namely nuclear, bacteriological, chemical, or conventional weapons or any other category of weapons. Secondly, the term “superfluous injury or unnecessary suffering” means those physical injuries which are more severe than would be necessary to render an adversary *hors de combat* or to make the enemy surrender and which are not justified by considerations of military necessity.¹⁴⁴

144. In its written statement submitted to the ICJ in the *Nuclear Weapons case* in 1995, India stated that “the use of nuclear weapons in an armed conflict is unlawful, being contrary to the conventional as well as customary international law because such a use . . . could cause excessive injuries to the combatants making their death inevitable”.¹⁴⁵

145. The Report on the Practice of India states that India considers that the prohibition of weapons causing unnecessary suffering also applies in non-international armed conflicts.¹⁴⁶

146. In its oral pleadings before the ICJ in the *Nuclear Weapons case* in 1995, Indonesia stated that:

¹⁴¹ FRG, Statement at the CDDH, *Official Records*, Vol. VI, CDDH/SR.39, 25 May 1977, p. 115.

¹⁴² India, Statement before the Third Committee of the UN General Assembly, UN Doc. A/C.3/SR.1801, 27 November 1970, p. 379.

¹⁴³ India, Statement at the CDDH, *Official Records*, Vol. XVI, CDDH/IV/SR.28, 20 May 1976, p. 284, § 5.

¹⁴⁴ India, Statement at the CDDH, *Official Records*, Vol. VI, CDDH/SR.39, 25 March 1977, p. 115.

¹⁴⁵ India, Written statement submitted to the ICJ, *Nuclear Weapons case*, 20 June 1995, p. 4.

¹⁴⁶ Report on the Practice of India, 1997, Chapter 3.1.

All international customary law and all treaties regulating the conduct of armed conflict among States are based on two fundamental principles, namely necessity and humanity . . . Actions which cause needless losses or suffering are prohibited. Furthermore, the employment of arms causing unnecessary suffering . . . is prohibited under the 1907 Hague Convention IV on Laws and Customs of Land Warfare.¹⁴⁷

147. In its written statement submitted to the ICJ in the *Nuclear Weapons case* in 1995, Iran stated that “some of the principles of humanitarian international law from which one can deduce the illegitimacy of the use of nuclear weapons are: . . . Prohibition of means and methods of war that cause unnecessary suffering to human societies and environment.”¹⁴⁸

148. Article 20 of draft AP II, prohibiting the use of weapons of a nature to cause superfluous injury or unnecessary suffering, was deleted at the last moment by the CDDH, without any plenary debate, as part of a general revision of AP II. During the amendment voting at this stage, Ireland voted in favour of the article because it believed that “the principles enunciated in the article are of a purely humanitarian nature”.¹⁴⁹

149. In its written statement submitted to the ICJ in the *Nuclear Weapons case* in 1995, Italy stated that “the exercise of armed violence should be carried out so as not to bring about unnecessary, and thus superfluous or useless, sufferings”.¹⁵⁰

150. At the CDDH, the Italian delegation stated that it had joined in the consensus on Articles 33 and 34 draft AP I (now Articles 35 and 36) “bearing in mind above all the principles which inspired them” but that “it could not, however, conceal its perplexity about the wording of those provisions which could not be interpreted as introducing a specific prohibition operative in all circumstances attendant on the study, development, acquisition or adoption of particular weapons or methods of warfare”.¹⁵¹

151. In its oral pleadings before the ICJ in the *Nuclear Weapons case* in 1995, Japan stated that it was of the understanding that “the free and unlimited selection of weapons is unacceptable in terms of international law concerning warfare, and that . . . the infliction of unnecessary suffering . . . is prohibited, even with regard to weapons that are not expressly banned”.¹⁵²

152. According to the Report on the Practice of Kuwait, Kuwait does not import weapons which cause superfluous injury because it is of the opinion that such weapons are unacceptable.¹⁵³

¹⁴⁷ Indonesia, Oral pleadings before the ICJ, *Nuclear Weapons case*, 3 November 1995, Verbatim Record CR 95/25, p. 27.

¹⁴⁸ Iran, Written statement submitted to the ICJ, *Nuclear Weapons (WHO) case*, undated, p. 1.

¹⁴⁹ Ireland, Statement at the CDDH, *Official Records*, Vol. VII, CDDH/SR.51, 3 June 1977, p. 120.

¹⁵⁰ Italy, Written statement submitted to the ICJ, *Nuclear Weapons case*, 19 June 1995, p. 5.

¹⁵¹ Italy, Statement at the CDDH, *Official Records*, Vol. VI, CDDH/SR.39, 25 March 1977, p. 102, § 59.

¹⁵² Japan, Oral pleadings before the ICJ, *Nuclear Weapons case*, 7 November 1995, Verbatim Record CR 95/27, p. 37.

¹⁵³ Report on the Practice of Kuwait, 1997, Chapter 3.3.

153. In its written statement submitted to the ICJ in the *Nuclear Weapons case* in 1995, Lesotho stated that “any use of nuclear weapons, even in self-defense, would violate international humanitarian law, including the Hague and Geneva Conventions, which prohibit as practices of war . . . causing unnecessary or aggravated suffering”.¹⁵⁴

154. In 1975, during discussions in the Ad Hoc Committee on Conventional Weapons established by the CDDH, Madagascar stated in relation to the report of the Conference of Government Experts on the Use of Certain Conventional Weapons that Might Cause Unnecessary Suffering or Have Indiscriminate Effects that “those provisions . . . were inadequate, for they reaffirmed rules that were already to be found in other international instruments”.¹⁵⁵

155. In its written statement submitted to the ICJ in the *Nuclear Weapons case* in 1995, the Marshall Islands stated that “any use of nuclear weapons violate the laws of war including the Geneva and Hague Conventions . . . Such laws prohibit . . . the causing of unnecessary or aggravated suffering.”¹⁵⁶

156. In 1975, during discussions in the Ad Hoc Committee on Conventional Weapons established by the CDDH, the representative of Mauritania stated that:

7. He strongly supported the general prohibition of all weapons that might cause unnecessary suffering.
8. For humanitarian reasons, a ban should be placed on the use of incendiary weapons, anti-personnel fragmentation weapons, fléchettes, small calibre projectiles causing serious wounds and anti-personnel land mines which . . . caused unnecessary suffering through serious, terrifying and painful wounds that were difficult to treat.
9. His delegation considered that the provisions of Articles 22 and 23(e) of the [1907 HR], which were also to be found in the Preamble to the Declaration of St. Petersburg of 1868 to the Effect of Prohibiting the Use of Certain Projectiles in Wartime, as well as in the report of the United Nations Secretary-General on Napalm and other incendiary weapons and all aspects of their possible use . . . showed that the use of certain categories of weapons should be generally prohibited for the well-being of all mankind.¹⁵⁷

157. In 1974, during discussions in the Ad Hoc Committee on Conventional Weapons established by the CDDH, Mexico stated that:

The debates in the United Nations General Assembly which culminated in the approval by an overwhelming majority of resolution 3076 (XXVIII) relating to napalm and other incendiary weapons were eloquent proof that humanity was anxious for

¹⁵⁴ Lesotho, Written statement submitted to the ICJ, *Nuclear Weapons case*, 20 June 1995, p. 2.

¹⁵⁵ Madagascar, Statement at the CDDH, *Official Records*, Vol. XVI, CDDH/IV/SR.10, 19 February 1975, p. 102, §§ 52–53.

¹⁵⁶ Marshall Islands, Written statement submitted to the ICJ, *Nuclear Weapons case*, 22 June 1995, § 5.

¹⁵⁷ Mauritania, Statement at the CDDH, *Official Records*, Vol. XVI, CDDH/IV/SR.11, 21 February 1975, p. 106, §§ 7–9.

the prohibition of the use of those weapons as well as other conventional weapons which could be considered as causing unnecessary suffering.¹⁵⁸

158. In 1976, during discussions on napalm and other incendiary weapons in the Ad Hoc Committee on Conventional Weapons established by the CDDH, Mexico stated that “incendiary weapons . . . were cruel weapons which caused unnecessary suffering, especially to those with least protection, namely, innocent victims not participating in military operations”.¹⁵⁹

159. In its written statement submitted to the ICJ in the *Nuclear Weapons case* in 1995, Mexico affirmed that:

The [1868] Declaration of Saint Petersburg was followed by a series of international instruments in which the idea of preventing unnecessary suffering and superfluous damage to the enemy led to a prohibition on the use of certain weapons. Such instruments included The Hague Conventions of 1899 and 1907, which prohibited the use of poisoned or poisonous weapons and or arms, projectiles or materials causing unnecessary suffering; the [1925] . . . Geneva Gas Protocol . . . and the [1972 BWC] . . . etc.

. . . All the above-mentioned instruments have made it clear that the right of the parties in an armed conflict to choose the means of harming the enemy is not unlimited and is, in fact, subject to restrictions. In this regard, it is worth highlighting Article 35 [AP I] . . . which reaffirms that the right of the Parties to an armed conflict to choose methods or means of warfare is not unlimited and that it is prohibited to employ weapons, projectiles and material and methods of warfare of a nature to cause superfluous injury or unnecessary suffering.

. . .

The international community considers that certain types of armaments should be prohibited on account of their inhumane effects on individuals.¹⁶⁰

160. At the CDDH, Mozambique stated that “while this Conference is meeting here, the people of Mozambique are being bombed by the illegal and racist régime of Ian Smith, which is using napalm and other materials causing superfluous injury”.¹⁶¹

161. In its response to submissions from other States submitted to the ICJ in the *Nuclear Weapons (WHO) case* in 1995, Nauru stated that “it is also a violation of customary international law to use weapons that cause unnecessary suffering”.¹⁶²

162. In its written statement submitted to the ICJ in the *Nuclear Weapons case* in 1995, the Netherlands stated that:

¹⁵⁸ Mexico, Statement at the CDDH, *Official Records*, Vol. XVI, CDDH/IV/SR.1, 13 March 1974, p. 8, § 6.

¹⁵⁹ Mexico, Statement at the CDDH, *Official Records*, Vol. XVI, CDDH/IV/SR.28, 20 May 1976, p. 283, § 1.

¹⁶⁰ Mexico, Written statement submitted to the ICJ, *Nuclear Weapons case*, 19 June 1995, §§ 72, 73 and 75.

¹⁶¹ Mozambique, Statement at the CDDH, *Official Records*, Vol. VI, CDDH/SR.44, 30 May 1977, p. 303.

¹⁶² Nauru, Response to submissions of other States submitted to the ICJ, *Nuclear Weapons (WHO) case*, 15 June 1995, Part 1, p. 11.

Suffering may be called “unnecessary” when its infliction is not necessary to attain a lawful military advantage or greatly exceeds what could reasonably have been considered necessary to attain that military advantage.

... The availability of considerably less harmful means to attain the military advantage or the causing of suffering out of proportion to the military advantage to be gained therefore appears to be the essential yardstick for determining whether the use of certain weapons must be deemed to cause “unnecessary” suffering. This approach has governed the development of rules with regard to means and methods of warfare since 1868.¹⁶³

163. In 1969, during a debate in the Third Committee of the UN General Assembly, the Netherlands stated that it was:

essential to update and broaden the Hague Conventions and the 1925 Geneva [Gas] Protocol, primarily in so far as related to international security and the protection of human rights, and to extend their application to cover armed conflicts which were not international in character.¹⁶⁴

164. In 1974, during discussions in the Ad Hoc Committee on Conventional Weapons established by the CDDH, New Zealand stated that “it was difficult to determine criteria for unnecessary suffering, except in the case of the indiscriminate use of weapons. One should not fall into the error of giving preference to weapons that killed cleanly rather than to weapons that wounded but did not kill.”¹⁶⁵

165. In its written statement submitted to the ICJ in the *Nuclear Weapons case* in 1995, New Zealand stated, with reference to customary international law, that “it is prohibited to use weapons or tactics that cause unnecessary or aggravated devastation and suffering”.¹⁶⁶

166. In 1974, during discussions in the Ad Hoc Committee on Conventional Weapons established by the CDDH, the representative of Norway stated that:

7. It was the task of the Conference to protect the civilian population and also to protect the combatants from suffering more than the strict minimum required to put them *hors de combat*. He suggested that the Committee should agree on the general prohibition of the use of incendiary weapons . . .
9. . . . It was also important to define inadmissible ways of using weapons, so as to avoid falling back on such criteria as “unnecessary suffering” which were far from specific.¹⁶⁷

¹⁶³ Netherlands, Written statement submitted to the ICJ, *Nuclear Weapons case*, 16 June 1995, §§ 19–21.

¹⁶⁴ Netherlands, Statement before the Third Committee of the UN General Assembly, UN Doc. A/C.3/SR.1733, 11 December 1969, p. 1.

¹⁶⁵ New Zealand, Statement at the CDDH, *Official Records*, Vol. XVI, CDDH/IV/SR.2, 14 March 1974, p. 18, § 5.

¹⁶⁶ New Zealand, Written statement submitted to the ICJ, *Nuclear Weapons case*, 20 June 1995, § 69.

¹⁶⁷ Norway, Statement at the CDDH, *Official Records*, Vol. XVI, CDDH/IV/SR.5, 20 March 1974, p. 42, §§ 8–9.

167. In a statement at the First CCW Review Conference in 1995, Peru declared that it “shared the international community’s concern at the increasing use of certain conventional weapons, including anti-personnel landmines, whose devastating effects on the civilian population had been well documented”. It added that “the Review Conference was duty bound to bring an end to the humanitarian crisis caused by such weapons”.¹⁶⁸

168. In 1974, during discussions in the Ad Hoc Committee on Conventional Weapons established by the CDDH, the representative of Poland stated that:

He feared that the idea of “unnecessary suffering” might tend to restrict the future work of the Committee to weapons and methods of combat which caused physical and moral suffering, but there were weapons which could inflict extremely serious wounds which were not necessarily accompanied by unbearable suffering, such as certain chemical substances which caused death or disablement. An example was laser, which could blind anyone coming in their range of action. It was his delegation’s opinion that it was not from the point of view of those who inflicted unnecessary suffering that weapons whose use should be restricted or forbidden should be defined, but from the point of view of the victims.¹⁶⁹

169. Article 20 of draft AP II, prohibiting the use of weapons of a nature to cause superfluous injury or unnecessary suffering, was deleted at the last moment by the CDDH, without any plenary debate, as part of a general revision of AP II. During the amendment voting at this stage, Portugal stated that it voted in favour of the inclusion of Article 20 in draft AP II “because it regards the article as a fundamental humanitarian provision the adoption of which will not imperil the authority of States”.¹⁷⁰

170. In 1972, during a debate in the Sixth Committee of the UN General Assembly, Romania stated that “the prohibition of weapons that caused unnecessary suffering . . . was of primordial importance”.¹⁷¹

171. In its written statement submitted to the ICJ in the *Nuclear Weapons case* in 1995, Russia stated that:

As to the attempts to justify the illegitimacy of the use of nuclear weapons by references that they cause “unnecessary sufferings while injuring, uselessly aggravate the sufferings of disabled men, or render their death inevitable”, they are . . . hardly reasonable . . . The reasonable comments of the ICRC confirm two considerations . . . The principle of not causing “unnecessary suffering” is not in itself a general ban on the use of nuclear weapons as such . . .

...

¹⁶⁸ Peru, Statement at the First Review Conference of the States Parties to the CCW, Vienna, 25 September–13 October 1995, UN Doc. CCW/CONF.I/SR.5, 3 October 1995, §§ 67–69.

¹⁶⁹ Poland, Statement at the CDDH, *Official Records*, Vol. XVI, CDDH/IV/SR.1, 13 March 1974, p. 13, § 27.

¹⁷⁰ Portugal, Statement at the CDDH, *Official Records*, Vol. VII, CDDH/SR.51, 3 June 1977, p. 123.

¹⁷¹ Romania, Statement before the Sixth Committee of the UN General Assembly, UN Doc. A/C.6/SR.1393, 12 December 1972, p. 501.

[AP I] reproduces, with slight changes (Art. 35), the above-mentioned provisions of the [1907 Hague Convention IV and the 1907 HR], but they, being treaty norms, are not applied to nuclear weapons . . .

The view that the said blanket formulas are not considered by the international community as a whole as a general ban on the use of specific types of weapons, including nuclear weapons as such, is supported by the fact that international law did not choose the option of a special ban of particular types of weapons and their use. That is how . . . the 1980 Convention on the Prohibition or Restrictions on the Use of Certain Conventional Weapons, which May Be Deemed to Be Excessively Injurious or to Have Indiscriminate Effects, together with the Protocols thereto . . . appeared.¹⁷²

172. In its oral pleadings before the ICJ in the *Nuclear Weapons case* in 1995, Russia stated that:

References to the effect that nuclear weapons cause “unnecessary sufferings while injuring, uselessly aggravate the sufferings of disabled men, or render their death inevitable”, and, thus, to Article 23 (a) of the Regulation on the Laws and Customs of War on Land annexed to the 1907 Hague Convention with the aim to justify the illegality of their use can hardly be considered as appropriate . . . These reasonable comments of the ICRC experts [contained in the report entitled “Weapons that May Cause Unnecessary Suffering or Have Indiscriminate Effects”] confirm that the principle of not causing “unnecessary suffering” is not in itself a general ban on the use of nuclear weapons *per se*. This is also confirmed by the fact that international law did embark on the road of a special ban of particular types of weapons and their use. That is how appeared the . . . 1980 Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons which May Be Deemed to Be Excessively Injurious or to Have Indiscriminate Effects, together with the Protocols thereto.¹⁷³

173. In its written statement submitted to the ICJ in the *Nuclear Weapons (WHO) case* in 1993, Rwanda noted that “the use of nuclear weapons by a State during a war or an armed conflict constitutes a violation of the agreements relating to international humanitarian law in general and of the [1980 CCW] in particular”.¹⁷⁴

174. In its written statement submitted to the ICJ in the *Nuclear Weapons (WHO) case* in 1994, Samoa stated that:

The use of nuclear weapons by a state in war or other armed conflict would be a violation of international customary law and conventions, including the Hague Conventions and the Geneva Conventions. Such law and conventions prohibit the use of weapons . . . which cause unnecessary suffering.¹⁷⁵

¹⁷² Russia, Written statement submitted to the ICJ, *Nuclear Weapons case*, 19 June 1995, pp. 12–14.

¹⁷³ Russia, Oral pleadings before the ICJ, *Nuclear Weapons case*, 10 November 1995, Verbatim Record CR 95/29, pp. 45–46.

¹⁷⁴ Rwanda, Written statement submitted to the ICJ, *Nuclear Weapons (WHO) case*, 8 December 1993, p. 1, § 3.

¹⁷⁵ Samoa, Written statement submitted to the ICJ, *Nuclear Weapons case*, 16 September 1994, p. 3.

175. In its written statement submitted to the ICJ in the *Nuclear Weapons case* in 1995, Samoa stressed that it “believes that the prohibition of the use or threat of use of nuclear weapons has been achieved under general international law. It has occurred by the cumulative effect of a series of multilateral treaties and of a series of resolutions of the General Assembly” including the 1868 St. Petersburg Declaration, the 1907 Hague Convention (IV) and AP I.¹⁷⁶

176. Article 20 of draft AP II, prohibiting the use of weapons of a nature to cause superfluous injury or unnecessary suffering, was deleted at the last moment by the CDDH, without any plenary debate, as part of a general revision of AP II. During the amendment voting at this stage, Saudi Arabia stated that “Article 20 (Basic rules) was rejected in a vote . . . since the legitimate party to an internal conflict is the *de jure* State. Obviously it will never try to exterminate its nationals or to damage its environment.”¹⁷⁷

177. In its written statement submitted to the ICJ in the *Nuclear Weapons (WHO) case* in 1994, the Solomon Islands stated that “since [their qualitative] effects may affect people outside the scope of conflict, both in time and geographically, the use of nuclear weapons violates the prohibition on the use of weapons which cause unnecessary suffering”.¹⁷⁸

178. In its written statement submitted to the ICJ in the *Nuclear Weapons case* in 1995, the Solomon Islands observed that:

According to the 1868 Declaration of St. Petersburg, the “legitimate objective” of war “would be exceeded by the employment of arms which uselessly aggravate the suffering of disabled men, or render their death inevitable.”

...

The obligation reflected in the preamble of the St. Petersburg Declaration remains in force and applicable today. It has been neither abolished nor superseded.

...

The prohibition on the use of weapons which render death inevitable reflects an even more fundamental principle of the law of armed conflict: the obligation to minimise harm to combatants. Accordingly in its use of force a State must not injure its enemy when it can capture him, nor cause serious injury when it can cause only slight injury, and not kill the enemy if he can be injured.¹⁷⁹

The Solomon Islands further stated that:

International law prohibits the use of weapons which:

...

- render death inevitable;
- cause unnecessary suffering.¹⁸⁰

¹⁷⁶ Samoa, Written statement submitted to the ICJ, *Nuclear Weapons case*, 15 June 1995, p. 3.

¹⁷⁷ Saudi Arabia, Statement at the CDDH, *Official Records*, Vol. VII, CDDH/SR.51, 3 June 1977, p. 123.

¹⁷⁸ Solomon Islands, Written statement submitted to the ICJ, *Nuclear Weapons (WHO) case*, 10 June 1994, p. 75, § 3.94.

¹⁷⁹ Solomon Islands, Written statement submitted to the ICJ, *Nuclear Weapons case*, 19 June 1995, p. 49, §§ 3.51–3.53.

¹⁸⁰ Solomon Islands, Written statement submitted to the ICJ, *Nuclear Weapons case*, 19 June 1995, p. 62, § 3.77.

179. In its written statement submitted to the ICJ in the *Nuclear Weapons (WHO) case*, Sri Lanka stated that “customary law principles which have evolved in the field of armed conflict prohibit the use of weapons and the methods of warfare of a nature to cause superfluous injury or unnecessary suffering”.¹⁸¹

180. In 1974, during discussions in the Ad Hoc Committee on Conventional Weapons established by the CDDH, Sweden stated that:

While it was difficult to discuss the degrees of suffering and injury caused by different weapons, it was not much easier to measure “military advantage” of weapons. Perhaps the gist of the concept was the effectiveness with which a weapon achieved its legitimate task of placing combatants *hors de combat*. It was not, on the other hand, legitimate military advantage that a weapon caused more or more severe injuries than were needed to disable a combatant...

With regard to weapons which might be deemed to cause unnecessary suffering or superfluous injury, it was hard to see why only civilians should be spared such suffering or injury. The dum-dum bullet had been banned because it caused excessive injury to soldiers. The same ban should apply... to high-velocity small arms projectiles, fléchettes and incendiaries.¹⁸²

181. In 1977, during a debate in the First Committee of the UN General Assembly, Sweden stated that high-velocity ammunition caused unnecessary suffering and should be banned.¹⁸³

182. In its written statement submitted to the ICJ in the *Nuclear Weapons case* in 1995, Sweden stated that:

The use of weapons which cause unnecessary suffering must be considered to be prohibited. The codification of the prohibition of dum-dum bullets was undertaken in accordance with this view, for example. The effect of radioactive radiation as a result of the use of nuclear weapons cause unnecessary suffering, not merely for third parties who are directly affected, but also future generations, for example as a result of genetic damage.¹⁸⁴

183. In 1974, during discussions in the Ad Hoc Committee on Conventional Weapons established by the CDDH, Switzerland stated that the principle prohibiting unnecessary suffering “belongs to customary law” and was “already in force”.¹⁸⁵

184. In 1970, during a debate in the Third Committee of the UN General Assembly on Resolution 2677 (XXIV), which emphasised the need to “secure the full observance of human rights applicable in all armed conflicts” and called

¹⁸¹ Sri Lanka, Written statement submitted to the ICJ, *Nuclear Weapons (WHO) case*, undated, p. 2.

¹⁸² Sweden, Statement at the CDDH, *Official Records*, Vol. XVI, CDDH/IV/SR.1, 13 March 1974, pp. 11–12, §§ 19 and 23.

¹⁸³ Sweden, Statement before the First Committee of the UN General Assembly, UN Doc. A/C.1/32/PV.32, 13 October 1977, p. 26.

¹⁸⁴ Sweden, Written statement submitted to the ICJ, *Nuclear Weapons case*, 20 June 1995, p. 5.

¹⁸⁵ Switzerland, Statement at the CDDH, *Official Records*, Vol. XVI, CDDH/IV/SR.1, 13 March 1974, pp. 12–13, § 24.

upon "all parties to any armed conflict to observe the rules laid down in the Hague Conventions of 1899 and 1907, the Geneva [Gas] Protocol of 1925 . . . and other humanitarian rules applicable in armed conflicts", Syria emphasised that the principles laid down in the resolution applied in all armed conflicts, even though the relevant humanitarian treaties only applied in international wars.¹⁸⁶

185. In 1974, during discussions in the Ad Hoc Committee on Conventional Weapons established by the CDDH, the representative of Togo stated that:

His delegation could not accept the concept of "unnecessary suffering". It considered that suffering could not be divided into categories. The Committee's report should state solemnly that the infliction of suffering was immoral and incompatible with human dignity.¹⁸⁷

186. In 1977, during a debate in the First Committee of the UN General Assembly, Turkey stated that it supported prohibitions or restrictions on incendiary and other excessively injurious weapons, but held that a ban would only be effective if this view reflected a consensus in the world community.¹⁸⁸

187. At the CDDH, the USSR considered that Article 20 of draft AP II "met the demands of humanitarian law and could give rise to no objections".¹⁸⁹

188. In 1975, during discussions in the Ad Hoc Committee on Conventional Weapons established by the CDDH, the USSR stated that "the question of prohibition or restriction of the use of certain types of conventional weapons liable to cause unnecessary suffering . . . was one of great importance".¹⁹⁰

189. In 1970, during a debate in the Third Committee of the UN General Assembly on Resolution 2677 (XXIV), which emphasised the need to "secure the full observance of human rights applicable in all armed conflicts" and called upon "all parties to any armed conflict to observe the rules laid down in the Hague Conventions of 1899 and 1907, the Geneva [Gas] Protocol of 1925 . . . and other humanitarian rules applicable in armed conflicts", the UK, as one of the sponsors of the resolution (the others were Australia, Belgium, Ceylon, Greece, Ireland, Japan, Luxembourg, Netherlands, New Zealand, Philippines, Singapore and Spain)¹⁹¹ defended the broader expression "all armed conflicts",

¹⁸⁶ Syria, Statement before Third Committee of the UN General Assembly, UN Doc. A/C.3/SR.1794, 19 November 1970, p. 343.

¹⁸⁷ Togo, Statement at the CDDH, *Official Records*, Vol. XVI, CDDH/IV/SR.1, 13 March 1974, p. 16, § 46.

¹⁸⁸ Turkey, Statement before the First Committee of the UN General Assembly, UN Doc. A/C.1/32/PV.44, 24 October 1977, p. 23.

¹⁸⁹ USSR, Statement at the CDDH, *Official Records*, Vol. XIV, CDDH/III/SR.32, 14 March 1975, pp. 310–311, § 10.

¹⁹⁰ USSR, Statement at the CDDH, *Official Records*, Vol. XVI, CDDH/IV/SR.19, 21 March 1975, pp. 186–187, § 13.

¹⁹¹ Australia, Belgium, Ceylon, Greece, Ireland, Japan, Luxembourg, Netherlands, New Zealand, Philippines, Singapore, Spain and UK, Revised draft resolution on respect for human rights in armed conflict submitted to the Third Committee of the UN General Assembly, UN Doc. A/C.3/L.1809/Rev.2, 26 November 1970.

instead of India's proposal "armed conflicts". The UK stated that "the fact was that in any armed conflict, whether international or not, certain minimal standards had to be respected, and for that reason the sponsors wished to retain the phrase 'all armed conflicts'"'.¹⁹²

190. A training video on IHL produced by the UK Ministry of Defence emphasises that the 1907 HR prohibits weapons that cause unnecessary suffering. It adds that weapons must not be altered with a view to causing unnecessary suffering.¹⁹³

191. In its written statement submitted to the ICJ in the *Nuclear Weapons case* in 1995, the UK stated that:

3.63 It has also been argued that the use of nuclear weapons would violate the prohibition on weapons which cause unnecessary suffering. The most recent statement of this principle is contained in Article 35(2) of Additional Protocol I, 1977, . . . The principle is, however, a long established one.

3.64 The principle prohibits only the use of weapons which cause *unnecessary* suffering or *superfluous* injury. It thus requires that a balance be struck between the military advantage which may be derived from the use of a particular weapon and the degree of suffering which the use of that weapon may cause. The more effective the weapon is from the military point of view, the less likely that the suffering which its use causes will be characterized as unnecessary. In particular, it has to be asked whether the same military advantage can be gained by using alternative means of warfare which will cause a lesser degree of suffering.¹⁹⁴ [emphasis in original]

192. In its oral pleadings before the ICJ in the *Nuclear Weapons case* in 1995, the UK stated that:

The principle that a belligerent must not use methods or means of warfare which cause unnecessary suffering and superfluous injury does not prohibit the use of a weapon which causes extensive suffering unless that suffering is truly *unnecessary*. What is required, therefore, is a balancing of military necessity and humanity. . . . Consideration of military necessity is an integral part of the *unnecessary* suffering principle. It is not a case of necessity being invoked to justify the use of an unlawful weapon; the use of that weapon is not unlawful if the injury it causes is necessary to the achievement of a legitimate military goal.¹⁹⁵ [emphasis in original]

193. In 1974, in reply to a letter from a member of the US House of Representatives, the Acting General Counsel of the US Department of Defense stated that:

¹⁹² UK, Statement before the Third Committee of the UN General Assembly, UN Doc. A/C.3/SR.1799, 26 November 1970, §§ 6 and 9.

¹⁹³ UK, Ministry of Defence, Training Video: The Geneva Conventions, 1986, Report on UK Practice, 1997, Chapter 3.1.

¹⁹⁴ UK, Written statement submitted to the ICJ, *Nuclear Weapons case*, 16 June 1995, p. 50, §§ 3.63 and 3.64.

¹⁹⁵ UK, Oral pleadings before the ICJ, *Nuclear Weapons case*, 15 November 1995, Verbatim Record CR 95/34, p. 39.

The distinguishing feature in Article 23 of the [1907 HR] is that it applies to all weapons, and qualifies the use of all weapons in armed conflict making unlawful uses which cause suffering intentionally superfluous to a valid military purpose. The term “unnecessary suffering” conveys this interpretation. The terms “calculated to cause” convey the element of intent such that members of the Armed Forces cannot justify the use of weapons inconsistent with attaining a legitimate military objective. This criterion must be distinguished from prohibitions agreed to by states for outlawing weapons regardless of how they are used or intended to be used. As noted in the Field Manual . . . one must refer to the practices of states in order to determine the present meaning of these principles.¹⁹⁶

194. At the Conference of Government Experts on Weapons which may Cause Unnecessary Suffering or have Indiscriminate Effects, held in Lucerne in 1974, the US stated that:

The prohibition against weapons that cause unnecessary suffering is a criterion to which we are currently bound under the Fourth Hague Convention of 1907, but interpretations of its scope and implications today vary significantly. It is the U.S. view that the “necessity” of the suffering must be judged in relation to the military utility of the weapons. The test is whether the suffering is needless, superfluous, or disproportionate to the military advantage reasonably expected from the use of the weapon.¹⁹⁷

195. In 1979, during the Preparatory Conference to the UN Conference that led to the adoption of the 1980 CCW, the US stated, in a discussion on incendiary weapons, that “some delegations had based themselves on the premise that incendiary weapons caused unnecessary suffering and were, by definition, inhumane, but if that premise was correct, they would already have been outlawed”.¹⁹⁸

196. In 1987, the Deputy Legal Adviser of the US Department of State affirmed that “we support the principle that the permissible means of injuring the enemy are not unlimited and that parties to a conflict not use weapons, projectiles, and materials and methods of warfare of a nature to cause superfluous injury or unnecessary suffering”.¹⁹⁹

¹⁹⁶ US, Reply of 18 January 1974 of the Acting General Counsel of the Department of Defense to a letter of a member of the House of Representatives, reprinted in Arthur W. Rovine, *Digest of United States Practice in International Law, 1974*, Department of State Publication 8809, Washington, D.C., 1975, pp. 705–706.

¹⁹⁷ US, Statement of 25 September 1974 at the Conference of Government Experts on Weapons which may Cause Unnecessary Suffering or have Indiscriminate Effects, Lucerne, 24 September–18 October 1974, reprinted in Arthur W. Rovine, *Digest of United States Practice in International Law, 1974*, US Department of State Publication 8809, Washington, D.C., 1975, p. 707.

¹⁹⁸ US, Statement at the Preparatory Conference to the UN Conference on prohibitions or restrictions of certain conventional weapons which may be deemed to be excessively injurious or to have indiscriminate effects, 12 April 1979, UN Doc. A/CONF.95/PREP.CONF./II/SR.28, 18 April 1979, pp. 2–3.

¹⁹⁹ US, Remarks of Michael J. Matheson, Deputy Legal Adviser, US Department of State, The Sixth Annual American Red Cross-Washington College of Law Conference on International Humanitarian Law: A Workshop on Customary International Law and the 1977 Protocols Additional to the 1949 Geneva Conventions, *American University Journal of International Law and Policy*, Vol. 2, 1987, p. 424.

197. In 1988, in a memorandum on laser weapons, the US Department of the Army affirmed that:

Article 23(e) [of the 1907 HR] prohibits the employment of “arms, projectiles, or material calculated to cause unnecessary suffering.” There is no internationally accepted definition of “unnecessary suffering.” In fact, an anomaly exists in that while it is legally permissible to kill an enemy soldier, in theory any wounding should not be calculated or intended to cause unnecessary suffering. In endeavoring to reconcile the two, in considering the customary practice of nations during this century, and in acknowledging the lethality of the battlefield for more than a century, certain factors emerge that are germane to this opinion:

- (a) No legal obligation exists or can exist to limit wounding mechanisms in a way that permits lawful killing while requiring that wounds merely temporarily disable, that is, that the effects of wounds do not extend beyond the period of hostilities; and
- (b) In considering whether a weapon may cause unnecessary suffering, it must be viewed in light of comparable wounding mechanisms extant on the modern battlefield rather than viewing the weapon in isolation.
- (c) The term “unnecessary suffering” implies that there is such a thing as “necessary suffering,” *i.e.*, that ordinary use of any military effective weapon will result in suffering on the part of those against whom it is employed.
- (d) The rule does prohibit deliberate design or alteration of a weapon solely for the purpose of increasing the suffering of those against whom it is used, including acts that will make their wounds more difficult to treat. This is the basis for rules against poisoned weapons and certain small caliber hollow point ammunition.²⁰⁰

198. Course material from the US Army War College, in discussing the balance between military necessity and unnecessary suffering, states that the “existence of a weapon generally indicates a legitimate military requirement” and maintains that no effective weapon has ever been outlawed. The example used to prove this statement is the 1907 Hague Convention (VIII), which bans anchored automatic contact mines which do not become harmless when they break loose from their mooring and torpedoes that do not become harmless after they have missed their target. In contrast to this, the course material points to the 1899 Hague Declaration concerning Asphyxiating Gases, which the UK and US did not ratify, and to the fact that poison gas was used during the First World War.²⁰¹

199. In 1990, in a memorandum of law on sniper use of open-tip ammunition, the US Department of the Army stated that:

²⁰⁰ US, Department of the Army, Office of the Judge Advocate General, Memorandum of law concerning the legality of the use of lasers as antipersonnel weapons, 29 September 1988, § 4, reprinted in Marian Nash, *Cumulative Digest of United States Practice in International Law, 1981–1988*, Department of State Publication 10120, Washington, D.C., 1993–1995, p. 3424.

²⁰¹ US, Marine Corps Reference Material for Marine Corps Law of Warfare Course, *Army War College Selected Readings, Advanced Course Law for the Joint Warfighter*, Vol. II, 2nd edition, 1989, p. 254, § b.

Although the United States has made the formal decision that for military, political, and humanitarian reasons it will not become a party to [AP I], U.S. officials have taken the position that the language of article 35(2) of Protocol I... is a codification of customary international law, and therefore binding upon all nations.²⁰²

200. In 1992, in a review of the legality of extended range anti-armour munition, the US Department of the Air Force stated that "international law prohibits the use, even against military objectives, of weapons which cause unnecessary suffering or superfluous injury".²⁰³

201. In 1993, in a legal review of the USSOCOM Special Operations Offensive Handgun, the Judge Advocate General of the US Department of the Army stated that:

Although President Ronald Reagan declined to submit [AP I] to the Senate for its advice and consent to ratification, the U.S. Government considers the language quoted from article 35(2) of Protocol I to be a codification of customary international law to the extent that it prohibits superfluous injury, as prohibited by Article 23e of the ... [1907 HR], and therefore binding upon all nations.²⁰⁴

202. In its written statement submitted to the ICJ in the *Nuclear Weapons case* in 1995, the US stated that it "has long taken the position that various principles of the international law of armed conflict would apply to the use of nuclear weapons as well as to other means and methods of warfare". It added that the prohibition on the use of weapons of a nature to cause superfluous injury or unnecessary suffering "was intended to preclude weapons designed to increase the injury or suffering of the persons attacked beyond that necessary to accomplish the military objective. It does not prohibit weapons that may cause great injury or suffering if the use of the weapon is necessary to accomplish the military mission."²⁰⁵

203. In its oral pleadings before the ICJ in the *Nuclear Weapons case* in 1995, the US stressed that:

Returning to the claims that have been made regarding specific principles of the law of armed conflict, it has also been argued that nuclear weapons categorically cause unnecessary suffering or superfluous injury and therefore violate the law of armed conflict. This line of argument cannot be sustained. The unnecessary suffering principle prohibits the use of weapons designed specifically to increase the suffering of persons attacked beyond that necessary to accomplish a particular military objective. As a general matter, however, it does not prohibit the use of weapons that cause great injury and pain, as such. Under this principle, whether use of a

²⁰² US, Department of the Army, Office of the Judge Advocate General, Memorandum of Law on Sniper Use of Open-Tip Ammunition, 12 October 1990, § 3.

²⁰³ US, Department of the Air Force, Office of the Judge Advocate General, Legal Review: Extended Range Antiarmor Munition (ERAM), 16 April 1992, § 3.

²⁰⁴ US, Department of the Army, Office of the Judge Advocate General, Legal Review of USSOCOM Special Operations Offensive Handgun, 16 February 1993, p. 11.

²⁰⁵ US, Written statement before the ICJ, *Nuclear Weapons case*, 20 June 1995, p. 21.

particular weapon causes unnecessary suffering depends, therefore, on whether its use and resultant effects are required to accomplish a legitimate military objective, a question which again cannot be answered in the abstract.²⁰⁶

204. In 1997, in a message to the US Senate analysing Article 3(3) of the 1996 Amended Protocol II to the CCW, the US President noted that “this rule is derived from Article 23 of [the 1907 HR]... It thus reiterates a proscription already in place as a matter of customary international law applicable to all weapons.”²⁰⁷

205. In a memorandum of law issued in 1997, the Judge Advocate General of the US Department of the Army stated, with reference to Article 23(e) 1907 HR, that “the law of war prohibits weapons calculated to cause unnecessary suffering”.²⁰⁸

206. In 1998, in a legal review of Oleoresin Capsicum (OC) pepper spray, the Deputy Assistant Judge Advocate General of the US Department of the Navy stated that:

The touchstone for legality of a weapon under traditional concepts in the law of war is whether that weapon’s intended use or method of employment is calculated to cause unnecessary suffering...

The Regulations to the Hague Convention on Land Warfare of 1907 codify the prohibition on the employment of arms, projectiles, or material “calculated to cause unnecessary suffering”. This customary prohibition requires a balancing of the military necessity in employing a weapon and the likely suffering occasioned by that employment. Any injury, collateral damage, or general suffering wrought by a weapon’s use should be justified by a military need. Historically, this analysis has involved comparisons to other existing technologies and comparable wounding mechanisms as well as a survey of the practice of other States regarding use of a particular weapon.

...

Oleoresin Capsicum is not calculated (i.e., designed), nor does it in fact cause unnecessary suffering. It is designed specifically to temporarily incapacitate violent or threatening subjects while reducing human suffering and is in consonance with the DoD [Non-Lethal Weapon] program. Its physiological effects, while relatively painful, are temporary and do not rise to the level of unnecessary suffering contemplated in the prohibition... Provided a military necessity justifies its employment, the principle of unnecessary suffering would not preclude employment of OC in appropriate circumstances.²⁰⁹

²⁰⁶ US, Oral pleadings before the ICJ, *Nuclear Weapons case*, 15 November 1995, Verbatim Record CR 95/34, pp. 70–72.

²⁰⁷ US, Message from the US President to the Senate transmitting Amended Protocol II, Protocol II and Protocol IV to the 1980 CCW, Treaty Doc. 105-1, 7 January 1997.

²⁰⁸ US, Department of the Army, Office of the Judge Advocate General, Memorandum of Law for AMSTA-AR-CCH-C, Picatinny Arsenal, NJ 07806-5000, 25 July 1997, § 4,

²⁰⁹ US, Department of the Navy, Deputy Assistant Judge Advocate General, International and Operational Law Division, Legal Review of Oleoresin Capsicum (OC) Pepper Spray, 19 May 1998, § 4.

207. According to the Report on US Practice, it is the *opinio juris* of the US that international law forbids weapons or methods of warfare calculated to cause unnecessary suffering or superfluous injury.²¹⁰

208. In the plenary session of the CDDH, the representative of the SFRY deplored the fact that the Ad Hoc Committee on Conventional Weapons established by the CDDH had not been able to “specify which were the weapons which caused superfluous injury”. He further stated that his delegation “was convinced that the question of prohibition and restriction of such weapons and methods or means of warfare came under humanitarian law and not under disarmament negotiations”.²¹¹

209. In 1991, in a document entitled “Examples of violations of the rules of international law committed by the so-called armed forces of Slovenia”, the Ministry of Defence of the SFRY (FRY) stated that:

The nature of the injuries of some of the members of the Yugoslav People’s Army show that forbidden means have been used in the armed conflict, before all ammunition suitable to inflict disproportionate and needless injuries, that reduce the chances of the injured to survive.

In that respect, the injuries of [a] soldier . . . are characteristic. He was hit in the tip of his right forearm and the round had crumbled and split the forearm bone, the tissue and thus blew the fist of the injured to bits. In the riddled channel and the surrounding tissue, pieces of a fragmented round were found. All that implies for the use of the so-called soft-nosed bullet.²¹²

210. In its oral pleadings before the ICJ in the *Nuclear Weapons case* in 1995, Zimbabwe stated that it fully shared the analysis by other States that “the threat or use of nuclear weapons violates the principles of humanitarian law prohibiting the use of weapons or methods of warfare that create unnecessary suffering”.²¹³

211. According to the Report on the Practice of Zimbabwe, Zimbabwe “does not employ any weapons meant to cause unnecessary suffering or superfluous injury, e.g. exploding bullets, incendiary weapons, booby-traps, etc.”.²¹⁴

III. Practice of International Organisations and Conferences

United Nations

212. In Resolution 2677 (XXV) adopted in 1970, the UN General Assembly advocated the need to “secure the full observance of human rights applicable

²¹⁰ Report on US Practice, 1997, Chapter 3.1.

²¹¹ SFRY, Statement at the CDDH, *Official Records*, Vol. VI, CDDH/SR.39, 25 March 1977, p. 100, § 52.

²¹² SFRY (FRY), Ministry of Defence, Examples of violations of the rules of international law committed by the so-called armed forces of Slovenia, July 1991, § 4.

²¹³ Zimbabwe, Oral pleadings before the ICJ, *Nuclear Weapons case*, 15 November 1995, Verbatim Record CR 95/35, p. 27.

²¹⁴ Report on the Practice of Zimbabwe, 1998, Chapter 3.1.

in all armed conflicts". It called upon "all parties to any armed conflict to observe the rules laid down in the Hague Conventions of 1899 and 1907, the Geneva [Gas] Protocol of 1925 . . . and other humanitarian rules applicable in armed conflicts".²¹⁵

213. In two resolutions adopted in 1971 on respect for human rights in armed conflicts, the UN General Assembly called upon "all parties to any armed conflict to observe the rules laid down in the Hague Conventions of 1899 and 1907".²¹⁶

214. In a resolution adopted in 1973, the UN General Assembly requested that the CDDH promote an agreement concerning incendiary weapons. It called for urgent efforts by States "to seek, through possible legal means, the prohibition or restriction of the use of weapons that may cause unnecessary suffering". It welcomed ICRC proposals at the Conference aimed at "a reaffirmation of the fundamental general principles of international law prohibiting the use of weapons which are likely to cause unnecessary suffering". The General Assembly invited the Conference to "seek agreement on rules prohibiting or restricting" the use of "incendiary weapons, as well as other specific conventional weapons which may be deemed to cause unnecessary suffering".²¹⁷

215. In a resolution adopted in 1973, the UN General Assembly called for "full and effective application by all parties to armed conflicts of existing legal rules to such conflicts" and for acknowledgement of and compliance with the "obligations under the humanitarian instruments and [observance of] the international humanitarian rules that are applicable", e.g., the Hague Conventions of 1899 and 1907. The General Assembly invited the CDDH to consider a prohibition of "specific conventional weapons which may cause unnecessary suffering".²¹⁸ The US explained its abstention in the vote on this resolution because it felt that "an inappropriate form of participation in the conference of entities that are not States would raise the question as to whether the [CDDH] would continue to be a useful forum for negotiation of international conventions".²¹⁹

216. In a number of resolutions adopted between 1973 and 1977, the UN General Assembly called upon "all parties to armed conflicts to acknowledge and to comply with their obligations under the humanitarian instruments and to observe the international humanitarian rules which are applicable, in

²¹⁵ UN General Assembly, Res. 2677 (XXV), 9 December 1970, preamble.

²¹⁶ UN General Assembly, Res. 2852 (XXVI), 20 December 1971, § 1; Res. 2853 (XXVI), 20 December 1971, § 1.

²¹⁷ UN General Assembly, Res. 3076 (XXVIII), 6 December 1973, preamble and § 1. The resolution was adopted by 103 votes in favour, none against and 18 abstentions (Belarus, Belgium, Bulgaria, Central African Republic, Czechoslovakia, France, GDR, Greece, Hungary, Israel, Italy, Mongolia, Poland, Saudi Arabia, Ukraine, USSR, UK and US).

²¹⁸ UN General Assembly, Res. 3102 (XXVIII), 12 December 1973, preamble and § 4. The resolution was adopted by 107 votes in favour, none against and 6 abstentions (Costa Rica, Israel, Paraguay, Portugal, Spain and US).

²¹⁹ UN General Assembly, UN Doc. A/PV.2197, 12 December 1973, p. 8.

particular the Hague Conventions of 1899 and 1907".²²⁰ These resolutions dropped the word "any" or "all" before "armed conflict" without an explanation.

217. In numerous resolutions adopted between 1973 and 1982, the UN General Assembly stated that the suffering of civilians and combatants would be reduced if all States could agree on restricting or prohibiting weapons causing unnecessary suffering.²²¹

218. In a resolution adopted in 1974, the UN General Assembly invited the CDDH to consider the prohibition of weapons that cause unnecessary suffering and a prohibition or restriction of napalm and other incendiary weapons. It called urgently "for renewed efforts by Governments to seek, through legal means, the prohibition of weapons that cause unnecessary suffering".²²²

219. In a resolution adopted in 1976, the UN General Assembly invited the CDDH:

to accelerate its consideration of the use of specific conventional weapons, including any which may be deemed to be excessively injurious or to have indiscriminate effects, and to do its utmost to agree for humanitarian reasons on possible rules prohibiting or restricting the use of such weapons.²²³

220. In a resolution adopted in 1977, the UN General Assembly decided to convene a UN conference to seek agreement on the prohibition or restriction of conventional weapons. It stated that it was convinced that:

The suffering of civilian populations and combatants could be significantly reduced if general agreement can be attained on the prohibition or restriction for humanitarian reasons of the use of specific conventional weapons, including any which may be deemed to be excessively injurious or to have indiscriminate effects.²²⁴

The 21 States which abstained in the vote on this resolution did not oppose humanitarian principles *per se* or the convening of the conference, but had reservations on procedural arrangements, details of the organisation and the directions the resolution gave the conference, for example.²²⁵

²²⁰ UN General Assembly, Res. 3102 (XXVIII), 12 December 1973, § 4; Res. 3319 (XXIX), 14 December 1974, § 3; Res. 3500 (XXX), 15 December 1975, § 1; Res. 31/19, 24 November 1976, § 1; Res. 32/44, 8 December 1977, § 6.

²²¹ UN General Assembly, Res. 3076 (XXVIII), 6 December 1973, preamble; Res. 3255 (XXIX), 9 December 1974, preamble; Res. 31/64, 10 December 1976, preamble; Res. 32/152, 14 December 1976, preamble and § 2; Res. 33/70, 14 December 1978, preamble; Res. 34/82, 11 December 1979, preamble; Res. 35/153, 12 December 1980, preamble; Res. 36/93, 9 December 1981, preamble; Res. 37/79, 9 December 1982, preamble.

²²² UN General Assembly, Res. 3255 (XXIX), 9 December 1974, preamble and §§ 1 and 3. The resolution was adopted by 108 votes in favour, none against and 13 abstentions (Belarus, Bulgaria, Czechoslovakia, France, GDR, Hungary, Israel, Mongolia, Poland, Ukraine, USSR, UK and US).

²²³ UN General Assembly, Res. 31/64, 10 December 1976, § 2.

²²⁴ UN General Assembly, Res. 32/152, 19 December 1977, preamble and § 2. The resolution was adopted by 115 votes in favour, none against and 21 abstentions (Belarus, Belgium, Bulgaria, Canada, Cuba, Czechoslovakia, France, GDR, FRG, Hungary, Israel, Italy, Japan, Luxembourg, Mongolia, Poland, Turkey, Ukraine, USSR, UK and US).

²²⁵ UN General Assembly, UN Doc. A/PV.106, 19 December 1977, pp. 1735–1736.

221. The Final Document of the Special Session on Disarmament (SSODI) was adopted without a vote in 1978 to lay the foundation for an international disarmament strategy. In it, the UN General Assembly stated that “further international action should be taken to prohibit or restrict for humanitarian reasons the use of specific conventional weapons, including those which may be excessively injurious, cause unnecessary suffering or have indiscriminate effects”.²²⁶ It further stated that:

The United Nations Conference on Prohibition or Restrictions of the Use of Certain Conventional Weapons which may be Deemed to be Excessively Injurious or to have Indiscriminate Effects should seek agreement, in the light of humanitarian and military considerations, on the prohibition or restriction of use of certain conventional weapons including those which may cause unnecessary suffering or have indiscriminate effects.²²⁷

222. In a resolution adopted in 1979, the UN General Assembly took note of the developments of the CCW Conference. It reaffirmed that the General Assembly’s objective was a general agreement to prohibit or restrict conventional weapons “which might be deemed to be excessively injurious or to have indiscriminate effects”.²²⁸

223. In a resolution adopted in 1980, the UN General Assembly commended the 1980 CCW agreed upon, “with a view to achieving the widest possible adherence to these instruments”. It reaffirmed that the General Assembly’s objective was a general agreement to prohibit or restrict conventional weapons “which might be deemed to be excessively injurious”.²²⁹

224. In a resolution adopted in 1981, the UN General Assembly urged all States to accede to the 1980 CCW and its Protocols. It also reaffirmed the General Assembly’s

conviction that the suffering of civilian populations and of combatants would be further significantly reduced if general agreement could be attained on the prohibition or restriction for humanitarian reasons of the use of specific conventional weapons, including any which may be deemed to be excessively injurious or to have indiscriminate effects.²³⁰

These statements were repeated in numerous other General Assembly resolutions.²³¹

²²⁶ UN General Assembly, Final Document of the Special Session of the General Assembly on Disarmament, 23 May–1 June 1978, UN Doc. A/S-10/2, 1978, § 23.

²²⁷ UN General Assembly, Final Document of the Special Session of the General Assembly on Disarmament, 23 May–1 June 1978, UN Doc. A/S-10/2, 1978, § 86.

²²⁸ UN General Assembly, Res. 34/82, 11 December 1979, preamble.

²²⁹ UN General Assembly, Res. 35/153, 12 December 1980, § 4 and preamble.

²³⁰ UN General Assembly, Res. 36/93, 9 December 1981, preamble.

²³¹ UN General Assembly, Res. 37/79, 9 December 1982, preamble and § 1; Res. 38/66, 15 December 1983, preamble and § 3; Res. 39/56, 12 December 1984, preamble and § 3; Res. 40/84, 12 December 1985, preamble and § 3; Res. 41/50, 3 December 1986, preamble and § 3; Res. 42/30, 30 November 1987, preamble and § 3; Res. 43/67, 7 December 1988, preamble and § 3; Res. 45/64, 4 December 1990, preamble and § 3; Res. 46/40, 6 December 1991, preamble and § 3; Res. 47/56, 9 December 1992, preamble and § 3; Res. 48/79, 16 December 1993, preamble

225. In a resolution adopted in 1997, the UN General Assembly explicitly mentioned that it based its recommendations on the “IHL principle that the right of parties to an armed conflict to choose means or weapons of warfare is not unlimited”.²³²

226. In 1969, in a report on respect for human rights in armed conflicts, the UN Secretary-General stated that the reference to “all armed conflicts” in Resolution 2444 (XXIII) was made to avoid “certain traditional distinctions as between international wars, internal conflicts, or conflicts which although internal in nature are characterized by a degree of direct or indirect involvement of foreign Powers or foreign nationals”. The Secretary-General discussed the effects of weapons of mass destruction, which were deemed to be both indiscriminate and of a nature to cause unnecessary suffering. He also identified precision-weapons that caused unnecessary suffering, e.g. expanding bullets.²³³

227. A survey prepared by the UN Secretariat in 1973 on existing rules of international law concerning the prohibition or restriction of the use of specific weapons listed the following examples of weapons that are deemed to cause unnecessary suffering according to military manuals: shotgun pellets, explosive and incendiary projectiles under 400 grams, projectiles treated with a substance designed to cause inflammation of wounds, dum-dum bullets, certain types of tracer ammunition, bayonets or lances with barbs, poison weapons, irregular shaped bullets, projectiles filled with glass.²³⁴

228. In 1995, in a report concerning the conflict in Guatemala, the Director of MINUGUA stated that “the Mission recommends that URNG issue precise instructions to its combatants to refrain from causing unnecessary harm to individuals and property, to take due care not to create additional risks to life in attacking military targets”.²³⁵

Other International Organisations

229. In a resolution adopted in 1994 on respect for international humanitarian law, the OAS General Assembly stated that it was “deeply disturbed by the testing, production, sale, transfer, and use of certain conventional weapons which may be deemed to be excessively injurious”. It urged all member States to accede to AP I and AP II and to the 1980 CCW.²³⁶

230. In a resolution adopted in 1998 on promotion of and respect for international humanitarian law, the OAS General Assembly stated that “international

and § 3; Res. 49/79, 15 December 1994, preamble and § 3; Res. 50/74, 12 December 1995, preamble and § 3; Res. 51/49, 10 December 1996, preamble and § 3; Res. 52/42, 9 December 1997, § 2; Res. 53/81, 4 December 1998, § 5; Res. 54/58, 1 December 1999, § III (3).

²³² UN General Assembly, Res. 52/38, 9 December 1997, preamble.

²³³ UN Secretary-General, Report on respect for human rights in armed conflicts, UN Doc. A/7720, 20 November 1969, p. 11 and pp. 59–63, §§ 183–201.

²³⁴ UN Secretariat, Respect for human rights in armed conflicts, Existing rules of international law concerning the prohibition or restriction of use of specific weapons, Survey, UN Doc. A/9215, 7 November 1973, pp. 204–205.

²³⁵ MINUGUA, Director, Second report, UN Doc. A/49/929, Annex, 29 June 1995, § 197.

²³⁶ OAS General Assembly, Res. 1270 (XXIV-O/94), 10 June 1994, preamble.

humanitarian law prohibits the use of weapons, projectiles, material, and methods of warfare that . . . cause excessive injury or unnecessary suffering".²³⁷

International Conferences

231. The 22nd International Conference of the Red Cross in 1973 adopted a resolution on the prohibition or restriction of the use of certain weapons in which it endorsed the view of the UN General Assembly in Resolution 2932 (XXVII) A that:

the widespread use of many weapons and the emergence of new methods of warfare that cause unnecessary suffering or are indiscriminate call urgently for renewed efforts by governments to seek, through legal means, the prohibition or restriction of the use of such weapons and of indiscriminate and cruel methods of warfare and, if possible, through measures of disarmament, the elimination of specific, especially cruel or indiscriminate, weapons.

The resolution urged the CDDH to "begin consideration at its 1974 session of the question of the prohibition or restriction of the use of conventional weapons which may cause unnecessary suffering or have indiscriminate effects" and invited the ICRC to convene in 1974 a conference of government experts to study the issue in depth.²³⁸

232. At the CCW Conference in 1979, the concept of unnecessary suffering was not discussed as such but the term was mentioned repeatedly.²³⁹

233. The 24th International Conference of the Red Cross in 1981 adopted a resolution on conventional weapons in which it noted with satisfaction the adoption of the 1980 CCW and its Protocols and invited States to become parties to them "as soon as possible, to apply them and examine the possibility of strengthening or developing them further".²⁴⁰

234. The 26th International Conference of the Red Cross and Red Crescent in 1995 adopted a resolution on protection of the civilian population in period of armed conflict in which it stressed that "proper attention should be given to other existing conventional weapons or future weapons which may cause unnecessary suffering or have indiscriminate effects".²⁴¹

235. The Plan of Action for the years 2000–2003 adopted in 1999 by the 27th International Conference of the Red Cross and Red Crescent stated that:

States which have not done so are encouraged to establish mechanisms and procedures to determine whether the use of weapons, whether held in their inventories or being procured or developed, would conform to the obligations binding

²³⁷ OAS General Assembly, Res. 1565 (XXVIII-O/98), 2 June 1998, preamble.

²³⁸ 22nd International Conference of the Red Cross, Tehran, 8–15 November 1973, Res. XIV.

²³⁹ UN Conference on prohibitions or restrictions of certain conventional weapons which may be deemed to be excessively injurious or to have indiscriminate effects, UN Doc. A/CONF.95, 10–28 September 1979 and 15 September–10 October 1980.

²⁴⁰ 24th International Conference of the Red Cross, Manila, 7–14 November 1981, Res. IX, § 2.

²⁴¹ 26th International Conference of the Red Cross and Red Crescent, Geneva, 3–7 December 1995, Res. II, § H(h).

on them under international humanitarian law... States and the ICRC may engage in consultations to promote these mechanisms, and in this regard analyse the extent to which the ICRC *SIRUS (Superfluous Injury or Unnecessary Suffering) Project Report* to the 27th Conference and other available information may assist States.²⁴²

236. In the Final Declaration of the Second Review Conference of States Parties to the CCW in 2001, the High Contracting Parties solemnly declared:

their reaffirmation of the principles of international humanitarian law, as mentioned in the Convention, [including] the principle that prohibits the employment in armed conflicts of weapons, projectiles and material and methods of warfare of a nature to cause superfluous injury or unnecessary suffering.²⁴³

237. In the Final Declaration of the African Parliamentary Conference on International Humanitarian Law for the Protection of Civilians during Armed Conflict in 2002, the participants stated that they were “worried in the face of the rapid expansion of arms trade and the uncontrolled proliferation of weapons, notably those which can... cause unnecessary suffering”.²⁴⁴

IV. Practice of International Judicial and Quasi-judicial Bodies

238. In its advisory opinion in the *Nuclear Weapons case* in 1996, the ICJ stated that:

The cardinal principles contained in the texts constituting the fabric of humanitarian law are the following... According to the second principle, it is prohibited to cause unnecessary suffering to combatants: it is accordingly prohibited to use weapons causing them such harm or uselessly aggravating their suffering. In application of that second principle, States do not have unlimited freedom of choice of means in the weapons they use... In conformity with the aforementioned principles, humanitarian law, at a very early stage, prohibited certain types of weapons either because of their indiscriminate effect on combatants and civilians or because of the unnecessary suffering caused to combatants, that is to say, a harm greater than that unavoidable to achieve legitimate military objectives... Further these fundamental rules are to be observed by all States whether or not they have ratified the conventions that contain them, because they constitute intransgressible principles of international customary law.²⁴⁵

239. In her dissenting opinion in the *Nuclear Weapons case* before the ICJ in 1996, Judge Higgins stated that “it is not permitted in the choice of weapons

²⁴² 27th International Conference of the Red Cross and Red Crescent, Geneva, 31 October–6 November 1999, Res. I, Annex 2, Plan of Action for the years 2000–2003, Actions proposed for final goal 1.5, § 21.

²⁴³ Second Review Conference of States Parties to the CCW, Geneva, 11–21 December 2001, Final Declaration, UN Doc. CCW/CONF.II/2, 2001, p. 10.

²⁴⁴ African Parliamentary Conference on International Humanitarian Law for the Protection of Civilians during Armed Conflict, Final Declaration, Niamey, 18–20 February 2002, preamble.

²⁴⁵ ICJ, *Nuclear Weapons case*, Advisory Opinion, 8 July 1996, §§ 78–79.

to cause unnecessary suffering to enemy combatants, nor to render their death inevitable". In her discussion on the balancing of necessity and humanity, she stated that "a military target may not be attacked if collateral civilian casualties would be excessive in relation to the military advantage".²⁴⁶

240. In his separate opinion in the *Nuclear Weapons case* before the ICJ in 1996, Judge Guillaume stated that "the harm caused to combatants must not be 'greater than that unavoidable to achieve legitimate military objectives'". He added that "therefore the nuclear weapon cannot be considered as unlawful due to the only fact of sufferings that it is likely to cause. It would be advisable to compare these sufferings to the 'military advantages' offered or to 'the military objectives' followed."²⁴⁷

241. In his declaration in the *Nuclear Weapons case* before the ICJ in 1996, President Bedjaoui stated that the effect of nuclear weapons was such that they caused unnecessary suffering.²⁴⁸

242. In his separate opinion in the *Nuclear Weapons case* before the ICJ in 1996, Judge Fleischhauer stated that "such immeasurable suffering" amounted to "the negation of the humanitarian considerations underlying the law of armed conflict".²⁴⁹

243. In his dissenting opinion in the *Nuclear Weapons case* before the ICJ in 1996, Judge Weeramantry stated that "the facts . . . are more than sufficient to establish that the nuclear weapon causes unnecessary suffering going far beyond the purposes of war".²⁵⁰

244. In his dissenting opinion in the *Nuclear Weapons case* before the ICJ in 1996, Judge Shahabudeen stated that the balance between military advantage and suffering "has to be struck by States". An important factor affecting this balance was public conscience which could consider that no conceivable military advantage could justify the suffering. It was "not possible to ascertain the humanitarian character of [international humanitarian] principles without taking account of the public conscience". Even though the use of chemical weapons was arguably "a more efficient way of deactivating the enemy in certain circumstances than other means in use during the First World War, [it] did not suffice to legitimize its use".²⁵¹

245. In his dissenting opinion in the *Nuclear Weapons case* before the ICJ in 1996, Judge Koroma, after describing the effects of atomic weapons in Hiroshima, Nagasaki and the Marshall Islands, stated that the radioactive effects were "more harmful" than those caused by poison gas and added "the

²⁴⁶ ICJ, *Nuclear Weapons case*, Dissenting Opinion of Judge Higgins, 8 July 1996, §§ 12 and 21.

²⁴⁷ ICJ, *Nuclear Weapons case*, Separate Opinion of Judge Guillaume, 8 July 1996, § 5.

²⁴⁸ ICJ, *Nuclear Weapons case*, Declaration of Judge Bedjaoui, President of the ICJ, 8 July 1996, § 20.

²⁴⁹ ICJ, *Nuclear Weapons case*, Separate Opinion of Judge Fleischhauer, 8 July 1996, § 2.

²⁵⁰ ICJ, *Nuclear Weapons case*, Dissenting Opinion of Judge Weeramantry, 8 July 1996, p. 48.

²⁵¹ ICJ, *Nuclear Weapons case*, Dissenting Opinion of Judge Shahabudeen, 8 July 1996, pp. 180–181, Part III, § 2.

above findings by the court should have led it inexorably to conclude that any use of nuclear weapons is unlawful under international law".²⁵²

246. In its decision on the defence motion for interlocutory appeal on jurisdiction in the *Tadić* case in 1995, the ICTY Appeals Chamber supported the view that UN General Assembly Resolution 2444 (XXIII) dealt with both international and internal conflicts. It stated that "the application of certain rules of war in both internal and international armed conflicts is corroborated by resolutions 2444 and 2675".²⁵³

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

247. To fulfil its task of disseminating IHL, the ICRC has delegates around the world teaching armed and security forces that "it is prohibited to use weapons of a nature to cause: a) superfluous injury or unnecessary suffering".²⁵⁴

248. In a background paper submitted to the Conference of Government Experts in 1971, the ICRC stated that the term "unnecessary suffering" was defined as "a question of sparing even combatants from injuries to no purpose or from suffering which exceeds what is necessary to put the adversary *hors de combat*".²⁵⁵

249. The ICRC Commentary on the Additional Protocols states that:

1419. The specific applications of the prohibition formulated in Article 23, paragraph 1(e), of the Hague Regulations, or resulting from the Declarations of St. Petersburg and The Hague, are not very numerous. They include:

1. explosive bullets and projectiles filled with glass, but not explosives contained in artillery missiles, mines, rockets and hand grenades;
2. "dum-dum" bullets, i.e., bullets which easily expand or flatten in the human body, such as bullets with a hard envelope which does not entirely cover the core or is pierced with incisions or bullets of irregular shape or with a hollowed out nose;
3. poison and poisoned weapons, as well as any substance intended to aggravate a wound;
4. asphyxiating or deleterious gases;
5. bayonets with a serrated edge, and lances with barbed heads;
6. hunting shotguns are the object of some controversy, depending on the nature of the ammunition and its effects on a soft target.

1420. The weapons which are prohibited under the provisions of the Hague Law are, *a fortiori*, prohibited under [Article 35(2) AP I].²⁵⁶

²⁵² ICJ, *Nuclear Weapons case*, Dissenting Opinion of Judge Koroma, 8 July 1996, p. 346.

²⁵³ ICTY, *Tadić case*, Interlocutory Appeal, 2 October 1995, § 110.

²⁵⁴ Frédéric de Mulinen, *Handbook on the Law of War for Armed Forces*, ICRC, Geneva, 1987, § 394, see also § 912(a).

²⁵⁵ ICRC, *Rules Relative to Behaviour of Combatants*, Submitted to the First Session of the Conference of Government Experts, 24 May–12 June 1971, Geneva, January 1971, p. 6.

²⁵⁶ Yves Sandoz *et al.* (eds.), *Commentary on the Additional Protocols*, ICRC, Geneva, 1987, §§ 1419–1420.

250. In a press release issued in 1991 in the context of the Gulf War, the ICRC reminded the belligerents that “the right to choose methods or means of warfare is not unlimited. Weapons... likely to cause disproportionate suffering... are prohibited.”²⁵⁷

251. In 1992, the ICRC reminded a separatist entity that the use of chemical weapons caused superfluous injury and that it considered the prohibition of weapons causing superfluous injury to be customary and therefore applicable even in internal conflicts.²⁵⁸

252. In a declaration issued in 1994 in the context of the conflict between the Mexican government and the EZLN, the Mexican Red Cross stated that “under international law, the use of arms... which may cause undue loss of life or excessive suffering is prohibited”.²⁵⁹

253. In 1994, in a Memorandum on Respect for International Humanitarian Law in Angola, the ICRC stated that “it is prohibited to employ weapons, munitions or methods of warfare of a nature to cause unnecessary suffering to persons *hors de combat* or which render their death inevitable”.²⁶⁰

254. In 1994, in a Memorandum on Compliance with International Humanitarian Law by the Forces Participating in Opération Turquoise in the Great Lakes region, the ICRC stated that “the use of arms or methods of combat which needlessly increase the suffering of persons placed *hors de combat* or which make their death inevitable is prohibited”.²⁶¹

255. In a working paper on war crimes submitted in 1997 to the Preparatory Committee for the Establishment of an International Criminal Court, the ICRC proposed that the employment of “weapons, projectiles and material and methods of warfare of a nature to cause superfluous injury or unnecessary suffering”, when committed in international or non-international armed conflicts, be subject to the jurisdiction of the Court.²⁶²

256. The ICRC’s SIrUS Project initiated in 1998 aimed to contribute to the evaluation of the lawfulness of weapons by indicating the health effects actually caused by commonly used weapons in the armed conflicts that have taken place over the last few decades. This material provided for some objectivity in the evaluation, in particular, of the expected health effects of a weapon that had to be weighed against the foreseen military utility. The findings of the SIrUS

²⁵⁷ ICRC, Press Release No. 1659, Middle East conflict: ICRC appeals to belligerents, 1 February 1991, *IRRC*, No. 280, 1991, p. 27.

²⁵⁸ ICRC archive document.

²⁵⁹ Mexican Red Cross, Declaración en torno a los acontecimientos que se han presentado en el estado de Chiapas a partir del 1 de enero de 1994, 3 January 1994, § 2(E).

²⁶⁰ ICRC, Memorandum on Respect for International Humanitarian Law in Angola, 8 June 1994, § II, *IRRC*, No. 320, 1997, p. 504.

²⁶¹ ICRC, Memorandum on Compliance with International Humanitarian Law by the Forces Participating in Opération Turquoise, 23 June 1994, § II, reprinted in Marco Sassòli and Antoine A. Bouvier, *How Does Law Protect in War?*, ICRC, Geneva, 1999, pp. 1308–1309.

²⁶² ICRC, Working paper on war crimes submitted to the Preparatory Committee for the Establishment of an International Criminal Court, New York, 14 February 1997, §§ 2(i) and 3(vii).

Project illustrated in particular the effects not normally seen on the battlefield, namely:

- disease other than that resulting from physical trauma from explosions or projectiles;
- abnormal physiological state or abnormal psychological state (other than the expected response to trauma from explosions or projectiles);
- permanent disability specific to the kind of weapon (with the exception of the effects of point-detonated anti-personnel mines – now widely prohibited);
- disfigurement specific to the kind of weapon;
- inevitable or virtually inevitable death in the field or a high hospital mortality level;
- grade 3 wounds among those who survive to hospital;
- effects for which there is no well-recognised and proven treatment which can be applied in a well-equipped field hospital.

The SIrUS Project suggested that:

States, when reviewing the legality of a weapon, take the above facts into account by:

- establishing whether the weapon in question would cause any of the above effects as a function of its design, and if so:
- weigh the military utility of the weapon against these effects; and
- determine whether the same purpose could reasonably be achieved by other lawful means that do not have such effects.

The project also proposed that “States make new efforts a) to build a common understanding of the norms to be applied in the review of new weapons and b) to promote transparency in the conduct and results of such reviews”.²⁶³

VI. Other Practice

257. In 1980, an armed opposition group expressed its acceptance of the fundamental principles of IHL as formulated by the ICRC, including the principle that “it is prohibited to employ weapons . . . of a nature to cause unnecessary losses or excessive suffering”.²⁶⁴

258. Rule A3 of the Rules of International Humanitarian Law Governing the Conduct of Hostilities in Non-International Armed Conflicts, adopted in 1990 by the Council of the IIHL, states that “the prohibition of superfluous injury or unnecessary suffering is a general rule applicable in non-international armed conflicts. It prohibits, in particular, the use of means of warfare which uselessly aggravate the sufferings of disabled men or render their death inevitable.”²⁶⁵

²⁶³ Robin M. Coupland and Peter Herby, “Review of the legality of weapons: a new approach. The SIrUS Project”, *IRRC*, No. 835, 1999, pp. 583–592.

²⁶⁴ ICRC archive document.

²⁶⁵ IIHL, Rules of International Humanitarian Law Governing the Conduct of Hostilities in Non-international Armed Conflicts, Rule A3, *IRRC*, No. 278, 1990, pp. 389–390.

259. In 1993, the permanent representative of Brazil to the UN and other international organisations in Geneva wrote an article in which he declared that “since the time when chemical weapons were first used, the Brazilian Government has consistently argued against the use of these and all other inhumane means of warfare”. He added that “the word ‘inhumane’ is employed here, in accordance with common usage, to mean weapons that cause unnecessary devastation and suffering”.²⁶⁶

260. In 1995, the IIHL stated that any declaration on minimum humanitarian standards should be based on “principles . . . of jus cogens, expressing basic humanitarian consideration[s] which are recognized to be universally binding”. According to the IIHL, this included the principle that “in hostilities, it is prohibited to cause superfluous injury or unnecessary suffering”.²⁶⁷

261. At its 50th General Assembly in 1998, the World Medical Association (WMA) adopted a resolution in which it stated that it warmly welcomed and supported the ICRC’s SIrUS Project and called upon National Medical Associations to endorse the Project.²⁶⁸

B. Weapons That Are by Nature Indiscriminate

Note: For practice concerning the use of means and methods of combat which cannot be directed at a specific military objective or the effects of which cannot be limited as required by international humanitarian law, see Chapter 3, section B.

I. Treaties and Other Instruments

Treaties

262. The preamble to the 1980 CCW recalls “the general principle of the protection of the civilian population against the effects of hostilities”.

263. Upon signature of the 1980 CCW, Romania affirmed “once again its decision to act, together with other States, to ensure the prohibition or restriction of all conventional weapons which . . . have indiscriminate effects”.²⁶⁹

264. The preamble to the 1997 Ottawa Convention provides that the States parties are “basing themselves . . . on the principle that a distinction must be made between civilians and combatants”.

265. Pursuant to Article 8(2)(b)(xx) of the 1998 ICC Statute, the following constitutes a war crime in international armed conflicts:

²⁶⁶ Celso L. N. Amorim, “The Chemical Weapons Convention and the Security and the Developments Needs of Brazil”, *Disarmament*, Vol. 16, 1993, No. 1, p. 111.

²⁶⁷ IIHL, Comments on the Declaration of Minimum Humanitarian Standards submitted to the UN Secretary-General, §§ 1 and 14, reprinted in Report of the Secretary-General prepared pursuant to UN Commission on Human Rights resolution 1995/29, UN Doc. E/CN.4/1996/80, 28 November 1995, pp. 8 and 10.

²⁶⁸ WMA, 50th General Assembly, Resolution on the SIrUS Project, Ottawa, October 1998.

²⁶⁹ Romania, Declaration made upon signature of the CCW, 8 April 1982, § 5.

employing weapons, projectiles and material and methods of warfare . . . which are inherently indiscriminate in violation of the international law of armed conflict, provided that such weapons, projectiles and material and methods of warfare are the subject of a comprehensive prohibition and are included in an annex to this Statute.

266. Upon signature of the 1998 ICC Statute, Egypt stated that its understanding of Article 8 of the Statute was as follows:

- (a) The provisions of the Statute with regard to the war crimes referred to in article 8 in general and article 8, paragraph 2(b) in particular shall apply irrespective of the means by which they were perpetrated or the type of weapon used, including nuclear weapons, which are indiscriminate in nature . . . in contravention of international humanitarian law.
...
- (d) Article 8, paragraph 2(b)(xvii) and (xviii) of the Statute shall be applicable to all types of emissions which are indiscriminate in their effects and the weapons used to deliver them, including emissions resulting from the use of nuclear weapons.²⁷⁰

Other Instruments

267. Article 14 of the 1956 New Delhi Draft Rules provides that:

Without prejudice to the present or future prohibition of certain specific weapons, the use is prohibited of weapons whose harmful effects – resulting in particular from the dissemination of incendiary, chemical, bacteriological, radioactive or other agents – could spread to an unforeseen degree or escape, either in space or in time, from the control of those who employ them, thus endangering the civilian population.

268. Paragraph 42(b) of the 1994 San Remo Manual states that:

In addition to any specific prohibitions binding upon the parties to a conflict, it is forbidden to employ methods or means of warfare which:

- ...
(b) are indiscriminate, in that:
 - (i) they are not, or cannot be, directed against a specific military objective;
or
 - (ii) their effects cannot be limited as required by international law as reflected in this document.

269. The 2000 UNTAET Regulation No. 2000/15 establishes panels with exclusive jurisdiction over serious criminal offences, including war crimes. According to Section 6(1)(b)(xx), “employing weapons, projectiles and material and methods of warfare . . . which are inherently indiscriminate in violation of the international law of armed conflict” constitutes a war crime in international armed conflicts.

²⁷⁰ Egypt, Declarations made upon signature of the 1998 ICC Statute, 26 December 2000, § 4(a) and (d).

II. National Practice

Military Manuals

270. Australia's Commanders' Guide states that "some weapons and weapons systems are totally prohibited. These blanket prohibitions, which may be traced to treaty or customary international law, are justified on the grounds that the subject weapons are either indiscriminate in their effect or cause unnecessary suffering."²⁷¹ It also states that "both chemical and biological weapons are prohibited because they cause unnecessary suffering and may affect the civilian population in an indiscriminate fashion".²⁷² It also states poison or poisoned weapons are prohibited "because of their potential to be indiscriminate in application".²⁷³ With respect to weapons deemed to be legal, the Guide notes that "all legal weapons are limited in the way in which they may be used. Specifically, no weapons may be used indiscriminately."²⁷⁴ In addition, it underlines that "weapons which cannot be directed at military objectives or the effect of which cannot be limited are prohibited".²⁷⁵ The Guide also states that:

Indiscriminate use is placement of such weapons [i.e. mines, booby traps and other devices] which:

- a. is not on, or directed at, a military objective; or
- b. employs a method or means of delivery which cannot be directed at a specific military objective; or
- c. may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated.²⁷⁶

271. Australia's Defence Force Manual states that "some weapons and weapons systems are totally prohibited. These blanket prohibitions, which may be traced to treaty or customary international law, are justified on the grounds that the subject weapons are either indiscriminate in their effect or cause unnecessary suffering."²⁷⁷ It also states that poison or poisoned weapons are prohibited "because of their potential to be indiscriminate".²⁷⁸ Likewise, according to the manual, "both chemical and biological weapons are prohibited because they cause unnecessary suffering and may affect the civilian population in an indiscriminate fashion".²⁷⁹ With respect to weapons deemed to be legal, the manual notes that "all legal weapons are limited in the way in which they may be used. Specifically, no weapons may be used indiscriminately."²⁸⁰

²⁷¹ Australia, *Commanders' Guide* (1994), § 304.

²⁷² Australia, *Commanders' Guide* (1994), § 306.

²⁷³ Australia, *Commanders' Guide* (1994), § 307.

²⁷⁴ Australia, *Commanders' Guide* (1994), § 311.

²⁷⁵ Australia, *Commanders' Guide* (1994), § 931.

²⁷⁶ Australia, *Commanders' Guide* (1994), § 937.

²⁷⁷ Australia, *Defence Force Manual* (1994), § 304.

²⁷⁸ Australia, *Defence Force Manual* (1994), § 406.

²⁷⁹ Australia, *Defence Force Manual* (1994), § 414.

²⁸⁰ Australia, *Defence Force Manual* (1994), § 415.

272. According to Belgium's Teaching Manual for Officers, it is especially forbidden to use indiscriminate weapons.²⁸¹

273. Canada's LOAC Manual states that some weapons are "totally prohibited by the LOAC" because they are indiscriminate. It further states that:

Weapons that are indiscriminate in their effect are prohibited. A weapon is indiscriminate if it might strike or affect legitimate targets and civilians or civilian objects without distinction. Therefore, a weapon that cannot be directed at a specific legitimate target or the effects of which cannot be limited as required by the law of armed conflict is prohibited. For example, it may be argued that the Scud missile used in the Gulf War falls in that category.²⁸²

The manual adds that the use of poison or poisoned weapons is

illegal because of their potential to be indiscriminate. For example, the poisoning or contamination of any source of drinking water is prohibited. Posting a notice that the water has been contaminated or poisoned does not make this practice legal, as both civilians and combatants might drink from that water source and be equally affected.²⁸³

As regards lawful weapons, the manual states that "legal weapons are limited in the way in which they may be used. Specifically, no weapons may be used indiscriminately."²⁸⁴

274. Colombia's Basic Military Manual states that the use of weapons which "cause unnecessary and indiscriminate, extensive, lasting and serious damage to people and the environment" is prohibited.²⁸⁵

275. Ecuador's Naval Manual states that "the use of weapons which by their nature are incapable of being directed specifically against military objectives, and therefore that put noncombatants at equivalent risk, are forbidden due to their indiscriminate effect".²⁸⁶ The manual further specifies that:

Weapons that are incapable of being controlled in the sense that they can be directed at a military target are forbidden as being indiscriminate in their effect. Drifting armed contact mines and long-range unguided missiles (such as the German V-1 and V-2 rockets of World War II) fall into this category. A weapon is not indiscriminate simply because it may cause incidental or collateral civilian casualties, provided such casualties are not foreseeably excessive in light of the expected military advantage to be gained. An artillery round that is capable of being directed with a reasonable degree of accuracy at a military target is not an indiscriminate weapon simply because it may miss its mark or inflict collateral damage. Conversely, uncontrolled balloon-borne bombs, such as those released by the Japanese against the west coast of the United States and Canada in World War II, lack that capability of direction and are, therefore, unlawful.²⁸⁷

²⁸¹ Belgium, *Teaching Manual for Officers* (1994), p. 36, § 17.

²⁸² Canada, *LOAC Manual* (1999), p. 5-2, §§ 10 and 11.

²⁸³ Canada, *LOAC Manual* (1999), p. 5-2, § 20.

²⁸⁴ Canada, *LOAC Manual* (1999), p. 5-3, § 32.

²⁸⁵ Colombia, *Basic Military Manual* (1995), pp. 49-50, see also p. 30.

²⁸⁶ Ecuador, *Naval Manual* (1989), § 9.1. ²⁸⁷ Ecuador, *Naval Manual* (1989), § 9.1.2.

276. France's LOAC Teaching Note states that, "because of their indiscriminate effects", the use of poison, chemical weapons, biological and bacteriological weapons, dum-dum bullets or other projectiles with expanding heads, anti-personnel mines, weapons that injure by non-detectable fragments, blinding laser weapons, and torpedoes without self-destruction mechanisms "is totally prohibited by the law of armed conflicts".²⁸⁸

277. France's LOAC Manual states that weapons that have "indiscriminate effects" are prohibited.²⁸⁹ It adds that, "because of their indiscriminate effects", the use of poison, chemical weapons, biological and bacteriological weapons, dum-dum bullets or other projectiles with expanding heads, anti-personnel mines, weapons that injure by non-detectable fragments, blinding laser weapons, and torpedoes without self-destruction mechanisms "is totally prohibited by the law of armed conflicts".²⁹⁰

278. Germany's Soldiers' Manual provides that "it is prohibited to use means or methods of warfare which are intended or of a nature . . . to strike military targets and civilian persons or civilian objects indiscriminately".²⁹¹

279. Germany's IHL Manual states that "it is prohibited, in particular, to employ means or methods of warfare, which are intended to or of a nature . . . to strike military targets and civilian persons or civilian objects indiscriminately".²⁹²

280. Israel's Manual on the Laws of War states that:

Since St. Petersburg, there have been several universally accepted rules regarding weapons:

...

Another important goal to attain is control over the weapons to ensure that the harm they inflict is limited only to the battlefield and the combatants thereon, and does not spread out of control to innocent parties such as civilians. Weapons that do not distinguish between targets are prohibited.²⁹³

281. South Korea's Operational Law Manual provides that "weapons that are by nature indiscriminate shall be prohibited".²⁹⁴

282. New Zealand's Military Manual states that "weapons which cannot be directed at military objectives or the effects of which cannot be limited are prohibited".²⁹⁵

283. Nigeria's Military Manual states that "the basic principles are that every commander has the right to choose the means and methods of type of warfare" but has to "distinguish between military and civilian objects".²⁹⁶

284. Russia's Military Manual provides that:

²⁸⁸ France, *LOAC Teaching Note* (2000), p. 6. ²⁸⁹ France, *LOAC Manual* (2001), p. 53.

²⁹⁰ France, *LOAC Manual* (2001), p. 54. ²⁹¹ Germany, *Soldiers' Manual* (1991), p. 5.

²⁹² Germany, *IHL Manual* (1996), § 302.

²⁹³ Israel, *Manual on the Laws of War* (1998), pp. 11–12, see also p. 37.

²⁹⁴ South Korea, *Operational Law Manual* (1996), p. 129.

²⁹⁵ New Zealand, *Military Manual* (1992), § 509(4).

²⁹⁶ Nigeria, *Military Manual* (1994), p. 42, § 11.

Prohibited means of warfare are the various weapons of an indiscriminate character and/or those that cause unnecessary suffering:

- a) bullets that expand or flatten easily in the human body;
- b) projectiles used with the only purpose to spread asphyxiating or poisonous gases;
- c) projectiles weighing less than 400 grammes, which are either explosive or charged with fulminating or inflammable substances;
- d) poisons or poisoned weapons;
- e) asphyxiating, poisonous or other similar gases and bacteriological means;
- f) bacteriological (biological) and toxin weapons;
- g) environmental modification techniques having widespread, long-term or serious effects as means of destruction, damage or injury;
- h) all types of weapons of an indiscriminate character or that cause excessive injury or suffering.²⁹⁷

285. Sweden's IHL Manual states that, according to the criteria given in the 1868 St. Petersburg Declaration and in the 1907 Hague Convention (IV),

Weapons shall be considered particularly inhuman if they:

- cause unnecessary suffering or superfluous damage, or
- have indiscriminate effects, meaning that the weapon effects strike military objectives and civilian persons without any distinction.

These criteria have been used in all arms limitation negotiations in recent years.²⁹⁸

286. Switzerland's Basic Military Manual, with respect to nuclear weapons, refers to Article 51 AP I and states that "it is prohibited to use weapons the effects of which can harm civilian or military objectives without discrimination".²⁹⁹

287. The US Air Force Pamphlet states that:

The existing law of armed conflict does not prohibit the use of weapons whose destructive force cannot strictly be confined to the specific military objective. Weapons are not unlawful simply because their use may cause incidental casualties to civilians and destruction of civilian objects. Nevertheless, particular weapons or methods of warfare may be prohibited because of their indiscriminate effects . . . Indiscriminate weapons are those incapable of being controlled, through design or function, and thus they can not, with any degree of certainty, be directed at military objectives. For example, in World War II German V-1 rockets, with extremely primitive guidance systems yet generally directed toward civilian populations, and Japanese incendiary balloons without any guidance systems were regarded as unlawful. Both weapons were, as deployed, incapable of being aimed specifically at military objectives. Use of such essentially unguided weapons could be expected to cause unlawful excessive injury to civilians and damage to civilian objects . . . Some weapons, though capable of being directed only at military objectives, may have otherwise uncontrollable effects so as to cause disproportionate civilian injuries or damage. Biological warfare is a universally agreed illustration

²⁹⁷ Russia, *Military Manual* (1990), Article 6.

²⁹⁸ Sweden, *IHL Manual* (1991), Section 3.3.1, pp. 78–79.

²⁹⁹ Switzerland, *Basic Military Manual* (1987), Article 24.

of such an indiscriminate weapon. Uncontrollable effects, in this context, may include injury to the civilian population of other states as well as injury to an enemy's civilian population. Uncontrollable refers to effects which escape in time or space from the control of the user as to necessarily create risks to civilian persons or objects excessive in relation to the military advantage anticipated. International law does not require that a weapon's effects be strictly confined to the military objectives against which it is directed, but it does restrict weapons whose foreseeable effects result in unlawful disproportionate injury to civilians or damage to civilian objects.³⁰⁰

As regards new weapons, the Pamphlet states that:

A new weapon or method of warfare may be illegal, per se, if it is restricted by international law including treaty or international custom . . . [T]he legality of new weapons . . . is determined by whether the weapon's . . . effects are indiscriminate as to cause disproportionate civilian injury or damage to civilian objects.³⁰¹

288. The US Air Force Commander's Handbook states that:

Weapons that are incapable of being controlled enough to direct them against a military objective . . . are forbidden. A weapon is not unlawful simply because its use may cause incidental or collateral casualties to civilians, as long as those casualties are not foreseeably excessive in light of the expected military advantage. Using unpowered and uncontrolled balloons to carry bombs is thus forbidden, since these weapons would be incapable of being directed against a military objective.³⁰²

289. The US Naval Handbook states that "weapons which by their nature are incapable of being directed specifically against military objectives, and therefore that put noncombatants at equivalent risk, are forbidden due to their indiscriminate effect".³⁰³ The Handbook further specifies that:

Weapons that are incapable of being controlled (i.e., directed at a military target) are forbidden as being indiscriminate in their effect. Drifting armed contact mines and long-range unguided missiles (such as the German V-1 and V-2 rockets of World War II) fall into this category. A weapon is not indiscriminate simply because it may cause incidental or collateral civilian casualties, provided such casualties are not foreseeably excessive in light of the expected military advantage to be gained. An artillery round that is capable of being directed with a reasonable degree of accuracy at a military target is not an indiscriminate weapon simply because it may miss its mark or inflict collateral damage. Conversely, uncontrolled balloon-borne bombs, such as those released by the Japanese against the west coast of the United States and Canada in World War II, lack that capability of direction and are, therefore, unlawful.³⁰⁴

290. The YPA Military Manual of the SFRY (FRY) prohibits "blind weapons" the effects of which "cannot be controlled during their use".³⁰⁵

³⁰⁰ US, *Air Force Pamphlet* (1976), § 6-3(c). ³⁰¹ US, *Air Force Pamphlet* (1976), § 6-7(a).

³⁰² US, *Air Force Commander's Handbook* (1980), § 6-2(b).

³⁰³ US, *Naval Handbook* (1995), § 9.1. ³⁰⁴ US, *Naval Handbook* (1995), § 9.1.2.

³⁰⁵ SFRY (FRY), *YPA Military Manual* (1988), § 102.

National Legislation

291. Under Burundi's Draft Law on Genocide, Crimes against Humanity and War Crimes, the following constitutes a war crime in international armed conflicts:

employing weapons, projectiles, materials and methods of combat... which are inherently indiscriminate in violation of the international law of armed conflict, provided that such weapons, projectiles, material and methods of combat are the subject of a comprehensive prohibition.³⁰⁶

292. Canada's Crimes against Humanity and War Crimes Act provides that the war crimes defined in Article 8(2) of the 1998 ICC Statute are "crimes according to customary international law" and, as such, indictable offences under the Act.³⁰⁷

293. Congo's Genocide, War Crimes and Crimes against Humanity Act defines war crimes with reference to the categories of crimes defined in Article 8 of the 1998 ICC Statute.³⁰⁸

294. Under Georgia's Criminal Code, any war crime provided for by the 1998 ICC Statute, which is not explicitly mentioned in the Code, such as "employing weapons, projectiles and material... which are inherently indiscriminate" in international armed conflicts, is a crime.³⁰⁹

295. Under Mali's Penal Code, "employing weapons, projectiles, materials and methods of warfare... which are inherently indiscriminate in violation of the international law of armed conflicts, provided that such means are the subject of a comprehensive prohibition" is a war crime in international armed conflicts.³¹⁰

296. Under New Zealand's International Crimes and ICC Act, war crimes include the crimes defined in Article 8(2)(b)(xx) of the 1998 ICC Statute.³¹¹

297. Under Trinidad and Tobago's Draft ICC Act, it is a punishable offence to commit a war crime as defined in Article 8(2)(b)(xx) of the 1998 ICC Statute.³¹²

298. Under the UK ICC Act, it is a punishable offence to commit a war crime as defined in Article 8(2)(b)(xx) of the 1998 ICC Statute.³¹³

National Case-law

299. No practice was found.

³⁰⁶ Burundi, *Draft Law on Genocide, Crimes against Humanity and War Crimes* (2001), Article 4(B)(s).

³⁰⁷ Canada, *Crimes against Humanity and War Crimes Act* (2000), Section 4(1) and (4).

³⁰⁸ Congo, *Genocide, War Crimes and Crimes against Humanity Act* (1998), Article 4.

³⁰⁹ Georgia, *Criminal Code* (1999), Article 413(d).

³¹⁰ Mali, *Penal Code* (2001), Article 31(i)(20).

³¹¹ New Zealand, *International Crimes and ICC Act* (2000), Section 11(2).

³¹² Trinidad and Tobago, *Draft ICC Act* (1999), Section 5(1)(a).

³¹³ UK, *ICC Act* (2001), Sections 50(1) and 51(1) (England and Wales) and Section 58(1) (Northern Ireland).

Other National Practice

300. In 1995, in a statement at the First Review Conference of States Parties to the CCW, the Australian delegation stated that:

Our presence at this conference reflects a shared belief that even the harsh reality of armed conflict should be tempered by humanitarian constraints. Participants in the diplomatic conferences on humanitarian law in the late 1970s concluded that the international community should develop a framework for specific regulations on the use of those conventional weapons which are indiscriminate or disproportionate in their effects. Those weapons have come to include landmines and booby traps, incendiary devices and weapons which injure by means of non-detectable fragments.³¹⁴

301. In its oral pleadings before the ICJ in the *Nuclear Weapons case* in 1995, Australia, admitting that “to date, international efforts have not culminated in an international convention banning the threat or use of nuclear weapons in all circumstances”, quoted UN General Assembly Resolution 1653 (XVI) according to which “the use of nuclear and thermo-nuclear weapons would . . . cause indiscriminate suffering” to conclude that “the use of nuclear weapons would be contrary to international law”.³¹⁵

302. In 1973, in its comments on the UN Secretary-General’s report on napalm and other incendiary weapons and all aspects of their possible use, Canada stated that:

Broadly, there should be concern with the use of all types of weapons in ways which could . . . be indiscriminate in effect; for this reason, the protocols additional to the Geneva Conventions of 1949 which are currently being prepared under the auspices of the International Committee of the Red Cross in close co-operation with the United Nations General Assembly, should reaffirm the existing principles and rules of conventional and customary international law of armed conflicts which apply generally to the choice and use of weapons by States in armed conflict and are contained, *inter alia*, in the Hague Declaration [concerning Asphyxiating Gases] of 1899, the Hague Conventions of 1907 and the Geneva [Gas] Protocol of 1925.³¹⁶

303. In 1974, during discussions in the Ad Hoc Committee on Conventional Weapons established by the CDDH, Canada stated that “agreement was lacking on standards by which . . . ‘indiscriminate effects’ could be measured”.³¹⁷

304. At the CDDH, Canada stated that:

The definition of indiscriminate attack contained in paragraph 4 of Article 46 [now Article 51] is not intended to mean that there are means of combat the use of which

³¹⁴ Australia, Statement of 26 September 1995 at the First Review Conference of States Parties to the CCW, Vienna, 25 September–13 October 1995, reprinted in *Australian Year Book of International Law*, Vol. 16, 1995, p. 732.

³¹⁵ Australia, Oral pleadings before the ICJ, *Nuclear Weapons case*, 30 October 1995, Verbatim Record CR 95/22, pp. 43–44.

³¹⁶ Canada, Comments on the report of the UN Secretary-General on napalm and other incendiary weapons and all aspects of their possible use, UN Doc. A/9207/Add.1, 17 December 1973, p. 2.

³¹⁷ Canada, Statement at the CDDH, *Official Records*, Vol. XVI, CDDH/IV/SR.1, 13 March 1974, p. 14, § 31.

would constitute an indiscriminate attack in all circumstances. It is our view that this definition takes account of the circumstances, as evidenced by the examples listed in paragraph 5 to determine the legitimacy of the use of means of combat.³¹⁸

305. At the Second Review Conference of States Parties to the CCW in 2001, China declared that “the impermissibility of using means of warfare that . . . had indiscriminate effects had become a universally accepted principle”.³¹⁹

306. In 1977, during a debate in the First Committee of the UN General Assembly, Cyprus referred to the Stockholm International Peace Research Institute (SIPRI), which had stated in its report on the law of war and dubious weapons that indiscriminate weapons were prohibited by international law.³²⁰

307. In 1988, during a debate at the Fifteenth Special Session of the UN General Assembly, Ecuador stated that “weapons, . . . which threaten equally belligerents and the helpless civilian population, must be the subject of a ban without reservations or limitations”.³²¹

308. In its written statement submitted to the ICJ in the *Nuclear Weapons case* in 1995, Ecuador stated that:

The use of nuclear weapons does not discriminate by general norm the military objectives from civil objectives. This factor equally attends against a fundamental principle of the International Humanitarian Law: which takes care of the protection of innocent people during war times.

...

. . . The uncontrollable effects that a nuclear device has can easily go against the laws and the uses of the war.³²²

309. In 1974, during discussions in the Ad Hoc Committee on Conventional Weapons established by the CDDH, Egypt stated that “time-delay[ed] weapons . . . were . . . indiscriminate”.³²³ In a later statement in 1976, Egypt also advocated a “total prohibition” of weapons that had indiscriminate effects.³²⁴

310. In its written statement submitted to the ICJ in the *Nuclear Weapons case* in 1995, Egypt stated that the use of nuclear weapons “cannot at all be legal” because:

by their inherent qualitative and quantitative characteristics of their effect, nuclear weapons necessarily have cataclysmic and indiscriminate effects and

³¹⁸ Canada, Statement at the CDDH, *Official Records*, Vol. VI, CDDH/SR.41, 26 May 1977, p. 179.

³¹⁹ China, Statement at the Second Review Conference of States Parties to the CCW, Geneva, 11–21 December 2001, UN Doc. CCW/CONF.II/SR.2, 16 January 2002, § 41.

³²⁰ Cyprus, Statement before the First Committee of the UN General Assembly, UN Doc. A/C.1/32/PV.44, 25 November 1977, p. 17.

³²¹ Ecuador, Statement at the Fifteenth Special Session of the UN General Assembly, UN Doc. A/S-15/PV.2, 1 June 1988, p. 28.

³²² Ecuador, Written statement submitted to the ICJ, *Nuclear Weapons case*, 20 June 1995, p. 2, §§ D and E.

³²³ Egypt, Statement at the CDDH, *Official Records*, Vol. XVI, CDDH/IV/SR.6, 22 March 1974, p. 49, § 14.

³²⁴ Egypt, Statement at the CDDH, *Official Records*, Vol. XVI, CDDH/IV/SR.26, 18 May 1976, p. 272, § 61.

cannot distinguish between combatants and non-combatants and between protected and unprotected objects, and are expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated.³²⁵

311. In its oral pleadings before the ICJ in the *Nuclear Weapons case* in 1995, Egypt stated that:

The use of nuclear weapons is prohibited not because they are or they are called nuclear weapons. They fall under the prohibitions of the fundamental and mandatory rules of humanitarian law which long predate them, by their effects; not because they are nuclear, but because they are indiscriminate weapons of mass destruction.³²⁶

312. In 1974, during discussions in the Ad Hoc Committee on Conventional Weapons established by the CDDH, France stated that:

29. ... Each weapon, with its characteristics, its effects and its method of use, had to be considered separately, if specific conclusions have to be reached.
30. ... The more important concept of indiscriminate effects might perhaps be applicable to some weapons, but related more often to their method of use. For instance, the mine became indiscriminate only when used as a drifting mine. Indiscriminateness lay much more in the use made of a weapon and in the brain of the commanding officer than in the weapon itself.³²⁷

313. In its written statement submitted to the ICJ in the *Nuclear Weapons (WHO) case* in 1995, France stated that:

The fact that the [CDDH] took into consideration only conventional weapons also follows from the creation therein of an *ad hoc* commission on "conventional weapons". Moreover, by its resolution 22, it [the CDDH] recommended the convocation of a conference "with a view to reaching a) agreements on prohibitions or restrictions on the use of specific conventional weapons including those which may be deemed to... have indiscriminate effects, taking into account humanitarian and military considerations; and b) agreement on a mechanism for the review of any such agreements and for the consideration of proposals for further such agreement".

...

It furthermore appears that the States which participated in the conference considered that the rules figuring in the protocol cannot in themselves suffice to establish the illegality of the use of specific weapons, to whatever type they might belong.

...

³²⁵ Egypt, Written statement submitted to the ICJ, *Nuclear Weapons case*, June 1995, § 18; see also Written comments of Egypt on other written statements submitted to the ICJ, *Nuclear Weapons case*, September 1995, §§ 53–55.

³²⁶ Egypt, Oral pleadings before the ICJ, *Nuclear Weapons case*, 1 November 1995, Verbatim Record CR 95/23, p. 34.

³²⁷ France, Statement at the CDDH, *Official Records*, Vol. XVI, CDDH/IV/SR.15, 7 March 1975, p. 146, §§ 29–30.

Also, one cannot but ascertain the absence of a customary rule prohibiting the use of nuclear weapons.

...

It is true that a certain trend of opinion tries to prove the existence of a legal principle of the prohibition of nuclear weapons not by relying on positive norms specifically dealing with such weapons, but by constructing a reasoning on the basis of other rules of international law. Without directly mentioning the weapons in question, it is said that these rules could be applied to them [i.e. the weapons], by way of implication or by way of extension. For instance, the idea is sometimes put forward that certain rules in force of humanitarian law and the law of war would involve the prohibition of nuclear weapons. The supporters of that theory base themselves especially on diverse rules or principles enunciated in [AP I] – without questioning which [of these rules] are of customary nature and which are of conventional nature – and especially ... the prohibition of indiscriminate attacks in the terms of article 51 of the protocol ...

The government of France does not deem it necessary ... to discuss in detail such reasoning, which it formally rejects ... Indeed, if one cannot contest that protocol I of 1977 expresses, in some respects, general basic principles of existing law, it is obvious that ... with respect to others, it constitutes a development ...

Moreover, to follow the reasoning recalled above, once the basic customary principles applicable to nuclear weapons were drawn out and defined, one would have to establish that a rule prohibiting the use of these weapons follows from it.³²⁸

314. At the CDDH, the FRG stated that:

The definition of indiscriminate attacks contained in paragraph 4 of Article 46 [now Article 51 AP I] is not intended to mean that there are means of combat the use of which would constitute an indiscriminate attack in all circumstances. Rather, the definition is intended to take account of the fact that the legality of the use of means of combat depends upon circumstances, as shown by the examples listed in paragraph 5. Consequently the definition does not prohibit as indiscriminate any specific weapon.³²⁹

315. In 1977, during a debate in the First Committee of the UN General Assembly, the Holy See condemned the use of indiscriminate weapons.³³⁰

316. The Report on the Practice of India states that:

The Geneva Convention norms regarding use of indiscriminate weapons are applicable by virtue of the Geneva Conventions Act. Although it is not specifically made applicable to internal conflicts, yet it is possible to suggest on the basis of the practice of not using such weapons that in India such weapons are prohibited in times of internal conflict.³³¹

³²⁸ France, Written statement submitted to the ICJ, *Nuclear Weapons (WHO) case*, June 1994, pp. 27–31, §§ 23–26.

³²⁹ FRG, Statement at the CDDH, *Official Records*, Vol. VI, CDDH/SR.41, 26 May 1977, pp. 187–188.

³³⁰ Holy See, Statement before the First Committee of the UN General Assembly, UN Doc. A/C.1/32/PV.24, 3 November 1977, p. 76.

³³¹ Report on the Practice of India, 1997, Chapter 3.3.

317. In its written statement submitted to the ICJ in the *Nuclear Weapons case* in 1995, Iran stated that:

Some of the principles of humanitarian international law from which one can deduce the illegitimacy of the use of nuclear weapons are: . . . Prohibition of the use of instruments that cause indiscriminate effects, including means and methods that are used suddenly and equally against both civilian and military targets.³³²

318. In its oral pleadings before the ICJ in the *Nuclear Weapons case* in 1995, Iran stated that “the prohibition of weapons or tactics that cause indiscriminate harm between combatants and non combatants is another argument against the legality of the use of nuclear weapons”.³³³

319. According to the Report on the Practice of Iran, Iran’s “*opinio juris* is supportive of not using indiscriminate weapons (because in Iran’s view civilians must be protected against war effects)”.³³⁴

320. In 1991, during a debate in the First Committee of the UN General Assembly, Israel advocated that all weapons that can kill civilians indiscriminately be considered weapons of mass destruction. It gave Scud missiles as an example of this class of weapon.³³⁵

321. According to the Report on the Practice of Israel, Israel “does not make use of inaccurate weapon systems which are liable, by their very nature, to strike at locations far removed from their original targets” and considers Scud missiles and Katyusha rockets to be indiscriminate.³³⁶

322. At the CDDH, Italy stated that:

There was nothing in paragraph 4 [of Article 46, now Article 51 AP I] to show that certain methods or means of combat were prohibited in all circumstances by the Protocol except where an explicit prohibition was established by international rules in force for the State concerned with regard to certain weapons or methods.³³⁷

323. In its oral pleadings before the ICJ in the *Nuclear Weapons case* in 1995, Japan stated that “the radiation released by [nuclear] weapons cannot be confined to specific military targets”.³³⁸

324. The Report on the Practice of Jordan states that, while Jordan has no official specific interpretation of the concept of indiscriminate weapons, it does

³³² Iran, Written statement submitted to the ICJ, *Nuclear Weapons case*, 19 June 1995, p. 2; see also Written statement submitted to the ICJ, *Nuclear Weapons (WHO) case*, undated, p. 1.

³³³ Iran, Oral pleadings before the ICJ, *Nuclear Weapons case*, 6 November 1995, p. 30.

³³⁴ Report on the Practice of Iran, 1997, Chapter 3.3.

³³⁵ Israel, Statement before the First Committee of the UN General Assembly, UN Doc. A/C.1/46/PV.19, 28 October 1991, pp. 24–25; Statement before the First Committee of the UN General Assembly, UN Doc. A/C.1/46/PV.34, 12 November 1991, p. 18.

³³⁶ Report on the Practice of Israel, 1997, Chapter 3.3.

³³⁷ Italy, Statement at the CDDH, *Official Records*, Vol. VI, CDDH/SR.41, 26 May 1977, p. 164, § 122.

³³⁸ Japan, Oral pleadings before the ICJ, *Nuclear Weapons case*, 7 November 1995, Verbatim Record CR 95/27, p. 36.

not “use, manufacture or export landmines, V-2 bombs or missiles that cannot be accurately guided”.³³⁹

325. According to the Report on the Practice of South Korea, South Korea considers the prohibition of the use of indiscriminate weapons to be part of customary international law.³⁴⁰ It refers to a presidential declaration in 1991 which stated that South Korea would not obtain these weapons.³⁴¹

326. According to the Report on the Practice of Kuwait, Kuwait is of the opinion that indiscriminate weapons must be prohibited.³⁴²

327. In its written statement submitted to the ICJ in the *Nuclear Weapons case* in 1995, Lesotho stated that “any use of nuclear weapons, even in self-defense, would violate international humanitarian law, including the Hague and Geneva Conventions, which prohibit as practices of war, indiscriminate killing”.³⁴³

328. In its written statement submitted to the ICJ in the *Nuclear Weapons (WHO) case* in 1995, Malaysia stated that “nuclear weapons are not just another weapon. Their nature and effect are such that they are inherently incapable of being limited with any degree of certainty to a specific military target.”³⁴⁴

329. In its written statement submitted to the ICJ in the *Nuclear Weapons case* in 1995, the Marshall Islands stated that “any use of nuclear weapons violates the laws of war including the Geneva and Hague Conventions and the United Nations Charter. Such laws prohibit . . . the use of indiscriminate weapons.”³⁴⁵

330. In its oral pleadings before the ICJ in the *Nuclear Weapons case* in 1995, the Marshall Islands stated that “nuclear weapons, by their nature, are indiscriminate in their effects – and very seriously so”.³⁴⁶

331. In its written statement submitted to the ICJ in the *Nuclear Weapons (WHO) case* in 1994, Mexico stated that “the principle of discrimination prohibits the use of weapons that fail to discriminate between civilian and military personnel”.³⁴⁷

332. In its written statement submitted to the ICJ in the *Nuclear Weapons case* in 1995, Nauru stated that “the nuclear weapons for which the status of legality

³³⁹ Report on the Practice of Jordan, 1997, Chapter 3.3.

³⁴⁰ Report on the Practice of South Korea, 1997, Chapter 3.3.

³⁴¹ Report on the Practice of South Korea, 1997, Chapter 3.3, referring to Presidential Declaration to Achieve Denuclearization and Peace of the Korean Peninsula, 8 November 1991.

³⁴² Report on the Practice of Kuwait, 1997, Chapter 3.3.

³⁴³ Lesotho, Written statement submitted to the ICJ, *Nuclear Weapons case*, 20 June 1995, p. 2.

³⁴⁴ Malaysia, Written statement submitted to the ICJ, *Nuclear Weapons (WHO) case*, 19 June 1995, p. 22; see also Written statement submitted to the ICJ, *Nuclear Weapons (WHO) case*, undated, pp. 5–6.

³⁴⁵ Marshall Island, Written statement submitted to the ICJ, *Nuclear Weapons case*, 22 June 1995, § 5.

³⁴⁶ Marshall Islands, Oral pleadings before the ICJ, *Nuclear Weapons case*, 14 November 1995, Verbatim Record CR 95/32, p. 23.

³⁴⁷ Mexico, Written statement submitted to the ICJ, *Nuclear Weapons (WHO) case*, 9 June 1994, § 25; see also Written statement submitted to the ICJ, *Nuclear Weapons case*, 19 June 1995, § 77(d).

is claimed should be capable of distinguishing between military objectives and civilian objects".³⁴⁸

333. In 1969, during a debate in the Third Committee of the UN General Assembly, the Netherlands stated that it was:

essential to update and broaden the Hague Conventions and the 1925 Geneva [Gas] Protocol, primarily in so far as related to international security and the protection of human rights, and to extend their application to cover armed conflicts which were not international in character.³⁴⁹

334. In 1992, during a debate in the First Committee of the UN General Assembly, the Netherlands appealed to States to adhere to the 1980 CCW, arguing that "universal adherence would compel States not to use such weapons any more in a military conflict and it would at the same time make it more difficult for such weapons to be used in internal conflicts against civilians".³⁵⁰

335. In its written statement submitted to the ICJ in the *Nuclear Weapons case* in 1995, the Netherlands stated that:

the general principles of international humanitarian law in armed conflict also apply to the use of nuclear weapons. Two principles, in particular, which form part of that law are the prohibition on making the civilian population as such the target of an attack and the prohibition on attacking military targets if this would cause disproportionate harm to the civilian population. The applicability of general principles of international humanitarian law in armed conflict – among which must also be counted the principle laid down in Article 22 of the 1907 Hague Regulations that the right of a belligerent to adopt means of injuring the enemy is not unlimited – to the use of nuclear weapons was also confirmed as long ago as 1965 in Resolution XXVIII of the 20th International Conference of the Red Cross (Vienna) which was passed unanimously. Consensus on this point was also reached at the diplomatic conference on Additional Protocol I to the 1949 Geneva Conventions.³⁵¹

336. In its written statement submitted to the ICJ in the *Nuclear Weapons case* in 1995, New Zealand stated that "in general, international humanitarian law bears on the threat or use of nuclear weapons as it does of other weapons. . . . The general application of international humanitarian law to the use of nuclear weapons has also been specifically acknowledged by nuclear-weapon States."³⁵² Among the customary law rules applicable to the use of nuclear weapons, New Zealand further mentioned the fact that "it is prohibited to use indiscriminate

³⁴⁸ Nauru, Written statement submitted to the ICJ, *Nuclear Weapons case*, 15 June 1995, p. 21, see also pp. 19–20.

³⁴⁹ Netherlands, Statement before the Third Committee of the UN General Assembly, UN Doc. A/C.3/SR.1733, 11 December 1969, p. 1.

³⁵⁰ Netherlands, Statement before the First Committee of the UN General Assembly, UN Doc. A/C.1/47/PV.26, 5 December 1992, p. 21.

³⁵¹ Netherlands, Written statement submitted to the ICJ, *Nuclear Weapons case*, 16 June 1995, § 32.

³⁵² New Zealand, Written statement submitted to the ICJ, *Nuclear Weapons case*, 20 June 1995, §§ 63 and 66.

methods and means of warfare which do not distinguish between combatants and civilians and other non-combatants".³⁵³

337. In 1974, during discussions in the Ad Hoc Committee on Conventional Weapons established by the CDDH, Nigeria stated that "the wars of liberation... were being fought with conventional weapons, with the weaker side, particularly the freedom fighters, as the exclusive targets of... indiscriminate weapons" and that "his country was therefore anxious for restrictions to be imposed on such weapons".³⁵⁴

338. The Report on the Practice of Pakistan states that Pakistan "disapproves" of weapons of an indiscriminate nature.³⁵⁵

339. The Report on the Practice of Peru, referring to a statement by the head of the Peruvian delegation at the international meeting on the reduction of mines in 1995, states that anti-personnel landmines are considered by Peru as weapons indiscriminate by nature. In addition, the Peruvian State supports the prohibition of anti-personnel mines that are not equipped with self-destruct mechanisms.³⁵⁶

340. In 1973, during a debate in the Sixth Committee of the UN General Assembly on the UN Secretary-General's report on respect for human rights in armed conflicts, Poland advocated that special emphasis be placed on the prohibition of the use of weapons indiscriminately affecting civilians and combatants.³⁵⁷

341. In 1974, during discussions in the Ad Hoc Committee on Conventional Weapons established by the CDDH, Romania stated that "the use of weapons with indiscriminate effects, including weapons of mass destruction... [and] biological and chemical weapons, was prohibited by international law and by legal conscience of peoples".³⁵⁸

342. In 1991, in a statement at the International Conference on the Protection of Victims of War, the Russian Minister of Foreign Affairs declared with reference to the conflict in Chechnya that in order to protect the civilian population against indiscriminate weapons, bombers, missiles, rockets, artillery shells, incendiary weapons and booby-traps should be completely banned in internal conflicts.³⁵⁹

³⁵³ New Zealand, Written statement submitted to the ICJ, *Nuclear Weapons case*, 20 June 1995, § 71.

³⁵⁴ Nigeria, Statement at the CDDH, *Official Records*, Vol. XVI, CDDH/IV/SR.2, 14 March 1974, p. 19, § 12.

³⁵⁵ Report on the Practice of Pakistan, 1998, Chapter 3.3.

³⁵⁶ Report on the Practice of Peru, 1998, Chapter 3.1, referring to Statement of the head of the Peruvian delegation at the international meeting on the reduction of mines, *Boletín Informativo*, No. 2432, Lima, 15 July 1995, p. 2.

³⁵⁷ Poland, Statement before the Sixth Committee of the UN General Assembly, UN Doc. A/C.6/SR.1450, 29 November 1973, pp. 287-288.

³⁵⁸ Romania, Statement at the CDDH, *Official Records*, Vol. XVI, CDDH/IV/SR.3, 15 March 1974, p. 28, § 16.

³⁵⁹ Russia, Statement by the Minister of Foreign Affairs, Andrey Kozyrev, at the International Conference on the Protection of Victims of War, Geneva, 30 August-1 September 1991.

343. In 1993, during a debate in the First Committee of the UN General Assembly, Russia stated that “in view of the sharp increase in the scale of internal ethnic conflicts and in the bloodshed resulting therefrom,” it had put forward “an initiative to establish restrictions under international law on the use of the most destructive and indiscriminate weapons systems in those conflicts”.³⁶⁰

344. In its written statement submitted to the ICJ in the *Nuclear Weapons case* in 1995, Russia stated that:

As Hans Blix said, “it is certainly correct to say the legality of the use of most weapons depends upon the manner in which they are employed. A rifle may be lawfully aimed at the enemy or it may be employed indiscriminately against civilians and soldiers alike. Bombs may be aimed at specific military targets or thrown at random. The indiscriminate use of a weapon will be prohibited, not the weapon as such.” We should add that it is a duly qualified use rather than the use of weapons as such at large that will be regarded as illegal.³⁶¹

345. In its written statement submitted to the ICJ in the *Nuclear Weapons (WHO) case* in 1993, Rwanda stated that “the use of nuclear weapons by a State during a war or an armed conflict constitutes a contravention of the rules of IHL in general and of the [1980 CCW] in particular”.³⁶²

346. According to the Report on the Practice of Rwanda, “landmines and bombs” are considered to be weapons with indiscriminate effects.³⁶³

347. In its written statement submitted to the ICJ in the *Nuclear Weapons (WHO) case* in 1994, the Solomon Islands stated that “since [their qualitative] effects may affect people outside the scope of conflict, both in time and geographically, the use of nuclear weapons violates the prohibition on the use of weapons which . . . cause harm to civilians and have indiscriminate effects”.³⁶⁴

348. In its written statement submitted to the ICJ in the *Nuclear Weapons case* in 1995, the Solomon Islands referred to:

The customary rule which states that belligerents must always distinguish between combatants and non-combatants and limit their attack only to the former. This is an old and well-established rule which has achieved universal acceptance. The first multilateral instrument to state it was the St. Petersburg Declaration of 1868 . . . This obligation is repeated and further elaborated in different forms in many instruments.³⁶⁵

³⁶⁰ Russia, Statement before the First Committee of the UN General Assembly, UN Doc. A/C.1/48/SR.7, 21 October 1993, p. 8.

³⁶¹ Russia, Written statement submitted to the ICJ, *Nuclear Weapons case*, 19 June 1995, p. 18; see also Oral pleadings before the ICJ, *Nuclear Weapons case*, Verbatim Record CR 95/29, 10 November 1995, p. 49.

³⁶² Rwanda, Written statement submitted to the ICJ, *Nuclear Weapons (WHO) case*, 8 December 1993, p. 1, § 3.

³⁶³ Report on the Practice of Rwanda, 1997, Chapter 3.3.

³⁶⁴ Solomon Islands, Written statement submitted to the ICJ, *Nuclear Weapons (WHO) case*, 10 June 1994, p. 75, § 3.94.

³⁶⁵ Solomon Islands, Written statement submitted to the ICJ, *Nuclear Weapons case*, 19 June 1995, p. 46, § 3.47.

The Solomon Islands further referred to:

Those rules of the international law of armed conflict which prohibit:

- the use of weapons that render death inevitable;
- the use of weapons which have indiscriminate effects;
- any behaviour which might violate this law.³⁶⁶

349. In its written statement submitted to the ICJ in the *Nuclear Weapons (WHO) case*, Sri Lanka stated that:

The unacceptability of the use of weapons that fail to discriminate between military and civilian personnel is firmly established as a fundamental principle of international humanitarian law. These principles which prohibit indiscriminate killing and make the fundamental distinction between combatants and non-combatants have also found expression in the body of treaty law which have been incorporated in a series of international conventions, from about the time of the 1899 Hague Peace Conference and culminating with the Geneva Conventions of 1949 and [their] Additional Protocols of 1977.³⁶⁷

350. In 1974, during discussions in the Ad Hoc Committee on Conventional Weapons established by the CDDH, Sweden stated that:

20. A general prohibition of the use of "indiscriminate weapons" could be deduced from the general duty of belligerents to distinguish between combatants and civilians, and between military and civilian objectives. . . Since, however, article 46, paragraph 3, [of draft AP I] prohibited "the employment of means of combat, and any methods which strike or affect indiscriminately the civilian population and combatants or civilian objects, and military objectives", a special rule on weapons was perhaps redundant. What were not redundant were rules on specific categories of weapons which governments might agree to ban or restrict the use of on grounds of their indiscriminate effects.
21. All weapons could be used indiscriminately but some were incapable of being directed at military objectives alone. One example was bacteriological weapons: germs could not distinguish between soldiers and civilians. . . Some of the incendiary weapons had turned out to be quite indiscriminate.³⁶⁸

351. In 1974, during discussions in the Ad Hoc Committee on Conventional Weapons established by the CDDH, the representative of Switzerland stated that:

24. He entirely agreed with the Swedish representative. Two basic principles provided the starting point for the Committee's discussions: the prohibition of arms which caused unnecessary sufferings, and the distinction between the

³⁶⁶ Solomon Islands, Written statement submitted to the ICJ, *Nuclear Weapons case*, 19 June 1995, p. 55, § 3.63.

³⁶⁷ Sri Lanka, Written statement submitted to the ICJ, *Nuclear Weapons (WHO) case*, undated, p. 2.

³⁶⁸ Sweden, Statement at the CDDH, *Official Records*, Vol. XVI, CDDH/IV/SR.1, 13 March 1974, p. 12, §§ 20–21.

civilian population and armed forces. Those principles belonged to customary law. They were already in force, and were to be found in the Declaration of St. Petersburg and the Hague Conventions. The ICRC had taken over those principles in articles 33 and 43(3) of draft Protocol I. The proposals put forward by a number of delegations... were merely executing rules: they were not aimed at creating new law, but at clarifying and illustrating the rules already in force.

25. ... The problems of banning or restricting the use of certain categories of weapons [introduced by draft Article 33 of AP I submitted to the CDDH by the ICRC]... was a question of a codification of existing law rather than the creation of new legal norms...
26. ... The weapons in question – incendiary or fragmentation weapons, high-velocity projectiles, fléchettes, etc. – were small weapons and could have no decisive impact on the outcome of a conflict; but there was a grave disparity between the suffering they caused and the military advantage they might confer. Even if they were used in defiance of a ban, the advantage of surprise thus gained would be ephemeral.³⁶⁹

352. In its report on “gross violations of human rights” committed between 1960 and 1993, the South African Truth and Reconciliation Commission noted that the killing of more than 600 people in an attack on the SWAPO base/refugee camp at Kassinga in Angola in 1978 constituted a violation of IHL, stating that:

International humanitarian law stipulates that the right of parties in a conflict to adopt means of injuring the enemy is not unlimited and that a distinction must at all times be made between persons taking part in hostilities and civilians, with the latter being spared as much as possible.³⁷⁰

353. In 1977, during a debate in the First Committee of the UN General Assembly, Turkey stated that it supported a prohibition or restrictions on incendiary weapons and other indiscriminate weapons, but held that such rules would only be effective if they reflected a consensus in the world community.³⁷¹

354. In 1975, during discussions in the Ad Hoc Committee on Conventional Weapons established by the CDDH, the USSR stated that “the question of prohibition or restriction of the use of certain types of conventional weapons... of an indiscriminate nature was one of great importance”.³⁷²

355. At the CDDH, the UK stated that:

The definition of indiscriminate attacks given in [Article 51(4) AP I] was not intended to mean that there were means of combat the use of which would constitute an indiscriminate attack in all circumstances. The paragraph did not in itself

³⁶⁹ Switzerland, Statement at the CDDH, *Official Records*, Vol. XVI, CDDH/IV/SR.1, 13 March 1974, pp. 12–13, §§ 24–26.

³⁷⁰ South Africa, *Truth and Reconciliation Commission Report*, 1998, Vol. 2, pp. 52–55, §§ 44–45.

³⁷¹ Turkey, Statement before the First Committee of the UN General Assembly, UN Doc. A/C.1/32/PV.44, 25 November 1977, p. 23.

³⁷² USSR, Statement at the CDDH, *Official Records*, Vol. XVI, CDDH/IV/SR.19, 21 March 1975, pp. 186–187, § 13.

prohibit the use of any specific weapon, but it took account of the fact that the lawful use of means of combat depended on the circumstances.³⁷³

356. In 1991, in a briefing note on the Gulf crisis, the UK Foreign and Commonwealth Office criticised Iraq's policy of launching Scud missiles against Israel and Saudi Arabia, "since these missiles are not precision weapons and are clearly intended to hit civilian targets".³⁷⁴

357. In 1995, in a letter to the UK House of Lords, the government spokesman deplored the use of weapons by the Israeli artillery in southern Lebanon that "may be deemed . . . to have indiscriminate effects".³⁷⁵

358. In its written statement submitted to the ICJ in the *Nuclear Weapons case* in 1995, the UK stated that:

3.67 A further argument which has been raised is that the use of any nuclear weapon would necessarily have such terrible effects upon civilians that it would violate those rules of the law of armed conflict which exist for their protection. There are two principles of particular relevance in this respect. First, it is a well established principle of customary international law that the civilian population and individual civilians are not a legitimate target in their own right. The parties to an armed conflict are required to discriminate between civilians and civilian objects on the one hand and combatants and military objectives on the other hand and to direct their attacks only against the latter . . .

3.68 . . . Modern nuclear weapons are capable of far more precise targeting and can therefore be directed against specific military objectives without the indiscriminate effect on the civilian population which the older literature assumed to be inevitable.³⁷⁶

359. In 1972, the General Counsel of the US Department of Defense stated that:

Existing laws of armed conflict do not prohibit the use of weapons whose destructive force cannot be limited to a specific military objective. The use of such weapons is not proscribed when their use is necessarily required against a military target of sufficient importance to outweigh inevitable, but regrettable, incidental casualties to civilians and destruction of civilian objects . . . I would like to reiterate that it is recognized by all states that they may not lawfully use their weapons against civilian population[s] or civilians as such, but there is no rule of international law that restrains them from using weapons against enemy armed forces or military targets. The correct rule of international law which has applied in the past and continued to apply to the conduct of our military operations in Southeast Asia is that "the loss of life and damage to property must not be out of proportion to the military advantage to be gained".³⁷⁷

³⁷³ UK, Statement at the CDDH, *Official Records*, Vol. VI, CDDH/SR.41, 26 May 1977, p. 164, § 119.

³⁷⁴ UK, FCO, Briefing Note on the Gulf Crisis, January 1991, *BYIL*, Vol. 62, 1991, p. 678.

³⁷⁵ UK, House of Lords, Letter from the government spokesman, 6 February 1995, *BYIL*, Vol. 66, 1995, p. 713.

³⁷⁶ UK, Written statement submitted to the ICJ, *Nuclear Weapons case*, 16 June 1995, p. 52, §§ 3.67–3.68.

³⁷⁷ US, Letter from J. Fred Buzhardt, General Counsel of the Department of Defense, to Senator Edward Kennedy, Chairman of the Subcommittee on Refugees of the Committee on the Judiciary, 22 September 1972, *AJIL*, Vol. 67, 1973, p. 124.

360. In 1987, during the debate on Security Council Resolution 598 concerning the use of chemical weapons in the Iran–Iraq war, the US stated that chemical weapons “honored no distinction between combatants and non-combatants”.³⁷⁸

361. In 1992, in its final report to Congress on the conduct of the Gulf War, the US Department of Defense accused Iraq of “indiscriminate Scud missile attacks”.³⁷⁹

362. In 1992, in a review of the legality of extended range anti-armour munition, the US Department of the Air Force stated that:

International law also forbids the use of weapons or means of warfare which are “indiscriminate.” A weapon is indiscriminate if it cannot be directed at a military objective or if, under the circumstances, it produces excessive civilian casualties in relation to the concrete and direct military advantage anticipated. The ERAM [extended range antiarmor munition] is clearly capable of being directed at a military objective, i.e., enemy armor formations.³⁸⁰

363. In 1993, in its report to Congress on the protection of natural and cultural resources during times of war, the US Department of Defense stated that:

Finally, with the poor track record of compliance with the law of war by some nations, the United States has a responsibility to protect against threats that may inflict serious collateral damage to our own interests and allies. These threats can arise from any nation that does not have the capability or desire to respect the law of war. One example is Iraq’s indiscriminate use of SCUDs during the Iran–Iraq War and the Gulf War. These highly inaccurate theater ballistic missiles can cause extensive collateral damage well out of proportion to military results.³⁸¹

364. In its written statement submitted to the ICJ in the *Nuclear Weapons case* in 1995, the US stated that:

It has been argued that nuclear weapons are unlawful because they cannot be directed at a military objective. This argument ignores the ability of modern delivery systems to target specific military objectives with nuclear weapons, and the ability of modern weapon designers to tailor the effects of a nuclear weapon to deal with various types of military objectives. Since nuclear weapons can be directed at a military objective, they can be used in a discriminate manner and are not inherently indiscriminate.³⁸²

³⁷⁸ US, Statement before the UN Security Council, UN Doc. S/PV.2750, 20 July 1987, p. 18.

³⁷⁹ US, Department of Defense, Final Report to Congress on the Conduct of the Persian Gulf War, 10 April 1992, Appendix O, The Role of the Law of War, *ILM*, Vol. 31, 1992, p. 635.

³⁸⁰ US, Department of the Air Force, Judge Advocate General, Legal Review: Extended Range Antiarmor Munition (ERAM), 16 April 1992, § 4.

³⁸¹ US, Department of Defense, Report to Congress on International Policies and Procedures Regarding the Protection of Natural and Cultural Resources During Times of War, 19 January 1993, p. 203.

³⁸² US, Written statement submitted to the ICJ, *Nuclear Weapons case*, 20 June 1995, p. 23; see also Oral pleadings before the ICJ, *Nuclear Weapons case*, 15 November 1995, Verbatim Record CR 95/34, p. 70.

365. In 1998, in a legal review of Oleoresin Capsicum (OC) pepper spray, the Deputy Assistant Judge Advocate General of the US Department of the Navy stated that:

A weapon must be discriminating, or capable of being controlled (i.e., it can be directed against intended targets). Those weapons which cannot be employed in a manner which distinguishes between lawful combatants and noncombatants violate these principles. Indiscriminate weapons are prohibited by customary international law and treaty law.

The OC system contemplated for acquisition and employment by the Marine Corps is specifically designed to limit its effects only to intended targets. The contemplated OC dispersers utilize a target specific stream of ballistic droplets for controlled delivery and minimal cross contamination (i.e., point target delivery), rather than an aerosolized spray which increases the likelihood of unintended subject impact. Provided the weapon is employed in a discriminating manner, the principle of distinction/discrimination presents no prohibition to acquisition and employment of OC in appropriate circumstances.³⁸³

366. According to the Report on US Practice, "it is the *opinio juris* of the United States that customary international law prohibits the use of indiscriminate weapons. Indiscriminate weapons are those that cannot be directed at a military objective."³⁸⁴

367. In 1976, during discussions in the Ad Hoc Committee on Conventional Weapons established by the CDDH, Vietnam stated that "no purpose would be served by suggesting the prohibition or the restriction of specific categories of weapons, since such suggestions amounted only to the classical criteria of the Declaration of St. Petersburg and the Hague Conventions".³⁸⁵

368. In its oral pleadings before the ICJ in the *Nuclear Weapons case* in 1995, Zimbabwe stated that:

Nuclear weapons create a vastly greater threat than any other weapon because of their indiscriminate nature. The radiation from nuclear weapons knows no boundaries . . . The threat or use of nuclear weapons violates the principles of humanitarian law prohibiting the use of weapons or methods of warfare that . . . are indiscriminate . . . Zimbabwe would like to emphasize that radiation from nuclear weapons cannot be contained either in space or in time.³⁸⁶

III. Practice of International Organisations and Conferences

United Nations

369. In a resolution adopted in 1961, the UN General Assembly stated that "the use of nuclear and thermo-nuclear weapons would exceed even the scope of war

³⁸³ US, Department of the Navy, Deputy Assistant Judge Advocate General, International and Operational Law Division, Legal Review of Oleoresin Capsicum (OC) Pepper Spray, 19 May 1998, § 5.

³⁸⁴ Report on US Practice, 1997, Chapter 3.3.

³⁸⁵ Vietnam, Statement at the CDDH, Vol. XVI, *Official Records*, CDDH/IV/SR.33, 2 June 1976, p. 344, § 25.

³⁸⁶ Zimbabwe, Oral pleadings before the ICJ, *Nuclear Weapons case*, 15 November 1995, Verbatim Record CR 95/35, pp. 25–28.

and cause indiscriminate suffering and destruction to mankind and civilization and, as such, is contrary to the rules of international law and to the laws of humanity".³⁸⁷

370. In a resolution adopted after the Conference of Government Experts in 1972, the UN General Assembly expressed its concern that no agreement was reached concerning weapons which indiscriminately affected civilians and combatants.³⁸⁸

371. In numerous resolutions adopted between 1973 and 1982, the UN General Assembly emphasised the need to eliminate indiscriminate weapons by treaty in order to alleviate the suffering of civilians and combatants.³⁸⁹

372. In two resolutions adopted in 1973 and 1974, the UN General Assembly stressed the need for States to effect "if possible through measures of disarmament, the elimination of specific, especially cruel or indiscriminate weapons".³⁹⁰

373. In a resolution adopted in 1973, the UN General Assembly welcomed the proposal from the ICRC to aim "at a reaffirmation of the fundamental general principles of international law prohibiting the use of weapons which may... have indiscriminate effects".³⁹¹

374. In a resolution adopted in 1976, the UN General Assembly invited the CDDH

to accelerate its consideration of the use of specific conventional weapons, including any which may be deemed to be excessively injurious or to have indiscriminate effects, and to do its utmost to agree for humanitarian reasons on possible rules prohibiting or restricting the use of such weapons.³⁹²

375. In a resolution adopted in 1979, the UN General Assembly reaffirmed that an agreement prohibiting or restricting conventional weapons "which might be deemed to be excessively injurious or to have indiscriminate effects" would mitigate the suffering of civilians and combatants in armed conflicts.³⁹³

³⁸⁷ UN General Assembly, Res. 1653 (XVI), 24 November 1961, § 1(b). (The resolution was adopted by 55 votes in favour, 20 against and 26 abstentions. Three of the abstaining States, Ecuador, Iran and Sweden, nevertheless indicated in their written statements submitted to the ICJ in the *Nuclear Weapons case* in 1995 that they did consider such weapons to be indiscriminate (see *supra*).

³⁸⁸ UN General Assembly, Res. 3032 (XXVII), 18 December 1972, preamble.

³⁸⁹ UN General Assembly, Res. 3076 (XXVIII), 6 December 1973, preamble; Res. 3255 A (XXIX), 9 December 1974, preamble; Res. 31/64, 10 December 1976, preamble; Res. 32/152, 19 December 1977, preamble; Res. 33/70, 14 December 1978, preamble; Res. 34/82, 11 December 1979, preamble; Res. 35/153, 12 December 1980, preamble; Res. 36/93, 9 December 1981, preamble; Res. 37/79, 9 December 1982, preamble.

³⁹⁰ UN General Assembly, Res. 3076 (XXVIII), 6 December 1973, preamble (adopted by 103 votes in favour, none against and 18 abstentions. GDR, Netherlands, UK, US and USSR explained their abstentions as being based on their opposition to the CDDH being considered the appropriate forum to discuss incendiary weapons); Res. 3255 (XXIX), 9 December 1974, preamble.

³⁹¹ UN General Assembly, Res. 3076 (XXVIII), 6 December 1973, preamble.

³⁹² UN General Assembly, Res. 31/64, 10 December 1976, § 2.

³⁹³ UN General Assembly, Res. 34/82, 11 December 1979, adopted without a vote.

376. In numerous resolutions adopted between 1980 and 1999, the UN General Assembly called for the accession of all States to the 1980 CCW.³⁹⁴

377. In a resolution adopted in 1980, the UN General Assembly commended the 1980 CCW agreed upon “with a view to achieving the widest possible adherence to these instruments”. It reaffirmed that it believed that an agreement prohibiting or restricting conventional weapons “which might be deemed to be excessively injurious or to have indiscriminate effects” would mitigate the suffering of civilians and combatants in armed conflicts.³⁹⁵ A further resolution adopted in 1981 reiterated this view and urged all States that had not done so to accede to the 1980 CCW and its Protocols.³⁹⁶ Numerous resolutions have repeated this appeal.³⁹⁷

378. In a resolution adopted in 1989, the UN Sub-Commission on Human Rights stated that chemical weapons were indiscriminate.³⁹⁸

379. In a resolution adopted in 1996, the UN Sub-Commission on Human Rights urged all States “to be guided in their national policies by the need to curb the production and the spread of weapons of mass destruction or with indiscriminate effects”. It then listed the following as falling within this category: nuclear, chemical and biological weapons, fuel-air and cluster bombs, and napalm and weaponry containing depleted uranium. It also stated that the use of these weapons was incompatible with human rights law and IHL.³⁹⁹

380. A survey carried out by the UN Secretariat in 1973 analysed practice and doctrine in relation to different humanitarian rules and enumerated the weapons that had been discussed from the point of view of their indiscriminate effects. These were: chemical and bacteriological weapons, incendiary weapons, nuclear weapons, conventional aerial bombardment, fragmentation

³⁹⁴ UN General Assembly, Res. 35/153, 12 December 1980, preamble; Res. 36/93, 9 December 1981, § 1; Res. 37/79, 9 December 1982, § 1; Res. 38/66, 15 December 1983, § 3; Res. 39/56, 12 December 1984, § 3; Res. 40/84, 12 December 1985, § 3; Res. 41/50, 3 December 1986, § 3; Res. 42/30, 30 November 1987, § 3; Res. 43/67, 8 December 1989, § 3; Res. 45/64, 4 December 1990, § 3; Res. 46/40, 6 December 1991, § 3; Res. 47/56, 9 December 1992, § 3; Res. 48/79, 16 December 1993, § 3; Res. 49/79, 15 December 1994, § 3; Res. 50/74, 12 December 1995, § 3; Res. 51/49, 10 December 1996, § 3; Res. 52/42, 9 December 1997, § 2; Res. 53/81, 4 December 1998, § 5; Res. 54/58, 1 December 1999, § III (3).

³⁹⁵ UN General Assembly, Res. 35/153, 12 December 1980, § 4, adopted without a vote.

³⁹⁶ UN General Assembly, Res. 36/93, 9 December 1981, § 1, adopted without a vote.

³⁹⁷ UN General Assembly, Res. 37/79, 9 December 1982, preamble and § 1; Res. 38/66, 15 December 1983, preamble and § 3; Res. 39/56, 12 December 1984, preamble and § 3; Res. 40/84, 12 December 1985, preamble and § 3; Res. 41/50, 3 December 1986, preamble and § 3; Res. 42/30, 30 November 1987, preamble and § 3; Res. 43/67, 7 December 1988, preamble and § 3; Res. 45/64, 4 December 1990, preamble and § 3; Res. 46/40, 6 December 1991, preamble and § 3; Res. 47/56, 9 December 1992, preamble and § 3; Res. 48/79, 16 December 1993, preamble and § 3; Res. 49/79, 15 December 1994, preamble and § 3; Res. 50/74, 12 December 1995, preamble and § 3; Res. 51/49, 10 December 1996, preamble and § 3; Res. 52/42, 9 December 1997, § 2; Res. 53/81, 4 December 1998, § 5; Res. 54/58, 1 December 1999, § III (3).

³⁹⁸ UN Sub-Commission on Human Rights, Res. 1989/39, 1 September 1989, p. 60.

³⁹⁹ UN Sub-Commission on Human Rights, Res. 1996/16, 29 August 1996, preamble and § 1.

bombs, landmines and booby-traps, missiles, delayed action weapons and naval weapons.⁴⁰⁰

Other International Organisations

381. In a resolution adopted in 1994 on respect for international humanitarian law, the OAS General Assembly stated that it was “deeply disturbed by the testing, production, sale, transfer, and use of certain conventional weapons which may be deemed . . . to have indiscriminate effects”. It urged all member States to accede to API and AP II and to the 1980 CCW.⁴⁰¹ This call was repeated in 1995.⁴⁰²

382. In a resolution adopted in 1998 on respect for international humanitarian law, the OAS General Assembly stated that “international humanitarian law prohibits the use of weapons, projectiles, material, and methods of warfare that have indiscriminate effects or cause excessive injury or unnecessary suffering”.⁴⁰³

International Conferences

383. The 22nd International Conference of the Red Cross in 1973 adopted a resolution on the prohibition or restriction of the use of certain weapons in which it endorsed the view of the UN General Assembly in Resolution 2932 (XXVII) A that:

The widespread use of many weapons and the emergence of new methods of warfare that cause unnecessary suffering or are indiscriminate call urgently for renewed efforts by governments to seek, through legal means, the prohibition or restriction of the use of such weapons and of indiscriminate and cruel methods of warfare and, if possible, through measures of disarmament, the elimination of specific, especially cruel or indiscriminate, weapons.

The resolution urged the CDDH to “begin consideration at its 1974 session of the question of the prohibition or restriction of the use of conventional weapons which may cause unnecessary suffering or have indiscriminate effects” and invited the ICRC to convene in 1974 a conference of government experts to study in depth the issue.⁴⁰⁴

384. The 24th International Conference of the Red Cross in 1981 adopted a resolution on conventional weapons in which it noted with satisfaction the adoption of the 1980 CCW and its Protocols and invited States to become parties

⁴⁰⁰ UN Secretariat, *Respect for human rights in armed conflicts, Existing rules of international law concerning the prohibition or restriction of use of specific weapons*, Survey, UN Doc. A/9215, 21 November 1973, p. 209.

⁴⁰¹ OAS, General Assembly, Res. 1270 (XXIV-O/94), 10 June 1994, preamble.

⁴⁰² OAS, General Assembly, Res. 1335 (XXV-O/95), 9 June 1995, § 1.

⁴⁰³ OAS, General Assembly, Res. 1565 (XXVIII-O/98), 2 June 1998, preamble.

⁴⁰⁴ 22nd International Conference of the Red Cross, Tehran, 8–15 November 1973, Res. XIV.

to them “as soon as possible, to apply them and examine the possibility of strengthening or developing them further”.⁴⁰⁵

385. The 24th International Conference of the Red Cross in 1981 adopted a resolution on disarmament, weapons of mass destruction and respect for non-combatants in which it urged parties to armed conflicts “not to use methods and means of warfare that cannot be directed against specific military targets and whose effects cannot be limited”.⁴⁰⁶

386. The 26th International Conference of the Red Cross and Red Crescent in 1995 stressed that “proper attention should be given to other existing conventional weapons or future weapons which may cause unnecessary suffering or have indiscriminate effects”.⁴⁰⁷

387. In the Final Declaration of the Second Review Conference of States Parties to the CCW in 2001, the High Contracting Parties expressed their grave concern about the fact that “the indiscriminate effects . . . of certain conventional weapons often fall on civilians, including in non-international armed conflicts”.⁴⁰⁸

388. In the Final Declaration of the African Parliamentary Conference on International Humanitarian Law for the Protection of Civilians during Armed Conflict in 2002, the participants stated that they were “worried in the face of the rapid expansion of arms trade and the uncontrolled proliferation of weapons, notably those which can have indiscriminate effects”.⁴⁰⁹

IV. Practice of International Judicial and Quasi-judicial Bodies

389. In its advisory opinion in the *Nuclear Weapons case* in 1996, the ICJ stated that:

The cardinal principles contained in the texts constituting the fabric of humanitarian law are the following. The first is aimed at the protection of the civilian population and civilian objects and establishes the distinction between combatants and non-combatants; States must never make civilians the object of attack and must consequently never use weapons that are incapable of distinguishing between civilian and military targets . . . In conformity with the aforementioned principles, humanitarian law, at a very early stage, prohibited certain types of weapons either because of their indiscriminate effect on combatants and civilians . . . Further these fundamental rules are to be observed by all States whether or not they have ratified the conventions that contain them, because they constitute intransgressible principles of international customary law.⁴¹⁰

⁴⁰⁵ 24th International Conference of the Red Cross, Manila, 7–14 November 1981, Res. IX, § 2.

⁴⁰⁶ 24th International Conference of the Red Cross, Manila, 7–14 November 1981, Res. XIII, § 1.

⁴⁰⁷ 26th International Conference of the Red Cross and Red Crescent, Geneva, 3–7 December 1995, Res. II, § H(h).

⁴⁰⁸ Second Review Conference of States Parties to the CCW, Geneva, 11–21 December 2001, Final Declaration, UN Doc. CCW/CONF.II/2, 25 January 2002, p. 8.

⁴⁰⁹ African Parliamentary Conference on International Humanitarian Law for the Protection of Civilians during Armed Conflict, Final Declaration, Niamey, 18–20 February 2002, preamble.

⁴¹⁰ ICJ, *Nuclear Weapons case*, Advisory Opinion, 8 July 1996, §§ 78–79.

390. In his separate opinion in the *Nuclear Weapons case* before the ICJ in 1996, Judge Guillaume stated that “customary law contains one single absolute prohibition: the one on so-called ‘blind’ weapons which are incapable to distinguish between civilian and military objectives”.⁴¹¹

391. In his dissenting opinion in the *Nuclear Weapons case* before the ICJ in 1996, Judge Weeramantry stated that “the rule of discrimination between civilian populations and military personnel is, like some of the other rules of *ius in bello*, of ancient vintage and shared by many cultures”.⁴¹²

392. In her dissenting opinion in the *Nuclear Weapons case* before the ICJ in 1996, Judge Higgins stated that:

Very important also . . . is the requirement of humanitarian law that weapons may not be used which are incapable of discriminating between civilian and military targets.

The requirement that a weapon be capable of differentiating between military and civilian targets is not a general principle of humanitarian law specified in the 1899, 1907 or 1949 law, but flows from the basic rule that civilians may not be the target of attack . . . It may be concluded that a weapon will be unlawful *per se* if it is incapable of being targeted at a military objective only, even if collateral damage occurs.⁴¹³

Judge Higgins was the only judge that offered a concrete definition of “indiscriminate weapons”, stating that:

It may be concluded that a weapon will be unlawful *per se* if it is incapable of being targeted at a military objective only, even if collateral harm occurs. Notwithstanding the unique and profoundly destructive characteristics of all nuclear weapons, that very term covers a variety of weapons which are not monolithic in all their effects. To the extent that a specific nuclear weapon would be incapable of this distinction, its use would be unlawful.⁴¹⁴

393. In his separate opinion in the *Nuclear Weapons case* before the ICJ in 1996, Judge Guillaume stated that “customary humanitarian law contains one single absolute prohibition: the one of so-called ‘blind’ weapons which are incapable of distinguishing between civilian targets and military targets. Obviously, nuclear weapons do not necessarily fall into this category” and that “the collateral damage caused to the civilian population must not be ‘excessive’ as compared to the ‘military advantage’ offered”.⁴¹⁵

394. In his separate opinion in the *Nuclear Weapons case* before the ICJ in 1996, Judge Fleischhauer arrived at the opposite conclusion, namely that “the nuclear weapon cannot distinguish between civilian and military targets”.⁴¹⁶

⁴¹¹ ICJ, *Nuclear Weapons case*, Separate Opinion of Judge Guillaume, 8 July 1996, § 5.

⁴¹² ICJ, *Nuclear Weapons case*, Dissenting Opinion of Judge Weeramantry, 8 July 1996, p. 277.

⁴¹³ ICJ, *Nuclear Weapons case*, Dissenting Opinion of Judge Higgins, 8 July 1996, §§ 23–24.

⁴¹⁴ ICJ, *Nuclear Weapons case*, Dissenting Opinion of Judge Higgins, 8 July 1996, § 24.

⁴¹⁵ ICJ, *Nuclear Weapons case*, Separate Opinion of Judge Guillaume, 8 July 1996, § 5.

⁴¹⁶ ICJ, *Nuclear Weapons case*, Separate Opinion of Judge Fleischhauer, 8 July 1996, § 2.

395. In his separate opinion in the *Nuclear Weapons case* before the ICJ in 1996, Judge Herczegh judged nuclear weapons illegal because they were “weapons of mass destruction”.⁴¹⁷

396. In a declaration in the *Nuclear Weapons case* before the ICJ in 1996, President Bedjaoui considered the weapons to be “of a nature to hit victims indiscriminately, confusing combatants and non-combatants”.⁴¹⁸

397. In its review of the indictment in the *Martić case* in 1996, the ICTY Trial Chamber had to determine whether the use of cluster bombs was prohibited in an armed conflict. Noting that no formal provision forbade the use of such bombs, the Trial Chamber recalled that the choice of weapons and their use were clearly delimited by IHL. Among the relevant norms of customary law, the Court referred to Article 51(4)(b) API, which forbade indiscriminate attacks involving the use of a means or method of combat that could not be directed against a specific military objective.⁴¹⁹

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

398. To fulfil its task of disseminating IHL, the ICRC has delegates around the world teaching armed and security forces that it is prohibited to use weapons “which, because of their lack of precision or their effects, affect civilian persons and combatants without distinction”. Delegates also teach that “belligerent Parties and their armed forces shall abstain from using weapons whose harmful effects go beyond the control, in time or place, of those employing them”.⁴²⁰

399. In a press release issued in 1991 in the context of the Gulf War, the ICRC reminded the belligerents that “weapons having indiscriminate effects... are prohibited”.⁴²¹

400. In 1996, in a statement before the First Committee of the UN General Assembly, the ICRC commented on the advisory opinion of the ICJ in the *Nuclear Weapons case* and stated that:

Turning now to the nature of nuclear weapons, we note that, on the basis of the scientific evidence submitted, the Court found that “...The destructive power of nuclear weapons cannot be contained in either space or time... the radiation released by a nuclear explosion would affect health, agriculture, natural resources and demography over a very wide area. Further, the use of nuclear weapons would be a serious danger to future generations...” In the light of this, ... the ICRC finds

⁴¹⁷ ICJ, *Nuclear Weapons case*, Declaration of Judge Herczegh, 8 July 1996, § 2.

⁴¹⁸ ICJ, *Nuclear Weapons case*, Declaration of President Bedjaoui, President of the ICJ, 8 July 1996, § 20.

⁴¹⁹ ICTY, *Martić case*, Review of the Indictment, 8 March 1996, § 18.

⁴²⁰ Frédéric de Mulinen, *Handbook on the Law of War for Armed Forces*, ICRC, Geneva, 1987, § 912(b) and (c).

⁴²¹ ICRC, Press Release No. 1659, Middle East conflict: ICRC appeals to belligerents, 1 February 1991, *IRRC*, No. 280, 1991, p. 27.

it difficult to envisage how a use of nuclear weapons could be compatible with the rules of international humanitarian law.⁴²²

401. In a working paper on war crimes submitted in 1997 to the Preparatory Committee for the Establishment of an International Criminal Court, the ICRC proposed that the employment of “weapons, projectiles and material and methods of warfare . . . inherently indiscriminate”, when committed in international or non-international armed conflicts, be subject to the jurisdiction of the Court.⁴²³

VI. *Other Practice*

402. In a resolution adopted during its Edinburgh Session in 1969, the Institute of International Law stated that:

Existing international law prohibits the use of all weapons which, by their very nature, affect indiscriminately both military objectives and non-military objects, or both armed forces and civilian populations. In particular, it prohibits the use of weapons the destructive effect of which is so great that it cannot be limited to specific military objectives or is otherwise uncontrollable (self-generating weapons) as well as of “blind” weapons.⁴²⁴

403. In 1985, in a report on violations of the laws of war in Nicaragua, Americas Watch listed the “use of ‘blind’ weapons that cannot be directed with any reasonable assurance against a specific military objective” among actions which were “prohibited by applicable international law rules”.⁴²⁵

404. In 1989, in a report on violations of the laws of war in Angola, Africa Watch listed the “use of ‘blind’ weapons that cannot be directed with any reasonable assurance against a specific military objective” among prohibited practices.⁴²⁶

C. Use of Prohibited Weapons

I. *Treaties and Other Instruments*

Treaties

405. Article 8 of the 1998 ICC Statute provides that:

⁴²² ICRC, Statement before the First Committee of the UN General Assembly, 18 October 1996.

⁴²³ ICRC, Working paper on war crimes submitted to the Preparatory Committee for the Establishment of an International Criminal Court, New York, 14 February 1997, §§ 2(i) and 3(vii).

⁴²⁴ Institute of International Law, Edinburgh Session, Resolution on the Distinction between Military Objectives and Non-military Objects in General and Particularly the Problems Associated with Weapons of Mass Destruction, 9 September 1969, § 7.

⁴²⁵ Americas Watch, *Violations of the Laws of War by Both Sides in Nicaragua: 1981–1985*, New York, March 1985, p. 34.

⁴²⁶ Africa Watch, *Angola: Violations of the Laws of War by Both Sides*, New York, April 1989, p. 141.

1. The Court shall have jurisdiction in respect of war crimes in particular when committed as part of a plan or policy or as part of a large-scale commission of such crimes.
2. For the purpose of this Statute, "war crimes" means:
 - ...
 - (b) Other serious violations of the laws and customs applicable in international armed conflict, within the established framework of international law, namely, any of the following acts:
 - ...
 - (xx) Employing weapons, projectiles and material and methods of warfare which are of a nature to cause superfluous injury or unnecessary suffering or which are inherently indiscriminate in violation of the international law of armed conflict, provided that such weapons, projectiles and material and methods of warfare are the subject of a comprehensive prohibition and are included in an annex to this Statute, by an amendment in accordance with the relevant provisions set forth in articles 121 and 123.

Other Instruments

406. Article 22(2)(c) of the 1991 ILC Draft Code of Crimes against the Peace and Security of Mankind provides that the "use of unlawful weapons" constitutes an "exceptionally serious war crime".

407. Section 6(2) of the 1999 UN Secretary-General's Bulletin provides that "the United Nations force shall respect the rules prohibiting or restricting the use of certain weapons . . . under the relevant instruments of international humanitarian law".

II. National Practice

Military Manuals

408. Australia's Commanders' Guide provides that "some weapons and weapons systems are totally prohibited".⁴²⁷ It further states that "the following examples constitute grave breaches or serious war crimes likely to warrant institution of criminal proceedings: . . . using certain unlawful weapons and ammunition such as poison".⁴²⁸

409. Australia's Defence Force Manual provides that "prohibited weapons" is one of the categories into which the limitations on the use of weapons fall.⁴²⁹ It further states that "the following examples constitute grave breaches or serious war crimes likely to warrant institution of criminal proceedings: . . . using certain unlawful weapons and ammunition such as poison".⁴³⁰

⁴²⁷ Australia, *Commanders' Guide* (1994), § 304.

⁴²⁸ Australia, *Commanders' Guide* (1994), § 1305(p).

⁴²⁹ Australia, *Defence Force Manual* (1994), § 401.

⁴³⁰ Australia, *Defence Force Manual* (1994), § 1315(p).

410. Bosnia and Herzegovina's Military Instructions states that "all means and methods of warfare are allowed, except for the ones which are prohibited or restricted by the international law of war".⁴³¹

411. Ecuador's Naval Manual provides that "the following acts constitute war crimes: . . . use of prohibited weapons or ammunition".⁴³²

412. Germany's Military Manual states that "grave breaches of international humanitarian law are in particular: . . . use of prohibited weapons".⁴³³

413. Under South Korea's Military Regulation 187, using prohibited weapons and ammunitions constitutes a war crime.⁴³⁴

414. Nigeria's Manual on the Laws of War includes "using . . . forbidden arms or ammunition" in its list of war crimes.⁴³⁵

415. South Africa's LOAC Manual provides that "making use of . . . forbidden arms or ammunition" is a grave breach of the law of war and a war crime.⁴³⁶

416. Switzerland's Basic Military Manual states that "employing methods and means of combat expressly prohibited in the Swiss army" constitutes a war crime.⁴³⁷

417. The UK Military Manual provides that "in addition to the 'grave breaches' of the 1949 Geneva Conventions . . . the following are examples of punishable violations of the laws of war, or war crimes: . . . using . . . forbidden arms or ammunition".⁴³⁸

418. The US Field Manual provides that "in addition to the 'grave breaches' of the Geneva Conventions of 1949, the following acts are representative of violations of the law of war ('war crimes'): . . . making use of . . . forbidden arms or ammunition".⁴³⁹

419. The US Instructor's Guide provides that "in addition to the grave breaches of the Geneva Conventions, the following acts are further examples of war crimes: using . . . forbidden arms or ammunition".⁴⁴⁰

420. The US Naval Handbook states that "the following acts are representative war crimes: . . . employing forbidden arms or ammunition".⁴⁴¹

National Legislation

421. Argentina's Draft Code of Military Justice punishes "any soldier who, on the occasion of an armed conflict, uses or orders to be used prohibited methods or means of combat".⁴⁴²

⁴³¹ Bosnia and Herzegovina, *Military Instructions* (1992), Item 5, § 1.

⁴³² Ecuador, *Naval Manual* (1989), § 6.2.5(10). ⁴³³ Germany, *Military Manual* (1992), § 1209.

⁴³⁴ South Korea, *Military Regulation 187* (1991), Article 4.2.

⁴³⁵ Nigeria, *Manual on the Laws of War* (undated), § 6(7).

⁴³⁶ South Africa, *LOAC Manual* (1996), §§ 39(a) and 41.

⁴³⁷ Switzerland, *Basic Military Manual* (1987), Article 200(2)(a).

⁴³⁸ UK, *Military Manual* (1958), § 626(g). ⁴³⁹ US, *Field Manual* (1956), § 504(a).

⁴⁴⁰ US, *Instructor's Guide* (1985), p. 13. ⁴⁴¹ US, *Naval Handbook* (1995), § 6.2.5(10).

⁴⁴² Argentina, *Draft Code of Military Justice* (1998), Article 290, introducing a new Article 874 in the *Code of Military Justice as amended* (1951).

422. The Criminal Code of Belarus provides that “the use in an armed conflict of . . . means and methods of warfare prohibited by international treaties binding upon the Republic of Belarus” is a war crime.⁴⁴³

423. Under the Criminal Code of the Federation of Bosnia and Herzegovina, the use of, or order to use, “means or practices of warfare prohibited by the rules of international law” in time of war or armed conflict is a war crime.⁴⁴⁴ The Criminal Code of the Republika Srpska contains the same provision.⁴⁴⁵

424. Bulgaria’s Penal Code as amended provides that “a person who, in violation of the rules of international law for waging war, uses or orders the use of . . . impermissible means or methods for waging war” commits a war crime.⁴⁴⁶

425. Colombia’s Penal Code imposes a criminal sanction on “anyone who, during an armed conflict, uses prohibited means and methods of warfare”.⁴⁴⁷

426. Congo’s Genocide, War Crimes and Crimes against Humanity Act defines as war crimes grave breaches of the Geneva Conventions, as well as all other grave breaches of the law and customs of war applied in international or non-international armed conflicts within the scope of international law.⁴⁴⁸

427. Under Croatia’s Criminal Code, the manufacture, improvement, production, stockpiling, offering for sale, purchase, interceding in purchasing or selling, possession, transfer, transport, use of, and order to use, “means or methods of combat prohibited by the rules of international law” are war crimes.⁴⁴⁹

428. The Czech Republic’s Criminal Code as amended punishes “any person who develops, produces, imports, possesses or stockpiles weapons, combat equipment or explosives prohibited by law or by an international treaty approved by the Parliament or otherwise disposes of them”.⁴⁵⁰ It also punishes “whoever in time of war or in combat . . . orders the use of a forbidden means of combat or material, or who uses such means or material”.⁴⁵¹

429. Denmark’s Military Criminal Code as amended punishes “any person who uses war instruments or procedures the application of which violates an international agreement entered into by Denmark or the general rules of international law”.⁴⁵²

430. El Salvador’s Law on the Control of Firearms, Ammunition and Explosives states that the armed forces “may use all types of weapons as long as they are not

⁴⁴³ Belarus, *Criminal Code* (1999), Article 136(16).

⁴⁴⁴ Bosnia and Herzegovina, Federation, *Criminal Code* (1998), Article 160(1).

⁴⁴⁵ Bosnia and Herzegovina, Republika Srpska, *Criminal Code* (2000), Article 436(1).

⁴⁴⁶ Bulgaria, *Penal Code as amended* (1968), Article 415(1).

⁴⁴⁷ Colombia, *Penal Code* (2000), Article 142.

⁴⁴⁸ Congo, *Genocide, War Crimes and Crimes against Humanity Act* (1998), Article 4.

⁴⁴⁹ Croatia, *Criminal Code* (1997), Article 163(1) and (2).

⁴⁵⁰ Czech Republic, *Criminal Code as amended* (1961), Article 185a(1).

⁴⁵¹ Czech Republic, *Criminal Code as amended* (1961), Article 262(1)(a).

⁴⁵² Denmark, *Military Criminal Code as amended* (1978), § 25.

prohibited by international conventions or treaties subscribed to and ratified by El Salvador".⁴⁵³

431. Under Estonia's Penal Code, "use of ... internationally prohibited weapons" is a war crime.⁴⁵⁴

432. Under Ethiopia's Penal Code, it is a punishable offence to use, or order to be used, against the enemy "any means or method of combat expressly forbidden by international conventions to which Ethiopia is a party".⁴⁵⁵

433. Under Finland's Revised Penal Code, any person who, in time of war, "uses a prohibited means of warfare or weapon [or] otherwise violates the provisions of an international agreement on warfare binding on Finland or the generally acknowledged and established rules and customs of war under public international law" shall be punished for war crime.⁴⁵⁶

434. Under Hungary's Criminal Code as amended, "any person who uses or orders the use of a weapon or instrument of war prohibited by international treaty in a theatre of military operation or in an occupied territory against the enemy" is guilty, upon conviction, of a war crime.⁴⁵⁷

435. Italy's Wartime Military Penal Code punishes any "commander of a military force who, to harm the enemy, orders or authorises the use of any of the methods or means of warfare that are prohibited by the law or by international conventions, or are in any way contrary to military honour". It also punishes "anyone who, to harm the enemy, adopts means or uses methods that are prohibited by the law or by international conventions, or are in any way contrary to military honour".⁴⁵⁸

436. Under Kazakhstan's Penal Code, "the use in an armed conflict of means and methods ... prohibited by an international treaty to which the Republic of Kazakhstan is a party" is a criminal offence.⁴⁵⁹

437. Under Lithuania's Criminal Code as amended, "an order to employ prohibited means of warfare or methods of combat and the employment of such [means or methods] in violation of the provisions of international agreements or universally accepted international customs regarding the means and methods of combat" are war crimes.⁴⁶⁰

438. Moldova's Penal Code punishes "the use during an armed conflict of means and methods of warfare prohibited by international treaties to which the Republic of Moldova is a party".⁴⁶¹

439. Under Mozambique's Military Criminal Law, it is a crime against humanitarian rules "to employ unlawful means of combat".⁴⁶²

⁴⁵³ El Salvador, *Law on the Control of Firearms, Ammunition and Explosives* (1999), Article 9.

⁴⁵⁴ Estonia, *Penal Code* (2001), § 103. ⁴⁵⁵ Ethiopia, *Penal Code* (1957), Article 288.

⁴⁵⁶ Finland, *Revised Penal Code* (1995), Chapter 11, Section 1(1)(1) and (3).

⁴⁵⁷ Hungary, *Criminal Code as amended* (1978), Section 160/A(1).

⁴⁵⁸ Italy, *Wartime Military Penal Code* (1941), Articles 174 and 175.

⁴⁵⁹ Kazakhstan, *Penal Code* (1997), Article 159(1).

⁴⁶⁰ Lithuania, *Criminal Code as amended* (1961), Article 340.

⁴⁶¹ Moldova, *Penal Code* (2002), Article 143(1).

⁴⁶² Mozambique, *Military Criminal Law* (1987), Article 83(a).

- 440.** New Zealand's Chemical Weapons Act forbids the use of weapons prohibited by international agreements.⁴⁶³
- 441.** Nicaragua's Military Penal Code punishes any soldier "who employs or orders the employment of prohibited weapons or means and methods of warfare".⁴⁶⁴
- 442.** Nicaragua's Revised Penal Code punishes "anyone who, during an international or civil war, commits serious violations of international conventions on the use of war weapons".⁴⁶⁵
- 443.** Norway's Military Penal Code as amended provides that "anyone who uses a weapon or means of combat which is prohibited by any international agreement to which Norway has acceded, or who is accessory thereto, is liable to imprisonment".⁴⁶⁶
- 444.** Poland's Penal Code punishes for a war crime "any person who, against the prohibition by international law or by the provisions of law, produces, stockpiles, acquires, sells, retains, transports or sends . . . means of warfare, or conducts research aimed at the production or use of such means".⁴⁶⁷
- 445.** Under Russia's Criminal Code, the "use in a military conflict of means and methods of warfare prohibited by an international treaty to which the Russian Federation is a party" is a crime against the peace and security of mankind.⁴⁶⁸
- 446.** Slovakia's Criminal Code as amended punishes "any person who develops, produces, imports, possesses or stockpiles weapons, combat equipment or explosives prohibited by law or by an international treaty approved by the Parliament or otherwise disposes of them". It also punishes "whoever in time of war or in combat . . . orders the use of a forbidden means of combat or material, or who uses such means or material".⁴⁶⁹
- 447.** Under Slovenia's Penal Code, the use of, or order to use, "weapons . . . prohibited under international law in time of war and armed conflict" is a war crime.⁴⁷⁰
- 448.** Spain's Military Criminal Code punishes "any soldier who uses, or orders the use of, means or methods of combat which are prohibited".⁴⁷¹
- 449.** Spain's Penal Code punishes "anyone who, during an armed conflict, uses, or orders to be used, methods or means of combat which are prohibited".⁴⁷²

⁴⁶³ New Zealand, *Chemical Weapons Act* (1996), Section 6.

⁴⁶⁴ Nicaragua, *Military Penal Code* (1996), Article 51.

⁴⁶⁵ Nicaragua, *Revised Penal Code* (1997), Article 551.

⁴⁶⁶ Norway, *Military Penal Code as amended* (1902), § 107.

⁴⁶⁷ Poland, *Penal Code* (1997), Article 121(1).

⁴⁶⁸ Russia, *Criminal Code* (1996), Article 356(1).

⁴⁶⁹ Slovakia, *Criminal Code as amended* (1961), Articles 185(a)(1) and 262(1)(a).

⁴⁷⁰ Slovenia, *Penal Code* (1994), Article 377(1).

⁴⁷¹ Spain, *Military Criminal Code* (1985), Article 70.

⁴⁷² Spain, *Penal Code* (1995), Article 610.

450. Under Sweden's Penal Code as amended, "use of any weapon prohibited by international law" constitutes a crime against international law.⁴⁷³

451. Tajikistan's Criminal Code punishes the "use during the hostilities or in armed conflict of means and materials prohibited under an international treaty".⁴⁷⁴

452. Uzbekistan's Criminal Code punishes "the employment of means of warfare forbidden by international law".⁴⁷⁵

453. Vietnam's Penal Code punishes "anyone who, in time of war, ... uses prohibited means or methods of warfare".⁴⁷⁶

454. Under the Penal Code as amended of the SFRY (FRY), the use of, or the order to use, "means or methods of combat prohibited under the rules of international law, during a war or an armed conflict" is a war crime.⁴⁷⁷

National Case-law

455. No practice was found.

Other National Practice

456. In its written statement submitted to the ICJ in the *Nuclear Weapons case* in 1995, Ecuador stated that "the use of nuclear weapons has the consequences that fit perfectly with the legal figure of war crimes against humankind: the assassination and extermination of entire populations and other inhuman acts committed against the civil population".⁴⁷⁸

457. At the CDDH, the SFRY voted in favour of the Philippine proposal concerning an amendment to include "the use of weapons prohibited by international Convention, namely: ... asphyxiating, poisonous or other gases, and all analogous liquids, materials or devices" in the list of grave breaches in Article 74 of draft API (now Article 85).⁴⁷⁹ However because that amendment had been rejected it stated that it:

deeply regrets that the use of unlawful methods or means of combat was not included in the grave breaches, particularly since to have done so would merely have been to have codified an already existing rule of customary law, because there can be no doubt that to use prohibited weapons or unlawful methods of making war is already to act unlawfully, that is, it is a war crime punishable by existing international law.⁴⁸⁰

⁴⁷³ Sweden, *Penal Code as amended* (1962), Chapter 22, § 6(1).

⁴⁷⁴ Tajikistan, *Criminal Code* (1998), Article 405.

⁴⁷⁵ Uzbekistan, *Criminal Code* (1994), Article 152.

⁴⁷⁶ Vietnam, *Penal Code* (1990), Article 279.

⁴⁷⁷ SFRY (FRY), *Penal Code as amended* (1976), Article 148(1).

⁴⁷⁸ Ecuador, Written statement submitted to the ICJ, *Nuclear Weapons case*, 20 June 1995, p. 2, § F.

⁴⁷⁹ see Philippines, Proposal of amendment to Article 74 of draft AP I submitted to the CDDH, *Official Records*, Vol. III, CDDH/418, 26 May 1977, p. 322.

⁴⁸⁰ SFRY, Statement at the CDDH, *Official Records*, Vol. VI, CDDH/SR.44, 30 May 1977, p. 306.

III. Practice of International Organisations and Conferences

458. No practice was found.

IV. Practice of International Judicial and Quasi-judicial Bodies

459. No practice was found.

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

460. No practice was found.

VI. Other Practice

461. The Declaration of Minimum Humanitarian Standards, adopted by an expert meeting convened by the Institute for Human Rights of Åbo Akademi University in Turku/Åbo, Finland in 1990, states that “weapons or other material or methods prohibited in international armed conflicts must not be employed in any circumstances”.⁴⁸¹

⁴⁸¹ Declaration of Minimum Humanitarian Standards, adopted by an expert meeting convened by the Institute for Human Rights, Åbo Akademi University, Turku/Åbo, 30 November–2 December 1990, Article 5(3), *IRRC*, No. 282, 1991, p. 332.

POISON

Poison (practice relating to Rule 72)

§§ 1–115

Poison*I. Treaties and Other Instruments**Treaties*

1. Article 23(a) of the 1899 HR provides that “it is especially prohibited . . . to employ poison or poisoned arms”.
2. Article 23(a) of the 1907 HR provides that “it is especially forbidden . . . to employ poison or poisoned weapons”.
3. Pursuant to Article 8(2)(b)(xvii) of the 1998 ICC Statute, “employing poison or poisoned weapons” is a war crime in international armed conflicts.

Other Instruments

4. Article 70 of the 1863 Lieber Code provides that “the use of poison in any manner, be it to poison wells, or food, or arms, is wholly excluded from modern warfare. He that uses it puts himself out of the pale of the law and usages of war.”
5. Article 13(a) of the 1874 Brussels Declaration states that “employment of poison or poisoned weapons” is especially forbidden.
6. Article 8(a) of the 1880 Oxford Manual provides that “it is forbidden . . . to make use of poison, in any form whatever”.
7. Article 16(1) of the 1913 Oxford Manual of Naval War provides that “it is forbidden . . . to employ poison or poisoned weapons”.
8. Based on several documents supplying evidence of outrages committed during the First World War, the 1919 Report of the Commission on Responsibility lists violations of the laws and customs of war which should be subject to criminal prosecution, including the “poisoning of wells”.
9. Article 3(a) of the 1993 ICTY Statute lists “employment of poisonous weapons” as a violation of the laws or customs of war to be subject to the jurisdiction of the Court.
10. Pursuant to Article 20(e)(i) of the 1996 ILC Draft Code of Crimes against the Peace and Security of Mankind, “employment of poisonous weapons” is a war crime.

11. The 2000 UNTAET Regulation No. 2000/15 establishes panels with exclusive jurisdiction over serious criminal offences, including war crimes. According to Section 6(1)(b)(xvii), “employing poison or poisoned weapons” is a war crime in international armed conflicts.

II. National Practice

Military Manuals

12. Argentina’s Law of War Manual states that the use of “poison or poisoned weapons” is especially prohibited.¹

13. Australia’s Commanders’ Guide states that the use of poison or poisoned weapons is prohibited.² It also provides that “because of their potential to be indiscriminate in application, poison and poisoned weapons are prohibited”.³ It further states that “the following examples constitute grave breaches or serious war crimes likely to warrant institution of criminal proceedings: . . . using certain unlawful weapons and ammunition such as poison”.⁴

14. Australia’s Defence Force Manual states that:

Poison or poisoned weapons are illegal because of their potential to be indiscriminate. So, for example, the poisoning or contamination of any source of drinking water is prohibited and the illegality is not cured by posting a notice that the water has been contaminated or poisoned.⁵

The manual further states that “the following examples constitute grave breaches or serious war crimes likely to warrant institution of criminal proceedings: . . . using certain unlawful weapons and ammunition such as poison”.⁶

15. Belgium’s Law of War Manual proscribes “the use of poison or poisoned arms”. The prohibition includes the poisoning of water sources, even with a warning.⁷

16. Bosnia and Herzegovina’s Military Instructions states that “it is prohibited to use . . . poisonous gas”.⁸

17. Canada’s LOAC Manual states that:

Poison or poisoned weapons are illegal because of their potential to be indiscriminate. For example, the poisoning or contamination of any source of drinking water is prohibited. Posting a notice that the water has been contaminated or poisoned does not make this practice legal.⁹

¹ Argentina, *Law of War Manual* (1969), § 1.008(2).

² Australia, *Commanders’ Guide* (1994), § 932(b).

³ Australia, *Commanders’ Guide* (1994), § 307, see also § 304.

⁴ Australia, *Commanders’ Guide* (1994), § 1305(p).

⁵ Australia, *Defence Force Manual* (1994), § 406.

⁶ Australia, *Defence Force Manual* (1994), § 1315(p).

⁷ Belgium, *Law of War Manual* (1983), p. 37.

⁸ Bosnia and Herzegovina, *Military Instructions* (1992), Item 11, § 1.

⁹ Canada, *LOAC Manual* (1999), pp. 5-2 and 5-3, § 20.

The manual also prohibits the use of “bullets that have been dipped in poison”.¹⁰ It further states that “using poison or poisoned weapons” constitutes a war crime.¹¹

18. Canada’s Code of Conduct provides that the use of “poison or poison weapons” is forbidden.¹²

19. Colombia’s Basic Military Manual prohibits the poisoning of water.¹³

20. The Military Manual of the Dominican Republic prohibits the use of poison and poisonous weapons. It tells soldiers that “you may not use poison or poisoning agents such as dead animals, bodies, or defecation to poison any water and food. Of course, you may use non-poisonous methods to destroy military food and water supplies in order to deprive the enemy combatants of their use.”¹⁴

21. Ecuador’s Naval Manual states that “poisoned projectiles are considered illegal, owing to their alteration, as are any other munitions covered with poison”.¹⁵

22. France’s LOAC Summary Note states that it is prohibited to use poisoned weapons.¹⁶

23. France’s LOAC Teaching Note includes poison in the list of weapons that “are totally prohibited by the law of armed conflict” “owing to their inhuman nature or to their excessive traumatic effect”.¹⁷

24. France’s LOAC Manual incorporates the content of Article 23(a) of the 1907 HR.¹⁸ It also includes poison in the list of weapons that “are totally prohibited by the law of armed conflicts” “owing to their inhuman nature or to their excessive traumatic effect”.¹⁹

25. Germany’s Military Manual states that “it is prohibited to employ poison and poisoned weapons”.²⁰ It adds that “the prohibition also applies to the toxic contamination of water supply installations and foodstuffs . . . for military purposes”.²¹

26. Indonesia’s Air Force Manual states that “it is prohibited to use poison or poisonous weapons in warfare”.²²

27. Referring to Israel’s Law of War Booklet, the Report on the Practice of Israel provides that the IDF “does not condone the use of poison in warfare, irrespective of the method or means of its employment”.²³

28. Israel’s Manual on the Laws of War provides that:

¹⁰ Canada, *LOAC Manual* (1999), p. 5-2, § 12(c).

¹¹ Canada, *LOAC Manual* (1999), pp. 16-3 and 16-4, §§ 20(a) and 21(h).

¹² Canada, *Code of Conduct* (2001), Rule 3, § 10(b).

¹³ Colombia, *Basic Military Manual* (1995), p. 49.

¹⁴ Dominican Republic, *Military Manual* (1980), p. 5.

¹⁵ Ecuador, *Naval Manual* (1989), § 9.1, see also § 9.1.1.

¹⁶ France, *LOAC Summary Note* (1992), § 4.6.

¹⁷ France, *LOAC Teaching Note* (2000), p. 6.

¹⁸ France, *LOAC Manual* (2001), p. 97.

¹⁹ France, *LOAC Manual* (2001), p. 54.

²⁰ Germany, *Military Manual* (1992), § 426.

²¹ Germany, *Military Manual* (1992), § 434.

²² Indonesia, *Air Force Manual* (1990), § 15(b)(1).

²³ Report on the Practice Israel, 1997, Chapter 3.2, referring to *Law of War Booklet* (1986), p. 11.

It is forbidden to poison water sources, arrows or bullets. This is one of the most ancient prohibitions in the laws of war. Already back in ancient Greece and Rome, it was forbidden to use poison which was perceived as “a dishonorable weapon” that disgraces the user. This prohibition has been carefully upheld also into the twentieth century. Another reason for this prohibition is the difficulty in controlling the outcome of the poisoning, with the possibility that it could also spread to an innocent civilian population (for example, the poisoning of water sources that cannot be restricted to military use only).²⁴

29. Italy’s IHL Manual states that “it is specifically prohibited . . . to use poison or poisoned weapons”.²⁵

30. Kenya’s LOAC Manual states that “the use of poison or poisoned weapons is prohibited”.²⁶

31. Under South Korea’s Military Regulation 187, “poisoning ponds and streams” constitutes a war crime.²⁷

32. The Military Manual of the Netherlands states that “it is prohibited to use poison or poisoned weapons. This includes a prohibition to poison or contaminate water supplies.”²⁸

33. The Military Handbook of the Netherlands states that “it is prohibited to use poison and poisoned weapons”.²⁹

34. New Zealand’s Military Manual prohibits the use of “poison or poisoned weapons”.³⁰ It further notes that “the use of poison or poisoned weapons” is “an old-established rule of customary law” which constitutes a war crime.³¹

35. Under Nigeria’s Military Manual, it is prohibited “to employ poison or poisoned weapons”.³²

36. Nigeria’s Manual on the Laws of War states that “the use of poison or poisonous weapons is prohibited”. It adds that “smearing any substance [on bullets] likely to inflame a wound is also prohibited”.³³ The manual includes “using . . . poisoned . . . arms or ammunition [and] poisoning of wells, streams and other sources of water supply” in its list of war crimes.³⁴

37. Nigeria’s Soldiers’ Code of Conduct provides that it is prohibited “to employ poison or poisoned weapons”.³⁵

38. Russia’s Military Manual prohibits “poison and poisoned weapons”.³⁶

²⁴ Israel, *Manual on the Laws of War* (1998), p. 12.

²⁵ Italy, *IHL Manual* (1991), Vol. I, § 8(1).

²⁶ Kenya, *LOAC Manual* (1997), Précis No. 3, p. 6.

²⁷ South Korea, *Military Regulation 187* (1991), Article 4(2).

²⁸ Netherlands, *Military Manual* (1993), p. IV-6.

²⁹ Netherlands, *Military Handbook* (1995), p. 7-39.

³⁰ New Zealand, *Military Manual* (1992), § 510.

³¹ New Zealand, *Military Manual* (1992), § 1704(2)(a) and footnote 32.

³² Nigeria, *Military Manual* (1994), p. 39, § 5(1)(i).

³³ Nigeria, *Manual on the Laws of War* (undated), §§ 12 and 11.

³⁴ Nigeria, *Manual on the Laws of War* (undated), § 6(7) and (9).

³⁵ Nigeria, *Soldiers’ Code of Conduct* (undated), § 12(a).

³⁶ Russia, *Military Manual* (1990), Article 6(d).

39. South Africa's LOAC Manual expressly prohibits the use of poison. It lists poison among "certain weapons . . . expressly prohibited by international agreement, treaty or custom".³⁷ The manual further provides that "making use of poisoned . . . arms or ammunition", as well as the "poisoning of wells or streams", are grave breaches of the law of war and war crimes.³⁸

40. Spain's LOAC Manual states that the use of "poison and poisoned weapons" is strictly forbidden in any circumstances.³⁹ It adds that "there also exists an absolute prohibition to poison food and water supplies".⁴⁰

41. Switzerland's Military Manual states that "the employment of poison . . . is prohibited".⁴¹

42. Switzerland's Teaching Manual states that the "law of armed conflict prohibits the use of poison".⁴²

43. Switzerland's Basic Military Manual states that "the employment of poison . . . is prohibited".⁴³ It also states that "poisoning springs" constitutes a war crime.⁴⁴

44. The UK Military Manual states that:

Poison and poisoned weapons . . . are forbidden.

Water in wells, pumps, pipes, reservoirs, lakes, rivers and the like, from which the enemy may draw drinking water, must not be poisoned or contaminated. The poisoning or contamination of water is not made lawful by posting up a notice informing the enemy that the water has been thus polluted.⁴⁵

The manual also provides that:

In addition to the "grave breaches" of the 1949 Geneva Conventions, . . . the following are examples of punishable violations of the laws of war, or war crimes: . . . using . . . poisoned . . . arms or ammunition; . . . poisoning of wells, streams, and other sources of water supply; . . . using . . . poisonous . . . gases.⁴⁶

45. The UK LOAC Manual states that "the following are prohibited in *international* armed conflict: . . . c. poison and poisoned weapons".⁴⁷ (emphasis in original)

46. The US Field Manual emphasises that "it is especially forbidden . . . to employ poison or poisoned weapons".⁴⁸ It further provides that "in addition to the 'grave breaches' of the Geneva Conventions of 1949, the following acts are representative of violations of the law of war ('war crimes'): . . . making use of poisoned . . . arms or ammunition . . . [and] poisoning of wells or streams".⁴⁹

³⁷ South Africa, *LOAC Manual* (1996), § 34(f)(iii).

³⁸ South Africa, *LOAC Manual* (1996), §§ 39(a) and (g) and 41.

³⁹ Spain, *LOAC Manual* (1996), § 3.2.a.(2). ⁴⁰ Spain, *LOAC Manual* (1996), § 3.2.c.(1).

⁴¹ Switzerland, *Military Manual* (1984), p. 10. ⁴² Switzerland, *Teaching Manual* (1986), p. 41.

⁴³ Switzerland, *Basic Military Manual* (1987), Article 22.

⁴⁴ Switzerland, *Basic Military Manual* (1987), Article 200(2)(k).

⁴⁵ UK, *Military Manual* (1958), §§ 111 and 112.

⁴⁶ UK, *Military Manual* (1958), § 626(g), (i) and (r).

⁴⁷ UK, *LOAC Manual* (1981), Section 5, p. 20, § 1(c), see also Section 4, p. 12, § 2(e).

⁴⁸ US, *Field Manual* (1956), § 37(a). ⁴⁹ US, *Field Manual* (1956), § 504(a) and (i).

47. The US Air Force Pamphlet states that “a weapon may be illegal *per se* if either international custom or treaty has forbidden its use under all circumstances. An example is poison to kill or injure a person.”⁵⁰ It further states that “usage and practice has also determined that it is *per se* illegal . . . to use any substance on projectiles that tend unnecessarily to inflame the wound they cause”.⁵¹ The manual defines poison as a “biological or chemical substance” and adds that “the long-standing customary prohibition against poison is based on their uncontrolled character and the inevitability of death or permanent disability”.⁵²

48. The US Soldier’s Manual instructs soldiers that “using poison or poisoned weapons is against the law of war. You may not use poison or poisoning agents such as dead animals, bodies, or defecation to poison any water or food supply.”⁵³

49. The US Instructor’s Guide provides that “in addition to the grave breaches of the Geneva Conventions, the following acts are further examples of war crimes: using poisoned . . . arms or ammunition [and] poisoning wells or streams”.⁵⁴

50. The US Operational Law Handbook states that “using . . . poison weapons” is “expressly prohibited by the law of war” and is “not excusable on the basis of military necessity”.⁵⁵

51. The US Naval Handbook states that “a few weapons, such as poisoned projectiles, are unlawful, no matter how employed”.⁵⁶

52. The YPA Military Manual of the SFRY (FRY) provides that “it is forbidden to use poison or poisoned weapons. This includes, for example, the use of poisonous bullets. Poisoning of drinking water, food, etc., is not forbidden but it must be announced or marked.”⁵⁷

National Legislation

53. Use of poison is a criminal offence under countless pieces of domestic legislation, in particular penal codes.⁵⁸

54. Australia’s War Crimes Act considers “any war crime within the meaning of the instrument of appointment of the Board of Inquiry [set up to investigate war crimes committed by enemy subjects]” as a war crime, including poisoning of wells.⁵⁹

⁵⁰ US, *Air Force Pamphlet* (1976), § 6-2. ⁵¹ US, *Air Force Pamphlet* (1976), § 6-3b(2).

⁵² US, *Air Force Pamphlet* (1976), § 6-4f. ⁵³ US, *Soldier’s Manual* (1984), p. 10.

⁵⁴ US, *Instructor’s Guide* (1985), p. 13.

⁵⁵ US, *Operational Law Handbook* (1993), p. Q-182, § (i).

⁵⁶ US, *Naval Handbook* (1995), § 9.1. ⁵⁷ SFRY (FRY), *YPA Military Manual* (1988), § 98.

⁵⁸ See, e.g., Albania, *Penal Code* (1995), Article 34; Algeria, *Penal Code* (1966), Article 87 bis (e); Norway, *Penal Code* (1902), §§ 153 and 160; Rwanda, *Penal Code* (1977), Article 315.

⁵⁹ Australia, *War Crimes Act* (1945), Section 3.

55. Australia's ICC (Consequential Amendments) Act incorporates in the Criminal Code the war crimes defined in the 1998 ICC Statute, including "employing poison or poisoned weapons" in international armed conflicts.⁶⁰
56. Brazil's Military Penal Code punishes "the poisoning of drinking water or foodstuffs".⁶¹
57. Under Burundi's Draft Law on Genocide, Crimes against Humanity and War Crimes, "employing poison or poisoned weapons" constitutes a war crime in international armed conflicts.⁶²
58. Canada's Crimes against Humanity and War Crimes Act provides that the war crimes defined in Article 8(2) of the 1998 ICC Statute are "crimes according to customary international law" and, as such, indictable offences under the Act.⁶³
59. China's Law Governing the Trial of War Criminals provides that "putting poison on food or drinking water" constitutes a war crime.⁶⁴
60. Congo's Genocide, War Crimes and Crimes against Humanity Act defines war crimes with reference to the categories of crimes defined in Article 8 of the 1998 ICC Statute.⁶⁵
61. The DRC Code of Military Justice as amended punishes "in time of war . . . poisoning of water or foodstuffs, as well as deposits, spraying or using harmful substances intended to cause death".⁶⁶
62. Under Estonia's Penal Code, "use of . . . toxic weapons" is a war crime.⁶⁷
63. Under Georgia's Criminal Code, any war crime provided for by the 1998 ICC Statute, which is not explicitly mentioned in the Code, such as "employing poison or poisoned weapons" in international armed conflicts, is a crime.⁶⁸
64. Germany's Law Introducing the International Crimes Code punishes anyone who, in connection with an international or a non-international armed conflict, "employs poison or poisoned weapons".⁶⁹
65. Italy's Law of War Decree as amended provides that "it is prohibited . . . to use poison or poisoned weapons".⁷⁰
66. Under Mali's Penal Code, "using poison or poisoned weapons" is a war crime in international armed conflicts.⁷¹
67. The Definition of War Crimes Decree of the Netherlands includes the "poisoning of wells" in its list of war crimes.⁷²

⁶⁰ Australia, *ICC (Consequential Amendments) Act* (2002), Schedule 1, § 268.55.

⁶¹ Brazil, *Military Penal Code* (1969), Article 293.

⁶² Burundi, *Draft Law on Genocide, Crimes against Humanity and War Crimes* (2001), Article 4(B)(q).

⁶³ Canada, *Crimes against Humanity and War Crimes Act* (2000), Section 4(1) and (4).

⁶⁴ China, *Law Governing the Trial of War Criminals* (1946), Article 3(15).

⁶⁵ Congo, *Genocide, War Crimes and Crimes against Humanity Act* (1998), Article 4.

⁶⁶ DRC, *Code of Military Justice as amended* (1972), Article 522.

⁶⁷ Estonia, *Penal Code* (2001), § 103. ⁶⁸ Georgia, *Criminal Code* (1999), Article 413(d).

⁶⁹ Germany, *Law Introducing the International Crimes Code* (2002), Article 1, § 12(1)(1).

⁷⁰ Italy, *Law of War Decree as amended* (1938), Article 35(1).

⁷¹ Mali, *Penal Code* (2001), Article 31(i)(17).

⁷² Netherlands, *Definition of War Crimes Decree* (1946), Article 1.

68. Under the International Crimes Act of the Netherlands, “employing poison or poisoned weapons” is a crime, when committed in an international armed conflict.⁷³
69. Under New Zealand’s International Crimes and ICC Act, war crimes include the crime defined in Article 8(2)(b)(xvii) of the 1998 ICC Statute.⁷⁴
70. Switzerland’s Military Criminal Code as amended punishes “anyone who wilfully pollutes drinking water used for persons or cattle with substances harmful to health”.⁷⁵
71. Under Trinidad and Tobago’s Draft ICC Act, it is a punishable offence to commit a war crime as defined in Article 8(2)(b)(xvii) of the 1998 ICC Statute.⁷⁶
72. Under the UK ICC Act, it is a punishable offence to commit a war crime as defined in Article 8(2)(b)(xvii) of the 1998 ICC Statute.⁷⁷
73. Under the US War Crimes Act as amended, violations of Article 23(a) of the 1907 HR are war crimes.⁷⁸
74. Under the Penal Code as amended of the SFRY (FRY), the use of, or the order to use, “means or methods of combat prohibited under the rules of international law, during a war or an armed conflict” is a war crime.⁷⁹ The commentary on this provision states that “the following weapons and means of combat are considered to be prohibited: . . . different kinds of poison and poisonous weapons”.⁸⁰

National Case-law

75. In its judgement in the *Shimoda case* in 1963, Japan’s District Court of Tokyo stated that “poison [and] poisonous gases” were part of “prohibited materials under international law”.⁸¹

Other National Practice

76. According to the Report on the Practice of Australia, the *opinio juris* of Australia supports the prohibition of poison or poisoned weapons.⁸²
77. According to the Report on the Practice of the Republika Srpska, the Instruction on Implementation of International Law of War in the Armed Forces of Republika Srpska states that “it is prohibited to use . . . poison”.⁸³

⁷³ Netherlands, *International Crimes Act* (2003), Article 5(5)(g).

⁷⁴ New Zealand, *International Crimes and ICC Act* (2000), Section 11(2).

⁷⁵ Switzerland, *Military Criminal Code as amended* (1927), Article 169(1).

⁷⁶ Trinidad and Tobago, *Draft ICC Act* (1999), Section 5(1)(a).

⁷⁷ UK, *ICC Act* (2001), Sections 50(1) and 51(1) (England and Wales) and Section 58(1) (Northern Ireland).

⁷⁸ US, *War Crimes Act as amended* (1996), Section 2441(c)(2).

⁷⁹ SFRY (FRY), *Penal Code as amended* (1976), Article 148(1).

⁸⁰ SFRY (FRY), *Penal Code as amended* (1976), commentary on Article 148(1).

⁸¹ Japan, District Court of Tokyo, *Shimoda case*, Judgement, 7 December 1963.

⁸² Report on the Practice of Australia, 1998, Chapter 3.2(3).

⁸³ Report on the Practice of Republika Srpska, 1997, Chapter 3.2, referring to Instruction on Implementation of International Law of War in the Armed Forces of Republika Srpska, *Official Gazette of ARBiH*, 5 December 1992, § 11.

78. In its written statement submitted to the ICJ in the *Nuclear Weapons case* in 1995, Egypt, referring to Article 22 of the 1907 HR, noted the “prohibition against the use of weapons which render death inevitable or cause unnecessary suffering” and, in this context, stated that “as far as weapons are concerned, since the nineteenth century this humanitarian principle has been embodied in two rules: one forbids the use of poisons”.⁸⁴

79. The Report on the Practice of India states that senior members of the Indian armed forces confirm that poison is not to be used in either international or non-international armed conflicts.⁸⁵

80. In 1991, during a debate in the UN Security Council concerning the aftermath of the Gulf War, Iraq implied that the use of shells made of depleted uranium was against international law, since they had poisonous effects.⁸⁶

81. The Report on the Practice of Iraq states that “the banning is absolute in using poisonous materials in itself due to its harmful effects to the individuals and the environment”.⁸⁷

82. The Report on the Practice of Jordan states that Jordan has never used poison or poisoned weapons.⁸⁸

83. In an article published in a military review, a member of the Kuwaiti armed forces stated that, during war, belligerents must:

respect restrictions and limits provided for in international conventions, such as restriction of the use of some weapons, and prohibition of using others, e.g. . . . the use of poisons. This is in application of well-established principles in wars, such as considerations of military honour and humanitarian considerations.⁸⁹

84. In its written statement submitted to the ICJ in the *Nuclear Weapons (WHO) case* in 1995, Malaysia, in a part entitled “Principle of Non-Toxicity”, referred, *inter alia*, to the 1925 Geneva Gas Protocol and the 1956 New Delhi Draft Rules.⁹⁰ It made the same references in its oral pleadings in the *Nuclear Weapons case* in 1995.⁹¹

85. According to the Report on the Practice of Malaysia, the armed forces of Malaysia do not use poison in warfare.⁹²

86. In its written statement submitted to the ICJ in the *Nuclear Weapons case* in 1995, the Marshall Islands stated that the “laws of war including the Geneva

⁸⁴ Egypt, Written statement submitted to the ICJ, *Nuclear Weapons case*, 20 June 1995, pp.12-13, § 19.

⁸⁵ Report on the Practice of India, 1997, Chapter 3.2.

⁸⁶ Iraq, Statement before the UN Security Council, UN Doc. S/PV.2981, 3 April 1991, pp. 29–30.

⁸⁷ Report on the Practice of Iraq, 1998, Chapter 3.2.

⁸⁸ Report on the Practice of Jordan, 1997, Chapter 3.2.

⁸⁹ Fellaḥ Awad Al-Anzi, “The Law of War”, *Homat Al-Watan*, No. 168, p. 57.

⁹⁰ Malaysia, Written statement submitted to the ICJ, *Nuclear Weapons (WHO) case*, 19 June 1995, pp. 23-24.

⁹¹ Malaysia, Oral pleadings before the ICJ, *Nuclear Weapons case*, Verbatim Record CR 95/27, 7 November 1995, p. 57.

⁹² Report on the Practice of Malaysia, 1997, Chapter 3.2

and Hague Conventions and the United Nations Charter . . . prohibit the use of poisonous substances".⁹³

87. In its written statement submitted to the ICJ in the *Nuclear Weapons case* in 1995, Mexico mentioned "a series of international instruments . . . [which] led to a prohibition on the use of certain weapons. Such instruments included the Hague Conventions of 1899 and 1907, which prohibited the use of poisoned or poisonous weapons."⁹⁴

88. In its written statement submitted to the ICJ in the *Nuclear Weapons (WHO) case* in 1995, Nauru stated that:

Clearly it is a violation of customary international law to use poisons or other analogous substances. Thus even where a State is not a party to the Geneva Gas Protocol it is nonetheless bound under customary law to refrain from using poisonous weapons.⁹⁵

89. In its written statement submitted to the ICJ in the *Nuclear Weapons case* in 1995, New Zealand stated that "the use of poison and poisoned weapons has long been prohibited. The prohibition is set out in the 1925 Geneva [Gas] Protocol but also forms part of customary law."⁹⁶

90. The Norwegian National Group, in response to a questionnaire from the International Society for Military Law and the Law of War on the "Investigation and Prosecution of Violations of the Law of Armed Conflict", stated that the use of poisonous weapons was mentioned in the 1902 Military Penal Act.⁹⁷

91. In 1996, at the Fourth Review Conference of States Parties to the BWC, Pakistan stated that:

The 1925 protocol and the BWC is a manifestation of a moral and cultural ethos that is over 1400 years old. Violations of the prohibitions against the production or use of poisonous weapons should be treated with equal determination in all cases, without selectivity or discrimination.⁹⁸

92. On the basis of an interview with a high-ranking officer of the AFP, the Report on the Practice of the Philippines notes that poison is prohibited.⁹⁹

⁹³ Marshall Islands, Written statement submitted to the ICJ, *Nuclear Weapons case*, 22 June 1995, § 5.

⁹⁴ Mexico, Written statement submitted to the ICJ, *Nuclear Weapons case*, 19 June 1995, p. 12, § 72.

⁹⁵ Nauru, Written statement submitted to the ICJ, *Nuclear Weapons (WHO) case*, 15 June 1995, p. 11.

⁹⁶ New Zealand, Written statement submitted to the ICJ, *Nuclear Weapons case*, 20 June 1995, § 72.

⁹⁷ Norway, Response from the Norwegian National Group to a Questionnaire on the Investigation and Prosecution of Violations of the Law of Armed Conflict, International Society for Military Law and the Law of War, XIVth International Congress, Athens 10-15 May 1997.

⁹⁸ Pakistan, Statement of 26 November 1996 at the Fourth Review Conference of States Parties to the BWC, Geneva, 25 November-6 December 1996.

⁹⁹ Report on the Practice of the Philippines, 1997, Interview with Navy Lt. Office of the Deputy Chief of Staff for Intelligence, 5 March 1997, Chapter 3.2.

93. On the basis of replies by army officers to a questionnaire, the Report on the Practice of Rwanda notes that the prohibition of the use of poison in armed conflicts is customary.¹⁰⁰

94. In its written statement submitted to the ICJ in the *Nuclear Weapons case* in 1995, the Solomon Islands stated that “international law prohibits the use of weapons which: . . . are poisonous”.¹⁰¹

95. In its oral pleadings before the ICJ in the *Nuclear Weapons case* in 1995, the Solomon Islands stated that the use of poisonous weapons was formally prohibited by Article 23(a) of the Hague Regulations of 1899 and 1907.¹⁰²

96. In its written statement submitted to the ICJ in the *Nuclear Weapons case* in 1995, Sweden stated that “as far back as the 17th century, Hugo Grotius stressed that poisoning was not allowed under international law. In certain respects, the principle of the prohibition of toxic weapons has also been codified (chiefly as a result of the 1925 Geneva Convention).”¹⁰³

97. In its written statement submitted to the ICJ in the *Nuclear Weapons case* in 1995, the UK referred to the “long established prohibition on the use of poison and poisoned weapons”, but it also stated that the prohibition was “intended to apply to weapons whose primary effect was poisonous and not to those where poison was a secondary or incidental effect”.¹⁰⁴

98. In 1974, in a memorandum on the depleted uranium tank round, the US Department of the Army stated that “the law of war prohibits the employment of poison or poisoned weapons”.¹⁰⁵

99. In 1975, in a legal review of 30MM ammunition, the US Department of the Air Force stated that “existing international law, both customary and treaty, prohibits the use of poison or poisoned weapons”.¹⁰⁶

100. In its written statement submitted to the ICJ in the *Nuclear Weapons case* in 1995, the US accepted the prohibition of poison as such. However, it considered the prohibition to be applicable only to “weapons that carry poison into the body of the victim” or “that are designed to kill or injure by the inhalation or other absorption into the body of poisonous gases or analogous substances”.¹⁰⁷

¹⁰⁰ Report on the Practice of Rwanda, 1997, Replies by army officers to a questionnaire, Chapter 3.2.

¹⁰¹ Solomon Islands, Written statement submitted to the ICJ, *Nuclear Weapons case*, 19 June 1995, p. 62, § 3.77.

¹⁰² Solomon Islands, Oral pleadings before the ICJ, *Nuclear Weapons case*, 14 November 1995, Verbatim Record CR 95/32, p. 47.

¹⁰³ Sweden, Written statement submitted to the ICJ, *Nuclear Weapons case*, 20 June 1995, p. 5.

¹⁰⁴ UK, Written statement submitted to the ICJ, *Nuclear Weapons case*, 16 June 1995, § 3.59 and § 3.60.

¹⁰⁵ US, Department of the Army, Memorandum for US Army Research, Development and Engineering Center, M829A2 Cartridge, 120MM, APFSDS-T (Depleted Uranium Tank Round), *Law of War Review*, 27 December 1994, § 6(b).

¹⁰⁶ US, Department of the Air Force, Legal Review of 30MM Ammunition, 14 March 1975, § II(1).

¹⁰⁷ US, Written statement submitted to the ICJ, *Nuclear Weapons case*, 20 June 1995, p. 24.

101. In its oral pleadings before the ICJ in the *Nuclear Weapons case* in 1995, Zimbabwe fully shared the analysis by other States that “the threat or use of nuclear weapons violates the principles of humanitarian law prohibiting the use of weapons or methods of warfare that . . . utilize poisonous or analogous substances”.¹⁰⁸

102. The Report on the Practice of Zimbabwe states that the prohibition of the use of poison is part of customary international law.¹⁰⁹

III. Practice of International Organisations and Conferences

United Nations

103. In a resolution adopted in 1970 on respect for human rights in armed conflicts, the UN General Assembly underlined “the continuing value of existing humanitarian rules relating to armed conflict, in particular the Hague Conventions of 1899 and 1907” and called upon “all parties to any armed conflict to observe the rules laid down in the Hague Conventions of 1899 and 1907”, including Article 23(a) which prohibits the use of poison or poisoned weapons.¹¹⁰

104. In two resolutions adopted in 1971 on respect for human rights in armed conflicts, the UN General Assembly repeated its call upon “all parties to any armed conflicts” to respect the Hague Conventions of 1899 and 1907.¹¹¹

105. In a resolution adopted in 1972 on respect for human rights in armed conflicts, the UN General Assembly called upon “all parties to armed conflicts to observe the international humanitarian rules which are applicable, in particular the Hague Conventions of 1899 and 1907”.¹¹²

106. In several resolutions adopted between 1973 and 1977 on respect for human rights in armed conflicts, the UN General Assembly called upon “all parties to armed conflicts to acknowledge and to comply with their obligations under the humanitarian instruments and to observe the international humanitarian rules which are applicable, in particular the Hague Conventions of 1899 and 1907”.¹¹³

107. In 1969, in a report on respect for human rights in armed conflicts, the UN Secretary-General stated that “the use of poisons and poisoned bullets has been prohibited by the international law of war for a long time”.¹¹⁴

¹⁰⁸ Zimbabwe, Oral pleadings before the ICJ, *Nuclear Weapons case*, 15 November 1995, Verbatim Record CR 95/35, p. 27.

¹⁰⁹ Report on the Practice of Zimbabwe, 1998, Chapter 3.2.

¹¹⁰ UN General Assembly, Res. 2677 (XXV), 9 December 1970, preamble and § 1.

¹¹¹ UN General Assembly, Res. 2852 (XXVII), 20 December 1971, § 1; Res. 2853 (XXVII), 20 December 1971, § 1.

¹¹² UN General Assembly, Res. 3032 (XXVIII), 18 December 1972, § 2.

¹¹³ UN General Assembly, Res. 3102 (XXVIII), 12 December 1973, § 4; Res. 3319 (XXIX), 14 December 1974, § 3; Res. 3500 (XXX), 15 December 1975, § 1; Res. 31/19, 24 November 1976, § 1; Res. 32/44, 8 December 1977, § 6.

¹¹⁴ UN Secretary-General, Report on respect for human rights in armed conflicts, UN Doc. A/7720, 20 December 1969, § 190.

108. In 1973, in a survey on respect for human rights in armed conflicts, the UN Secretariat made a thorough study of different legal sources (practice, doctrine and treaties) to establish whether poison was prohibited. It concluded that most sources supported the view that there was a customary prohibition on the use of poison.¹¹⁵

Other International Organisations

109. In 1985, in a report on the deteriorating situation in Afghanistan, the Rapporteur of the Parliamentary Assembly of the Council of Europe stated that "according to several concordant accounts, water, cereals and livestock have been poisoned [and] chemical substances and incendiary bombs producing gases of various colours have been discharged". In this respect, he added that the report of the Special Rapporteur of the UN Commission on Human Rights deserved mention.¹¹⁶ In that report, the UN Special Rapporteur had recommended that "the parties to the conflict, namely government and opposition forces, should be reminded that it is their duty to apply fully the rules of international humanitarian law without discrimination, particularly those concerning the protection of women and children".¹¹⁷

International Conferences

110. No practice was found.

IV. Practice of International Judicial and Quasi-judicial Bodies

111. In its advisory opinion in the *Nuclear Weapons case* in 1996, the ICJ discussed whether "nuclear weapons should be treated in the same way as poisoned weapons" and stated that, in that case, they would be prohibited under:

- (a) the Second Hague Declaration of 29 July 1899, which prohibits "the use of projectiles the object of which is the diffusion of asphyxiating or deleterious gases";
- (b) Article 23 (a) of the Regulations respecting the laws and customs of war on land annexed to the Hague Convention IV of 18 October 1907, whereby "it is especially forbidden: . . . to employ poison or poisoned weapons"; and
- (c) the Geneva Protocol of 17 June 1925 which prohibits "the use in war of asphyxiating, poisonous or other gases, and of all analogous liquids, materials or devices".

¹¹⁵ UN Secretariat, *Respect for human rights in armed conflicts, Existing rules of international law concerning the prohibition or restriction of use of specific weapons, Survey*, UN Doc. A/9215, 7 November 1973, pp. 115-119.

¹¹⁶ Council of Europe, Parliamentary Assembly, Rapporteur, *Report on the deteriorating situation in Afghanistan*, Doc. 5495, 15 November 1985, pp. 7-8, § 16(e).

¹¹⁷ UN Commission on Human Rights, Special Rapporteur on the Situation of Human Rights in Afghanistan, *Report, Recommendations*, reprinted in Council of Europe, Parliamentary Assembly, Doc. 5495, Appendix 1, 15 November 1985, p. 11, § 190.

According to the Court, the terms “poison” and “poisoned weapons” “have been understood, in the practice of States, in their ordinary sense as covering weapons whose prime, or even exclusive, effect is to poison or asphyxiate. This practice is clear.”¹¹⁸

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

112. To fulfil its task of disseminating IHL, the ICRC has delegates around the world teaching armed and security forces that “the use of poison or poisoned weapons is prohibited”.¹¹⁹

113. In 1994, in a Memorandum on Respect for International Humanitarian Law in Angola, the ICRC stated that “in particular, the use of...poison is prohibited”.¹²⁰

VI. Other Practice

114. Rule B3 of the Rules of International Humanitarian Law Governing the Conduct of Hostilities in Non-international Armed Conflicts, adopted in 1990 by the Council of the IIHL, states that “the customary rule prohibiting the use of poison as a means or method of warfare is applicable in non-international armed conflicts”.¹²¹

115. In 1992, the Ecumenical Council for Justice and Peace of the Philippines denounced the use of poison by the Philippine military.¹²²

¹¹⁸ ICJ, *Nuclear Weapons case*, Advisory Opinion, 8 July 1996, §§ 54 and 55.

¹¹⁹ Frédéric de Mulinen, *Handbook on the Law of War for Armed Forces*, ICRC, Geneva, 1987, § 918.

¹²⁰ ICRC, Memorandum on Respect for International Humanitarian Law in Angola, 8 June 1994, § II, *IRRC*, No. 320, 1997, p. 504.

¹²¹ IIHL, Rules of International Humanitarian Law Governing the Conduct of Hostilities in Non-international Armed Conflicts, Rule B3, *IRRC*, No. 278, 1990, p. 398.

¹²² Ecumenical Council for Justice and Peace (ECJP), Documented Human Rights Violations in Marag Valley for 1992, Report on the Practice of the Philippines, 1997, Chapter 3.2.

NUCLEAR WEAPONS

Nuclear Weapons

§§ 1–4

Nuclear Weapons

1. As explained in Volume I, an assessment of the legality of the use of nuclear weapons was not undertaken in the framework of this study because such an assessment was ongoing by the ICJ in the *Nuclear Weapons case* at the time the scope of the study was decided on. As a result, no specific practice was collected in this study. However, States' positions on the legality of the use of nuclear weapons can be found in their written statements and oral pleadings before the ICJ in this case.¹

¹ See the *Nuclear Weapons case*: written statements of Bosnia and Herzegovina, Burundi, Ecuador, Egypt, Finland, France, Germany, India, Iran, Ireland, Italy, Japan, North Korea, Lesotho, Malaysia, Marshall Islands, Mexico, Nauru, Netherlands, New Zealand, Qatar, Russia, Samoa, San Marino, Solomon Islands, Sweden, UK and US; oral pleadings of Australia (Verbatim Record CR 95/22, 30 October 1995, pp. 29–65), Costa Rica, annexing ICRC communication (Verbatim Record CR 95/33, 14 November 1995, pp. 18–33), Egypt (Verbatim Record CR 95/23, 1 November 1995, pp. 17–37), France (Verbatim Record CR 95/23, 1 November 1995, pp. 38–67 and Verbatim Record CR 95/24, 2 November 1995, pp. 17–28), Germany (Verbatim Record CR 95/24, 2 November 1995, pp. 28–38), Indonesia (Verbatim Record CR 95/25, 3 November 1995, pp. 16–39), Iran (Verbatim Record CR 95/26, 6 November 1995, pp. 16–42), Italy (Verbatim Record CR 95/26, 6 November 1995, pp. 42–49), Japan (Verbatim Record CR 95/27, 7 November 1995, pp. 18–40), Malaysia (Verbatim Record CR 95/27, 7 November 1995, pp. 40–66), Marshall Islands (Verbatim Record CR 95/32, 14 November 1995, pp. 18–28), Mexico (Verbatim Record CR 95/25, 3 November 1995, pp. 29–57), New Zealand (Verbatim Record CR 95/28, 9 November 1995, pp. 19–49), Philippines (Verbatim Record CR 95/28, 9 November 1995, pp. 49–65), Qatar (Verbatim Record CR 95/29, 10 November 1995, pp. 19–39), Russia (Verbatim Record CR 95/29, 10 November 1995, pp. 39–51), Samoa (Verbatim Record CR 95/31, 13 November 1995, pp. 23–54), San Marino (Verbatim Record CR 95/31, 13 November 1995, pp. 19–23), Solomon Islands (Verbatim Record CR 95/32, 14 November 1995, pp. 28–73), UK (Verbatim Record CR 95/34, 15 November 1995, pp. 20–54), US (Verbatim Record CR 95/34, 15 November 1995, pp. 55–81), Zimbabwe (Verbatim Record CR 95/35, 15 November 1995, pp. 20–36) and WHO (Verbatim Record CR 95/22, 30 October 1995, pp. 19–29), available at <http://212.153.43.18/icjwww/icases/iunan/iunanframe.htm>. On the same issue, see also the *Nuclear Weapons (WHO) case*: written statements of Australia, Colombia, Costa Rica, Finland, France, Germany, India, Iran, Ireland, Italy, Japan, Kazakhstan, North Korea, Lithuania, Malaysia, Mexico, Moldova, Nauru, Netherlands, New Zealand, Norway, Papua New Guinea, Philippines, Russia, Rwanda, Samoa, Saudi Arabia, Solomon Islands, Sri Lanka, Sweden, Uganda, Ukraine, UK and US, available at <http://212.153.43.18/icjwww/icases/ianw/ianwframe.htm>.

2. The ICJ delivered its advisory opinion in the *Nuclear Weapons case* on 8 July 1996.²
3. In a subsequent debate in the First Committee of the UN General Assembly, several States expressed themselves on the implications of the advisory opinion.³

² ICJ, *Nuclear Weapons case*, 8 July 1996.

³ See the statements before the First Committee of the UN General Assembly of Algeria (UN Doc. A/C.1/51/PV.5, 16 October 1996, p. 10, UN Doc. A/C.1/51/PV.18, 11 November 1996, p. 8 and UN Doc. A/C.1/51/PV.20, 12 November 1996, p. 1), Argentina (UN Doc. A/C.1/51/PV.3, 14 October 1996, p. 25 and UN Doc. A/C.1/51/PV.22, 14 November 1996, p. 11), Austria (UN Doc. A/C.1/51/PV.22, 14 November 1996, p. 9), Bahrain (UN Doc. A/C.1/51/PV.11, 22 October 1996, p. 16), Bangladesh (UN Doc. A/C.1/51/PV.8, 18 October 1996, p. 7), Belgium, also speaking on behalf of Luxembourg and Netherlands (UN Doc. A/C.1/51/PV.22, 14 November 1996, pp. 2–3), Bolivia (UN Doc. A/C.1/51/PV.7, 18 October 1996, p. 1), Botswana (UN Doc. A/C.1/51/PV.13, 24 October 1996, p. 3), Brazil (UN Doc. A/C.1/51/PV.4, 15 October 1996, p. 5), Brunei Darussalam (UN Doc. A/C.1/51/PV.13, 24 October 1996, p. 17), Burundi (UN Doc. A/C.1/51/PV.13, 24 October 1996, p. 9), Chile (UN Doc. A/C.1/51/PV.22, 14 November 1996, p. 11), China (UN Doc. A/C.1/51/PV.22, 14 November 1996, p. 7), Colombia (UN Doc. A/C.1/51/PV.4, 15 October 1996, p. 24), Costa Rica (UN Doc. A/C.1/51/PV.8, 18 October 1996, p. 13), Cuba (UN Doc. A/C.1/51/PV.9, 21 October 1996, pp. 3–4, UN Doc. A/C.1/51/PV.10, 21 October 1996, p. 3 and UN Doc. A/C.1/51/PV.18, 11 November 1996, p. 9), Ecuador (UN Doc. A/C.1/51/PV.4, 15 October 1996, pp. 9–10), Egypt (UN Doc. A/C.1/51/PV.4, 15 October 1996, pp. 15–16), France (UN Doc. A/C.1/51/PV.22, 14 November 1996, p. 4), Gabon (UN Doc. A/C.1/51/PV.7, 18 October 1996, p. 18), Germany (UN Doc. A/C.1/51/PV.22, 14 November 1996, p. 10), Ghana (UN Doc. A/C.1/51/PV.7, 18 October 1996, pp. 15–16), Holy See (UN Doc. A/C.1/51/PV.12, 24 October 1996, p. 9), Iceland (UN Doc. A/C.1/51/PV.22, 14 November 1996, p. 4), India (UN Doc. A/C.1/51/PV.7, 18 October 1996, p. 12, UN Doc. A/C.1/51/PV.14, 4 November 1996, p. 16 and UN Doc. A/C.1/51/PV.18, 11 November 1996, p. 10), Indonesia (UN Doc. A/C.1/51/PV.3, 14 October 1996, p. 19 and UN Doc. A/C.1/51/PV.20, 12 November 1996, p. 5), Indonesia, on behalf of the Non-Aligned Movement (UN Doc. A/C.1/51/PV.9, 21 October 1996, p. 4), Iran (UN Doc. A/C.1/51/PV.13, 24 October 1996, p. 17, UN Doc. A/C.1/51/PV.18, 11 November 1996, p. 9 and UN Doc. A/C.1/51/PV.20, 12 November 1996, p. 6), Iraq (UN Doc. A/C.1/51/PV.13, 24 October 1996, p. 1), Ireland (UN Doc. A/C.1/51/PV.22, 14 November 1996, p. 9), Japan (UN Doc. A/C.1/51/PV.22, 14 November 1996, pp. 7–8), Kenya (UN Doc. A/C.1/51/PV.11, 22 October 1996, p. 22), South Korea (UN Doc. A/C.1/51/PV.6, 17 October 1996, pp. 18–19), Laos (UN Doc. A/C.1/51/PV.10, 21 October 1996, p. 15), Libya (UN Doc. A/C.1/51/PV.10, 21 October 1996, p. 13), Malaysia (UN Doc. A/C.1/51/PV.3, 14 October 1996, p. 24 and UN Doc. A/C.1/51/PV.15, 6 November 1996, pp. 5–6), Marshall Islands (UN Doc. A/C.1/51/PV.6, 17 October 1996, p. 17), Mexico (UN Doc. A/C.1/51/PV.3, 14 October 1996, pp. 6–8 and UN Doc. A/C.1/51/PV.18, 11 November 1996, p. 12), Mongolia (UN Doc. A/C.1/51/PV.10, 21 October 1996, pp. 6–8), Myanmar (UN Doc. A/C.1/51/PV.6, 17 October 1996, p. 9 and UN Doc. A/C.1/51/PV.18, 11 November 1996, p. 4), Namibia (UN Doc. A/C.1/51/PV.12, 24 October 1996, p. 19), Nepal (UN Doc. A/C.1/51/PV.11, 22 October 1996, p. 17), New Zealand (UN Doc. A/C.1/51/PV.8, 18 October 1996, p. 3, UN Doc. A/C.1/51/PV.18, 11 November 1996, p. 14 and UN Doc. A/C.1/51/PV.22, 14 November 1996, p. 8), Nicaragua (UN Doc. A/C.1/51/PV.13, 24 October 1996, p. 14), Nigeria (UN Doc. A/C.1/51/PV.12, 24 October 1996, p. 1), Oman (UN Doc. A/C.1/51/PV.12, 24 October 1996, p. 20), Pakistan (UN Doc. A/C.1/51/PV.10, 21 October 1996, p. 17, UN Doc. A/C.1/51/PV.18, 11 November 1996, p. 4 and UN Doc. A/C.1/51/PV.19, 11 November 1996, p. 1), Papua New Guinea (UN Doc. A/C.1/51/PV.11, 22 October 1996, p. 21), Paraguay (UN Doc. A/C.1/51/PV.5, 16 October 1996, p. 5), Peru (UN Doc. A/C.1/51/PV.10, 21 October 1996, p. 12), Philippines (UN Doc. A/C.1/51/PV.11, 22 October 1996, pp. 8–9), Poland (UN Doc. A/C.1/51/PV.17, 7 November 1996, p. 15), Portugal (UN Doc. A/C.1/51/PV.22, 14 November 1996, p. 9), Russia (UN Doc. A/C.1/51/PV.6, 17 October 1996, p. 3 and UN Doc. A/C.1/51/PV.22, 14 November 1996, p. 10), Samoa (UN Doc. A/C.1/51/PV.6, 17 October 1996, p. 22), Saudi Arabia (UN Doc. A/C.1/51/PV.10, 21 October 1996, p. 5), South Africa (UN Doc. A/C.1/51/PV.9, 21 October 1996, p. 2), Sri Lanka (UN Doc. A/C.1/51/PV.5, 17 October 1996, p. 2 and UN Doc. A/C.1/51/PV.18, 11 November 1996, p. 6), Sudan (UN Doc. A/C.1/51/PV.12, 24 October 1996, p. 19), Sweden (UN Doc. A/C.1/51/PV.22, 14 November 1996, p. 11), Switzerland (UN Doc. A/C.1/51/PV.4, 15 October 1996, p. 19),

4. During this debate, the ICRC also expressed its opinion on the issue.⁴

Tanzania (UN Doc. A/C.1/51/PV.11, 22 October 1996, p. 3), Thailand (UN Doc. A/C.1/51/PV.10, 21 October 1996, p. 11), Togo (UN Doc. A/C.1/51/PV.13, 24 October 1996, p. 7), UAE (UN Doc. A/C.1/51/PV.8, 18 October 1996, p. 2), UK (UN Doc. A/C.1/51/PV.22, 14 November 1996, p. 5), US (UN Doc. A/C.1/51/PV.22, 14 November 1996, p. 3), Uruguay (UN Doc. A/C.1/51/PV.10, 21 October 1996, pp. 1–2), Venezuela (UN Doc. A/C.1/51/PV.7, 18 October 1996, p. 6), Yemen (UN Doc. A/C.1/51/PV.12, 24 October 1996, p. 13), Zambia (UN Doc. A/C.1/51/PV.12, 24 October 1996, p. 11); see also Rio Group, Statement by Bolivia on behalf of the Rio Group before the Sixth Committee of the UN General Assembly, UN Doc. A/C.6/51/SR.4, 19 November 1996, § 26.

⁴ See the statement of the ICRC before the First Committee of the UN General Assembly, UN Doc. A/C.1/51/PV.8, 18 October 1996, p. 10, also reproduced in *IRRC*, No. 316, 1997, pp. 118–119.

BIOLOGICAL WEAPONS

Biological Weapons (practice relating to Rule 73)

§§ 1–283

Biological Weapons*I. Treaties and Other Instruments**Treaties*

1. According to the 1925 Geneva Gas Protocol, the States parties accept the prohibition on the use of asphyxiating, poisonous or other gases and “agree to extend this prohibition to the use of bacteriological methods of warfare”. There are 20 reservations to the Protocol related to biological weapons.¹ These generally indicate that if an adverse party does not respect the Protocol, the ratifying State will no longer consider itself bound by the Protocol vis-à-vis that party.² There were an additional 17 reservations to this effect, but they have been withdrawn.³

2. The three protocols to the 1948 Brussels Treaty deal with biological weapons. Article 1 Part I (Armaments not to be manufactured) of Protocol III states that:

The High Contracting Parties, members of the Western European Union,⁴ take note of and record their agreement with the Declarations of the Chancellor of the Federal Republic of Germany (made in London on 3rd October, 1954, and annexed hereto as Annex I) in which the Federal Republic of Germany undertook not to manufacture in its territory . . . biological . . . weapons.

3. Article 13(1) of the 1955 Austrian State Treaty provides that:

¹ Algeria, Angola, Bahrain, Bangladesh, China, Fiji, India, Iraq, Israel, Jordan, North Korea, Kuwait, Libya, Nigeria, Pakistan, Papua New Guinea, Portugal, Solomon Islands, Vietnam and SFRY.

² A number of reservations include non-respect by allies also as a reason for no longer being obliged to respect the Protocol.

³ By Ireland in 1972; by Australia in 1986; by New Zealand in 1989; by Slovakia in 1990; by Bulgaria, Canada (in relation to bacteriological weapons), Chile, Romania and UK (in relation to bacteriological weapons) in 1991; by Spain in 1992; by the Netherlands in 1995; by France and South Africa in 1996; by Belgium in 1997; and by Estonia in 1999; by Russia in 2001; by South Korea in 2002.

⁴ Belgium, France, Germany, Greece, Italy, Luxembourg, Netherlands, Portugal, Spain and UK.

Austria shall not possess, construct or experiment with –

- ...
- (j) ... biological substances in quantities greater than, or of types other than, are required for legitimate civil purposes, or any apparatus designed to produce, project or spread such materials or substances for war purposes.

4. The preamble to the 1972 BWC provides that:

The States Parties to this Convention,

Determined to act with a view to achieving effective progress towards general and complete disarmament, including the prohibition and elimination of all types of weapons of mass destruction, and convinced that the prohibition of the development, production and stockpiling of chemical and bacteriological (biological) weapons and their elimination, through effective measures, will facilitate the achievement of general and complete disarmament under strict and effective international control.

Recognising the important significance of the Protocol for the Prohibition of the Use in War of Asphyxiating, Poisonous or Other Gases and of Bacteriological Methods of Warfare, signed at Geneva on 17 June 1925, and conscious also of the contribution which the said Protocol has already made, and continues to make, to mitigating the horrors of war,

Reaffirming their adherence to the principles and objectives of that Protocol and calling upon all States to comply strictly with them,

Recalling that the General Assembly of the United Nations has repeatedly condemned all actions contrary to the principles and objectives of the Geneva Protocol of 17 June 1925, ...

Convinced of the importance and urgency of eliminating from the arsenals of States, through effective measures, such dangerous weapons of mass destruction as those using chemical or bacteriological (biological) agents,

Recognising that an agreement on the prohibition of bacteriological (biological) and toxin weapons represents a first possible step towards the achievement of agreement on effective measures also for the prohibition of the development, production and stockpiling of chemical weapons, and determined to continue negotiations to that end,

Determined, for the sake of all mankind, to exclude completely the possibility of bacteriological (biological) agents and toxins being used as weapons,

Convinced that such use would be repugnant to the conscience of mankind and that no effort should be spared to minimise this risk.

5. Article 1 of the 1972 BWC provides that:

Each State Party to this Convention undertakes never in any circumstances to develop, produce, stockpile or otherwise acquire or retain:

1. microbial or other biological agents, or toxins whatever their origin or method of production, of types and in quantities that have no justification for prophylactic, protective or other peaceful purposes;
2. weapons, equipment or means of delivery designed to use such agents or toxins for hostile purposes or in armed conflict.

6. In September 1991, Argentina, Brazil and Chile signed the Mendoza Declaration on Chemical and Biological Weapons. Bolivia, Paraguay and Uruguay later acceded to the Declaration. In it, the parties state that they are “convinced that a complete ban on biological weapons will contribute to strengthening the security of all States”. In the first paragraph, they declare their “full commitment not to develop, produce, acquire in any way, stockpile or retain, transfer directly or indirectly, or use biological weapons”.

7. In December 1991, Bolivia, Colombia, Ecuador, Peru and Venezuela adopted the Cartagena Declaration on Weapons of Mass Destruction. The Declaration expresses the commitment of these governments to:

renounce the possession, production, development, use, testing and transfer of all weapons of mass destruction whether . . . bacteriological (biological), toxin . . . weapons, and to refrain from storing, acquiring or holding such categories of weapons, in any circumstances.

Other Instruments

8. Articles 6 and 9 of the 1938 ILA Draft Convention for the Protection of Civilian Populations against New Engines of War provide that:

Art. 6. The use of . . . bacterial weapons as against any State, whether or not a party to the present convention, and in any war, whatever its character, is prohibited.

...

Art. 9. The prohibition of the use of bacterial weapons shall apply to the use for the purpose of injuring an adversary of all methods for the dissemination of pathogenic microbes or of filter-passing viruses, or of infected substances, whether for the purpose of bringing them into immediate contact with human beings, animals or plants, or for the purpose of affecting any of the latter in any manner whatsoever, as, for example, by polluting the atmosphere, water, foodstuffs or any other objects of human use or consumption.

9. Article 14 of the 1956 New Delhi Draft Rules prohibits the use of weapons

whose harmful effects – resulting in particular from the dissemination of . . . bacteriological . . . agents – could spread to an unforeseen degree or escape, either in space or in time, from the control of those who employ them, thus endangering the civilian population.

10. Under Article 4(4) of Part IV of the 1998 Comprehensive Agreement on Respect for Human Rights and IHL in the Philippines, “civilian population and civilians . . . shall be protected . . . from . . . the stockpiling near or in their midst, and the use of . . . biological weapons”.

11. Section 6.2 of the 1999 UN Secretary-General’s Bulletin states that “the United Nations force shall respect the rules prohibiting or restricting the use of certain weapons and methods of combat under the relevant instruments of

international humanitarian law. These include, in particular, the prohibition on the use of . . . biological methods of warfare.”

II. National Practice

Military Manuals

12. Australia’s *Commanders’ Guide* provides that States are prohibited “from manufacturing, storing and using biological weapons. Both chemical and biological weapons are prohibited because they cause unnecessary suffering and may affect the civilian population in an indiscriminate fashion.”⁵ It defines the use of “certain unlawful weapons and ammunition” as “grave breaches or serious war crimes”.⁶

13. Australia’s *Defence Force Manual* states that “bacteriological methods of warfare are prohibited”. It further provides that States are prohibited “from manufacturing, storing and using biological weapons. Both chemical and biological weapons are prohibited because they cause unnecessary suffering and may affect the civilian population in an indiscriminate fashion.”⁷ The manual defines the use of “certain unlawful weapons and ammunition” as “grave breaches or serious war crimes”.⁸

14. Belgium’s *Law of War Manual* proscribes the use of biological weapons with reference to the 1925 Geneva Gas Protocol and the 1972 BWC.⁹

15. Bosnia and Herzegovina’s *Military Instructions* states that “it is prohibited to use . . . bacteriological agents”.¹⁰

16. Cameroon’s *Instructors’ Manual* states, on the issue of biological and bacteriological weapons, that “the restrictions here are clear. It is prohibited to use such weapons against enemy combatants as well as against civilian populations.” It also calls for the “total destruction of the existing stockpile”.¹¹

17. Canada’s *LOAC Manual* states that “nations are prohibited from manufacturing, storing and using biological weapons. Both bacteriological and biological weapons are prohibited because they cause unnecessary suffering and may affect the civilian population in an indiscriminate fashion.”¹² It further states that “using bacteriological methods of warfare” constitutes a war crime.¹³

18. Colombia’s *Basic Military Manual* states that the use, production, possession and importation of biological weapons are banned.¹⁴

⁵ Australia, *Commanders’ Guide* (1994), § 306.

⁶ Australia, *Commanders’ Guide* (1994), § 1305(p).

⁷ Australia, *Defence Force Manual* (1994), §§ 411 and 414.

⁸ Australia, *Defence Force Manual* (1994), § 1315(p).

⁹ Belgium, *Law of War Manual* (1983), p. 38.

¹⁰ Bosnia and Herzegovina, *Military Instructions* (1992), Item 11, § 1.

¹¹ Cameroon, *Instructors’ Manual* (1992), p. 124, § 441.

¹² Canada, *LOAC Manual* (1999), p. 5-3, § 25.

¹³ Canada, *LOAC Manual* (1999), pp. 16-3 and 16-4, § 21(i).

¹⁴ Colombia, *Basic Military Manual* (1995), pp. 49–50.

19. Ecuador's Naval Manual states that "international law prohibits all biological weapons or methods of warfare whether they are directed against persons, animals or plants. Biological weapons include microbial or biological or toxin agents of any origin (natural or artificial) or method of production."¹⁵

20. France's LOAC Summary Note states that it is prohibited to use biological weapons.¹⁶

21. France's LOAC Teaching Note includes biological and bacteriological weapons in the list of weapons that "are totally prohibited by the law of armed conflict" because of their inhuman and indiscriminate character.¹⁷

22. France's LOAC Manual incorporates the content of Article 1 of the 1972 BWC and makes reference to the 1925 Geneva Gas Protocol.¹⁸ It further includes biological and bacteriological weapons in the list of weapons that "are totally prohibited by the law of armed conflict" because of their inhuman and indiscriminate character.¹⁹

23. Germany's Soldiers' Manual provides that "the use... of bacteriological means of warfare is prohibited".²⁰

24. Germany's Military Manual proscribes "the use of bacteriological weapons" and refers to the 1925 Geneva Gas Protocol. It further states that:

The development, manufacture, acquisition and stockpiling of bacteriological (biological) and toxin weapons is prohibited (BWC). These prohibitions shall apply both to biotechnological and synthetic procedures serving other but peaceful purposes. They also include genetic engineering procedures and micro-organisms altered through genetic engineering.²¹

25. Germany's IHL Manual states that "international humanitarian law prohibits the use of a number of means of warfare which are of a nature to violate the principle of humanity and to cause unnecessary suffering, e.g. ... bacteriological means of warfare, e.g. substances which cause disease".²²

26. Italy's IHL Manual provides that "the use of bacteriological means... is forbidden in conformity with the international provisions in force".²³

27. Kenya's LOAC Manual prohibits the use of "bacteriological methods of warfare".²⁴

28. The Military Manual of the Netherlands states that the 1972 BWC "prohibits the development, production and stockpiling of bacteriological (biological) and toxin weapons (means of warfare). Logically this implies that the use of these weapons is also prohibited."²⁵

¹⁵ Ecuador, *Naval Manual* (1989), § 10.4.

¹⁶ France, *LOAC Summary Note* (1992), § 4.6. ¹⁷ France, *LOAC Teaching Note* (2000), p. 6.

¹⁸ France, *LOAC Manual* (2001), p. 22. ¹⁹ France, *LOAC Manual* (2001), p. 54.

²⁰ Germany, *Soldiers' Manual* (1991), p. 5.

²¹ Germany, *Military Manual* (1992), §§ 438–439.

²² Germany, *IHL Manual* (1996), § 305. ²³ Italy, *IHL Manual* (1991), Vol. I, § 19.

²⁴ Kenya, *LOAC Manual* (1997), Précis No. 3, p. 6.

²⁵ Netherlands, *Military Manual* (1993), pp. IV-7/IV-8, § 13.

29. The Military Handbook of the Netherlands states that “a general prohibition applies to the use of biological (bacteriological) means of warfare. The Netherlands shall in all circumstances respect this prohibition.”²⁶

30. New Zealand’s Military Manual states that “the [1925 Geneva Gas Protocol] prohibits the use . . . of bacteriological methods of warfare.”²⁷ It also includes “using bacteriological methods of warfare” in a list of “war crimes recognised by the customary law of armed conflict”.²⁸

31. Nigeria’s Manual on the Laws of War mentions the 1925 Geneva Gas Protocol and states that:

There is no rule to prevent measures being taken to dry up springs and destroy water-wells from which the enemy may draw water or devastate crops by means of chemicals and bacteria which are not harmful to human beings. Since 1925 a great number of States have signed a protocol for the prohibition of the use in war of asphyxiating gases or bacteriological means of warfare.

The manual includes “using bacteriological methods of warfare” in its list of war crimes.²⁹

32. Russia’s Military Manual prohibits bacteriological (biological) weapons. It refers to the 1925 Geneva Gas Protocol and the 1972 BWC.³⁰

33. South Africa’s LOAC Manual states that “the use of certain weapons is expressly prohibited by international agreement, treaty or custom (e.g. biological and toxic weapons)”.³¹

34. Spain’s LOAC Manual states that “it is prohibited to use . . . bacteriological weapons”. It repeats the content of Article 1 of the 1972 BWC.³²

35. Switzerland’s Teaching Manual states that the use of bacteriological means of warfare is prohibited.³³

36. Switzerland’s Basic Military Manual prohibits the use of biological weapons.³⁴

37. The UK Military Manual states that “the use of bacteriological methods of warfare is forbidden”.³⁵ A footnote explains that “the prohibition . . . in the [1925 Geneva] Gas Protocol was declaratory of the view generally accepted by the civilised world”. It adds that:

As Japan was not a party to the Protocol, the Russian military tribunal at Khabarovsk . . . would therefore seem to have assumed that the prohibition of bacteriological warfare derived from the customary law of war prevailing among civilised nations and it was only declaratory of such customary law.³⁶

²⁶ Netherlands, *Military Handbook* (1995), p. 7-39.

²⁷ New Zealand, *Military Manual* (1992), §§ 512, 619 and 711.

²⁸ New Zealand, *Military Manual* (1992), § 1704(5).

²⁹ Nigeria, *Manual on the Laws of War* (undated), § 12 and § 6(19).

³⁰ Russia, *Military Manual* (1990), § 6(e) and (f).

³¹ South Africa, *LOAC Manual* (1996), p. 12, § 34.f.(iii).

³² Spain, *LOAC Manual* (1996), §§ 3.2.c.(1) and 3.2.c(2).

³³ Switzerland, *Teaching Manual* (1986), p. 41.

³⁴ Switzerland, *Basic Military Manual* (1987), Article 22.

³⁵ UK, *Military Manual* (1958), § 111. ³⁶ UK, *Military Manual* (1958), § 111, footnote 1(b).

The manual also provides that “in addition to the ‘grave breaches’ of the 1949 [Geneva] Conventions, . . . the following are examples of punishable violations of the laws of war, or war crimes: . . . using bacteriological methods of warfare”.³⁷

38. The UK LOAC Manual states that “the following are prohibited in *international* armed conflict: . . . f. bacteriological weapons”.³⁸ (emphasis in original)

39. The US Field Manual states that:

The reservation of the United States [to the 1925 Geneva Gas Protocol] does not, however, reserve the right to retaliate with bacteriological methods of warfare against a state if that state or any of its allies fails to respect the prohibitions of the Protocol. The prohibition concerning bacteriological methods of warfare which the United States has accepted under the Protocol, therefore, proscribes not only the initial but also any retaliatory use of bacteriological methods of warfare. In this connection, the United States considers bacteriological methods of warfare to include not only biological weapons but also toxins, which, although not living organisms and therefore susceptible of being characterized as chemical agents, are generally produced from biological agents. All toxins, however, regardless of the manner of production, are regarded by the United States as bacteriological methods of warfare within the meaning of the proscription of the Geneva Protocol of 1925.³⁹

40. The US Air Force Pamphlet states that:

International law prohibits biological weapons or methods of warfare whether they are directed against persons, animals or plants. The wholly indiscriminate and uncontrollable nature of biological weapons has resulted in the condemnation of biological weapons by the international community, and the practice of states in refraining from their use in warfare has confirmed this rule. The Biological Weapons Convention prohibits also the development, preparation, stockpiling and supply to others of such weapons.⁴⁰

41. The US Air Force Commander’s Handbook states that “the United States has renounced the use of bacteriological weapons under all circumstances, and their possession is forbidden by a 1972 Treaty”.⁴¹

42. The US Operational Law Handbook states that “the US has renounced . . . all use of biological weapons”.⁴²

43. The US Naval Handbook states that:

The United States considers the prohibition against the use of biological weapons during armed conflict to be part of customary international law and thereby binding on all nations whether or not they are parties to the 1925 Gas Protocol or the 1972 Biological Weapons Convention.

The United States has, therefore, formally renounced the use of biological weapons under any circumstance. Pursuant to its treaty obligations, the United

³⁷ UK, *Military Manual* (1958), § 626(s). ³⁸ UK, *LOAC Manual* (1981), Section 5, p. 20, § 1(f).

³⁹ US, *Field Manual* (1956), § 38(d). ⁴⁰ US, *Air Force Pamphlet* (1976), § 6-4(b).

⁴¹ US, *Air Force Commander’s Handbook* (1980), § 6-3(b).

⁴² US, *Operational Law Handbook* (1993), p. Q-182, § (i).

States has destroyed all its biological and toxin weapons and restricts its research activities to development of defensive capabilities.⁴³

44. The YPA Military Manual of the SFRY (FRY) prohibits the use of bacteriological (biological) means of warfare.⁴⁴

National Legislation

45. Under Armenia's Penal Code, the development, production, acquisition, sale, use and testing of biological weapons and weapons of mass destruction constitute crimes against the peace and security of mankind.⁴⁵

46. Australia's Biological Weapons Act provides that:

- (1) It is unlawful to develop, produce, stockpile or otherwise acquire or retain:
 - (a) microbial or other biological agents, or toxins whatever their origin or method of production, of types and in quantities that have no justification for prophylactic, protective or other peaceful purposes; or
 - (b) weapons, equipment or means of delivery designed to use such agents or toxins for hostile purposes or in armed conflicts;
- (2) A corporation that, or a natural person who, does an act or thing declared by subsection (1) to be unlawful is guilty of an offence and is punishable, on conviction:
 - (a) in the case of a corporation – by a fine not exceeding \$ 200,000; and
 - (b) in the case of a natural person – by a fine not exceeding \$ 10,000, or by imprisonment for a specified period or for life, or both.⁴⁶

47. The Criminal Code of Belarus provides that “production, acquisition, stockpiling, transport, transfer or sale of weapons of mass destruction prohibited by international treaties binding upon the Republic of Belarus” is a criminal offence, while the use of such weapons is a war crime.⁴⁷

48. Brazil's Military Penal Code prohibits the spreading of epidemics or infestations in a location under military control which could result in damage to forests, crops, grazing pastures or animals used for economic or military purposes.⁴⁸

49. China's Law Governing the Trial of War Criminals provides that “use of . . . bacteriological warfare” constitutes a war crime.⁴⁹

50. Colombia's Constitution prohibits the “manufacture, import, possession and use of . . . biological . . . weapons”.⁵⁰

51. Under Croatia's Criminal Code, the manufacture, improvement, production, stockpiling, offering for sale, purchase, interceding in purchasing or

⁴³ US, *Naval Handbook* (1995), § 10.4.2.

⁴⁴ SFRY (FRY), *YPA Military Manual* (1988), § 99.

⁴⁵ Armenia, *Penal Code* (2003), Articles 386 and 387(2).

⁴⁶ Australia, *Biological Weapons Act* (1976), § 8.

⁴⁷ Belarus, *Criminal Code* (1999), Articles 129 and 134.

⁴⁸ Brazil, *Military Penal Code* (1969), Article 278.

⁴⁹ China, *Law Governing the Trial of War Criminals* (1946), Article 3(12).

⁵⁰ Colombia, *Constitution* (1991), Article 81.

selling, possession, transfer, transport, use of, and order to use, biological weapons are war crimes.⁵¹

52. Estonia's Penal Code punishes any "person who designs, manufactures, stores, acquires, hands over, sells or provides or offers for use in any other manner . . . biological or bacteriological weapons".⁵² Under the Code, "use of biological [or] bacteriological . . . weapons" is a war crime.⁵³

53. France's Law on the Prohibition of Biological Weapons prohibits the production, retention, acquisition, stockpiling and transfer of biological weapons.⁵⁴

54. Under Georgia's Criminal Code, "the production, acquisition or sale of . . . biological, or other kinds of weapon of mass destruction, prohibited by an international treaty" and the "use during hostilities or in armed conflict of such means and materials or weapons of mass destruction which are prohibited by an international treaty" are crimes.⁵⁵

55. Germany's Law Introducing the International Crimes Code punishes anyone who, in connection with an international or non-international armed conflict, "employs biological . . . weapons".⁵⁶

56. Hungary's Law/Decree on the Prohibition of Biological Weapons prohibits the development, production, stockpiling and acquisition or retention of microbial or other biological agents, or toxins, weapons, equipment and means of delivery as specified in Article 1 of the 1972 BWC.⁵⁷

57. Under Hungary's Criminal Code as amended, employing "bacteriological methods of warfare" as set forth in the 1925 Geneva Gas Protocol is a war crime.⁵⁸

58. Italy's Law of War Decree as amended states that "the use of bacteriological means . . . is forbidden in conformity with the international provisions in force".⁵⁹

59. Italy's Law on the Export, Import and Transit of Armaments provides that "the manufacture, import, export and transit of biological, chemical and nuclear weapons are prohibited, as is research designed for their production or the provision of the relevant technology".⁶⁰

60. Under Kazakhstan's Penal Code, "the production, acquisition, or sale of biological weapons" is a criminal offence.⁶¹

61. Moldova's Draft Penal Code punishes the use of bacteriological weapons.⁶²

⁵¹ Croatia, *Criminal Code* (1997), Article 163(1) and (2).

⁵² Estonia, *Penal Code* (2001), § 93(1). ⁵³ Estonia, *Penal Code* (2001), § 103.

⁵⁴ France, *Law on the Prohibition of Biological Weapons* (1972), Article 1.

⁵⁵ Georgia, *Criminal Code* (1999), Articles 406 and 413(c).

⁵⁶ Germany, *Law Introducing the International Crimes Code* (2002), Article 1, § 12(1)(2).

⁵⁷ Hungary, *Law/Decree on the Prohibition of Biological Weapons* (1975).

⁵⁸ Hungary, *Criminal Code as amended* (1978), Section 160, § A(3)(a).

⁵⁹ Italy, *Law of War Decree as amended* (1938), Article 51.

⁶⁰ Italy, *Law on the Export, Import and Transit of Armaments* (1990), Chapter 1, Section 1, § 7.

⁶¹ Kazakhstan, *Penal Code* (1997), Articles 158 and 159(2).

⁶² Moldova, *Draft Penal Code* (1999), Article 138(2).

62. New Zealand's Disarmament Act provides that "no person shall manufacture, station, acquire, or possess, or have control over any biological weapon in the New Zealand Nuclear Free Zone".⁶³

63. Norway's Penal Code provides that:

Any person shall be liable to imprisonment for a term not exceeding 10 years who develops, produces, stores or otherwise obtains or possesses:

- (1) bacteriological or other biological substances or toxins regardless of their origin or method of production, of such a kind and in such quantities that they are not justified for preventive, protective or other peaceful purposes,
- (2) weapons, equipment or means of dissemination made for using such substances or toxins as are mentioned in item 1 for hostile purposes or in armed conflict.

Accomplices shall be liable to the same penalty.⁶⁴

64. Poland's Penal Code punishes "any person who uses a means of mass destruction prohibited by international law" and "any person who, against the prohibition by international law or by the provision of law, produces, stockpiles, acquires, sells, retains, transports or sends means of mass destruction or means of combat, or conducts research aimed at the production or use of such means".⁶⁵

65. South Africa's Non-Proliferation of Weapons of Mass Destruction Act provides that:

The Minister may, by notice in the Gazette, determine the general policy to be followed with a view to:

- ...
- (d) the imposition of a prohibition, whether for offensive or defensive purposes, on the development, production, acquisition, stockpiling, maintenance or transit of any weapons of mass destruction.⁶⁶

66. Switzerland's Military Criminal Code as amended punishes "whoever will intentionally spread a dangerous and transmissible human disease".⁶⁷

67. Switzerland's Federal Law on War Equipment as amended provides that:

It is prohibited:

- a. to develop, produce, deliver to anyone, acquire, import, export, procure the transit of or stockpile biological weapons, engage in the brokerage thereof or otherwise dispose of them;
- b. to induce anyone to commit an act mentioned under letter a;
- c. to facilitate the commission of an act mentioned under letter a.⁶⁸

⁶³ New Zealand, *Disarmament Act* (1987), Section 8.

⁶⁴ Norway, *Penal Code* (1902), § 153a. ⁶⁵ Poland, *Penal Code* (1997), Articles 120 and 121.

⁶⁶ South Africa, *Non-Proliferation of Weapons of Mass Destruction Act* (1993), Section 2(1)(d).

⁶⁷ Switzerland, *Military Criminal Code as amended* (1927), Article 167.

⁶⁸ Switzerland, *Federal Law on War Equipment as amended* (1996), Article 7.

68. Tajikistan's Criminal Code punishes the "creation, production, acquisition, storage, transportation, sending or sale of . . . biological (bacteriological) . . . weapons of mass destruction, prohibited by an international treaty, as well as transfer to any other State, which does not possess nuclear weapons, of initial or special fissionable material, technologies, which can knowingly be used to produce weapons of mass destruction, or providing anyone with any other kind of weapons of mass destruction or components necessary for their production, prohibited by an international treaty". It further prohibits the "use of . . . biological (bacteriological) . . . weapons".⁶⁹

69. Under Ukraine's Criminal Code, "the use of weapons of mass destruction prohibited by international instruments consented to be binding by the [parliament] of Ukraine" is a war crime.⁷⁰

70. The UK Biological Weapons Act provides that:

No person shall develop, produce, stockpile, acquire or retain . . . any biological agent or toxin . . . in a quantity not justified for peaceful purposes . . . any weapon, equipment or means of delivery designed to use biological agents or toxins for hostile purposes or in armed conflict.⁷¹

71. The US Biological Weapons Anti-Terrorism Act criminalises "whoever knowingly develops, produces, stockpiles, transfers, acquires, retains, or possesses any biological agent, toxin or delivery system for use as a weapon or knowingly assists a foreign State or any organization to do so".⁷²

72. Uruguay's Organisational Law of Armed Forces states that it is forbidden for residents of the republic to possess war material for any purpose. Biological agents are included in this category.⁷³

73. Under the Penal Code as amended of the SFRY (FRY), the use of, or the order to use, "means or methods of combat prohibited under the rules of international law, during a war or an armed conflict" is a war crime.⁷⁴ The commentary on the Code adds that "the following weapons and means of combat are considered to be prohibited: . . . bacteriological agents".⁷⁵

National Case-law

74. In 1995, in a ruling on the constitutionality of AP II, Colombia's Constitutional Court stated in relation to the prohibition on the use of weapons of a nature to cause unnecessary suffering or superfluous injury that:

Although none of the treaty rules expressly applicable to internal conflicts prohibits indiscriminate attacks or the use of certain weapons, the Taormina Declaration

⁶⁹ Tajikistan, *Criminal Code* (1998), Articles 397 and 399, see also Article 405.

⁷⁰ Ukraine, *Criminal Code* (2001), Article 439(1).

⁷¹ UK, *Biological Weapons Act* (1974), Section 1.

⁷² US, *Biological Weapons Anti-Terrorism Act* (1989), § 175.

⁷³ Uruguay, *Organisational Law of Armed Forces* (1974), Article 49.

⁷⁴ SFRY (FRY), *Penal Code as amended* (1976), Article 148(1).

⁷⁵ SFRY (FRY), *Penal Code as amended* (1976), commentary on Article 148(1).

consequently considers that the bans (established partly by customary law and partly by treaty law) on the use of...bacteriological weapons...apply to non-international armed conflicts, not only because they form part of customary international law but also because they evidently derive from the general rule prohibiting attacks against the civilian population.⁷⁶

75. The Report on the Practice of Japan states that there is no national legislation specifically dealing with the prohibition of the use of bacteriological weapons, but that the judgement in the *Shimoda case* held that "bacteria" were part of "prohibited materials" under international law.⁷⁷

Other National Practice

76. In 1989, the Minister of Foreign Affairs of Afghanistan stated that "the Republic of Afghanistan, while once again confirming its pledges on the non-use and elimination of chemical weapons, announces that it will never resort to the production, use, development, storage, or export of... biological weapons".⁷⁸

77. At the CDDH, Algeria supported the Philippine amendment (see *infra*) because "it was a simple reaffirmation of the principles of positive humanitarian law".⁷⁹

78. In 1993, Argentina's Minister of Defence said that "we will not manufacture bacteriological weapons because we deem them immoral".⁸⁰

79. In its oral pleadings before the ICJ in the *Nuclear Weapons case* in 1995, Australia stated that:

Both conventions have widespread adherence. The Biological Weapons Convention has 131 States parties. The very new Chemical Weapons Convention has already 159 signatories and 40 ratifications or acceptances. The final preambular paragraph to the Biological Weapons Convention expresses the conviction of the States Parties that the use of biological weapons "would be repugnant to the conscience of mankind and that no effort should be spared to minimise this risk". Clearly, this is a strong international statement that the use of such weapons would be contrary to fundamental general principles of humanity.⁸¹

80. In 1992, during a debate in the First Committee of the UN General Assembly, which dealt mostly with the 1972 BWC, Austria stated that the elimination of biological weapons was important.⁸²

⁷⁶ Colombia, Constitutional Court, *Constitutional Case No. C-225/95*, Judgement, 18 May 1995, § 23.

⁷⁷ Report on the Practice of Japan, 1998, Chapter 3.1, referring to District Court of Tokyo, *Shimoda case*, Judgement, 7 December 1963, § 11.

⁷⁸ Kabul Radio, "Foreign Minister Returns from Paris Conference", 10 January 1989, as translated in FBIS-NES-89-006.

⁷⁹ Algeria, Statement at the CDDH, *Official Records*, Vol. VI, CDDH/SR.44, 30 May 1977, p. 286, § 37.

⁸⁰ "Minister Admits 'US Pressure' To Suspend Condor-2 Project", *Noticias Argentinas*, Buenos Aires, 6 August 1993, as translated from Spanish in FBIS-LAT-93-151, 9 August 1993, p. 27.

⁸¹ Australia, Oral pleadings before the ICJ, *Nuclear Weapons case*, 30 October 1995, Verbatim Record CR 95/22, § 39.

⁸² Austria, Statement before the First Committee of the UN General Assembly, UN Doc. A/C.1/47/PV.5, 14 October 1992, p. 10.

81. In 1992, during a debate in the First Committee of the UN General Assembly, Bahrain stated that the Middle East had to be free from biological weapons.⁸³

82. At the Fourth Review Conference of States Parties to the BWC in 1996, Bangladesh affirmed its commitment to “general and complete disarmament”. It added that “any effort to try to contain the spread of weapons of mass destruction, biological weapons included, must be combined with measures for their complete elimination”.⁸⁴

83. In 1970, in the context of the adoption of UN General Assembly Resolution 2444 (XXIII), Belarus stated that:

The need for all States without exception to abide, in any armed conflict, by the existing international conventions defining and limiting the means, ways and methods of waging war assumes particular importance. Among these conventions are . . . the Geneva Protocol of 1925.⁸⁵

84. In the preliminary stages of the First Review Conference of States Parties to the BWC in 1980, Belarus ensured “the fulfilment of undertakings assumed by it under articles I, II, III, and IV, and also under the relevant parts of the preamble of the [1972 BWC]”.⁸⁶

85. In 1993, during a debate in the First Committee of the UN General Assembly, Belarus referred to a declaration in which all States which had emerged from the Soviet Union had expressed support for biological disarmament.⁸⁷

86. At the First Review Conference of States Parties to the BWC in 1980, Belgium stated that “with regard to article IV [of the 1972 BWC], Belgium, in common with many other States, had taken the necessary domestic measures, the Belgian Parliament having enacted legislation approving the Convention”.⁸⁸

87. In the preliminary stages of the First Review Conference of States Parties to the BWC in 1980, Benin confirmed that it “has developed no weapon of that kind, and intends to continue to respect its undertakings under the Convention, to which Benin is a party”.⁸⁹

⁸³ Bahrain, Statement before the First Committee of the UN General Assembly, UN Doc. A/C.1/46/PV.20, 28 October 1991, p. 32.

⁸⁴ Bangladesh, Statement of 26 November 1996 at the Fourth Review Conference of States Parties to the BWC, Geneva, 25 November–6 December 1996.

⁸⁵ Belarus, Reply dated 2 March 1970 to the UN Secretary-General regarding the preparation of the study requested in paragraph 2 of General Assembly Resolution 2444 (XXIII), annexed to Report of the Secretary-General on respect for human rights in armed conflicts, UN Doc. A/8052, 18 September 1970, Annex III, p. 118, § 5.

⁸⁶ Belarus, Response to the request by the Preparatory Committee for the First Review Conference of States Parties to the BWC, Geneva, 3–21 March 1980, excerpted in UN Doc. BWC/CONF.I/4, 20 February 1980, § 32.

⁸⁷ Belarus, Statement before the First Committee of the UN General Assembly, UN Doc. A/C.1/48/SR.8, 22 October 1993, § 5.

⁸⁸ Belgium, Statement of 7 March 1980 at the First Review Conference of States Parties to the BWC, Geneva, 3–21 March 1980, UN Doc. BWC/CONF.I/SR.6, 7 March 1980, § 3.

⁸⁹ Benin, Response to the request by the Preparatory Committee for the First Review Conference of States Parties to the BWC, Geneva, 3–21 March 1980, excerpted in UN Doc. BWC/CONF.I/4, 20 February 1980, § 31.

88. In 1994, during a debate in the First Committee of the UN General Assembly, Benin advocated the elimination of bacteriological weapons.⁹⁰

89. At the Fourth Review Conference of States Parties to the BWC in 1996, Brazil stated that biological weapons, "given their sheer destructive force, indiscriminate effects and ghastly human toll . . . have from their inception generated international abhorrence". It further emphasised that it had always been a keen participant in efforts to rid the world of biological weapons. With reference to the BWC, it stated that it had "spared no effort in giving its contribution with a view to perfecting and strengthening this major international instrument".⁹¹

90. In 1991, during a debate in the First Committee of the UN General Assembly, Brunei declared that it had prohibited biological weapons.⁹²

91. At the First Review Conference of States Parties to the BWC in 1980, the representative of Bulgaria stated that:

10. His Government had already informed the Secretary-General of the United Nations that his country had never developed, produced, stockpiled or acquired by other means bacteriological (biological) weapons or toxins, and had stressed that it was strictly observing its commitments under the [1972 BCW]. That policy . . . provided a safeguard against any violations.
11. In the light of the obligations undertaken by . . . Bulgaria in ratifying all the international legal instruments banning or limiting the weapons or means used in armed conflicts, article 415 of the Bulgarian [Penal Code as amended] established severe penalties for anyone who in violation of the existing international rules of conduct in armed conflicts used, or ordered the use of, prohibited methods of warfare.⁹³

92. In 1977, during a debate in the First Committee of the UN General Assembly, Burma declared that the elimination of biological weapons was a goal of the Burmese Socialist Party.⁹⁴

93. At the CDDH, Canada voted against the Philippine amendment (see *infra*) because "the particular weapons are forbidden by international law and their use, other than by way of reprisal, already constitutes a war crime".⁹⁵

94. In the preliminary stages of the First Review Conference of States Parties to the BWC in 1980, Canada stated that "as a matter of national policy and in keeping with the Geneva Protocol of 1925, Canada does not 'develop, produce, stockpile, or otherwise acquire or retain' microbiological agents,

⁹⁰ Benin, Statement before the First Committee of the UN General Assembly, UN Doc. A/C.1/49/PV.3, 17 October 1994, p. 21.

⁹¹ Brazil, Statement of 25 November 1996 at the Fourth Review Conference of States Parties to the BWC, Geneva, 25 November–6 December 1996.

⁹² Brunei, Statement before the First Committee of the UN General Assembly, UN Doc. A/C.1/46/PV.20, 28 October 1991, p. 38.

⁹³ Bulgaria, Statement of 6 March 1980 at the First Review Conference of States Parties to the BWC, Geneva, 3–21 March 1980, UN Doc. BWC/CONF.I/SR.5, 10 March 1980, §§ 10–11.

⁹⁴ Burma, Statement before the First Committee of the UN General Assembly, UN Doc. A/C.1/32/PV.10, 24 October 1977, p. 2.

⁹⁵ Canada, Statement at the CDDH, *Official Records*, Vol. VI, CDDH/SR.44, 30 May 1977, p. 298.

toxins, weapons or other means of delivery for purposes of use in armed conflict".⁹⁶

95. In 1994, during a debate in the First Committee of the UN General Assembly, Canada stated that "biological weapons have no place in this world".⁹⁷

96. At the Fourth Review Conference of States Parties to the BWC in 1996, Canada stressed that it "believes that the time has . . . come to strengthen" the BWC and that "the purpose of the Convention is to prohibit an entire class of abhorred weapons" (i.e. biological weapons).⁹⁸

97. At the Fifth Review Conference of States Parties to the BWC in 2001, Canada, when talking about weapons of mass destruction, especially biological weapons, stated that "we need to make sure that they are never used". It added that biological weapons "cannot even be weapons of last resort, for their very preparation is banned".⁹⁹

98. In the preliminary stages of the First Review Conference of States Parties to the BWC in 1980, Cape Verde stated that it "has never been in violation of the provisions of Articles I, II, III, IV, V and X of the Convention on biological weapons and respects the obligations undertaken pursuant to the above-mentioned articles".¹⁰⁰

99. In 1992, during a debate in the First Committee of the UN General Assembly, which dealt mostly with the 1972 BWC, Chile referred to the 1991 Mendoza Declaration on Chemical and Biological Weapons, stating that "the region's participation in the Mendoza Accord on the complete prohibition of . . . biological weapons is an unequivocal demonstration of the will for disarmament that inspires the countries of South America".¹⁰¹

100. In 1986, during a debate in the UN Security Council on the Iran–Iraq War, China held that it "consistently opposed the use of . . . bacteriological . . . weapons at any place and time".¹⁰²

101. In 1991, during a debate in the First Committee of the UN General Assembly, China stated that it had always "stood for the complete prohibition of . . . biological weapons".¹⁰³

⁹⁶ Canada, Response to the request by the Preparatory Committee for the First Review Conference of States Parties to the BWC, Geneva, 3–21 March 1980, excerpted in UN Doc. BWC/CONF.I/4, 20 February 1980, § 33, Article I.

⁹⁷ Canada, Statement before the First Committee of the UN General Assembly, UN Doc. A/C.1/49/PV.4, 18 October 1994, p. 10.

⁹⁸ Canada, Statement of 26 November 1996 at the Fourth Review Conference of States Parties to the BWC, Geneva, 25 November–6 December 1996.

⁹⁹ Canada, Statement of 19 November 2001 at the Fifth Review Conference of States Parties to the BWC, Geneva, 19 November–7 December 2001.

¹⁰⁰ Cape Verde, Response to the request by the Preparatory Committee for the First Review Conference of States Parties to the BWC, Geneva, 3–21 March 1980, excerpted in UN Doc. BWC/CONF.I/4, 20 February 1980, § 34.

¹⁰¹ Chile, Statement before the First Committee of the UN General Assembly, UN Doc. A/C.1/47/PV.4, 13 October 1992, p. 6.

¹⁰² China, Statement before the UN Security Council, UN Doc. S/PV.2666, 24 February, pp. 29–30.

¹⁰³ China, Statement before the First Committee of the UN General Assembly, UN Doc. A/C.1/46/PV.9, 21 October 1991, p. 15.

102. A White Paper issued by the Information Office of the State Council of the People's Republic of China in 1995 states that China has consistently advocated the complete prohibition and thorough destruction of biological weapons. It opposes the production of biological weapons by any country and their proliferation in any form by any country. In 1984, China acceded to the 1972 BWC, and "since that date it has fully and conscientiously fulfilled its obligations under the convention".¹⁰⁴

103. At the Fourth Review Conference of States Parties to the BWC in 1996, China stated that it:

has all along stood against the arms race and for genuine disarmament, for the complete prohibition and thorough destruction of all weapons of mass destruction such as... biological weapons. The Chinese government gives full confirmation to the active role of the Convention, always supports the purposes and objectives of the Convention, and faithfully fulfils its obligations assumed as a State Party. China does not develop, produce, equipment or means of delivery prohibited under Article I of the Convention. China has always been against the proliferation of biological weapons and related technology. China has never in any way encouraged, assisted or induced any state, group of states or international organisation to conduct activities prohibited under the Convention.¹⁰⁵

104. At the Fifth Review Conference of States Parties to the BWC in 2001, China stated that it

is in favour of the complete prohibition and the thorough destruction of biological... weapons. Based on this very position, the Chinese government attaches great importance to the Convention and has always abided strictly its provisions in a serious and comprehensive manner.

It added that China "supports the effort to strengthen the effectiveness of the Convention. To this end, China has, since 1991, deeply involved itself in in-depth studies and exploration of possible verification measures within the Ad Hoc Group of Governmental Experts."¹⁰⁶

105. At the Fifth Review Conference of States Parties to the BWC in 2001, Croatia asked for the "immediate re-commencement of the work of the Ad Hoc Group, in whatever form delegations see fit".¹⁰⁷

106. In 1991, in a debate preceding UN Security Council Resolution 699 concerning the destruction of biological weapons in Iraq, Cuba stated that it favoured the "universal elimination of... biological weapons".¹⁰⁸

¹⁰⁴ White Paper on arms control and disarmament in China issued by the People's Republic of China, 16 November 1995, Xinhua News Agency, Beijing, as translated in BBC-SWB, 17 November 1995.

¹⁰⁵ China, Statement of 26 November 1996 at the Fourth Review Conference of States Parties to the BWC, Geneva, 25 November–6 December 1996.

¹⁰⁶ China, Statement of 19 November 2001 at the Fifth Review Conference of States Parties to the BWC, Geneva, 19 November–7 December 2001.

¹⁰⁷ Croatia, Statement of 19 November 2001 at the Fifth Review Conference of States Parties to the BWC, Geneva, 19 November–7 December 2001.

¹⁰⁸ Cuba, Statement before the UN Security Council, UN Doc. S/PV.2994, 17 June 1991, p. 23.

107. At the Fourth Review Conference of States Parties to the BWC in 1996, Cuba expressed the hope that the work of the Conference would lead to the crystallisation of the proposal to liberate the world of biological weapons.¹⁰⁹

108. In 1997, Cuba alleged that a US State Department aircraft, apparently on an approved flight to Grand Cayman Island, had dispensed Thrips Palmi insecticide over Cuba, which caused significant crop damage.¹¹⁰ The US Department of State categorically denied “the outrageous charges made by the Cuban Government” and noted that it had “not engaged in any act which would be in violation” of the 1972 BWC and that it had “unilaterally destroyed all stockpiled biological agents prior to entry into force of the Convention”.¹¹¹

109. In the preliminary stages of the First Review Conference of States Parties to the BWC in 1980, Cyprus stated that it “fully complies with the provisions of the Convention, as the Republic of Cyprus does not have at its disposal weapons of any such nature”.¹¹²

110. At the Second Review Conference of States Parties to the BWC in 1986, Czechoslovakia stated that it “fully complies with the obligations enshrined in its provisions and does not carry any weapons of that sort”.¹¹³

111. At the 733rd plenary meeting in Geneva of the Conference on Disarmament in 1996, the Czech Republic stated that it:

attaches great importance to the prohibition, elimination and non-proliferation of biological and toxin weapons. It regards the BWC as a binding international document and although it neither possesses nor develops any kind of biological weapons, it has been annually providing all necessary data in the form of non-mandatory declarations.¹¹⁴

112. At the Fifth Review Conference of States Parties to the BWC in 2001, the Czech Republic underlined “the importance the country attaches to the BWC and strict compliance with its terms and provisions”.¹¹⁵

113. In the preliminary stages of the First Review Conference of States Parties to the BWC in 1980, Denmark stated that:

¹⁰⁹ Cuba, Statement of 26 November 1996 at the Fourth Review Conference of States Parties to the BWC, Geneva, 25 November–6 December 1996.

¹¹⁰ Cuba, Information about the appearance in Cuba of the Thrips Palmi plague, annexed to Note verbale dated 28 April 1997 to the UN Secretary-General, UN Doc. A/52/128, 29 April 1997; see also Anthony Goodman, “Cuba accuses US of ‘biological aggression’”, *Reuter*, New York, 5 May 1997.

¹¹¹ US, Department of State, Office of the Spokesman, Press Statement by Acting Spokesman, “Cuba: No Use of Biological Weapons”, 6 May 1997.

¹¹² Cyprus, Response to the request by the Preparatory Committee for the First Review Conference of States Parties to the BWC, Geneva, 3–21 March 1980, excerpted in UN Doc. BWC/CONF.I/4, 20 February 1980, § 35.

¹¹³ Czechoslovakia, Statement at the Second Review Conference of States Parties to the BWC, Geneva, 8–26 September 1986, UN Doc. BWC/CONF.II/3, 25 August 1986, p. 2.

¹¹⁴ Czech Republic, Statement at the Conference on Disarmament, UN Doc. CD/PV.733, 28 March 1996, p. 17.

¹¹⁵ Czech Republic, Statement of 20 November 2001 at the Fifth Review Conference of States Parties to the BWC, Geneva, 19 November–7 December 2001.

Prior to ratification of the [1972 BWC], the Danish governmental departments concerned ascertained that no legislation, amendments of existing national law or other measures would be necessary in order to secure compliance with the obligations of the Convention. Accordingly, the requirements contained in the 1972 BWC have been implemented in Danish law and practice.¹¹⁶

114. In 1988, in a statement before the Fifteenth Special Session of the UN General Assembly, Ecuador stated that “among disarmament measures, Ecuador believes that priority should be given to the following: . . . a complete ban on the testing or production of new weapons of mass destruction, including . . . biological [weapons]”.¹¹⁷

115. In 1991, during a debate in the UN Security Council on the situation between Iraq and Kuwait, Ecuador stated that “it is . . . timely to insist on observance of the international agreements which prohibit the use of asphyxiating and toxic gases and bacterial warfare and which seek the universal elimination of chemical and biological weapons”.¹¹⁸

116. At the CDDH, Egypt expressed “its disappointment at the failure of the Philippine amendment, establishing as a grave breach the use of prohibited weapons, to be adopted”, but noted that Article 74 of draft AP I (now Article 85) “as it stands now does cover the use of such weapons through their effects”.¹¹⁹

117. At the CDDH, Finland stated that it “attached the greatest importance . . . to the prohibition of . . . bacteriological warfare in the Geneva Protocol of 1925”.¹²⁰

118. In the preliminary stages of the First Review Conference of States Parties to the BWC in 1980, Finland stated that:

With regard to the compliance by the Government of Finland to articles I–V and X, I wish to communicate the following information: (1) the obligations set out in articles I–III have been complied with; (2) the legislation of Finland is in harmony with the obligations set out in article IV.¹²¹

119. At the Conference for the Supervision of the International Trade in Arms and Ammunition and in Implements of War in 1925, France, with regard to a Polish proposal to extend the prohibition contained in what became the 1925

¹¹⁶ Denmark, Response to the request by the Preparatory Committee for the First Review Conference of States Parties to the BWC, Geneva, 3–21 March 1980, excerpted in UN Doc. BWC/CONF.I/4, 20 February 1980, § 36.

¹¹⁷ Ecuador, Statement before the Fifteenth Special Session of the UN General Assembly, UN Doc. A/S-15/PV.2, 1 June 1988, § 158.

¹¹⁸ Ecuador, Statement before the UN Security Council, UN Doc. S/PV.2981, 3 April 1991, p. 107.

¹¹⁹ Egypt, Statement at the CDDH, *Official Records*, Vol. VI, CDDH/SR.44, 30 May 1977, p. 300.

¹²⁰ Finland, Statement at the CDDH, *Official Records*, Vol. VI, CDDH/SR.44, 30 May 1977, p. 285, § 34.

¹²¹ Finland, Response to the request by the Preparatory Committee for the First Review Conference of States Parties to the BWC, Geneva, 3–21 March 1980, excerpted in UN Doc. BWC/CONF.I/4, 20 February 1980, § 37.

Geneva Gas Protocol to bacteriological warfare (see *infra*), begged “to second the Polish proposal”.¹²²

120. At the Second Review Conference of States Parties to the BWC in 1986, France stated that it:

had not initially signed the BWC taking a critical view of the lack of provisions relating to verification, it nevertheless recognised the importance of its purpose. It therefore adopted at the national level provisions similar to those of the Convention with regard to the prohibition of the development, production and stockpiling of bacteriological (biological) and toxin weapons and their destruction. Thus, since that date France has for its part assumed the obligations in this field stemming from the Convention of 10 April 1972.

Accordingly, it added, all technological research and work on biological weapons have been interrupted. The biological agents and toxins produced have been destroyed. Since then no research has been undertaken on the production for hostile purposes of biological or toxin weapons or on the dissemination of such agents. No aid has been given to third countries in these fields. Therefore, France has fulfilled all the obligations stemming from Articles I, II, III, and IV since 1972, in other words, well before its accession to the Convention (27 September 1984).¹²³

121. In 1991, during a debate in the UN Security Council preceding the adoption of Resolution 699 concerning the destruction of biological weapons in Iraq, France held that the ban on Iraqi possession of biological weapons was carried out with the perspective of regional and global disarmament.¹²⁴

122. In the preliminary stages of the First Review Conference of States Parties to the BWC in 1980, the GDR stated that:

Being a Party to the [1972 BWC], the German Democratic Republic has been fulfilling conscientiously its obligations deriving from the provisions of the Convention. Since the GDR has not developed, produced, stockpiled or otherwise acquired or retained such agents, toxins, weapons, equipment or means of delivery as specified in article I, the ruling in article II calling for their destruction and diversion to peaceful purposes is not applicable.

... Violations by individuals of the provisions of the Convention are to be regarded as impossible to occur so that, for its part, the German Democratic Republic definitely can declare that the Convention is being strictly observed.¹²⁵

123. At the First Review Conference of States Parties to the BWC in 1980, the representative of the GDR stated that:

¹²² France, Statement of 8 June 1925 at the Conference for the Supervision of the International Trade in Arms and Ammunition and in Implements of War, Geneva, 4 May–17 June 1925, League of Nations, Records of the Conference, Doc. A.13.1925.IX, September 1925, p. 341.

¹²³ France, Statement at the Second Review Conference of States Parties to the BWC, Geneva, 8–26 September 1986, UN Doc. BWC/CONF.II/3Add. 5, 25 August 1986, pp. 1–2.

¹²⁴ France, Statement before the UN Security Council, UN Doc. S/PV.2981, 3 April 1991, p. 92.

¹²⁵ GDR, Response to the request by the Preparatory Committee for the First Review Conference of States Parties to the BWC, Geneva, 3–21 March 1980, excerpted in UN Doc. BWC/CONF.I/4, 20 February 1980, § 38.

His country had been among the first to accede to the [1972 BWC] and... it had strictly abided by the obligations it had thereby assumed. His Government held the view that the Convention also covered the prohibition of all new scientific and technological developments in the field of microbiological and other biological agents and toxins and recombinant DNA techniques. The Convention thus prohibited their misuse for military purposes.¹²⁶

124. In 1983, the German government declared in parliament that biological weapons were as such prohibited.¹²⁷

125. At the Second Review Conference of States Parties to the BWC in 1986, the FRG stated that it had:

never researched, developed, produced, stockpiled or otherwise acquired or retained microbial or other biological agents or toxins of types and in quantities that have no justification for prophylactic, protective or other peaceful purposes, as well as weapons, equipment or means of delivery designed to use such agents or toxins for hostile purposes or in armed conflict... Furthermore, in 1954 the Federal Republic of Germany gave an internationally binding pledge within the WEU not to manufacture... biological... weapons... The legislation in force in the Federal Republic of Germany guarantees observance of the Convention's provisions.¹²⁸

126. In 1968, during a debate in the First Committee of the UN General Assembly, Ghana supported the prohibition of all biological weapons.¹²⁹

127. At the First Review Conference of States Parties to the BWC in 1980, Ghana stated that it "had abided strictly by its obligations under the [1972 BWC] and, as a developing country, had no intention of developing bacteriological weapons".¹³⁰

128. In the preliminary stages of the First Review Conference of States Parties to the BWC in 1980, Greece stated that it "complies with and applies the obligations set out in Articles I, II, III, IV, V and X" of the 1972 BWC.¹³¹

129. In 1992, during a debate in the First Committee of the UN General Assembly, which dealt mostly with the 1972 BWC, Guinea stated that Africa "should also become a region free from biological weapons".¹³²

130. In the preliminary stages of the First Review Conference of States Parties to the BWC in 1980, Hungary declared that it:

¹²⁶ GDR, Statement of 6 March 1980 at the First Review Conference of States Parties to the BWC, Geneva, 3–21 March 1980, UN Doc. BWC/CONF.I/SR.5, 10 March 1980, § 16.

¹²⁷ Germany, Lower House of Parliament, Reply by the government to a question in parliament, *Kriegsvölkerrechtliche Verträge*, 5 October 1983, *BT-Drucksache* 10/445, 1983, p. 14.

¹²⁸ FRG, Statement at the Second Review Conference of States Parties to the BWC, Geneva, 8–26 September 1986, UN Doc. BWC/CONF.II/3/Add. 3, 25 August 1986, p. 2.

¹²⁹ Ghana, Statement before the First Committee of the UN General Assembly, UN Doc. A/C.1/PV.1614, 21 November 1968, p. 6.

¹³⁰ Ghana, Statement of 7 March 1980 at the First Review Conference of States Parties to the BWC, Geneva, 3–21 March 1980, UN Doc. BWC/CONF.I/SR.7, 11 March 1980, § 19.

¹³¹ Greece, Response to the request by the Preparatory Committee for the First Review Conference of States Parties to the BWC, Geneva, 3–21 March 1980, excerpted in UN Doc. BWC/CONF.I/4, 20 February 1980, § 39.

¹³² Guinea, Statement before the First Committee of the UN General Assembly, UN Doc. A/C.1/47/PV.3, 12 October 1992, p. 59.

has never been in possession of any agents, toxins, weapons, equipment or means of delivery specified in article I of the Convention, and as a Party to the Convention has always complied and continues to comply fully and in good faith with [articles I, II, III, IV, V and X] of the Convention.¹³³

131. In the preliminary stages of the First Review Conference of States Parties to the BWC in 1980, India stated that “as a party to the Biological Weapons Convention, India continues to comply with all the obligations under the Convention”.¹³⁴

132. At the Fourth Review Conference of States Parties to the BWC in 1996, India stated that “it has been our consistent belief that the only certain defence against the inhumane weapons is their destruction and total elimination”.¹³⁵

133. At the Fifth Review Conference of States Parties to the BWC in 2001, India expressed its feeling that “the comprehensive legal norm against biological weapons, embodied by the Biological and Toxins Convention, needs to be strengthened”.¹³⁶

134. At the Fourth Review Conference of States Parties to the BWC in 1996, Indonesia stated that “biological . . . weapons have no place in today’s world and should be considered things of the past”.¹³⁷

135. The Guidance Book in the Field for the Indonesian Army concerning the Use of Biological Weapons states that the use of biological weapons is prohibited.¹³⁸

136. At the Fourth Review Conference of States Parties to the BWC in 1996, Iran stated that it believed in a total ban on the use of biological weapons which was explicit and devoid of judgemental interpretations. It noted that:

The use of biological weapons is already in contradiction to the provisions and the spirit of the 1925 Geneva Protocol and the BWC. In fact, the predominant *Opinio Juris* considers the prohibition of use a matter of customary international law. Yet, lack of explicit reference in the Convention on the one hand, and persistence of reservations on the Geneva Protocol on the other, can leave the door ajar for those who have held a different opinion in the past or may perhaps continue to do so in future.¹³⁹

¹³³ Hungary, Response to the request by the Preparatory Committee for the First Review Conference of States Parties to the BWC, Geneva, 3–21 March 1980, excerpted in UN Doc. BWC/CONF.I/4, 20 February 1980, § 40.

¹³⁴ India, Response to the request by the Preparatory Committee for the First Review Conference of States Parties to the BWC, Geneva, 3–21 March 1980, excerpted in UN Doc. BWC/CONF.I/4, 20 February 1980, § 41.

¹³⁵ India, Statement of 26 November 1996 at the Fourth Review Conference of States Parties to the BWC, Geneva, 25 November–6 December 1996.

¹³⁶ India, Statement of 20 November 2001 at the Fifth Review Conference of States Parties to the BWC, Geneva, 19 November–7 December 2001.

¹³⁷ Indonesia, Statement of 27 November 1996 at the Fourth Review Conference of States Parties to the BWC, Geneva, 25 November–6 December 1996.

¹³⁸ Report on the Practice of Indonesia, 1997, Chapter 3.4, referring to Guidance Book in the Field for the Indonesian Army concerning the Use of Biological Weapons, No. 42-01-06, p. 24, § 28.

¹³⁹ Iran, Statement of 26 November 1996 at the Fourth Review Conference of States Parties to the BWC, Geneva, 25 November–6 December 1996.

137. At the Fifth Review Conference of States Parties to the BWC in 2001, Iran recalled the “urgent need for an international legally binding instrument, for the strengthening of the Convention to be followed by establishment of an organisation in order to implement its provisions”. It added that it “supported the Ad Hoc Group negotiation and expected the successful conclusion and final adoption of a protocol”. According to Iran, the fact that the use is not expressly included in the Convention can be solved by using one of these alternatives: “insert the clause ‘use’ in the title and Article I, or the reservation to Geneva Protocol be withdrawn”.¹⁴⁰ Furthermore, while exercising its right of reply, it accused the US of not complying with its obligation by “transferring deadly agents to Israel and other allies as well as conducting research and development in the area of biological weapons”.¹⁴¹

138. In 1991, during a debate in the UN Security Council preceding the adoption of Resolution 699 concerning the destruction of biological weapons in Iraq, Iraq stated that it accepted not to “use, develop, manufacture or acquire any material referred to in the resolution”.¹⁴²

139. At the CDDH, Italy abstained in the vote on the Philippine amendment (see *infra*) stating that “it would not be useful because it dealt with means and methods of warfare which were already prohibited by the existing law”.¹⁴³

140. The Japanese army allegedly disseminated cholera and plague pathogens in several incidents in the USSR and Mongolia in the period 1939–1940 and in China between 1940 and 1944. These allegations were documented by Dr Robert Lim, the then head of the Chinese Red Cross, Dr R. Pollitzer, a League of Nations epidemiologist stationed in Hunan Province at the time of the alleged attacks, Dr P. Z. King, Director General of the Chinese National Health Administration, and a number of other sources.¹⁴⁴

141. In 1968, during a debate in the First Committee of the UN General Assembly, Japan stated that it should not only be prohibited to use biological weapons, but that this prohibition should also cover production and stockpiling.¹⁴⁵

¹⁴⁰ Iran, Statement of 19 November 2001 at the Fifth Review Conference of States Parties to the BWC, Geneva, 19 November–7 December 2001.

¹⁴¹ Iran, Statement of 19 November 2001 (right of reply) at the Fifth Review Conference of States Parties to the BWC, Geneva, 19 November–7 December 2001.

¹⁴² Iraq, Statement before the UN Security Council, UN Doc. S/PV.2994, 17 June 1991, p. 6.

¹⁴³ Italy, Statement at the CDDH, *Official Records*, Vol. VI, CDDH/SR.44, 30 May 1977, p. 285, § 30.

¹⁴⁴ SIPRI, *The Problem of Chemical and Biological Warfare*, Vol. I, *The Rise of CB Weapons*, Almquist & Wiksell, Stockholm, 1971, pp. 217–221; see also British Medical Association, *Biotechnology, Weapons and Humanity*, Harwood Academic Publishers, Amsterdam, 1999, pp. 15–17; Erhard Geissler (ed.), *Biological and Toxin Weapons Today*, SIPRI, Oxford University Press, Oxford 1986, pp. 10–12; Thomas Stock, Maria Haug and Patricia Radler, Chemical and biological weapon developments and arms control, *SIPRI Yearbook 1996: Armaments, Disarmament and International Security*, Oxford University Press, Oxford, 1996, p. 687.

¹⁴⁵ Japan, Statement before the First Committee of the UN General Assembly, UN Doc. A/C.1/PV.1616, 22 November 1968, p. 8.

142. In 1992, during a debate in the First Committee of the UN General Assembly, Japan stated that it “attached great importance to the prohibition of biological weapons”.¹⁴⁶

143. In its oral pleadings before the ICJ in the *Nuclear Weapons case* in 1995, Japan stated that the 1925 Geneva Gas Protocol and the 1972 BWC “and similar laws all rest on the desire to prevent the most irrational deeds of humankind. International law has always sought to play a humanitarian role.”¹⁴⁷

144. At the Fourth Review Conference of States Parties to the BWC in 1996, Japan stated that “it is extremely important that more countries accede to the Convention so that we can achieve the desired universality”.¹⁴⁸

145. At the Fifth Review Conference of States Parties to the BWC in 2001, Japan stated that it had “undertaken legislative measures to strengthen the national legislation with further punitive actions against those who use biological weapons as well as those who disseminate biological agents and toxins”.¹⁴⁹

146. At the CDDH, Jordan supported the principle behind the Philippine amendment (see *infra*), but stated that “it would be more generally acceptable if it were amended to apply only to the first user of weapons prohibited by international conventions”.¹⁵⁰

147. In 1994, during a debate in the First Committee of the UN General Assembly, South Korea stated that it was dedicated to the elimination of biological weapons.¹⁵¹

148. At the Fourth Review Conference of States Parties to the BWC in 1996, South Korea stated that “the Republic of Korea, since it acceded in 1987, has faithfully implemented the obligations and duties under the BWC”. It added that it “has never developed, produced, stockpiled or otherwise acquired or retained any biological agents, nor the means for their delivery”. It further stated that the need for a legally binding verification regime of the BWC “has been reaffirmed in the light of the recent evidence that biological materials have been illegally acquired and developed by some states parties to the BWC, and sub-state organisations”.¹⁵²

¹⁴⁶ Japan, Statement before the First Committee of the UN General Assembly, UN Doc. A/C.1/48/SR.4, 19 October 1993, § 23.

¹⁴⁷ Japan, Oral pleadings before the ICJ, *Nuclear Weapons case*, Verbatim Record CR 95/27, 7 November 1995, p. 30.

¹⁴⁸ Japan, Statement of 26 November 1996 at the Fourth Review Conference of States Parties to the BWC, Geneva, 25 November–6 December 1996.

¹⁴⁹ Japan, Statement of 19 November 2001 at the Fifth Review Conference of States Parties to the BWC, Geneva, 19 November–7 December 2001.

¹⁵⁰ Jordan, Statement at the CDDH, *Official Records*, Vol. VI, CDDH/SR.44, 30 May 1977, p. 283, § 21.

¹⁵¹ South Korea, Statement before the First Committee of the UN General Assembly, UN Doc. A/C.1/49/PV.6, 19 October 1994, pp. 12–13.

¹⁵² South Korea, Statement of 26 November 1996 at the Fourth Review Conference of States Parties to the BWC, Geneva, 25 November–6 December 1996.

149. At the Fifth Review Conference of States Parties to the BWC in 2001, South Korea stated that it “has faithfully implemented its obligations and duties under the BWC since its accession to it in 1987”.¹⁵³

150. According to the Report on the Practice of South Korea, South Korea is of the opinion that the prohibition of the use of biological weapons is customary.¹⁵⁴

151. In 1976, during discussions in the Ad Hoc Committee on Conventional Weapons established by the CDDH, Kuwait stated that it supported “the prohibition of all weapons, including biological weapons, which caused mass destruction and genocide”.¹⁵⁵

152. In the preliminary stages of the First Review Conference of States Parties to the BWC in 1980, Kuwait stated that:

With regard to Article I of the Biological Weapons Convention, Kuwait has not developed, produced or stockpiled such weapons or placed them at the disposal of its armed forces. Kuwait has not in any manner used microbial or other biological agents or toxins for non-peaceful purposes.

Kuwait does not intend to acquire or retain weapons, equipment or means of delivery designed to use such agents or toxins for hostile purposes or in armed conflict.¹⁵⁶

153. In 1993, during a debate in the First Committee of the UN General Assembly, Kuwait said it supported all international efforts to destroy weapons of mass destruction.¹⁵⁷

154. In an article published in a military review, a member of the Kuwaiti armed forces stated that, during war, belligerents must:

respect restrictions and limits provided for in international conventions, such as restriction of the use of some weapons, and prohibition of using others, e.g. . . . biological weapons . . . This is in application of well-established principles in wars, such as considerations of military honour and humanitarian considerations.¹⁵⁸

155. In the preliminary stages of the First Review Conference of States Parties to the BWC in 1980, Laos stated that it:

has rigorously observed the relevant provisions of [the 1972 BWC] and favours their strict application in order to contribute to the cause of general and complete

¹⁵³ South Korea, Statement of 20 November 2001 at the Fifth Review Conference of States Parties to the BWC, Geneva, 19 November–7 December 2001.

¹⁵⁴ Report on the Practice of South Korea, 1997, Chapter 3.4.

¹⁵⁵ Kuwait, Statement at the CDDH, *Official Records*, Vol. XVI, CDDH/IV/SR.34, 3 June 1976, p. 355, § 18.

¹⁵⁶ Kuwait, Response to the request by the Preparatory Committee for the First Review Conference of States Parties to the BWC, Geneva, 3–21 March 1980, excerpted in UN Doc. BWC/CONF.I/4, 20 February 1980, § 42.

¹⁵⁷ Kuwait, Statement before the First Committee of the UN General Assembly, UN Doc. A/C.1/48/SR.7, 21 October 1993, § 81.

¹⁵⁸ Fellah Awad Al-Anzi, “The Law of War”, *Homat Al-Watan*, No. 168, p. 57.

disarmament. Furthermore, the Lao People's Republic has conducted no scientific or technical research with a view to developing and manufacturing such weapons.¹⁵⁹

156. In 1993, during a debate in the First Committee of the UN General Assembly, Lebanon held that a local ban on biological weapons was part of the concept of a global ban on the same weapons.¹⁶⁰

157. In 1991, during a debate in the First Committee of the UN General Assembly, Libya expressed its belief that there was a "need to prevent the human race from . . . biological warfare".¹⁶¹

158. In 1992, during a debate in the First Committee of the UN General Assembly dealing mainly with the 1972 BWC, Libya supported an Egyptian initiative for a Middle East zone free of weapons of mass destruction.¹⁶²

159. In 1993, during a debate in the First Committee of the UN General Assembly, Libya supported a regional ban on weapons of mass destruction.¹⁶³

160. In its written statement submitted to the ICJ in the *Nuclear Weapons (WHO) case* in 1995, Malaysia stated that "biological weapons . . . have been banned".¹⁶⁴ In a part entitled "Principle of Non-Toxicity", Malaysia also referred to the 1925 Geneva Gas Protocol and the 1956 New Delhi Draft Rules.¹⁶⁵ Malaysia made the same reference in its oral pleadings in the *Nuclear Weapons case* in 1995.¹⁶⁶

161. At the Fourth Review Conference of States Parties to the BWC in 1996, Malta stated that it "strongly supports the BWC and is firmly committed to the total and comprehensive banning of biological weapons and to the control of the spread and use of such weapons".¹⁶⁷

162. In its written statement submitted to the ICJ in the *Nuclear Weapons case* in 1995, Mexico noted:

a series of international instruments . . . [which] led to a prohibition on the use of certain weapons. Such instruments included . . . the Protocol of 1925 for the

¹⁵⁹ Laos, Response to the request by the Preparatory Committee for the First Review Conference of States Parties to the BWC, Geneva, 3–21 March 1980, excerpted in UN Doc. BWC/CONF.I/4, 20 February 1980, § 43.

¹⁶⁰ Lebanon, Statement before the First Committee of the UN General Assembly, UN Doc. A/C.1/48/SR.12, 26 October 1993, § 10.

¹⁶¹ Libya, Statement before the First Committee of the UN General Assembly, UN Doc. A/C.1/46/PV.22, 29 October 1991, p. 34.

¹⁶² Libya, Statement before the First Committee of the UN General Assembly, UN Doc. A/C.1/47/PV.10, 20 October 1992, p. 9–10.

¹⁶³ Libya, Statement before the First Committee of the UN General Assembly, UN Doc. A/C.1/48/SR.13, 26 October 1993, § 64.

¹⁶⁴ Malaysia, Written statement submitted to the ICJ, *Nuclear Weapons (WHO) case*, 19 June 1995, p. 2.

¹⁶⁵ Malaysia, Written statement submitted to the ICJ, *Nuclear Weapons (WHO) case*, 19 June 1995, pp. 23–24.

¹⁶⁶ Malaysia, Oral pleadings before the ICJ, *Nuclear Weapons case*, Verbatim Record CR 95/27, 7 November 1995, p. 57.

¹⁶⁷ Malta, Statement of 26 November 1996 at the Fourth Review Conference of States Parties to the BWC, Geneva, 25 November–6 December 1996.

prohibition of the use in war . . . of bacteriological methods of warfare (The Geneva Gas Protocol); and the Convention on the prohibition of the development, production and stockpiling of bacteriological (biological) and toxin weapons and their destruction of 10 April 1972, etc.¹⁶⁸

163. At the Fifth Review Conference of States Parties to the BWC in 2001, Mexico stated that “the 1972 Convention broadens the provisions of the 1925 Protocol and renders obsolete the reservations that had restricted the latter to an instrument of first use prohibition”. It encouraged “the States that have not yet done so to withdraw these reservations”. It also urged that the “goal must be to review and strengthen the compliance with the regime on the prohibition of biological weapons to protect nations and individuals from the risk of the possible use of weapons of mass destruction”.¹⁶⁹

164. In the preliminary stages of the First Review Conference of States Parties to the BWC in 1980, Mongolia stated that, as a party to the 1972 BWC, it “strictly complies with all the obligations under the Convention and particularly with Articles I, II, III, IV, V and X of the said Convention”.¹⁷⁰

165. At the First Review Conference of States Parties to the BWC in 1980, the representative of New Zealand stated that “since New Zealand possessed none of the weapons or delivery systems referred to in article I of the [1972 BWC], his Government had not considered it necessary to enact any special legislation prohibiting the activities in question”.¹⁷¹

166. At the Fourth Review Conference of States Parties to the BWC in 1996, New Zealand stressed that it was “strongly committed to the BWC”. Moreover, it stated that it was very conscious that:

[B]iological weapons pose as great a threat to humanity as nuclear weapons. But they are much easier to manufacture and conceal. For that reason States Parties to the Convention have a major responsibility to strengthen the Convention and establish a mechanism to ensure that the Parties to the Convention comply with its prohibition.¹⁷²

167. At the First Review Conference of States Parties to the BWC in 1980, Nigeria reported that it “had complied fully with its obligations under the [1972 BWC]. As Nigeria did not possess biological weapons, as defined in article I, it

¹⁶⁸ Mexico, Written statement submitted to the ICJ, *Nuclear Weapons case*, 19 June 1995, p. 12, § 72.

¹⁶⁹ Mexico, Statement of 20 November 2001 at the Fifth Review Conference of States Parties to the BWC, Geneva, 19 November–7 December 2001.

¹⁷⁰ Mongolia, Response to the request by the Preparatory Committee for the First Review Conference of States Parties to the BWC, Geneva, 3–21 March 1980, excerpted in UN Doc. BWC/CONF.I/4, 20 February 1980, § 44.

¹⁷¹ New Zealand, Statement of 7 March 1980 at the First Review Conference of States Parties to the BWC, Geneva, 3–21 March 1980, UN Doc. BWC/CONF.I/SR.6, 7 March 1980, § 13.

¹⁷² New Zealand, Statement of 25 November 1996 at the Fourth Review Conference of States Parties to the BWC, Geneva, 25 November–6 December 1996.

followed that it had no such weapons to destroy, as required by article II, or, indeed, to transfer."¹⁷³

168. In 1995, during a debate in the First Committee of the UN General Assembly, Nigeria stated that it was committed to the total prohibition of biological weapons.¹⁷⁴

169. At the Fourth Review Conference of States Parties to the BWC in 1996, Nigeria stated that "it is our hope that all weapons of mass destruction – be they biological... – will be under ban, their production prohibited and their transfer and use outlawed".¹⁷⁵

170. In the preliminary stages of the First Review Conference of States Parties to the BWC in 1980, Norway stated that it "has never developed, produced or stored any biological weapons, and has never had the intention of using such weapons in a conflict (arts. I and II)".¹⁷⁶

171. At the Fifth Review Conference of States Parties to the BWC in 2001, Norway stated that "a multilateral, legally binding instrument is needed now more than ever to fill the existing gap in the non-proliferation regime". It stated that such a legally binding instrument were "very important aspects of our fight against the use, or threat of use, of biological weapons".¹⁷⁷

172. At the Fourth Review Conference of States Parties to the BWC in 1996, Pakistan stated that "the 1925 protocol and the BWC is a manifestation of a moral and cultural ethos that is over 1400 years old".¹⁷⁸

173. At the Fifth Review Conference of States Parties to the BWC in 2001, Pakistan stated that it "has been fully abiding by all the provisions of the BWC".¹⁷⁹

174. In 1991, during a debate in the First Committee of the UN General Assembly, Peru stated that it had invited the countries of the Rio Group to reach an agreement on the prohibition of biological weapons.¹⁸⁰

175. At the CDDH, the Philippines proposed an amendment to include "the use of weapons prohibited by International Conventions, namely: ... bacteriological methods of warfare" in the list of grave breaches in Article 74 of draft

¹⁷³ Nigeria, Statement of 7 March 1980 at the First Review Conference of States Parties to the BWC, Geneva, 3–21 March 1980, UN Doc. BWC/CONF.I/SR.7, 11 March 1980, § 13.

¹⁷⁴ Nigeria, Statement before the First Committee of the UN General Assembly, UN Doc. A/C.1/50/PV.9, 25 October 1995, p. 18.

¹⁷⁵ Nigeria, Statement of 25 November 1996 at the Fourth Review Conference of States Parties to the BWC, Geneva, 25 November–6 December 1996.

¹⁷⁶ Norway, Response to the request by the Preparatory Committee for the First Review Conference of States Parties to the BWC, Geneva, 3–21 March 1980, excerpted in UN Doc. BWC/CONF.I/4, 20 February 1980, § 45.

¹⁷⁷ Norway, Statement of 20 November 2001 at the Fifth Review Conference of States Parties to the BWC, Geneva, 19 November–7 December 2001.

¹⁷⁸ Pakistan, Statement of 26 November 1996 at the Fourth Review Conference of States Parties to the BWC, Geneva, 25 November–6 December 1996.

¹⁷⁹ Pakistan, Statement of 19 November 2001 at the Fifth Review Conference of States Parties to the BWC, Geneva, 19 November–7 December 2001.

¹⁸⁰ Peru, Statement before the First Committee of the UN General Assembly, UN Doc. A/C.1/46/PV.8, 18 October 1991, p. 48.

AP I (now Article 85).¹⁸¹ The proposal was rejected because it failed to obtain the necessary two-thirds majority (41 votes in favour, 25 against and 25 abstentions).¹⁸²

176. The Report on the Practice of the Philippines states with reference to the prohibition of biological weapons that “the country holds such prohibition customary”.¹⁸³

177. At the Conference for the Supervision of the International Trade in Arms and Ammunition and in Implements of War in 1925, Poland proposed to complete what became the 1925 Geneva Gas Protocol as follows:

In the third paragraph of the draft concerning chemical warfare, we would say: “declare that the High Contracting Parties, so far as they are not already parties to treaties prohibiting such use, accept this prohibition, and extend it to means of bacteriological warfare, and agree to be bound thereby as between themselves.”¹⁸⁴

178. In the preliminary stages of the First Review Conference of States Parties to the BWC in 1980, Poland stated that it “does not conduct any activities contrary to the provisions of [the 1972 BWC] and that the bacteriological and toxin weapons have never been nor are at present part of the equipment of its armed forces”.¹⁸⁵

179. At the Fifth Review Conference of States Parties to the BWC in 2001, Poland confirmed its “strong and constant support for the Biological and Toxins Weapons Convention... especially for the work on effectiveness and implementation of the Convention”.¹⁸⁶

180. At the Fourth Review Conference of States Parties to the BWC in 1996, Romania stated that:

The BWC together with complementary efforts aimed at the non-proliferation of biological and toxin weapons constitutes at present and in the years to come one of the main pillars of international stability and security, both at regional and global

¹⁸¹ Philippines, Proposal of amendment to Article 74 of draft API submitted to the CDDH, *Official Records*, Vol. III, CDDH/418, 26 May 1977, p. 322.

¹⁸² CDDH, *Official Records*, Vol. VI, CDDH/SR.44, 30 May 1977, pp. 288–289. (Against: Australia, Belarus, Belgium, Bulgaria, Canada, Czechoslovakia, Denmark, Finland, France, FRG, GDR, Hungary, India, Luxembourg, Monaco, Mongolia, Netherlands, New Zealand, Poland, Portugal, Ukraine, USSR, UK, US and Zaire. Abstaining: Brazil, Cameroon, Cyprus, Cuba, Greece, Guatemala, Indonesia, Iran, Ireland, Israel, Italy, Japan, South Korea, Mauritania, Morocco, Nigeria, Norway, Romania, Spain, Swaziland, Sweden, Thailand, Turkey, Uganda and Vietnam.)

¹⁸³ Report on the Practice of the Philippines, 1997, Answers to additional questions on Chapter 3, referring to Statement by the Department of Foreign Affairs, Office of United Nations and International Organizations (UNIO), Manila, 6 March 1998.

¹⁸⁴ Poland, Proposal made on 8 June 1925 at the Conference for the Supervision of the International Trade in Arms and Ammunition and in Implements of War, Geneva, 4 May–17 June 1925, League of Nations, Records of the Conference, Doc. A.13.1925.IX, September 1925, p. 341.

¹⁸⁵ Poland, Response to the request by the Preparatory Committee for the First Review Conference of States Parties to the BWC, Geneva, 3–21 March 1980, excerpted in UN Doc. BWC/CONF.1/4, 20 February 1980, § 46.

¹⁸⁶ Poland, Statement of 20 November 2001 at the Fifth Review Conference of States Parties to the BWC, Geneva, 19 November–7 December 2001.

levels. To that effect, Romania . . . has a consistent policy of strict observance of the provisions of the Convention and the export controls of biological agents, equipment and technologies which could be used for the production of biological and toxin weapons.

Strongly supporting the view that export controls are an essential lever of enforcing non-proliferation, Romania has established the necessary mechanisms, procedures and lists of items, all similar to those convened within existing international non-proliferation regimes.

...

We re-emphasize the significance of this international norm against biological and toxin weapons, the importance of full implementation by all parties of the provisions of the Convention, as well as the need to make all efforts to secure universal adherence to [the] BWC.¹⁸⁷

181. At the Fifth Review Conference of States Parties to the BWC in 2001, Russia asserted that it was standing "for creating a verification mechanism on a multilateral basis".¹⁸⁸

182. According to the Report on the Practice of Rwanda, Rwanda has prohibited the use of bacteriological means of warfare as stipulated by the 1925 Geneva Gas Protocol.¹⁸⁹

183. In 1968, during a debate in the First Committee of the UN General Assembly, Saudi Arabia advocated a total prohibition of the use and production of biological weapons.¹⁹⁰

184. In 1993, during a debate in the First Committee of the UN General Assembly, Saudi Arabia stated that it had worked tirelessly to reach a global elimination of weapons of mass destruction.¹⁹¹

185. In 1995, during a debate in the First Committee of the UN General Assembly, Saudi Arabia stated that it supported "all treaties and conventions that aim at eliminating all types of weapons of mass destruction, including biological weapons".¹⁹²

186. At the Fourth Review Conference of States Parties to the BWC in 1996, South Africa declared that it remained "committed to achieving a world free of all weapons of mass destruction and to addressing the proliferation of conventional weapons". It also reaffirmed its "commitment to strengthening the BWC by establishing a verifiable compliance protocol for the Convention".¹⁹³

¹⁸⁷ Romania, Statement of 25 November 1996 at the Fourth Review Conference of States Parties to the BWC, Geneva, 25 November–6 December 1996, pp. 2–3.

¹⁸⁸ Russia, Statement of 19 November 2001 at the Fifth Review Conference of States Parties to the BWC, Geneva, 19 November–7 December 2001.

¹⁸⁹ Report on the Practice of Rwanda, 1997, Chapter 3.4.

¹⁹⁰ Saudi Arabia, Statement before the First Committee of the UN General Assembly, UN Doc. A/C.1/PV.1608, 14 November 1968, pp. 4 and 7.

¹⁹¹ Saudi Arabia, Statement before the First Committee of the UN General Assembly, UN Doc. A/C.1/48/SR.14, 28 October 1993, § 24.

¹⁹² Saudi Arabia, Statement before the First Committee of the UN General Assembly, UN Doc. A/C.1/50/PV.9, 25 October 1995, p. 12.

¹⁹³ South Africa, Statement of 26 November 1996 at the Fourth Review Conference of States Parties to the BWC, Geneva, 25 November–6 December 1996.

187. At the Fifth Review Conference of States Parties to the BWC in 2001, South Africa stated that “the use of disease – in this case anthrax – as a weapon of terror should... be condemned in the strongest possible terms”. It further emphasised:

the importance of the work that had been undertaken to negotiate a legally binding Protocol to strengthen the implementation of the Convention... South Africa continues to see the strengthening of the implementation of the BWC as a core element of the international security architecture.¹⁹⁴

188. In the preliminary stages of the First Review Conference of States Parties to the BWC in 1980, Spain stated that “since Spain is not developing or producing bacteriological (biological) or toxin weapons or acquiring them from any other country, the conditions referred to in articles I, II, III, IV, V and X of the [1972 BWC] do not exist [for Spain]”.¹⁹⁵

189. In 1968, during a debate in the First Committee of the UN General Assembly, Sweden advocated a process leading to a total prohibition of the use, production and stockpiling of biological weapons.¹⁹⁶

190. In 1970, during a debate in the Third Committee of the UN General Assembly, Sweden stated that “the rationale for a comprehensive ban on biological weapons in international armed conflicts would seem to be equally valid in internal armed conflicts. At all events, there should be no hesitation in imposing a complete ban in internal conflicts.”¹⁹⁷

191. In 1974, during discussions in the Ad Hoc Committee on Conventional Weapons established by the CDDH, Sweden stated that “all weapons could be used indiscriminately, but some were incapable of being directed at military objectives alone. One example was bacteriological weapons: germs could not distinguish between soldiers and civilians.”¹⁹⁸

192. In the preliminary stages of the First Review Conference of States Parties to the BWC in 1980, Sweden stated that:

In 1970 the Swedish Government declared that Sweden does not possess and does not intend to acquire biological... weapons. National investigations in 1974 showed that no ongoing activity violated the provisions of the [1972 BWC]...

... The prohibition of the development and production of biological and toxin weapons is covered by national Swedish legislation passed in 1935 on the control of production of war materials according to which no such production may take place

¹⁹⁴ South Africa, Statement of 19 November 2001 at the Fifth Review Conference of States Parties to the BWC, Geneva, 19 November–7 December 2001.

¹⁹⁵ Spain, Response to the request by the Preparatory Committee for the First Review Conference of States Parties to the BWC, Geneva, 3–21 March 1980, excerpted in UN Doc. BWC/CONF.1/4, 20 February 1980, § 47.

¹⁹⁶ Sweden, Statement before the First Committee of the UN General Assembly, UN Doc. A/C.1/PV.1609, 18 November 1968, p. 11.

¹⁹⁷ Sweden, Statement before the Third Committee of the UN General Assembly, UN Doc. A/C.3/SR.1784, 10 November 1970, p. 273, § 5.

¹⁹⁸ Sweden, Statement at the CDDH, *Official Records*, Vol. XVI, CDDH/IV/SR.1, 13 March 1974, p. 12, § 21.

without the Government's permission. The provisions of the Convention concerning stockpiling, acquisition and possession of these weapons have not resulted in any special legislation. The provisions may, as necessary, be enforced in accordance with national legislation of 1974 on the handling of dangerous goods.¹⁹⁹

193. In 1991, during a debate in the First Committee of the UN General Assembly, Sweden urged States to withdraw reservations to the 1925 Geneva Gas Protocol in order to make "it possible finally to exclude the possibility that biological weapons may be used in the future".²⁰⁰

194. At the CDDH, Switzerland voted in favour of the Philippine amendment (see *supra*) because:

It would be a step forward to state expressly that any violation of The Hague Declaration of 1899 and the Geneva Protocol of 1925 would constitute a grave breach. The rules laid down in those two instruments were undisputed and indisputable, and the amendment would have a deterrent effect on any State tempted to violate them, by exposing the members of its armed forces to the penalties applicable under the Geneva Conventions.²⁰¹

195. At the First Review Conference of States Parties to the BWC in 1980, Switzerland stated that:

Since it had possessed no bacteriological or toxin weapons before the conclusion of the [1972 BWC], Switzerland had had no stocks to destroy. With regard to the other States parties, he regretted that they had not all given formal assurances on that point. The Swiss army actually had a biological branch, but its sole purpose was to care for the health of army personnel; it would play only a protective role if bacteriological weapons were used against Switzerland in an armed conflict.²⁰²

196. At the Fourth Review Conference of States Parties to the BWC in 1996, Switzerland stated that it had never equipped itself with biological weapons and that its research in this field was strictly limited to protective measures. It further stated that since 30 June 1972, it had enacted a law which subjects the production, importation and exportation of all weaponry to authorisation.²⁰³

¹⁹⁹ Sweden, Response to the request by the Preparatory Committee for the First Review Conference of States Parties to the BWC, Geneva, 3–21 March 1980, excerpted in UN Doc. BWC/CONF.I/4, 20 February 1980, § 48; see also Statement of 5 March 1980 at the First Review Conference of States Parties to the BWC, Geneva, 3–21 March 1980, UN Doc. BWC/CONF.I/SR.3, 7 March 1980, § 36.

²⁰⁰ Sweden, Statement before the First Committee of the UN General Assembly, UN Doc. A/C.1/46/PV.8, 18 October 1991, p. 27.

²⁰¹ Switzerland, Statement at the CDDH, *Official Records*, Vol. VI, CDDH/SR.44, 30 May 1977, p. 281, § 9.

²⁰² Switzerland, Statement of 7 March 1980 at the First Review Conference of States Parties to the BWC, Geneva, 3–21 March 1980, UN Doc. BWC/CONF.I/SR.6, 7 March 1980, § 7.

²⁰³ Switzerland, Statement of 25 November 1996 at the Fourth Review Conference of States Parties to the BWC, Geneva, 25 November–6 December 1996.

197. In 1993, during a debate in the First Committee of the UN General Assembly, Syria advocated a proposal to make the Middle East a zone free from weapons of mass destruction.²⁰⁴

198. In 1994, during a debate in the First Committee of the UN General Assembly, Syria supported an initiative to make the Middle East a zone free from weapons of mass destruction.²⁰⁵

199. At the Fifth Review Conference of States Parties to the BWC in 2001, Thailand declared that it had “always solemnly adhered to our commitments under the BWC”.²⁰⁶

200. In 1991, during a debate in the First Committee of the UN General Assembly, Tunisia advocated a complete ban on biological weapons.²⁰⁷

201. In the preliminary stages of the First Review Conference of States Parties to the BWC in 1980, Turkey stated that “no weapons, equipment or other materials that are the subject of the [1972 BWC] exist within the Turkish Armed Forces”.²⁰⁸

202. In the preliminary stages of the First Review Conference of States Parties to the BWC in 1980, Ukraine stated that “the Ukrainian SSR is fully complying with its obligations under articles I, II, III, IV, V and X of the [1972 BWC], taking into account the relevant parts of the preamble to the Convention”.²⁰⁹

203. In 1994, during a debate in the First Committee of the UN General Assembly, Ukraine stated that it wanted to “rid the densely populated European continent, as well as other regions, of these deadly weapons by the beginning of next century”.²¹⁰

204. At the Fifth Review Conference of States Parties to the BWC in 2001, Ukraine stated that it “fully complies with its obligations under the Convention and has never had the intention to develop, produce, stockpile or acquire in any way the biological weapons, equipment or means of its delivery”.²¹¹

²⁰⁴ Syria, Statement before the First Committee of the UN General Assembly, UN Doc. A/C.1/48/SR.9, 22 October 1993, § 44.

²⁰⁵ Syria, Statement before the First Committee of the UN General Assembly, UN Doc. A/C.1/49/PV.7, 20 October 1994, p. 20.

²⁰⁶ Thailand, Statement of 20 November 2001 at the Fifth Review Conference of States Parties to the BWC, Geneva, 19 November–7 December 2001.

²⁰⁷ Tunisia, Statement before the First Committee of the UN General Assembly, UN Doc. A/C.1/46/PV.11, 22 October 1991, p. 7.

²⁰⁸ Turkey, Response to the request by the Preparatory Committee for the First Review Conference of States Parties to the BWC, Geneva, 3–21 March 1980, excerpted in UN Doc. BWC/CONF.I/4, 20 February 1980, § 49.

²⁰⁹ Ukraine, Response to the request by the Preparatory Committee for the First Review Conference of States Parties to the BWC, Geneva, 3–21 March 1980, excerpted in UN Doc. BWC/CONF.I/4, 20 February 1980, § 50; see also Statement of 6 March 1980 at the First Review Conference of States Parties to the BWC, Geneva, 3–21 March 1980, UN Doc. BWC/CONF.I/SR.4, 7 March 1980, § 8.

²¹⁰ Ukraine, Statement before the First Committee of the UN General Assembly, UN Doc. A/C.1/49/PV.7, 20 October 1994, p. 17.

²¹¹ Ukraine, Statement of 20 November 2001 at the Fifth Review Conference of States Parties to the BWC, Geneva, 19 November–7 December 2001.

205. In 1970, in the context of the adoption of UN General Assembly Resolution 2444 (XXIII), the USSR stated that:

The use of . . . bacteriological methods of warfare . . . was prohibited by the Geneva Protocol of 17 June 1925. The United States signed that Protocol, but did not ratify it. However, that does not mean that the prohibition of the use of poisonous substances does not extend to the United States. That prohibition has become a generally recognized rule of international law, and countries which violate it must bear responsibility before the international community.²¹²

206. In 1970, during a debate in the Third Committee of the UN General Assembly, the USSR stated that the 1925 Geneva Gas Protocol was fully applicable in situations where freedom fighters struggled for liberation against colonial powers.²¹³

207. In the preliminary stages of the First Review Conference of States Parties to the BWC in 1980, the USSR stated that:

In accordance with the law and practice of the Soviet Union, compliance with the provisions of the [1972 BWC] which was ratified by a Decree of the Presidium of the Supreme Soviet of the USSR dated 11 February 1975 is guaranteed by the appropriate State institutions of the USSR. The Soviet Union does not possess any of the bacteriological (biological) agents or toxins, weapons, equipment or means of delivery mentioned in article I of the Convention. Thus, the implementation of articles I, II, III and IV of the Convention is reliably ensured.²¹⁴

208. In 1987, during a debate in the First Committee of the UN General Assembly, the USSR stated that "measures to consolidate the regime of the 1925 Geneva Protocol prohibiting the use of bacteriological weapons in war are in the interest of all".²¹⁵

209. In 1991, during a debate in the UN Security Council on the situation between Iraq and Kuwait, the USSR, with regard to UN Security Council resolution 687 (1991), stated that:

The most acute issue is that of creating an effective barrier against the use of weapons of mass destruction in that region. From that viewpoint, of great importance are the provisions in the resolution regarding Iraq's destruction of . . . biological weapons . . . and in the context of Iraq's confirmation of its obligations of the Geneva Protocol of 1925 to bring into play the International Atomic

²¹² USSR, Reply dated 30 December 1969 to the UN Secretary-General regarding the preparation of the study requested in paragraph 2 of General Assembly Resolution 2444 (XXIII), annexed to Report of the UN Secretary-General on respect for human rights in armed conflicts, UN Doc. A/8052, 18 September 1970, Annex III, p. 120.

²¹³ USSR, Statement before the Third Committee of the UN General Assembly, UN Doc. A/C.3/SR.1786, 12 November 1970, p. 284, § 6.

²¹⁴ USSR, Response to the request by the Preparatory Committee for the First Review Conference of States Parties to the BWC, Geneva, 3–21 March 1980, excerpted in UN Doc. BWC/CONF.I/4, 20 February 1980, § 51.

²¹⁵ USSR, Statement before the First Committee of the UN General Assembly, UN Doc. A/C.1/42/PV.23, 28 October 1987, p. 28.

Energy Agency... It is also important that all Middle Eastern countries accede to... those international agreements prohibiting... biological weapons.²¹⁶

210. The development of a biological weapons programme by the USSR between 1973 and 1992 was widely documented and detailed in a number of different sources.²¹⁷ The Chairman of the Presidential Committee on Chemical and Biological Weapons Problems, in response to a question about Soviet non-compliance with the 1972 BWC, said in an interview published in the journal *Rossiyskiye Vesti* in 1992 that:

Indeed, these clear violations... were only admitted after the totalitarian regime collapsed and duplicity in politics was abandoned. We admitted that after the convention was ratified, the offensive programs in the area of biological warfare were not immediately curtailed, research in this area continued, and production went on... The first palpable move... toward the offensive programs finally being wound down was made in 1985 when it was proposed that the Soviet Union present a report to the United Nations on its compliance with the convention. At this time research also began to be wound down, and the equipment for producing biological preparations began to be dismantled. But this winding down process went on for several years. The remnants of the offensive programs in the area of biological weapons were still around as recently as 1991. It was only in 1992 that Russia absolutely stopped this work.²¹⁸

211. During a tripartite meeting on biological weapons held in Moscow in September 1992 between Russia, UK and US, the Russian President admitted that Russia had conducted an offensive biological warfare programme in violation of the 1972 BWC.²¹⁹ However, the Russian government stated that it had taken steps to resolve compliance concerns, stating that it:

A. Noted that President Yeltsin had issued on 11 April 1992 a decree on securing the fulfilment of international obligations in the area of biological weapons. This affirms the legal succession of the Russian Federation to the obligations of the Convention and states that the development and carrying out of biological programs in violation of the Convention is illegal. Pursuant to that decree, the Presidential Committee on Convention-related problems of chemical weapons and biological weapons was entrusted with the oversight of the implementation of the 1972 Convention in the Russian Federation.

B. Confirmed the termination of offensive research, the dismantlement of experimental technological lines for the production of biological agents, and the closure of the biological weapons testing facility...

...

²¹⁶ USSR, Statement before the UN Security Council, UN Doc. S/PV.2981, 3 April 1991, pp. 101–102.

²¹⁷ British Medical Association, *Biotechnology Weapons and Humanity*, Harwood Academic Publishers, Amsterdam, 1999, pp. 44–45.

²¹⁸ Lev Chernenko, "In order to live we should destroy the deadly weapons stockpiles", *Rossiyskiye Vesti*, Moscow, 22 September 1992, p. 2, as translated from Russian in FBIS-SOV-92-186, 24 September 1992, pp. 2–4; Viktor Litovkin, "Yeltsin bans work on bacteriological weapons. This means: work was under way, and we were deceived", *Izvestiya*, Moscow, 27 April 1992, p. 1, as translated from Russian in BBC-SWB, 30 April 1992.

²¹⁹ J. Dahlburg, "Russia Admits it Violated Pact on Biological Warfare", *Los Angeles Times*, 15 September 1992, p. A1.

H. The Russian Parliament has recommended to the President of the Russian Federation that he propose legislation to enforce Russia's obligations under the 1972 Convention.

As a result of these exchanges, Russia agreed to the followings steps:

A. Visits to any non-military biological site at any time in order to remove ambiguities, subject to the need to respect proprietary information on the basis of agreed principles. Such visits would include unrestricted access, sampling interviews with personnel, and audio and video taping. After initial visits to Russian facilities there will be comparable visits to such US and UK facilities on the same basis.

B. The provision, on request, of information about dismantlement accomplished to date.

In addition, the three governments agreed to create working groups to examine several different issues, including the establishment of a system of reciprocal visits to military biological facilities; a review of potential monitoring mechanisms for the 1972 BWC; consideration of cooperation in developing biological weapons defence and "consideration of an exchange of information on a confidential, reciprocal basis concerning past offensive programmes not recorded in detail in the declarations to the UN".²²⁰

212. On Primetime Live in 1998, the former First Deputy Director of Biopreparat from 1988 to 1992, Dr Kanatjan Alibekov (a.k.a. Ben Alibek), stated that in Russia, under the guise of the development of defensive biological weapons, research continued on new biological agents. In Moscow, this allegation was described as "sheer nonsense" by one member of the President's Committee on CBW Convention Problems, who also said that "Russia has carried out no research and development of biological weapons since all work in the field was cancelled in 1990".²²¹ The Russian Defence Ministry also issued a denial, saying that Russia "scrupulously observes" the 1972 BWC.²²²

213. In 1998, a Russian Foreign Ministry spokesman told a news briefing that the offensive military biological programme of the USSR had been discontinued.²²³

214. At the CDDH, the UK voted against the Philippine amendment (see *supra*) because:

A significant number of the States party to the Geneva Protocol of 1925 had entered a reservation thereto; for those States the Protocol contained no absolute prohibition on the use of the weapons mentioned in it, but rather a prohibition on the first use only. Nor was it convincing to state that the Geneva Protocol of 1925 represented no more than the existing customary law of war, ever since the adoption of

²²⁰ Russia, UK and US, Joint Statement on Biological Weapons, 14 September 1992.

²²¹ "Russia – biological weapons", AP, New York, 25 February 1998.

²²² ITAR-TASS World Service (Moscow) in English, 27 February 1998, BBC-SWB, 2 March 1998.

²²³ Aleksei Meshkov, "There are no reasons to doubt Russia's undeviating observance of all its commitments under convention banning biological weapons, says Russian Foreign Ministry", RIA Novosti, Moscow, 31 March 1998, via RIA-Novosti Hotline; A. Mironov and I. Chumakova, "Russia denies allegations of violating biological weapons ban", TASS, Moscow, 31 March 1998.

resolution XXVIII by the XXth International Conference of the Red Cross (Vienna 1965), States had been urged in United Nations resolutions to accede to that Protocol in accordance with its express terms. Such a situation was entirely inconsistent with the contention made in debate that the Geneva Protocol of 1925 reflected existing customary international law. That contention could not be supported.²²⁴

215. In the preliminary stages of the First Review Conference of States Parties to the BWC in 1980, the UK stated that:

The United Kingdom has never possessed and has not acquired microbial or other biological agents and toxins in quantities which could be employed for weapons purposes. The United Kingdom maintains only small quantities of such agents and toxins for peaceful purposes, primarily prophylaxis and research . . . No system designed to apply these agents for hostile purposes exists, nor are being developed.²²⁵

216. At the First Review Conference of States Parties to the BWC in 1980, the UK stated that:

Since the United Kingdom has never possessed any of the agents proscribed by the [1972 BWC] in quantities other than those explicitly permitted, related action had been confined to the passing of domestic legislation [i.e. the Biological Weapons Act] in compliance with the provisions of article IV. In addition, the United Kingdom had, over the period since the Convention's entry into force, concluded a series of bilateral and multilateral agreements on public health and medical research which, *inter alia*, supported the provisions of article X.²²⁶

217. In 1983, in reply to a question in the House of Lords on the subject of the use of chemical weapons in South-East Asia, the UK Minister of State, FCO, stated that "the use of toxins in South-East Asia would represent a breach of the 1972 Convention banning biological and toxin weapons".²²⁷

218. In 1990, during a debate in the UN Security Council on a peaceful and just post-Cold War world, the UK recalled that, under paragraph 12 of Resolution 670 (1990), individuals were held responsible for grave breaches of the Geneva Conventions. It added that "we should also hold personally responsible those involved in violations of the laws of armed conflict, including the prohibition against initiating the use of . . . biological weapons contrary to the Geneva Protocol of 1925, to which Iraq is a party".²²⁸

219. In 1991, during a debate in the House of Commons on the Gulf conflict, the UK Prime Minister stated that "contrary to international agreements, Iraq

²²⁴ UK, Statement at the CDDH, *Official Records*, Vol. VI, CDDH/SR.44, 30 May 1977, p. 282, § 17.

²²⁵ UK, Response to the request by the Preparatory Committee for the First Review Conference of States Parties to the BWC, Geneva, 3–21 March 1980, excerpted in UN Doc. BWC/CONF.I/4, 20 February 1980, § 52, Article I.

²²⁶ UK, Statement of 5 March 1980 at the First Review Conference of States Parties to the BWC, Geneva, 3–21 March 1980, UN Doc. BWC/CONF.I/SR.3, 7 March 1980, § 42.

²²⁷ UK, House of Lords, Reply by the Minister of State, FCO, *Hansard*, 7 June 1983, Vol. 431, col. 92.

²²⁸ UK, Statement before the UN Security Council, UN Doc. S/PV.2963, 29 November 1990, § 78.

has produced and threatened to use both chemical and biological weapons, the use of which would be wholly contrary to international agreements".²²⁹

220. In 1991, in a report submitted to the UN Security Council on operations in the Gulf War, the UK stated that "the Iraqi Ambassador [to the UK] was also reminded of Iraq's obligations under the 1925 Geneva [Gas] Protocol in respect of . . . biological weapons. The United Kingdom would take the severest view of any use of these weapons by Iraq."²³⁰

221. In 1991, during a debate in the First Committee of the UN General Assembly, the UK explained that it intended to withdraw its reservation to the 1925 Geneva Gas Protocol, in which it had reserved the right to retaliate with biological weapons.²³¹

222. In 1991, during a debate in the UN Security Council on the situation between Iraq and Kuwait, the UK, with regard to UN Security Council Resolution 687 (1991), stated that:

The resolution contains tough provisions for the destruction of Iraqi chemical and biological weapons . . . It is surely right to do so. For Iraq alone in the region has not only developed many of these weapons, it has actually used them both against a neighbouring State and against its own population, and it has made the threat of their use part of the daily discourse of its diplomacy as it has attempted to bully and coerce its neighbours.²³²

223. At the Fourth Review Conference of States Parties to the BWC in 1996, the UK stated that it was of the utmost importance

to send out a strong message. That the 1972 Convention remains the unequivocal and comprehensive ban on Biological Weapons. But that recent history has proved that a ban alone is not enough. That the overwhelming majority of States Parties believe that strengthening the Convention is both necessary and possible; and that we are all determined to work to achieve this as quickly as possible.²³³

224. In 1998, in response to a question in the House of Commons on the UK's position on biological weapons at a meeting of the Preparatory Committee for the Establishment of an International Criminal Court, the UK Prime Minister stated that:

The UK delegation supported proposals to include within the jurisdiction of the ICC war crimes under existing customary international law. For that reason, the delegation supported the inclusion of the use of methods of warfare of a nature to

²²⁹ UK, House of Commons, Statement by the Prime Minister, *Hansard*, 15 January 1991, Vol. 183, col. 735.

²³⁰ UK, Letter dated 21 January 1991 to the President of the UN Security Council, UN Doc. S/22117, 21 January 1991, p. 1; see also Statement by FCO spokesperson, 21 January 1991, reprinted in *BYIL*, Vol. 62, 1991, p. 680.

²³¹ UK, Statement before the First Committee of the UN General Assembly, UN Doc. A/C.1/46/PV.27, 5 November 1991, p. 6.

²³² UK, Statement before the UN Security Council, UN Doc. S/PV.2981, 3 April 1991, pp. 113–114.

²³³ UK, Statement of 26 November 1996 at the Fourth Review Conference of States Parties to the BWC, Geneva, 25 November–6 December 1996.

cause superfluous injury or unnecessary suffering; these included bacteriological (biological) agents or toxins for hostile purposes or in armed conflict.²³⁴

225. According to the Report on UK Practice, representatives of the UK have repeatedly expressed condemnation of the use of biological weapons.²³⁵

226. At the Conference for the Supervision of the International Trade in Arms and Ammunition and in Implements of War in 1925, the US, with regard to a Polish proposal to extend the prohibition contained in what became the 1925 Geneva Gas Protocol to bacteriological warfare (see *supra*), stated that "bacteriological warfare is so revolting and so foul that it must meet with the condemnation of all civilized nations, and hence my delegation . . . accepts this amendment proposed by the Polish delegate".²³⁶

227. On 25 November 1969, the US President formally renounced the use of biological agents as weapons. On the same day, the US Secretary of State stated in a memo to the National Security Council that biological research and development would be limited to "defensive" activities and that research into "offensive" aspects of biological agents would only be permitted to the extent that it was pursued for "defensive" reasons.²³⁷

228. On 14 February 1970, the US President stated that "the United States renounces offensive preparations for and the use of toxins as a method of warfare". The reason given for the decision on toxins by the Office of the White House Press Secretary was that their production in any significant quantities "would require facilities similar to those needed for the production of biological agents. If the United States continued to operate such facilities, it would be difficult for others to know whether they were being used to produce only toxins but not biological agents."²³⁸

229. At the CDDH, the US voted against the Philippine amendment (see *supra*) because:

Grave breaches were meant to be the most serious type of crime; Parties had an obligation to punish or extradite those guilty of them. Such crimes should therefore be clearly specified, so that a soldier would know if he was about to commit an illegal act for which he could be punished. The amendment, however, was vague and imprecise . . . It would also punish those who used the weapons, namely,

²³⁴ UK, House of Commons, Reply by the Prime Minister, *Hansard*, 20 January 1998, Vol. 304, Written Answers, col. 477.

²³⁵ Report on UK Practice, 1997, Chapter 3.4.

²³⁶ US, Statement made on 8 June 1925 at the Conference for the Supervision of the International Trade in Arms and Ammunition and in Implements of War, Geneva, 4 May–17 June 1925, League of Nations, Records of the Conference, Doc. A.13.1925.IX, September 1925, p. 341.

²³⁷ Alfred Mechttersheimer, "US military strategy and chemical and biological weapons", in Erhard Geissler (ed.), *Biological and Toxin Weapons Today*, SIPRI, Oxford University Press, Oxford, 1986, p. 79.

²³⁸ Erhard Geissler, "Introduction", in Erhard Geissler (ed.), *Biological and Toxin Weapons Today*, SIPRI, Oxford University Press, Oxford, 1986, p. 18.

the soldiers, rather than those who made the decision as to their use, namely, Governments.²³⁹

230. In the preliminary stages of the First Review Conference of States Parties to the BWC in 1980, the US stated that:

Article I

The United States is in full compliance with the obligations contained in article I. Facilities previously used for development, production or stockpiling of biological weapons were now devoted to peaceful purposes . . .

...

Article IV

The US has taken, and is taking, a number of steps to prohibit and prevent activities contrary to the provisions of the Convention:

1. . . . all heads of federal departments and agencies certified to the President at his request, that their organizations were in compliance.
2. Detailed regulations have been established to ensure that the small remaining quantities of biological and toxin agents are used only for peaceful purposes.
3. Existing legislation already controls certain private actions concerning items prohibited under article I, including provisions of the Arms Export Control Act, the Export Administration Act, the Transportation of Dangerous Articles Act, and the regulations issued pursuant to these laws.²⁴⁰

231. In 1982, at the CSCE review meeting in Madrid, the US delegation directly accused the USSR of "seriously and deliberately" violating both the 1972 BWC and the 1925 Geneva Gas Protocol. The Soviet delegation rejected the charges as "monstrous accusations, false from beginning to end" and denied that the USSR had ever used chemical weapons "anywhere under any circumstances or by any means".²⁴¹

232. In an executive order issued in 1990, the US President stated that "the proliferation of . . . biological weapons constitutes an unusual and extraordinary threat to the national security and foreign policy of the United States". The order also provided for the possibility of imposing sanctions against foreign persons and governments found to have "knowingly and materially" contributed to efforts to "use, develop, produce, stockpile or otherwise acquire . . . biological weapons".²⁴²

²³⁹ US, Statement at the CDDH, *Official Records*, Vol. VI, CDDH/SR.44, 30 May 1977, pp. 280–281, § 7.

²⁴⁰ US, Response to the request by the Preparatory Committee for the First Review Conference of States Parties to the BWC, Geneva, 3–21 March 1980, excerpted in UN Doc. BWC/CONF.I/4, 20 February 1980, § 53, Articles I and IV.

²⁴¹ Julian Perry Robinson, "Chemical and biological warfare: developments in 1982", *SIPRI Yearbook 1983: World Armaments and Disarmament*, Taylor & Francis, London, 1983, p. 393.

²⁴² US, Executive Order 12735, Chemical and Biological Weapons Proliferation, 16 November 1990, preamble and Section 4(b)(1), *Federal Register*, Vol. 55, 1990, p. 48587.

233. In 1991, in a diplomatic note to Iraq concerning operations in the Gulf War, the US stated that it “expects the Government of Iraq to respect its obligations under the Geneva [Gas] Protocol of 1925 not to use . . . biological weapons”.²⁴³

234. In 1993, during a debate in the First Committee of the UN General Assembly, the US stated that it had worked for the elimination of bacteriological weapons.²⁴⁴

235. At the Fourth Review Conference of States Parties to the BWC in 1996, the US stated that it had “unilaterally renounced all use of biological and toxin weapons and destroyed its offensive stockpile before the Convention’s effective date in 1975”. In its concluding statement, the US stressed that it was important that biological weapons were “not just renounced, but banished from the face of the earth”.²⁴⁵

236. At the Fifth Review Conference of States Parties to the BWC in 2001, the US accused a number of countries of not complying with their obligations under the 1972 BWC. It named Iraq, North Korea, Libya, Iran, Syria and Sudan as violating the Convention and specified that “this list is not meant to be exhaustive”.²⁴⁶ In a written statement, the US President declared that:

All civilized nations reject as intolerable the use of disease and biological weapons as instruments of war and terror . . . The vast majority of nations has banned all biological weapons in accordance with the 1972 Biological and Toxins Weapons Convention (BWC) . . . The United States unilaterally destroyed its biological weapons stockpiles and dismantled or converted to peaceful uses the facilities that had been used for developing and producing them.²⁴⁷

237. In 1991, during a debate in the UN Security Council preceding the adoption of Resolution 699 concerning the destruction of biological weapons in Iraq, Yemen stated that it supported eradication of weapons of mass destruction in the Middle East, but that unilateral disarmament of Iraq would create imbalance in the region.²⁴⁸

238. In 1970, the SFRY informed the First Committee of the UN General Assembly “of the decision of the Yugoslav Government on a unilateral renunciation of biological weapons”.²⁴⁹

²⁴³ US, Department of State, Diplomatic Note to Iraq, Washington, 19 January 1991, annexed to Letter dated 21 January 1991 to the President of the UN Security Council, UN Doc. S/22122, 21 January 1991, Annex I, p. 2.

²⁴⁴ US, Statement before the First Committee of the UN General Assembly, UN Doc. A/C.1/48/SR.5, 19 October 1993, p. 10.

²⁴⁵ US, Statement of 26 November 1996 at the Fourth Review Conference of States Parties to the BWC, Geneva, 25 November–6 December 1996.

²⁴⁶ US, Statement of 19 November 2001 at the Fifth Review Conference of States Parties to the BWC, Geneva, 19 November–7 December 2001.

²⁴⁷ US, Written statement dated 1 November 2001 by the US President submitted to the Fifth Review Conference of States Parties to the BWC, Geneva, 19 November–7 December 2001.

²⁴⁸ Yemen, Statement before the UN Security Council, UN Doc. S/PV.2981, 3 April 1991, p. 42.

²⁴⁹ SFRY, Statement before the First Committee of the UN General Assembly, UN Doc. A/C.1/PV.1750, 4 November 1970, p. 3, § 18.

239. At the CDDH, the SFRY voted in favour of the Philippine amendment (see *supra*). When the amendment was rejected it stated that it

deeply regrets that the use of unlawful methods or means of combat was not included in the grave breaches, particularly since to have done so would merely have been to have codified an already existing rule of customary law, because there can be no doubt that to use prohibited weapons or unlawful methods of making war is already to act unlawfully, that is, it is a war crime punishable by existing international law.²⁵⁰

240. In the preliminary stages of the First Review Conference of States Parties to the BWC in 1980, the SFRY stated that:

The Government of the Socialist Federal Republic of Yugoslavia strictly adheres to and fulfils the obligations regarding the prohibition of the development, production and stockpiling of bacteriological (biological) weapons, as set forth in articles I, II, IV, V and X of the [1972 BWC]. The Government of the Socialist Federal Republic of Yugoslavia further declares that it has never possessed biological weapons.²⁵¹

241. According to the Report on the Practice of Zimbabwe, Zimbabwe's practice in international fora shows that it believes that the prohibition of the use of biological weapons is customary.²⁵²

III. Practice of International Organisations and Conferences

United Nations

242. In a resolution adopted in 1938 concerning the protection of civilian populations against air bombardment in case of war, the Assembly of the League of Nations reaffirmed that "the use of . . . bacterial methods in the conduct of war is contrary to international law".²⁵³

243. In Resolution 687 adopted in 1991 after the Gulf War, the UN Security Council recalled the objective of universal elimination of biological weapons and created a "Special Commission, which shall carry out immediate on-site inspection of Iraq's biological . . . capabilities".²⁵⁴

244. In a resolution adopted in 1991, the UN Security Council confirmed that the Special Commission (UNSCOM) had the authority to destroy biological weapons in Iraq.²⁵⁵

²⁵⁰ SFRY, Statement at the CDDH, *Official Records*, Vol. VI, CDDH/SR.44, 30 May 1977, p. 306.

²⁵¹ SFRY, Response to the request by the Preparatory Committee for the First Review Conference of States Parties to the BWC, Geneva, 3–21 March 1980, excerpted in UN Doc. BWC/CONF.I/4, 20 February 1980, § 54.

²⁵² Report on the Practice of Zimbabwe, 1998, Chapter 3.4.

²⁵³ League of Nations, Assembly, Resolution adopted on 30 September 1938, § II, *Official Journal*, Special Supplement No. 182, Records of the XIXth Ordinary Session of the Assembly, pp. 15–17.

²⁵⁴ UN Security Council, Res. 687, 8 April 1991, preamble and section C.

²⁵⁵ UN Security Council, Res. 699, 17 June 1991, § 2.

245. In numerous resolutions, the UN General Assembly has called upon all States to become parties to the 1925 Geneva Gas Protocol.²⁵⁶

246. In numerous resolutions, the UN General Assembly has called upon all States to become parties to the 1972 BWC.²⁵⁷

247. A large number of UN General Assembly resolutions call for respect for the 1925 Geneva Gas Protocol or indicate its importance: 18 resolutions state that the General Assembly “reiterates its call for strict observance by all States of the principles and objectives” of the Protocol;²⁵⁸ another 14 resolutions repeat this call and condemn “all actions contrary to those objectives”.²⁵⁹ Similar wording is used in three other resolutions, in which the General Assembly stresses the “need for strict observance of existing international obligations regarding prohibitions on . . . biological weapons and condemns all actions that

²⁵⁶ UN General Assembly, Res. 2444 (XXIII), 19 December 1968, § 5; Res. 2454 (XXIII) A, 20 December 1968, preamble; Res. 2603 B (XXIV), 16 December 1969, § 2; Res. 2662 (XXV), 7 December 1970, § 2; Res. 2677 (XXV), 9 December 1970, § 1; Res. 2827 (XXVI) A, 16 December 1971, § 6; Res. 2852 (XXVI), 20 December 1971, § 1; Res. 2853 (XXVI), 20 December 1971, § 1; Res. 2933 (XXVII), 29 December 1972, § 5; Res. 3077 (XXVIII), 6 December 1973, § 5; Res. 3256 (XXIX), 9 December 1974, § 5; Res. 3465 (XXX), 11 December 1975, § 5; Res. 31/65, 10 December 1976, § 4; Res. 32/77, 12 December 1977, § 3; Res. 33/59 A, 14 December 1978, § 4; Res. 35/144 C, 12 December 1980, § 2; Res. 37/98 D, 13 December 1982, § 1; Res. 40/92 A, 12 December 1985, § 5; Res. 41/58 B, 3 December 1986, § 5; Res. 43/74 A, 7 December 1988, § 2; Res. 44/115 B, 15 December 1989, § 2.

²⁵⁷ UN General Assembly, Res. 2826 (XXVI), 16 December 1971, § 3; Res. 2933 (XXVII), 29 November 1972, § 5; Res. 3077 (XXVIII), 6 December 1973, § 4; Res. 3256 (XXIX), 9 December 1974, § 4; Res. 3465 (XXX), 11 December 1975, § 4; Res. 31/65, 10 December 1976, § 4; Res. 32/77, 12 December 1977, § 3; Res. 33/59 A, 14 December 1978, § 4; Res. 34/72, 11 December 1979, preamble; Res. 35/144 A, 12 December 1980, § 2; Res. 35/144 B, 12 December 1980, preamble; Res. 36/96 A, 9 December 1981, preamble; Res. 37/98 B, 13 December 1982, preamble; Res. 38/187 B, 20 December 1983, preamble; Res. 39/65 A, 12 December 1984, preamble; Res. 39/65 C, 12 December 1984, preamble; Res. 40/92 B, 12 December 1985, preamble; Res. 40/92 C, 12 December 1985, preamble; Res. 41/58 A, 3 December 1986, § 3; Res. 42/37 A, 30 November 1987, preamble; Res. 42/37 C, 30 November 1987, preamble; Res. 43/74 A, 7 December 1988, preamble; Res. 43/74 B, 7 December 1988, § 5; Res. 43/74 C, 7 December 1988, preamble; Res. 44/115 A, 15 December 1989, preamble; Res. 44/115 B, 15 December 1989, preamble; Res. 45/57 A, 4 December 1990, preamble; Res. 45/57 B, 4 December 1990, § 7; Res. 46/35 A, 6 December 1991, § 5; Res. 48/65, 16 December 1993, § 6; Res. 49/86, 15 December 1994, § 5; Res. 50/79, 12 December 1995, § 6; Res. 51/54, 10 December 1996, § 5; Res. 52/47, 9 December 1997, § 5; Res. 54/61, 1 December 1999, § 2; Res. 55/40, 20 November 2000, § 1.

²⁵⁸ UN General Assembly, Res. 2454 (XXIII) A, 20 December 1968, preamble; Res. 3465 (XXX), 11 December 1975, § 5; Res. 31/65, 10 December 1976, preamble; Res. 35/144 B, 12 December 1980, preamble; Res. 35/144 C, 12 December 1980, § 3; Res. 36/96 A, 9 December 1981, preamble; Res. 37/98 B, 13 December 1982, preamble; Res. 38/187 B, 20 December 1983, preamble; Res. 40/92 B, 12 December 1985, preamble; Res. 41/58 C, 3 December 1986, preamble; Res. 41/58 D, 3 December 1986, preamble; Res. 44/115 A, 15 December 1989, preamble; Res. 45/57 A, 4 December 1990, preamble and § 1; Res. 45/57 C, 4 December 1990, § 2; Res. 46/35 C, 6 December 1991, preamble and § 1; Res. 51/45 P, 10 December 1996, § 1; Res. 53/77 L, 4 December 1998, § 1; Res. 55/33 J, 20 November 2000, preamble and § 1.

²⁵⁹ UN General Assembly, Res. 2162 (XXI) B, 5 December 1966, § 1; Res. 2662 (XXV), 7 December 1970, § 1; Res. 2674 (XXV), 9 December 1970, § 3; Res. 2827 (XXVI) A, 16 December 1971, preamble; Res. 2933 (XXVII), 29 November 1972, preamble; Res. 3077 (XXVIII), 6 December 1973, preamble; Res. 3256 (XXIX), 9 December 1974, preamble; Res. 3465 (XXX), 11 December 1975, preamble; Res. 39/65 A, 12 December 1984, § 1; Res. 42/37 C, 30 November 1987, § 1; Res. 43/74 A, 7 December 1988, § 1; Res. 44/115 B, 15 December 1989, § 1; Res. 45/57 C, 4 December 1990, § 1; Res. 46/35 B, 6 December 1991, §§ 1 and 2.

contravene these obligations".²⁶⁰ Two resolutions refer to the "continuing importance of the 1925 Geneva Protocol",²⁶¹ and several resolutions are entitled "Measures to uphold the authority of the 1925 Geneva Protocol".²⁶² A number of others refer to the Protocol as part of the rules of IHL to be respected: "[the General Assembly]... calls upon all parties to armed conflicts to observe the international humanitarian rules which are applicable, in particular... the 1925 Geneva Protocol"²⁶³ and "convinced of the continuing value of established humanitarian rules relating to armed conflict, in particular... the 1925 Geneva Protocol".²⁶⁴ Two resolutions recall the provisions of the 1925 Geneva Gas Protocol and other relevant rules of customary international law.²⁶⁵

248. In a resolution adopted in 1969, the UN General Assembly stated that the 1925 Geneva Gas Protocol "embodies the generally recognised rules of international law prohibiting the use in international armed conflicts of all biological and chemical methods of warfare, regardless of any technical developments". It declared:

as contrary to the generally recognized rules of international law, as embodied in the [1925 Geneva Gas Protocol], the use in international armed conflicts of:

- ...
- (b) Any biological agents of warfare – living organisms, whatever their nature, or infective material derived from them – which are intended to cause disease or death in man, animals or plants, and which depend for their effects on their ability to multiply in the person, animal or plant attacked.²⁶⁶

The large number of abstentions in the vote on this resolution (36) was partly due to disagreement on the scope of the 1925 Geneva Gas Protocol. Other

²⁶⁰ UN General Assembly, Res. 37/98 E, 13 December 1982, § 2; Res. 40/92 C, 12 December 1985, § 1; Res. 41/58 C, 3 December 1986, § 1.

²⁶¹ UN General Assembly, Res. 40/92 A, 12 December 1985, preamble; Res. 41/58 B, 3 December 1986, preamble.

²⁶² UN General Assembly, Res. 37/98 D, 13 December 1982; Res. 42/37 C, 30 November 1987; Res. 44/115 B, 15 December 1989; Res. 45/57 C, 4 December 1990; Res. 46/35 B, 6 December 1991, § 2; Res. 51/45 P, 10 December 1996, § 1; Res. 53/77 L, 4 December 1998; Res. 55/33 J, 20 November 2000, preamble and § 1.

²⁶³ See, e.g., UN General Assembly, Res. 3032 (XXVII), 18 December 1972, § 2; Res. 3102 (XXVIII), 12 December 1973, § 4; Res. 3319 (XXIX), 14 December 1974, § 3; Res. 3500 (XXX), 15 December 1975, § 1; Res. 31/19, 24 December 1976, § 1.

²⁶⁴ UN General Assembly, Res. 32/44, 8 December 1977, § 6.

²⁶⁵ UN General Assembly, Res. 42/37 C, 30 November 1987, preamble; Res. 43/74 A, 7 December 1988, preamble.

²⁶⁶ UN General Assembly, Res. 2603 A (XXIV), 16 December 1969, preamble and § (b). The resolution was adopted by 80 votes in favour, 3 against (Australia, Portugal and US) and 36 abstentions (Austria, Belgium, Bolivia, Canada, Chile, China, Denmark, El Salvador, France, Greece, Iceland, Israel, Italy, Japan, Laos, Liberia, Luxembourg, Madagascar, Malawi, Malaysia, Netherlands, New Zealand, Nicaragua, Norway, Paraguay, Philippines, Sierra Leone, Singapore, South Africa, Swaziland, Thailand, Tunisia, Turkey, UK, Uruguay and Venezuela), UN Doc. A/PV.1836, 16 December 1969, p. 4.

States thought that the UN General Assembly should not interpret multilateral treaties.²⁶⁷

249. In a resolution adopted in 1970, the UN General Assembly called upon the government of Portugal:

not to use biological methods of warfare against the peoples of Angola, Mozambique and Guinea (Bissau), contrary to the generally recognized rules of international law embodied in the [1925 Geneva Protocol] and to General Assembly 2603 (XXIV) of 16 December 1969.²⁶⁸

250. In resolutions adopted in 1971, the UN General Assembly called upon "all parties to *any armed conflict* to observe the rules laid down . . . in the 1925 Geneva Protocol".²⁶⁹ (emphasis added)

251. In a resolution adopted in 1974, the UN General Assembly stated that "the use of . . . bacteriological weapons in the course of military operations constitutes one of the most flagrant violations of the Geneva [Gas] Protocol of 1925 . . . and the principles of international humanitarian law . . . and shall be severely condemned".²⁷⁰

252. In the Final Document of its Tenth Special Session in 1978, the UN General Assembly stated that:

72. All States should adhere to the Protocol for the Prohibition of the Use in War of Asphyxiating, Poisonous or Other Gases, and of Bacteriological Methods of Warfare, signed at Geneva on 17 June 1925.

73. All States which have not yet done so should consider adhering to the Convention on the Prohibition of the Development, Production and Stockpiling of Bacteriological (Biological) and Toxin Weapons and on Their Destruction.²⁷¹

253. In two resolutions, adopted in 1977 and 1978, the UN General Assembly called for "strict observance by all States of the principles and objectives of the 1972 Biological Weapons Treaty and the 1925 Geneva Protocol".²⁷²

254. In a resolution adopted in 1982, the UN General Assembly stated that "the use of . . . biological weapons has been declared incompatible with the accepted norms of civilization".²⁷³

²⁶⁷ Debates in the First Committee of the UN General Assembly, UN Doc.A/C.1/PV.1716, 9 December 1969; UN Doc. A/C.1/PV.1717, 10 December 1969.

²⁶⁸ UN General Assembly, Res. 2707 (XXV), 14 December 1970, § 9. (The resolution was adopted by 94 votes in favour, 6 against and 16 abstentions. Against: Brazil, Portugal, South Africa, Spain, UK and US. Abstaining: Argentina, Australia, Austria, Belgium, Canada, Denmark, Finland, France, Italy, Luxembourg, Malawi, Netherlands, New Zealand, Norway, Paraguay and Sweden.)

²⁶⁹ UN General Assembly, Res. 2852 (XXVI), 20 December 1971, § 1; Res. 2853 (XXVI), 20 December 1971, § 1.

²⁷⁰ UN General Assembly, Res. 3318 (XXIX), 14 December 1974, § 2.

²⁷¹ UN General Assembly, Final Document of the Tenth Special Session, UN Doc. A/S-10/2, 30 June 1978, §§ 72–73.

²⁷² UN General Assembly, Res. 32/77, 12 December 1977, preamble and § 3; Res. 33/59 A, 14 December 1978, preamble.

²⁷³ UN General Assembly, Res. 37/98 E, 13 December 1982, preamble.

255. In a resolution adopted in 1996, the UN Sub-Commission on Human Rights stated that biological weapons were weapons of mass destruction and had indiscriminate effects. It also stated that the use of these weapons was incompatible with human rights and IHL.²⁷⁴

256. In 1969, in a report on chemical and bacteriological (biological) weapons and the effects of their possible use, the UN Secretary-General included an analysis by a group of experts on the effects of the use of biological weapons. The experts recommended the elimination of all biological weapons in order to make the world more peaceful. The UN Secretary-General urged all UN members: to accede to the 1925 Geneva Gas Protocol; to affirm that the prohibition covers all sorts of biological weapons; and to reach agreement to eliminate biological weapons.²⁷⁵

257. In reports in 1995 and 1996, the UN Secretary-General noted that UNSCOM, which was mandated to inspect and destroy facilities for weapons of mass destruction in Iraq following the Gulf War, had extensively documented an Iraqi biological weapons programme.²⁷⁶

258. In 1999, the report of an UNSCOM panel (constituted to examine issues of disarmament, monitoring and verification in Iraq following the decision to re-evaluate the work of UNSCOM) noted that:

22. UNSCOM uncovered the proscribed biological weapons (BW) programme of Iraq, whose complete existence had been concealed by Iraq until 1995 . . .
23. UNSCOM ordered and supervised the destruction of Iraq's main declared BW production and development facility, Al Hakam. Some 60 pieces of equipment from three other facilities involved in proscribed BW activities as well as some 22 tonnes of growth media for biological weapons production collected from four other facilities were also destroyed. As a result, the declared facilities of Iraq's biological weapons programme have been destroyed and rendered harmless.

Current status/remaining questions

24. In the biological area, Iraq's Full Final and Complete Disclosure (FFCD) has not been accepted by UNSCOM as a full account of Iraq's biological weapons programme . . . It has also been recognised that due to the fact that biological weapons agents can be produced using low technology and simple equipment, generally dual-use, Iraq possesses the capability and knowledge base through which biological warfare agents could be produced quickly and in volume.²⁷⁷

²⁷⁴ UN Sub-Commission on Human Rights, Res. 1996/16, 29 August 1996, § 1 and preamble.

²⁷⁵ UN Secretary-General, Report on chemical and bacteriological (biological) weapons and the effects of their possible use, UN Doc. A/7575, 1 July 1969, p. xii.

²⁷⁶ UN Secretary-General, Report on the status of the implementation of the Special Commission's plan for the ongoing monitoring and verification of Iraq's compliance with the relevant parts of section C of Security Council resolution 687 (1991), UN Doc. S/1995/864, 11 October 1995, Annex; Report on the activities of the Special Commission Established by the Secretary-General pursuant to paragraph 9 (b) (i) of resolution 687 (1991), UN Doc. S/1996/848, 11 October 1996; Report of the Secretary-General on the activities of the Special Commission Established by the Secretary-General pursuant to paragraph 9 (b) (i) of resolution 687 (1991), UN Doc. S/1997/301, 11 April 1997.

²⁷⁷ UNSCOM, Panel on disarmament and current and future ongoing monitoring and verification issues, Final report of 27 March 1999 annexed to Letters dated 27 and 30 March 1999

259. In his message at the opening of the Fifth Review Conference of States Parties to the BWC, held in Geneva in 2001, the UN Secretary-General stated that:

144 States have now undertaken the commitment never, under any circumstances, to develop, produce, stockpile or otherwise acquire or retain biological or toxin weapons. They have recognised that the use of biological agents and toxins as weapons would, in the words of the Convention's preamble, "be repugnant to the conscience of mankind".

He added that "the challenge for the international community is clear: to implement, to the fullest extent possible, the prohibition regime offered by the Convention".²⁷⁸

Other International Organisations

260. In 1995, during a debate in the First Committee of the UN General Assembly, Spain, on behalf of the EU, expressed support for the strengthening of the prohibition against biological weapons.²⁷⁹

261. At the Fourth Review Conference of States Parties to the BWC in 1996, the EU stated that it believed that "there is an urgent need to strengthen compliance with the international system of non-proliferation of these weapons of mass destruction including through the reinforcement of the BWC with a legally binding and effective verification regime". According to the EU, "the strengthening of the BWC through agreement on a legally binding verification regime would contribute to international peace and security and must henceforth be accorded the priority it warrants in international arms control and disarmament negotiations".²⁸⁰

262. At the Fifth Review Conference of States Parties to the BWC in 2001, Spain, on behalf of the EU, explained that:

In its conclusion of 11 June 2001, the Council of the European Union confirmed its commitment to contribute to drawing up a Protocol including the set of concrete measures which the EU's Common Position of 17 May 1999 defined as essential for the establishment of an instrument which would effectively reinforce the Convention.²⁸¹

respectively from the Chairman of the panels established pursuant to the Note by the President of the Security Council of 30 January 1999 (S/1999/100) addressed to the President of the Security Council, UN Doc. S/1999/356, 30 March 1999, Annex I, §§ 22–24.

²⁷⁸ UN Under-Secretary-General for Disarmament Affairs, Statement of 19 November 2001 on behalf of the UN Secretary-General at the Fifth Review Conference of States Parties to the BWC, Geneva, 19 November–7 December 2001.

²⁷⁹ EU, Statement by Spain on behalf of the EU before the First Committee of the UN General Assembly, UN Doc. A/C.1/50/PV.3, 16 October 1995, p. 12.

²⁸⁰ EU, Statement of 25 November 1996 by Ireland on behalf of the EU and associated countries at the Fourth Review Conference of States Parties to the BWC, Geneva, 25 November–6 December 1996. (The statement was also given on behalf of Bulgaria, Cyprus, Czech Republic, Estonia, Hungary, Iceland, Latvia, Liechtenstein, Lithuania, Norway, Poland, Romania, Slovenia and Slovakia.)

²⁸¹ EU, Statement of 19 November 2001 by Belgium on behalf of the EU at the Fifth Review Conference of States Parties to the BWC, Geneva, 19 November–7 December 2001.

263. In the Final Communiqué of its 12th Session in 1991, the GCC Supreme Council confirmed “the need to rid the entire Middle East region of all types of weapons of mass destruction, including . . . biological weapons”.²⁸²

264. In the Final Communiqué of its 16th Session in 1995, the GCC Supreme Council expressed “its deep regret that the Government of Iraq was continuing to produce bacteriological weapons of a pestilential nature to inflict overwhelming damage on Iraq itself and on the region as a whole”. It called for a zone free of weapons of mass destruction, including biological weapons, and confirmed “its concern for the elimination of all kinds of weapons of mass destruction, as a means of arriving at a Middle East region entirely free of such weapons”.²⁸³

International Conferences

265. The 20th International Conference of the Red Cross in 1965 adopted a resolution on the protection of civilian populations against the dangers of indiscriminate warfare which expressly invited “all Governments who have not yet done so to accede to the Geneva Gas Protocol of 1925 which prohibits the use of . . . bacteriological methods of warfare”.²⁸⁴

266. In a resolution adopted in 1968, the Teheran International Conference on Human Rights emphasised that “the widespread violence and brutality of our times, including . . . the use of . . . biological means of warfare . . . erode human rights and engender counter-brutality”.²⁸⁵

267. The 21st International Conference of the Red Cross in 1969 adopted a resolution on appealed to States to accede to the 1925 Geneva Gas Protocol and “to comply strictly with its provisions”. The Conference further urged governments “to conclude as rapidly as possible an agreement banning the production and stockpiling of chemical and bacteriological weapons”.²⁸⁶

268. There have so far been five review conferences of the BWC (1980, 1986, 1991, 1996 and 2001), during which numerous States declared their commitment to the 1972 BWC and to the prohibition of the use of biological weapons.

269. The Final Declaration of the Paris Conference of State Parties to the 1925 Geneva Gas Protocol and Other Interested States in 1989 affirmed that:

The participating States recognise the importance and continuous validity of the Protocol for the Prohibition of the Use of Asphyxiating, Poisonous or Other Gases,

²⁸² GCC, Supreme Council, 12th Session, Kuwait, 23–25 December 1991, Final Communiqué, annexed to Letter dated 30 December 1991 from Kuwait to the UN Secretary-General, UN Doc. A/46/833-S/23336, 30 December 1991, p. 5.

²⁸³ GCC, Supreme Council, 16th Session, Muscat, 4–6 December 1995, Final Communiqué, annexed to Letter dated 29 December 1995 from Oman to the UN Secretary-General, UN Doc. A/51/56-S/1995/1070, 29 December 1995, p. 4.

²⁸⁴ 20th International Conference of the Red Cross, Vienna, 2–9 October 1965, Res. XXVIII.

²⁸⁵ International Conference on Human Rights, Teheran, 22 April–13 May 1968, Res. XXIII on Human Rights in Armed Conflicts, preamble.

²⁸⁶ 21st International Conference of the Red Cross, Istanbul, 6–13 September 1969, Res. XIV.

and of Bacteriological Methods of Warfare, signed on 17 June 1925 in Geneva. The States party to the Protocol solemnly reaffirm the prohibition prescribed there in.²⁸⁷

IV. Practice of International Judicial and Quasi-judicial Bodies

270. In its advisory opinion in the *Nuclear Weapons case* in 1996, the ICJ stated that:

The pattern until now has been for weapons of mass destruction to be declared illegal by specific instruments. The most recent such instruments are the Convention of 10 April 1972 on the Prohibition of the Development, Production and Stockpiling of Bacteriological (Biological) and Toxin Weapons and on their destruction (which prohibits the possession of bacteriological and toxin weapons and reinforces the prohibition of their use).²⁸⁸

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

271. To fulfil its task of disseminating IHL, the ICRC has delegates around the world teaching armed and security forces that it is prohibited to use "bacteriological methods of warfare".²⁸⁹

272. In a Memorandum on the Applicability of International Humanitarian Law sent in 1990 to all States party to the Geneva Conventions in the context of the Gulf War, the ICRC stated that "the use of . . . bacteriological weapons is prohibited (1925 Geneva Protocol)".²⁹⁰

273. In a press release issued in 1991 in the context of the Gulf War, the ICRC reminded the parties that "the use of . . . bacteriological weapons is prohibited under international humanitarian law."²⁹¹

274. In 1994, in a Memorandum on Respect for International Humanitarian Law in Angola, the ICRC stated that "in particular, the use of . . . bacteriological weapons . . . is prohibited".²⁹²

275. In its statement at the Fourth Review Conference of States Parties to the BWC in 1996, the ICRC, referring to the 1925 Geneva Gas Protocol, stated that "the norms which your predecessors so carefully constructed have now become

²⁸⁷ Conference of State Parties to the 1925 Geneva Gas Protocol and Other Interested States, Paris, 7–11 January 1989, Final Declaration, 11 January 1989, § 2, annexed to letter dated 19 January 1989 from France to the UN Secretary-General, UN Doc. A/44/88, 20 January 1989.

²⁸⁸ ICJ, *Nuclear Weapons case*, Advisory Opinion, 8 July 1996, § 57.

²⁸⁹ Frédéric de Mulinen, *Handbook on the Law of War for Armed Forces*, ICRC, Geneva, 1987, § 919(c).

²⁹⁰ ICRC, Memorandum on the Applicability of International Humanitarian Law, 14 December 1990, § II, *IRRC*, No. 280, 1991, p. 25.

²⁹¹ ICRC, Press Release No. 1658, Gulf War: ICRC reminds States of their obligations, 17 January 1991, *IRRC*, No. 280, 1991, p. 26.

²⁹² ICRC, Memorandum on Respect for International Humanitarian Law in Angola, 8 June 1994, § II, *IRRC*, No. 320, 1997, p. 504.

elements of customary international law. With few exceptions, they have been respected even in times of armed conflict." It called upon States to adhere to the BWC and to consider withdrawing any reservations that they might have to the Geneva Gas Protocol. The ICRC concluded by stating that:

Biological warfare, in whatever form and by whatever party, is rightfully considered abhorrent by the public conscience and by the world's most ancient cultures. This Conference's most important task will be to reaffirm, in both word and action, that no party should even think of using biological knowledge to inflict harm and to assure anyone who does that this will not be tolerated by the international community.²⁹³

276. In its working paper on war crimes submitted in 1997 to the Preparatory Committee for the Establishment of an International Criminal Court, the ICRC stated that:

The applicability of weapons prohibitions to internal conflicts and the prohibitions now clearly attached to the use of such weapons as . . . biological weapons . . . in time of non-international armed conflicts is to be related to the more general principle that all means and methods of warfare of a nature to cause superfluous injury or unnecessary suffering are unlawful.²⁹⁴

VI. Other Practice

277. According to commentators, between 1978 and 1987 the US repeatedly accused Soviet forces of having used toxin weapons in South-east Asia in the period 1978–1984. The allegations charged that attacks had been conducted by Soviet aircraft spraying a yellow material that fell like rain and contained trichothecene toxins, causing illness and death among thousands of victims, most of them among people from Laos living in Thai refugee camps. The USSR consistently denied the accusations concerning its alleged use of biological weapons in the region. In 1982, a UK government scientist analysed a sample of the "yellow rain" and concluded that it consisted largely of pollen. The UK finding was later independently corroborated by scientists in Australia, Canada, France, Sweden and Thailand. The US administration responded to this discovery by arguing that the USSR had deliberately added pollen when manufacturing the yellow rain. Between 1983 and 1986, following further scientific analysis, government and university researchers from France, Thailand, UK and US reported that the samples contained no trace of trichothecenes and concluded that the powder was actually the faeces of wild honeybees.²⁹⁵

²⁹³ ICRC, Statement at the Fourth Review Conference of States Parties to the BWC, Geneva, 25 November–6 December 1996.

²⁹⁴ ICRC, Working paper on war crimes submitted to the Preparatory Committee for the Establishment of an International Criminal Court, 14 February 1997, p. 29.

²⁹⁵ Julian Robinson, Jeanne Harley Guillemin and Matthew Meselson, "Yellow Rain in Southeast Asia: The Story Collapses", in Susan Wright (ed.), *Preventing a Biological Arms Race*, MIT Press, Cambridge, Massachusetts, 1990, pp. 220–238.

278. Rule B1 of the Rules of International Law Governing the Conduct of Hostilities in Non-international Armed Conflicts, adopted in 1990 by the Council of the IHL, states that "the customary rule prohibiting... the use of bacteriological (biological) weapons is applicable in non-international armed conflicts".²⁹⁶

279. The Declaration of Minimum Humanitarian Standards, adopted by an expert meeting convened by the Institute for Human Rights of Åbo Akademi University in Turku/Åbo, Finland in 1990, states that "weapons or other material or methods prohibited in international armed conflicts must not be employed in any circumstances".²⁹⁷

280. SIPRI has documented a number of allegations concerning the use of biological weapons since the Second World War. However, it noted that "there are no indisputably verified instances of their having been used".²⁹⁸

281. The participating experts in the Workshop on International Criminalisation of Biological and Chemical Weapons at the Lauterpacht Research Centre for International Law in 1998 developed the text of a Draft Convention on the Prevention and Punishment of the Crime of Developing, Producing, Acquiring, Stockpiling, Retaining, Transferring or Using Biological and Chemical Weapons. The Draft Convention makes it an international criminal offence to use chemical or biological weapons.²⁹⁹

282. In 1999, the British Medical Association reported that in the light of the existence of non-parties to the 1925 Geneva Gas Protocol and the reservations of some States to the Protocol which permitted retaliatory use in kind of biological weapons, a number of countries undertook research in and developed and stockpiled biological agents for military retaliation purposes in the 20th century, although this practice had been progressively abandoned, in particular since the adoption of the 1972 BWC.³⁰⁰

283. According to a report by the Center for Non-Proliferation Studies, Algeria and India carry out research programmes into biological weapons. However, it emphasises that there is no evidence of production of such agents by those States. It adds that China, Egypt and Iran are likely to have maintained a research programme into biological weapons. It notes that Iraq had previously a research and production programme and emphasises that in the absence of

²⁹⁶ IHL, Rules of International Humanitarian Law Governing the Conduct of Hostilities in Non-international Armed Conflicts, Rule B1, *IRRC*, No. 278, 1990, p. 395.

²⁹⁷ Declaration of Minimum Humanitarian Standards, adopted by an expert meeting convened by the Institute for Human Rights, Åbo Akademi University, Turku/Åbo, 30 November–2 December 1990, Article 5(3), *IRRC*, No. 282, 1991, p. 332.

²⁹⁸ SIPRI, *The Problem of Chemical and Biological Warfare*, Vol. I, *The Rise of CB Weapons*, Almqvist & Wiksell, Stockholm, 1971, pp. 217–230.

²⁹⁹ Workshop on International Criminalisation of Biological and Chemical Weapons, Lauterpacht Research Centre for International Law, Cambridge, 1–2 May 1998, Draft Convention on the Prevention and Punishment of the Crime of Developing, Producing, Acquiring, Stockpiling, Retaining, Transferring or Using Biological and Chemical Weapons, reprinted in *The CBW Conventions Bulletin*, Issue No. 42, December 1998, pp. 1–5.

³⁰⁰ British Medical Association, *Biotechnology Weapons and Humanity*, Harwood Academic Publishers, London, 1999, pp. 14–32.

UN inspections and monitoring it is possible that Iraq has resumed its research programmes on biological agents. The report notes that Israel, Libya, North Korea and Syria conduct research programmes and that the production of biological weapons remains possible. It further states that Russia has a research programme. According to the report, it is also possible that Sudan and Taiwan have research programmes on biological agents.³⁰¹

³⁰¹ Monterey Institute of International Studies, Center for Nonproliferation Studies, Chemical and Biological Weapons: Possession and Programs Past and Present, last updated in 2002.

CHEMICAL WEAPONS

A. Chemical Weapons (practice relating to Rule 74)	§§ 1–526
B. Riot Control Agents (practice relating to Rule 75)	§§ 527–595
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A. Chemical Weapons

I. Treaties and Other Instruments

Treaties

1. The 1899 Hague Declaration concerning Asphyxiating Gases was the first treaty to outlaw the use of gas in warfare. In the Declaration, which has been ratified by 31 States, “the contracting Powers agree to abstain from the use of projectiles the sole object of which is the diffusion of asphyxiating or deleterious gases”.
2. Article 171 of the 1919 Treaty of Versailles stipulated that “the use of asphyxiating, poisonous or other gases and analogous liquids, materials or devices being prohibited, their manufacture and importation are strictly forbidden in Germany.”
3. Article 5 of the 1922 Treaty on the Use of Submarines and Noxious Gases in Warfare provides that:

The use in war of asphyxiating, poisonous or other gases, and all analogous liquids, materials or devices, having been justly condemned by the general opinion of the civilized world and a prohibition of such having been declared in treaties to which a majority of the civilized Powers are parties,

The Signatory Powers, to the end that this prohibition shall be universally accepted as a part of international law binding alike the conscience and practice of nations, declare their assent to such prohibition, agree to be bound thereby between themselves and invite all other civilized nations to adhere thereto.

4. The 1925 Geneva Gas Protocol provides that:

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

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

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

Declare:

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

Of the 132 States party, 39 made reservations upon ratification of the Protocol, stating that if an adverse party does not respect the Protocol, the ratifying State will no longer consider itself bound by the Protocol vis-à-vis that party (a number of the reservations included non-respect by allies also as a reason for no longer being obliged to respect the Protocol).¹ As at 1 March 2003, 18 of these reservations had been withdrawn.²

5. According to Article 14 of the 1947 Treaty of Peace between the Allied and Associated Powers and Bulgaria, Bulgaria "shall not retain, produce or otherwise acquire, or maintain facilities for the manufacture of, war material in excess of that required for the maintenance of the armed forces". According to Annex III of the treaty, "war material" comprises, *inter alia*, "asphyxiating, lethal, toxic or incapacitating substances intended for war purposes, or manufactured in excess of civilian requirements" (Category VI). Article 15 further provides that Bulgaria is obliged to hand over to the Allied Powers or destroy some of such war material.

6. According to Article 18 of the 1947 Treaty of Peace between the Allied and Associated Powers and Finland, "Finland shall not retain, produce or otherwise acquire, or maintain facilities for the manufacture of, war material in excess of that required for the maintenance of the armed forces". According to Annex III of the treaty, "war material" comprises, *inter alia*, "asphyxiating, lethal, toxic or incapacitating substances intended for war purposes, or manufactured in excess of civilian requirements" (Category VI). Article 19 further provides that Finland is obliged to hand over to the Allied Powers or destroy some of such "war material".

7. According to Article 16 of the 1947 Treaty of Peace between the Allied and Associated Powers and Hungary, "Hungary shall not retain, produce or otherwise acquire, or maintain facilities for the manufacture of, war material in

¹ Algeria, Angola, Australia, Bahrain, Bangladesh, Belgium, Bulgaria, Canada, Chile, China, Czechoslovakia, Estonia, Fiji, France, India, Iraq, Ireland, Israel, Jordan, North Korea, South Korea, Kuwait, Libya, Mongolia, Netherlands, New Zealand, Nigeria, Pakistan, Papua New Guinea, Portugal, Romania, Solomon Islands, South Africa, Spain, USSR, UK, US, Vietnam and SFRY.

² Ireland (1972); Australia (1986); New Zealand (1989); Czechoslovakia (1990); Mongolia (1990); Bulgaria (1991); Chile (1991); Romania (1991); UK (partially, 1991); Spain (1992); Netherlands (1995); France (1996); South Africa (1996); Belgium (1997); Estonia (1999); Canada (1999); Russia (2001); South Korea (2002).

excess of that required for the maintenance of the armed forces". According to Annex III of the treaty, "war material" comprises, *inter alia*, "asphyxiating, lethal, toxic or incapacitating substances intended for war purposes, or manufactured in excess of civilian requirements" (Category VI). Article 17 further provides that Hungary is obliged to hand over to the Allied Powers or destroy some of such "war material".

8. According to Article 53 of the 1947 Treaty of Peace between the Allied and Associated Powers and Italy, "Italy shall not manufacture or possess, either publicly or privately, any war material different from, or exceeding in quantity, that required for the forces permitted in" other sections of the treaty. According to the Annex XIII(C) of the treaty, "war material" comprises, *inter alia*, "asphyxiating, lethal, toxic or incapacitating substances intended for war purposes, or manufactured in excess of civilian requirements" (Category VI). Article 67 further provides that Italy is obliged to hand over to the Allied Powers or destroy such "war material".

9. According to Article 15 of the 1947 Treaty of Peace between the Allied and Associated Powers and Romania, "Romania shall not retain, produce or otherwise acquire, or maintain facilities for the manufacture of, war material in excess of that required for the maintenance of the armed forces". According to Annex III of the treaty, "war material" comprises, *inter alia*, "asphyxiating, lethal, toxic or incapacitating substances intended for war purposes, or manufactured in excess of civilian requirements" (Category VI). Article 16 further provides that Romania is obliged to hand over to the Allied Powers or destroy some of such "war material".

10. Article 13(1) of the 1955 Austrian State Treaty provides that:

Austria shall not possess, construct or experiment with –

- ...
- (j) asphyxiating, vesicant or poisonous materials or biological substances in quantities greater than, or of types other than, are required for legitimate civil purposes, or any apparatus designed to produce, project or spread such materials or substances for war purposes.

11. The preamble to the 1972 BWC states that the States party to the Convention are "convinced of the importance and urgency of eliminating from the arsenals of States, through effective measures, such dangerous weapons of mass destruction as those using chemical or bacteriological (biological) agents". States also recognize that "an agreement on the prohibition of bacteriological (biological) and toxin weapons represents a first possible step towards the achievement of agreement on effective measures also for the prohibition of the development, production and stockpiling of chemical weapons" and that they are "determined to continue negotiations to that end".

12. Article 1(1) of the 1990 US-Soviet Chemical Weapons Agreement states that:

In accordance with provisions of this Agreement, the Parties undertake:

- a. to cooperate regarding methods and technologies for the safe and efficient destruction of chemical weapons;
- b. not to produce chemical weapons;
- c. to reduce their chemical weapons stockpiles to equal, low levels;
- d. to cooperate in developing, testing, and carrying out appropriate inspection procedures; and
- e. to adopt practical measures to encourage all chemical weapons-capable states to become parties to the multilateral convention.

13. Article I of the 1993 CWC provides that:

1. Each State Party to this Convention undertakes never under any circumstances:
 - (a) To develop, produce, otherwise acquire, stockpile or retain chemical weapons, or transfer, directly or indirectly, chemical weapons to anyone;
 - (b) To use chemical weapons;
 - (c) To engage in any military preparations to use chemical weapons;
 - (d) To assist, encourage or induce, in any way, anyone to engage in any activity prohibited to a State Party under this Convention;
2. Each State Party undertakes to destroy chemical weapons it owns or possesses, or that are located in any place under its jurisdiction or control . . .
3. Each State Party undertakes to destroy all chemical weapons it abandoned on the territory of another State Party . . .
4. Each State Party undertakes to destroy any chemical weapons production facilities it owns or possesses, or that are located in any place under its jurisdiction or control.

14. The 1993 CWC prohibits the use of chemical weapons in any circumstances, including by way of reprisal, and also obliges States parties not to use chemical weapons against non-parties.³ Article XXII states that “the Articles of this Convention shall not be subject to reservations”. The treaty includes an extensive implementation and verification regime.

15. Pursuant to Article 8(2)(b)(xviii) of the 1998 ICC Statute, “employing asphyxiating, poisonous or other gases, and all analogous liquids, materials or devices” is a war crime in international armed conflicts.

Other Instruments

16. Article 16(1) of the 1913 Oxford Manual of Naval War prohibits the use of “projectiles the sole object of which is the diffusion of asphyxiating or deleterious gases”.

17. Based on several documents supplying evidence of outrages committed during the First World War, the 1919 Report of the Commission on

³ Natalino Ronzitti, “Relations Between the Chemical Weapons Convention and Other Relevant International Norms”, *The Convention on the Prohibition and Elimination of Chemical Weapons: a Breakthrough in Multilateral Disarmament*, Hague Academy of International Law Workshop, Martinus Nijhoff Publishers, Dordrecht, 1994, p. 184.

Responsibility lists violations of the laws and customs of war which should be subject to criminal prosecution, including the “use of deleterious and asphyxiating gases”.

18. Articles 6 and 7 of the 1938 ILA Draft Convention for the Protection of Civilian Populations against New Engines of War provides that:

Art. 6. The use of chemical . . . weapons as against any State, whether or not a party to the present convention, and in any war, whatever its character, is prohibited.

Art. 7. (a) The prohibition of the use of chemical weapons shall apply to the use, by any method whatsoever, for the purpose of injuring an adversary, of any natural or synthetic substance (whether solid, liquid or gaseous) which is harmful to the human or animal organism by reason of its being a toxic, asphyxiating, irritant or vesicant substance.

(b) The said prohibition shall not apply:

- I. to explosives that are not in the last-mentioned category;
- II. to the noxious substances arising from the combustion or detonation of such explosives, provided that such explosives have not been designed or used with the object of producing such noxious substances;
- III. to smoke or fog used to screen objectives or for other military purposes, provided that such smoke or fog is not liable to produce harmful effects under normal conditions of use;
- IV. to gas that is merely lachrymatory.

19. Article 14 of the 1956 New Delhi Draft Rules provides, under the heading “Weapons with uncontrollable effects”, that:

The use is prohibited of weapons whose harmful effects – resulting in particular from the dissemination of . . . chemical . . . agents – could spread to an unforeseen degree or escape, either in space or in time, from the control of those who employ them, thus endangering the civilian population.

20. The preamble to the 1991 Mendoza Declaration on Chemical and Biological Weapons states that the parties are “convinced that a complete ban on chemical . . . weapons will contribute to strengthening the security of all States”. In paragraph 1, the parties declare their “full commitment not to develop, produce, acquire in any way, stockpile or retain, transfer directly or indirectly, or use chemical weapons”.

21. The 1991 Cartagena Declaration on Weapons of Mass Destruction expresses the commitment of the signatory governments to:

renounce the possession, production, development, use, testing and transfer of all weapons of mass destruction whether . . . toxin or chemical weapons, and to refrain from storing, acquiring or holding such categories of weapons, in any circumstances.

22. The 1992 India-Pakistan Declaration on Prohibition of Chemical Weapons provides that the governments of India and Pakistan:

undertake never under any circumstances:

- a) to develop, produce or otherwise acquire chemical weapons;
- b) to use chemical weapons;
- c) to assist, encourage or induce, in any way, anyone to engage in development, production, acquisition, stockpiling or use of chemical weapons.

23. Under Article 4(4) of Part IV of the 1998 Comprehensive Agreement on Respect for Human Rights and IHL in the Philippines, "civilian population and civilians . . . shall be protected . . . from . . . the stockpiling near or in their midst, and the use of chemical . . . weapons".

24. Section 6.2 of the 1999 UN Secretary-General's Bulletin provides that:

The United Nations force shall respect the rules prohibiting or restricting the use of certain weapons and methods of combat under the relevant instruments of international humanitarian law. These include, in particular, the prohibition on the use of asphyxiating, poisonous or other gases.

25. The 2000 UNTAET Regulation No. 2000/15 establishes panels with exclusive jurisdiction over serious criminal offences, including war crimes. According to Section 6(1)(b)(xviii), "employing asphyxiating, poisonous or other gases, and all analogous liquids, materials or devices" is a war crime in international armed conflicts.

II. National Practice

Military Manuals

26. Australia's *Commanders' Guide* places chemical weapons under the heading "Prohibited weapons" and refers to the 1993 CWC.⁴ The manual defines the use of "certain unlawful weapons and ammunition" as "grave breaches or serious war crimes".⁵

27. Australia's *Defence Force Manual* provides that "asphyxiating, poisonous or other gases are prohibited".⁶ It adds that "chemical weapons, which include toxic chemicals and their precursors (those chemicals which can cause death, permanent harm or temporary incapacity to humans or animals) and munitions or devices designed to carry such chemicals, are banned".⁷ The manual defines the use of "certain unlawful weapons and ammunition" as "grave breaches or serious war crimes".⁸

28. Belgium's *Law of War Manual*, with reference to the 1925 Geneva Gas Protocol, proscribes "the use of asphyxiating, toxic or similar gases, as well as all liquids, materials or analogous devices", with a reservation on the first use.⁹

⁴ Australia, *Commanders' Guide* (1994), § 305.

⁵ Australia, *Commanders' Guide* (1994), § 1305(p).

⁶ Australia, *Defence Force Manual* (1994), § 410.

⁷ Australia, *Defence Force Manual* (1994), § 412.

⁸ Australia, *Defence Force Manual* (1994), § 1315(p).

⁹ Belgium, *Law of War Manual* (1983), p. 38.

29. Bosnia and Herzegovina's Military Instructions states that "it is prohibited to use . . . poisonous gas".¹⁰
30. Cameroon's *Instructors' Manual* states on the issue of chemical weapons that "the restrictions here are clear. It is prohibited to use such weapons against enemy combatants as well as against civilian populations." It also calls for the "total destruction of the existing stockpile".¹¹
31. Canada's LOAC Manual prohibits the use of asphyxiating, poisonous or other gases "at all times and under all circumstances".¹² It also bans the use of chemical weapons, "which include toxic chemicals and their precursors (those chemicals which can cause death, permanent harm or temporary incapacity to humans or animals) and munitions or devices designed to carry such chemicals".¹³ It defines "using asphyxiating, poisonous and other gases" as a war crime.¹⁴ The manual also provides that "smoke grenades, smoke ammunition from indirect fire weapons and tank smoke ammunition are not prohibited as long as they are used to conceal position or movement or to mask target".¹⁵
32. Canada's Code of Conduct provides that the use of chemical weapons is forbidden.¹⁶
33. Colombia's Basic Military Manual states that the use of weapons which "cause unnecessary and indiscriminate, extensive, lasting and serious damage to people and the environment" is prohibited. It adds that the use of chemical weapons, as well as their production, possession and importation, is banned.¹⁷
34. Ecuador's Naval Manual states, under the heading "Chemical weapons", that "international law, both customary and treaty-based, prohibits taking the initiative to use lethal chemical weapons during armed conflicts".¹⁸ It also provides that "the following acts constitute war crimes: . . . use of prohibited weapons or ammunition".¹⁹
35. France's LOAC Summary Note states that it is prohibited to use combat gases.²⁰
36. France's LOAC Teaching Note includes chemical weapons in the list of weapons that "are totally prohibited by the law of armed conflict" because of their inhuman and indiscriminate character.²¹
37. France's LOAC Manual incorporates the content of Article 2 of the 1993 CWC and refers to the 1899 Hague Declaration concerning Asphyxiating Gases

¹⁰ Bosnia and Herzegovina, *Military Instructions* (1992), Item 11, § 1.

¹¹ Cameroon, *Instructors' Manual* (1992), p. 124, § 441.

¹² Canada, *LOAC Manual* (1999), p. 5-3, § 23.

¹³ Canada, *LOAC Manual* (1999), p. 5-3, § 26.

¹⁴ Canada, *LOAC Manual* (1999), pp. 16-3 and 16-4, § 21(h).

¹⁵ Canada, *LOAC Manual* (1999), p. 5-3, § 24.

¹⁶ Canada, *Code of Conduct* (2001), Rule 3, § 10(d).

¹⁷ Colombia, *Basic Military Manual* (1995), pp. 49-50.

¹⁸ Ecuador, *Naval Manual* (1989), § 10.3.

¹⁹ Ecuador, *Naval Manual* (1989), § 6.2.5(10).

²⁰ France, *LOAC Summary Note* (1992), § 4.6.

²¹ France, *LOAC Teaching Note* (2000), p. 6.

and the 1925 Geneva Gas Protocol.²² It also includes chemical weapons in the list of weapons that “are totally prohibited by the law of armed conflict” because of their inhuman and indiscriminate character.²³

38. Germany’s Soldiers’ Manual provides that “the use of chemical weapons (for example poisonous gas) . . . is prohibited”.²⁴

39. Germany’s Military Manual proscribes “the use of asphyxiating, poisonous or other gases and all analogous liquids, materials or similar devices in war” and refers to the 1925 Geneva Gas Protocol and to Article 23(a) of the 1907 HR. It adds that:

The prohibition also applies to the toxic contamination of water supply installations and foodstuffs and the use of irritant agents for military purposes. This prohibition does not refer to unintentional and insignificant poisonous secondary effects of otherwise permissible munitions.

It further states that:

The scope of this prohibition is restricted by the fact that, when signing the Geneva Gas Protocol, numerous states declared that this Protocol should cease to be binding in regard to any enemy state whose armed forces fail to respect the prohibition embodied in the Protocol.²⁵

The manual refers to the 1993 CWC and stresses that it was not at the time (1992) in force. However, it declares that:

On signing the Convention on the Prohibition of the Development, Production and Stockpiling of Bacteriological (Biological) and Toxin Weapons and their Destruction on 10 April 1972, the Federal Republic of Germany further declared that, in accordance with its attitude, it would neither develop nor acquire or stockpile under its own control chemical weapons whose manufacture it has already abstained from. This commitment was confirmed under Article 3 of the Treaty on the Final Settlement with respect to Germany of 12 September 1990.²⁶

40. Germany’s IHL Manual states that “international humanitarian law prohibits the use of a number of means of warfare, which are of a nature to violate the principle of humanity and to cause unnecessary suffering, e.g. . . . chemical means of warfare, e.g. poisonous gases”.²⁷

41. Israel’s Manual on the Laws of War states that “today 128 countries are signatories to [the 1925 Geneva Gas Protocol], whose provisions are regarded as customary practice, thereby making it binding on all countries, irrespective of whether they signed the Protocol”.²⁸

²² France, *LOAC Manual* (2001), pp. 22 and 23.

²³ France, *LOAC Manual* (2001), p. 54.

²⁴ Germany, *Soldiers’ Manual* (1991), p. 5.

²⁵ Germany, *Military Manual* (1992), §§ 434 and 435.

²⁶ Germany, *Military Manual* (1992), §§ 436–437.

²⁷ Germany, *IHL Manual* (1996), § 305.

²⁸ Israel, *Manual on the Laws of War* (1998), p. 20.

42. Italy's IHL Manual states that "the use... of asphyxiating, toxic or similar gases... is forbidden in conformity with the international provisions in force".²⁹

43. Kenya's LOAC Manual prohibits the use of "asphyxiating, poisonous or other gases, all analogous liquids, materials or devices".³⁰

44. The Military Manual of the Netherlands states that "it is generally accepted that this prohibition [of the use of chemical weapons] applies to States which have not ratified the Gas Protocol; it belongs to customary law".³¹

45. The Military Handbook of the Netherlands provides a general prohibition on the use of chemical weapons.³²

46. New Zealand's Military Manual states that "the 1925 Geneva Protocol prohibits the use in war of asphyxiating, poisonous and other gases, and bacteriological methods of warfare".³³ It further includes "using asphyxiating, poisonous and other gases" in a list of "war crimes recognised by the customary law of armed conflict".³⁴

47. Nigeria's Manual on the Laws of War includes "using asphyxiating, poisonous or other gases and all analogous liquids, materials or devices" in its list of war crimes.³⁵

48. Russia's Military Manual prohibits the use of "projectiles used with the only purpose to spread asphyxiating or poisonous gases... asphyxiating, poisonous or other similar gases and bacteriological means".³⁶

49. South Africa's LOAC Manual states that "the use of certain weapons is expressly prohibited by international agreement, treaty or custom (e.g. chemical... and toxic weapons)".³⁷

50. Spain's LOAC Manual prohibits the use of asphyxiating or poisonous gases. It reproduces the content of Articles I and IV of the 1993 CWC.³⁸

51. Switzerland's Teaching Manual prohibits the use of toxic gases of any kind.³⁹

52. Switzerland's Basic Military Manual prohibits the use of poison, asphyxiating, toxic or similar gases, or analogous liquids or materials.⁴⁰

53. The UK Military Manual provides that "asphyxiating, poisonous or other gases, and all analogous liquids, materials or devices are forbidden".⁴¹ A footnote to this passage states that the use of chemical weapons in the First World

²⁹ Italy, *IHL Manual* (1991), Vol. I, § 19.

³⁰ Kenya, *LOAC Manual* (1997), Précis No. 3, p. 6.

³¹ Netherlands, *Military Manual* (1993), p. IV-8, § 14.

³² Netherlands, *Military Handbook* (1995), p. 7-39.

³³ New Zealand, *Military Manual* (1992), §§ 512, 619 and 711.

³⁴ New Zealand, *Military Manual* (1992), § 1704(5).

³⁵ Nigeria, *Manual on the Laws of War* (undated), § 6(18).

³⁶ Russia, *Military Manual* (1990), § 6(b) and (e).

³⁷ South Africa, *LOAC Manual* (1996), § 34(f)(iii).

³⁸ Spain, *LOAC Manual* (1996), § 3.2.c.(1) and (2).

³⁹ Switzerland, *Teaching Manual* (1986), p. 41.

⁴⁰ Switzerland, *Basic Military Manual* (1987), Articles 17 and 22.

⁴¹ UK, *Military Manual* (1958), § 111.

War was illegal “in so far as it exposed combatants to unnecessary suffering”.⁴² The manual also provides that “in addition to the ‘grave breaches’ of the 1949 [Geneva] Conventions, . . . the following are examples of punishable violations of the laws of war, or war crimes: . . . using asphyxiating, poisonous or other gases, and all analogous liquids, materials or devices”.⁴³

54. The UK LOAC Manual states that “the following are prohibited in *international* armed conflict: . . . e. the first use of gas and chemical weapons”.⁴⁴ (emphasis in original)

55. The US Field Manual provides that:

Although the language of the 1925 Geneva Protocol appears to ban unqualifiedly the use in war of the chemical weapons within the scope of its prohibition, reservations submitted by most of the Parties to the Protocol, including the United States, have, in effect, rendered the Protocol a prohibition only of the first use in war of materials within its scope. Therefore, the United States, like many other Parties, has reserved the right to use chemical weapons against a state if that state or any of its allies fails to respect the prohibitions of this Protocol.⁴⁵

56. The US Air Force Pamphlet states that:

The first use of lethal chemical weapons is now regarded as unlawful in armed conflicts. During World War II President Roosevelt, in response to reports that the enemy was seriously contemplating the use of gas warfare, stated: “Use of such weapons has been outlawed by the general opinion of civilized mankind. . . We shall under no circumstances resort to the use of such weapons unless they are first used by our enemies.” This United States position has been reaffirmed on many occasions by the United States as well as confirmed by resolutions in various international forums.⁴⁶

57. The US Air Force Commander’s Handbook states that “the United States, however, has reserved the right to use chemical weapons against ‘an enemy State if such State or any of its allies fails to respect the prohibition of the Protocol.’ The USSR and the People’s Republic of China have reserved similar rights.”⁴⁷

58. The US Operational Law Handbook states that “the US has renounced first use of chemical weapons”.⁴⁸

59. The US Naval Handbook states that:

The United States considers the prohibition against first use of lethal and incapacitating chemical weapons to be part of customary international law and, therefore, binding on all nations whether or not they are parties to the 1925 Gas Protocol. . . Consistent with its first-use reservation to the 1925 Gas Protocol, the United States

⁴² UK, *Military Manual* (1958), § 111, footnote 1(a). ⁴³ UK, *Military Manual* (1958), § 626(r).

⁴⁴ UK, *LOAC Manual* (1981), Section 5, p. 20, § 1(e). ⁴⁵ US, *Field Manual* (1956), § 38(d).

⁴⁶ US, *Air Force Pamphlet* (1976), § 6-4(c), quoting Statement by the President, Use of Poison Gas, 12 June 1943, *State Department Bulletin*, Vol. 8, 1947, No. 207, p. 507.

⁴⁷ US, *Air Force Commander’s Handbook* (1980), § 6-3(a).

⁴⁸ US, *Operational Law Handbook* (1993), p. Q-182, § (i).

maintained a lethal and incapacitating chemical weapons capability for deterrence and possible retaliatory purposes only. National Command Authorities (NCA) approval was required for retaliatory use of lethal or incapacitating chemical weapons by U.S. forces. Retaliatory use of lethal or incapacitating chemical agents was to be terminated as soon as the enemy use of such agents that prompted the retaliation had ceased and any tactical advantage gained by the enemy through unlawful first use had been redressed. Upon coming into force of the 1993 Chemical Weapons Convention, any use of chemical weapons by a party to that convention, whether or not in retaliation against unlawful first use by another nation, will be prohibited.

[The 1993 CWC] will, upon entry into force, prohibit the development, production, stockpiling and use of chemical weapons, and mandate the destruction of chemical weapons and chemical weapons production facilities for all nations that are party to it.⁴⁹

60. The YPA Military Manual of the SFRY (FRY) prohibits the use of chemical agents such as asphyxiating and poisonous gases.⁵⁰

National Legislation

61. Under Armenia's Penal Code, the development, production, acquisition, sale, use and testing of chemical weapons and weapons of mass destruction constitute crimes against the peace and security of mankind.⁵¹

62. Australia's War Crimes Act considers "any war crime within the meaning of the instrument of appointment of the Board of Inquiry [set up to investigate war crimes committed by enemy subjects]" as a war crime, including the use of deleterious and asphyxiating gases.⁵²

63. Australia's Chemical Weapons (Prohibition) Act provides that:

A person must not intentionally or recklessly:

- (a) develop, produce, otherwise acquire, stockpile or retain chemical weapons or
- (b) transfer, directly or indirectly, chemical weapons to another person; or
- (c) use chemical weapons; or
- (d) engage in any military preparations to use chemical weapons; or
- (e) assist, encourage or induce, in any way, another person to engage in any activity prohibited to a State Party under the Convention; or
- (f) use riot control agents as a method of warfare.

Penalty: imprisonment for life.

It also specifies the purposes which are not prohibited under the 1993 CWC:

- (a) industrial, agricultural, research, medical, pharmaceutical or other peaceful purposes;
- (b) protective purposes, namely those purposes directly related to protection against toxic chemicals and to protection against chemical weapons;

⁴⁹ US, *Naval Handbook* (1995), §§ 10.3.1.1 and 10.3.1.2.

⁵⁰ SFRY (FRY), *YPA Military Manual* (1988), § 99.

⁵¹ Armenia, *Penal Code* (2003), Articles 386 and 387(2).

⁵² Australia, *War Crimes Act* (1945), Section 3.

- (c) military purposes not connected with the use of chemical weapons and not dependent on the use of the toxic properties of chemicals as a method of warfare;
- (d) law enforcement including domestic riot control purposes.⁵³

64. Australia's ICC (Consequential Amendments) Act incorporates in the Criminal Code the war crimes defined in the 1998 ICC Statute, including "employing prohibited gases, liquids, materials or devices" in international armed conflicts.⁵⁴

65. The Criminal Code of Belarus provides that "production, acquisition, stockpiling, transport, transfer or sale of weapons of mass destruction prohibited by international treaties binding upon the Republic of Belarus" is a criminal offence, while the use of such weapons is a war crime.⁵⁵

66. Bulgaria's Penal Code as amended provides that "a person who, in violation of the rules of international law for waging war, uses or orders the use of . . . chemical weapons" commits a war crime.⁵⁶

67. Under Burundi's Draft Law on Genocide, Crimes against Humanity and War Crimes, "the fact of employing asphyxiating, poisonous or other gases, and all analogous liquids, materials or devices" constitutes a war crime in international armed conflicts.⁵⁷

68. Canada's Chemical Weapons Act provides that:

No person shall

- (a) develop, produce, otherwise acquire, stockpile or retain a chemical weapon or transfer, directly or indirectly, a chemical weapon to anyone;
- (b) use a chemical weapon;
- (c) engage in any military preparations to use a chemical weapon;
- (d) assist, encourage or induce, in any way, anyone to engage in any activity prohibited to a State Party under the Convention.⁵⁸

69. Canada's Crimes against Humanity and War Crimes Act provides that the war crimes defined in Article 8(2) of the 1998 ICC Statute are "crimes according to customary international law" and, as such, indictable offences under the Act.⁵⁹

70. China's Law Governing the Trial of War Criminals provides that "use of poison gas" constitutes a war crime.⁶⁰

71. Colombia's Constitution prohibits "the manufacture, import, possession, and use of chemical . . . weapons".⁶¹

⁵³ Australia, *Chemical Weapons (Prohibition) Act* (1994), p. 13, Section 12 and p. 95, Section 9.

⁵⁴ Australia, *ICC (Consequential Amendments) Act* (2002), Schedule 1, § 268.56.

⁵⁵ Belarus, *Criminal Code* (1999), Articles 129 and 134.

⁵⁶ Bulgaria, *Penal Code as amended* (1968), Article 415(1).

⁵⁷ Burundi, *Draft Law on Genocide, Crimes against Humanity and War Crimes* (2001), Article 4(B)(q).

⁵⁸ Canada, *Chemical Weapons Act* (1995), § 6.

⁵⁹ Canada, *Crimes against Humanity and War Crimes Act* (2000), Section 4(1) and (4).

⁶⁰ China, *Law Governing the Trial of War Criminals* (1946), Article 3(12).

⁶¹ Colombia, *Constitution* (1991), Article 81.

72. Colombia's Decree on the Control of Firearms, Ammunition and Explosives provides that "it is prohibited to carry devices manufactured on the basis of poisoned gases, corrosive substances or metal which by the expansion of gas produce fragments".⁶²

73. Congo's Genocide, War Crimes and Crimes against Humanity Act defines war crimes with reference to the categories of crimes defined in Article 8 of the 1998 ICC Statute.⁶³

74. Under Croatia's Criminal Code, the manufacture, improvement, production, stockpiling, offering for sale, purchase, interceding in purchasing or sale, possession, transfer, transport, use of, and order to use, chemical weapons are war crimes.⁶⁴

75. The Czech Republic's Act on the Prohibition of Chemical Weapons bans the "development, production, use and handling of chemical weapons", as well as the "import of chemical weapons to the Czech Republic or their transit".⁶⁵

76. Denmark's Executive Order on Weapons and Ammunition prohibits the importation, development, production, consumption, stockpiling, selling, exportation or possession of chemical weapons.⁶⁶

77. Ecuador's National Civil Police Penal Code states that members of the National Civil Police "who use or order to be used . . . asphyxiating or poisonous gases" commit a punishable offence.⁶⁷

78. Estonia's Penal Code punishes any "person who designs, manufactures, stores, acquires, hands over, sells or provides or offers for use in any other manner chemical . . . weapons". Under the Code, "use of . . . chemical weapons" is a war crime.⁶⁸

79. Under Finland's Revised Penal Code, it is a punishable offence to use, develop, produce, otherwise procure, stockpile, possess, transport or participate in military preparations for the use of chemical weapons, in violation of the 1993 CWC.⁶⁹

80. France's Law on the Implementation of the CWC prohibits the use of chemical weapons and the development, production, stockpiling, possession, retention, acquisition, assignment, import, export and transfer of such weapons, and selling or trading in them.⁷⁰

81. Under Georgia's Criminal Code, "the production, acquisition or sale of chemical . . . or other kinds of weapon of mass destruction prohibited by an

⁶² Colombia, *Decree on the Control of Firearms, Ammunition and Explosives* (1993), Article 14.

⁶³ Congo, *Genocide, War Crimes and Crimes against Humanity Act* (1998), Article 4.

⁶⁴ Croatia, *Criminal Code* (1997), Article 163(1) and (2).

⁶⁵ Czech Republic, *Act on the Prohibition of Chemical Weapons* (1997), Part 2, § 3.

⁶⁶ Denmark, *Executive Order on Weapons and Ammunition* (1995), Section 11.

⁶⁷ Ecuador, *National Civil Police Penal Code* (1960), Article 117.4.

⁶⁸ Estonia, *Penal Code* (2001), §§ 93(1) and 103.

⁶⁹ Finland, *Revised Penal Code* (1995), Chapter 11, Section 7a.

⁷⁰ France, *Law on the Implementation of the CWC* (1998), Article 2.

international treaty” and the “use during hostilities or in armed conflict of such means and materials or weapons of mass destruction which are prohibited by an international treaty” are crimes.⁷¹

82. Germany's Law Introducing the International Crimes Code punishes anyone who, in connection with an international or non-international armed conflict, “employs . . . chemical weapons”.⁷²

83. Under Hungary's Criminal Code as amended, employing “chemical weapons and chemical instruments of war” as defined in Article II(1) and (7) of the 1993 CWC is a war crime.⁷³

84. India's Chemical Weapons Act provides that:

- (1) No person shall
 - (a) develop, produce, otherwise acquire, stockpile, retain or use Chemical Weapons, or transfer, directly or indirectly, any Chemical Weapons to any person;
 - ...
 - (c) engage in any military preparations to use Chemical Weapons;
 - (d) assist, encourage or induce, in any manner, any person to engage in
 - (i) the use of any riot control agent as a method of warfare
 - (ii) any other activity prohibited to a State Party under the Convention.

It also prohibits the production, acquisition, retaining or use of toxic chemicals or precursors listed in Schedule 1 of the Annex on Chemicals to the Convention.⁷⁴

85. Ireland's Chemical Weapons Act provides that:

- 3. (1) No person shall –
 - (a) produce, develop, retain, use or transfer, directly or indirectly to anyone, a chemical weapon or assist another person to produce, develop, retain, use or transfer a chemical weapon,
 - (b) construct, convert, maintain or use any premises or equipment for a purpose referred to in paragraph (a) or assist another person to do any of those things for such a purpose, or
 - (c) engage in preparations of a military nature to use a chemical weapon.⁷⁵

86. Italy's Law of War Decree as amended, in an article dealing with “Bacteriological and chemical means”, provides that “the use . . . of asphyxiating, toxic or similar gases . . . is forbidden in conformity with the international provisions in force”.⁷⁶

⁷¹ Georgia, *Criminal Code* (1999), Articles 406 and 413(c).

⁷² Germany, *Law Introducing the International Crimes Code* (2002), Article 1, § 12(1)(2).

⁷³ Hungary, *Criminal Code as amended* (1978), Section 160/A(3)(c).

⁷⁴ India, *Chemical Weapons Act* (2000), Chapter III, §§ 13 and 15.

⁷⁵ Ireland, *Chemical Weapons Act* (1997), Article 3.

⁷⁶ Italy, *Law of War Decree as amended* (1938), Article 51.

87. Italy's Law on the Prohibition of Chemical Weapons provides that:

Production, transfer or receipt, directly or indirectly, acquisition, import, export, transit, retention and use – with the exception of the cases referred to in comma 2 – of the chemicals listed in Schedule 1 of the Annex on Chemicals to the Convention, as well as of any other chemical product which might be exclusively employed for the production of chemical weapons, are prohibited.⁷⁷

88. Japan's Law on the Prohibition of Chemical Weapons provides that:

1. No person shall manufacture chemical weapons.
2. No person shall possess, assign or take over chemical weapons.
3. No person shall manufacture, possess, assign or take over toxic chemicals or chemicals having toxicity equivalent thereto or raw materials of these chemicals with the aim to supply for the manufacture of chemical weapons.
4. No person shall manufacture, possess, assign or take over parts used exclusively for chemical weapons or machinery and equipment used exclusively in case of the use of chemical weapons, which are provided for by Cabinet Order.⁷⁸

89. Japan's Law on the Prevention of Personal Injury Caused by Sarin prohibits the production, importation and use of sarin, and provides for a severe prison sentence for offenders.⁷⁹

90. Under Kazakhstan's Penal Code, "the production, acquisition, or sale of . . . chemical weapons" and "the use of the weapons of mass destruction prohibited by an international treaty to which the Republic of Kazakhstan is a party" are criminal offences.⁸⁰

91. South Korea's Chemical Weapons Act provides that:

- (1) A person who develops, produces, stockpiles, transfers or uses chemical weapons or assists or induces any other person to do so in violation of Article 3(1) shall be punished by life imprisonment or imprisonment for not less than five years or a fine not exceeding 100 million Wons.
- (2) A person who causes harm to human life, body or property or disturbs the public peace through the use of chemical weapons shall be punished by the death penalty, life imprisonment or imprisonment for not less than seven years.⁸¹

92. Luxembourg's Law on the Approval of the CWC provides that no natural or legal person may:

- a. develop, produce or acquire chemical weapons by any other means, stockpile or preserve them in any capacity or for any purpose, or transfer them directly or indirectly to any person;
- b. use chemical weapons;
- c. undertake any preparatory steps for using chemical weapons;

⁷⁷ Italy, *Law on the Prohibition of Chemical Weapons* (1995), Article 3.

⁷⁸ Japan, *Law on the Prohibition of Chemical Weapons* (1995), Chapter 2, Article 3.

⁷⁹ Japan, *Law on the Prevention of Personal Injury Caused by Sarin* (1995), Articles 3 and 5.

⁸⁰ Kazakhstan, *Penal Code* (1997), Articles 158 and 159(2).

⁸¹ South Korea, *Chemical Weapons Act* (1996), Chapter VII, Article 25.

- d. assist, encourage or incite any person by whatever means to undertake any activity prohibited by the Convention and by this law;
- e. transfer or receive, subject to the applicable Community provisions, the chemical products defined in Annex 1 to the Convention in circumstances prohibited by the Convention and not authorised by the Licensing Office.⁸²

93. Under Mali's Penal Code, "using asphyxiating, toxic or assimilated gases and all analogous liquids, materials or devices" is a war crime in international armed conflicts.⁸³

94. The Definition of War Crimes Decree of the Netherlands includes the "use of deleterious and asphyxiating gases" in its list of war crimes.⁸⁴

95. According to the Chemical Weapons Act of the Netherlands, the development, production, acquisition, stockpiling, retaining, transfer and use of chemical weapons is prohibited.⁸⁵

96. Under the International Crimes Act of the Netherlands, "employing asphyxiating, poisonous or other gases and all analogous liquids, materials or devices" is a crime, when committed in an international armed conflict.⁸⁶

97. New Zealand's Chemical Weapons Act provides that:

- (1) Every person commits an offence who intentionally or recklessly
 - (a) Develops, produces, otherwise acquires, stockpiles or retains chemical weapons; or
 - (b) Transfers directly or indirectly, chemical weapons to another person; or
 - (c) Uses chemical weapons; or
 - (d) Engages in any military preparations to use chemical weapons; or
 - (e) Assists, encourages, or induces, in any way any person to engage in any activity prohibited to a State Party under the Convention.⁸⁷

98. Under New Zealand's International Crimes and ICC Act, war crimes include the crime defined in Article 8(2)(b)(xviii) of the 1998 ICC Statute.⁸⁸

99. Norway's Chemical Weapons Act provides that it is "prohibited to develop, produce, otherwise acquire, stockpile, transfer . . . chemical weapons in contravention of the Convention of 13 January 1993".⁸⁹

100. Panama incorporated the 1993 CWC in its entirety into national law in 1998.⁹⁰

101. Peru's Law on Chemical Weapons prohibits the use of chemical weapons, as well as their development, production, acquisition and delivery, and makes reference to the 1993 CWC.⁹¹

⁸² Luxembourg, *Law on the Approval of the CWC* (1997), Article 3.

⁸³ Mali, *Penal Code* (2001), Article 31(i)(18).

⁸⁴ Netherlands, *Definition of War Crimes Decree* (1946), Article 1.

⁸⁵ Netherlands, *Chemical Weapons Act* (1995), Section 2.

⁸⁶ Netherlands, *International Crimes Act* (2003), Article 5(5)(h).

⁸⁷ New Zealand, *Chemical Weapons Act* (1996), Section 6, § 1.

⁸⁸ New Zealand, *International Crimes and ICC Act* (2000), Section 11(2).

⁸⁹ Norway, *Chemical Weapons Act* (1994), Article 1.

⁹⁰ Panama, *Chemical Weapons Law* (1998).

⁹¹ Peru, *Law on Chemical Weapons* (1996), Articles 4(b) and 5.

102. Poland's Penal Code punishes "any person who uses a means of mass destruction prohibited by international law" and "any person who, against the prohibition by international law or by the provision of law, produces, stockpiles, acquires, sells, retains, transports or sends means of mass destruction or means of combat, or conducts research aimed at the production or use of such means".⁹²

103. Romania's Law on the Prohibition of Chemical Weapons provides that:

- (1) It is prohibited for any person, under any circumstance:
 - (a) to develop, produce, acquire, retain or transfer chemical weapons, directly or indirectly, to other persons;
 - (b) to use chemical weapons;
 - (c) to engage, in any way, in military preparations to use chemical weapons;
 - (d) to assist, encourage or induce, in any way, other persons to engage in an activity prohibited under this Act;
- (2) Persons means any natural or legal person on the territory of Romania including public authorities.⁹³

It further provides that "the act of using chemical weapons is considered as a criminal act and is punished".⁹⁴

104. Under Russia's Criminal Code, the "use of weapons of mass destruction, prohibited by an international treaty to which the Russian Federation is a party" is a crime against peace and security of mankind.⁹⁵

105. Singapore's Chemical Weapons (Prohibition) Act provides that:

Any person who

- (a) uses a chemical weapon;
- (b) develops or produces a chemical weapon;
- (c) acquires, stockpiles or retains a chemical weapon;
- (d) transfers, directly or indirectly, a chemical weapon to another person;
- (f) knowingly assists, encourages or induces, in any way, another person to engage in any activity prohibited to a State Party under the Convention;

...

shall be guilty of an offence and shall on conviction be punished with

- (i) imprisonment for a term which may extend to life imprisonment, and
- (ii) a fine not exceeding \$ 1 million.⁹⁶

106. Slovenia's National Assembly passed a Chemical Weapons Law through a fast-track procedure in 1999.⁹⁷

107. South Africa's Non-Proliferation of Weapons of Mass Destruction Act provides that:

The Minister may, by notice in the Gazette, determine the general policy to be followed with a view to:

⁹² Poland, *Penal Code* (1997), Articles 120 and 121.

⁹³ Romania, *Law on the Prohibition of Chemical Weapons* (1997), Article 3.

⁹⁴ Romania, *Law on the Prohibition of Chemical Weapons* (1997), Article 50(1).

⁹⁵ Russia, *Criminal Code* (1996), Article 356(2).

⁹⁶ Singapore, *Chemical Weapons (Prohibition) Act* (2000), Section 8.

⁹⁷ Slovenia, *Chemical Weapons Law* (1999).

...

- (d) the imposition of a prohibition, whether for offensive or defensive purposes, on the development, production, acquisition, stockpiling, maintenance or transit of any weapons of mass destruction.⁹⁸

108. Sweden's Penal Code as amended provides that:

A person who:

1. develops, produces or by other means acquires, stores or holds chemical weapons or directly or indirectly transfers chemical weapons to another person,
2. uses chemical weapons,
3. participates in military preparations for the use of chemical weapons,

... shall be sentenced, if the act is not regarded as a war crime against international law, for *unlawful handling of chemical weapons* to [punishment].⁹⁹ [emphasis in original]

109. Switzerland's Military Criminal Code as amended punishes "whoever will intentionally endanger somebody's life or physical integrity by means of ... toxic gases".¹⁰⁰

110. Switzerland's Chemical Weapons Implementation Order provides that:

It shall be prohibited:

- a. to develop, produce, acquire, deliver to anyone, import, export, procure the transit of or stockpile chemical weapons within the meaning of Article II of the Chemical Weapons Convention, engage in the brokerage thereof or otherwise dispose of them;
- b. to induce anyone to commit an act mentioned under letter a;
- c. to facilitate the commission of an act mentioned under letter a.¹⁰¹

111. Tajikistan's Criminal Code punishes the

development, production, acquisition, storage, transportation, sending or sale of ... chemical ... weapons of mass destruction, prohibited by an international treaty, as well as transfer to any other State, which does not possess nuclear weapons, of initial or special fissionable material, technologies, which can knowingly be used to produce weapons of mass destruction, or providing anyone with any other kind of weapons of mass destruction or components necessary for their production, prohibited by an international treaty.¹⁰²

112. Under Trinidad and Tobago's Draft ICC Act, it is a punishable offence to commit a war crime as defined in Article 8(2)(b)(xviii) of the 1998 ICC Statute.¹⁰³

⁹⁸ South Africa, *Non-Proliferation of Weapons of Mass Destruction Act* (1993), Section 2(1)(d).

⁹⁹ Sweden, *Penal Code as amended* (1962), Chapter 22, § 6a(1)–(3).

¹⁰⁰ Switzerland, *Military Criminal Code as amended* (1927), Article 162.

¹⁰¹ Switzerland, *Chemical Weapons Implementation Order* (1994), Article 1; see also *Federal Law on War Equipment as amended* (1996), Article 7.

¹⁰² Tajikistan, *Criminal Code* (1998), Articles 397, see also Article 399 (biocide) and Article 405 (use of weapons of mass destruction prohibited by an international treaty).

¹⁰³ Trinidad and Tobago, *Draft ICC Act* (1999), Section 5(1)(a).

113. Pursuant to Ukraine's Criminal Code, "the use of weapons of mass destruction prohibited by international instruments consented to be binding by the [parliament] of Ukraine" is a war crime.¹⁰⁴

114. The UK Chemical Weapons Act provides that:

- (1) No person shall—
 - (a) use a chemical weapon;
 - (b) develop or produce a chemical weapon;
 - (c) have a chemical weapon in his possession;
 - (d) participate in the transfer of a chemical weapon;
 - (e) engage in military preparations, or in preparations of a military nature, intending to use a chemical weapon.¹⁰⁵

115. Under the UK ICC Act, it is a punishable offence to commit a war crime as defined in Article 8(2)(b)(xviii) of the 1998 ICC Statute.¹⁰⁶

116. The US Chemical Weapons Act provides that:

It shall be unlawful for any person knowingly

- (1) to develop, produce, otherwise acquire, transfer directly or indirectly, receive, stockpile, retain, own, possess, or use, or threaten to use, any chemical weapon; or
- (2) to assist or induce, in any way, any person to violate paragraph (1), or to attempt or conspire to violate paragraph (1).¹⁰⁷

117. Under Penal Code as amended of the SFRY (FRY), the use of, or the order to use, "means or methods of combat prohibited under the rules of international law, during a war or an armed conflict" is a war crime.¹⁰⁸ The commentary on this provision specifies that "the following weapons and means of combat are considered to be prohibited: . . . war gases".¹⁰⁹

118. Zimbabwe has incorporated the 1993 CWC into national law by means of the Chemical Weapons Prohibition Act.¹¹⁰

National Case-law

119. In 1995, in a ruling on the constitutionality of AP II, Colombia's Constitutional Court stated in relation to the prohibition on the use of weapons of a nature to cause unnecessary suffering or superfluous injury that:

Although none of the treaty rules expressly applicable to internal conflicts prohibits indiscriminate attacks or the use of certain weapons, the Taormina Declaration consequently considers that the bans (established partly by customary law and partly by

¹⁰⁴ Ukraine, *Criminal Code* (2001), Article 439(1).

¹⁰⁵ UK, *Chemical Weapons Act* (1996), Section 2(1).

¹⁰⁶ UK, *ICC Act* (2001), Sections 50(1) and 51(1) (England and Wales) and Section 58(1) (Northern Ireland).

¹⁰⁷ US, *Chemical Weapons Act* (1998), § 229.

¹⁰⁸ SFRY (FRY), *Penal Code as amended* (1976), Article 148(1).

¹⁰⁹ SFRY (FRY), *Penal Code as amended* (1976), commentary on Article 148(1).

¹¹⁰ Zimbabwe, *Chemical Weapons Prohibition Act* (1998).

treaty law) on the use of chemical . . . weapons . . . apply to non-international armed conflicts, not only because they form part of customary international law but also because they evidently derive from the general rule prohibiting attacks against the civilian population.¹¹¹

120. In its judgement in the *Shimoda case* in 1963, Japan's District Court of Tokyo held that the use of poisonous gases was prohibited.¹¹²

Other National Practice

121. At the Conference of States Parties to the 1925 Geneva Protocol and Other Interested States in 1989, Afghanistan expressed its commitment to the non-use of chemical weapons, stating that:

Relying on the belief that the production, development, and propagation of chemical weapons should be prevented and that such weapons should be completely eliminated, the Republic of Afghanistan has acquired no chemical weapons of any type whatsoever. It does not and will not in the future seek to acquire such weapons, the use of which it considers a crime against humanity.¹¹³

122. In a speech delivered to the Conference of States Parties to the 1925 Geneva Protocol and Other Interested States in 1989, the Afghan Foreign Minister stated that Afghanistan, while once again confirming its pledges on the non-use and elimination of chemical weapons, announced that it would never resort to the production, use, development, storage or export of chemical weapons, and that it would not allow any country to pass chemical weapons through Afghan territory. The Foreign Minister added that Afghanistan would sign the convention on halting chemical weapons as soon as it was completed.¹¹⁴

123. At the Conference of States Parties to the 1925 Geneva Protocol and Other Interested States in 1989, the Albanian Minister of Foreign Affairs stated that "Albania not only is and always has been in favour of banning the production, storage, and use of chemical weapons, but is in favour of their total elimination".¹¹⁵

124. At the CDDH, Algeria supported the Philippine amendment (see *infra*) because "it was a simple reaffirmation of the principles of positive humanitarian law".¹¹⁶

125. In 1992, during a debate in the First Committee of the UN General Assembly dealing mainly with the 1993 CWC, the negotiation of which had been

¹¹¹ Colombia, Constitutional Court, *Constitutional Case No. C-225/95*, Judgement, 18 May 1995, § 23.

¹¹² Japan, District Court of Tokyo, *Shimoda case*, Judgement, 7 December 1963, § 11.

¹¹³ "Foreign Ministry Spokesman Denies Use of Chemical Weapons", as translated in JPRS-TAC-89-019, 9 May 1989, p. 20.

¹¹⁴ "Foreign Minister Returns From Paris Conference", Kabul Radio, as translated in FBIS-NES-89-006, 10 January 1989.

¹¹⁵ "Action To Implement BW Ban Urged", as translated in JPRS-TAC-89-003, 27 January 1989.

¹¹⁶ Algeria, Statement at the CDDH, *Official Records*, Vol. VI, CDDH/SR.44, 30 May 1977, p. 286, § 37.

concluded by the Conference on Disarmament, Algeria expressed "its traditional position" for a complete ban on chemical weapons and their use.¹¹⁷

126. At the 1992 Session of the Conference of Disarmament, Algeria stated that it "has always been, and remains, in favour of a total ban on chemical weapons and their use". It added that:

Algeria is not developing and does not produce chemical weapons, and it is not seeking to acquire them. It remains profoundly convinced that the best way to curb the threat of these weapons is to banish them once and for all, by means of this international convention. In this regard, it will be Algeria's honour and duty to be among the original signatories.¹¹⁸

127. At the First Conference of States Parties to the CWC in 1997, Algeria made statements in support of the object and purpose of the 1993 CWC.¹¹⁹

128. In 1988, in a statement before the Fifteenth Special Session of the UN General Assembly, the President of Argentina confirmed that "Argentina does not possess chemical-weapon arsenals and that it will continue to commit all its efforts to the conclusion of a convention on chemical weapons".¹²⁰

129. In 1989, in a reply to a note verbale of the UN Secretary-General on the subject of chemical weapons, Argentina declared that it did not possess chemical weapons.¹²¹

130. During the 1991 Session of the Conference on Disarmament, Argentina stated that it "does not possess and has never possessed or used chemical weapons".¹²²

131. In a press communiqué issued in 1997, the Ministry of Foreign Affairs of Argentina stated that:

Argentina... does not have any chemical weapons installations or deposits in its territory. Such a declaration clearly conveys to the international community Argentina's political will to abide by the convention provisions within the framework of its foreign policy, which is committed to disarmament and the non-proliferation of weapons of mass destruction.¹²³

132. At the First Conference of States Parties to the CWC in 1997, Armenia emphasised the importance of the 1993 CWC and stated its commitment and

¹¹⁷ Algeria, Statement before the First Committee of the UN General Assembly, UN Doc. A/C.1/47/PV.10, 20 October 1992, p. 27.

¹¹⁸ Algeria, Statement before the Conference on Disarmament, UN Doc. CD/PV.621, 21 May 1992, p. 5.

¹¹⁹ Algeria, Statement at the First Conference of States Parties to the CWC, The Hague, 6–23 May 1997.

¹²⁰ Argentina, Statement by the President before the Fifteenth Special Session of the UN General Assembly, UN Doc. A/S-15/PV.2, 1 June 1988, § 44.

¹²¹ Argentina, Reply to a note verbale of the UN Secretary-General, referred to in Report of the Secretary-General on respect for the right to life: elimination of chemical weapons, prepared in accordance with UN Sub-Commission on Human Rights Resolution 1988/27, UN Doc. E/CN.4/Sub.2/1989/4, 17 August 1989, § 98.

¹²² Argentina, Statement before the Conference on Disarmament, UN Doc. CD/PV. 596, 20 June 1991, p. 11.

¹²³ "Foreign Ministry says no chemical weapons installations on Argentine Territory", *Noticias Argentinas*, Buenos Aires, 28 May 1997, as translated in BBC-SWB, 30 May 1997.

its determination to contribute actively to the realisation of the Convention's aims. It reconfirmed its good intentions by once more emphasising its commitment to global chemical disarmament.¹²⁴

133. In 1966, during a debate in the First Committee of the UN General Assembly, Australia supported the principle that international law prohibits the use of chemical weapons as a result of the 1925 Geneva Gas Protocol.¹²⁵

134. In 1989, Australia co-sponsored a draft resolution in the UN Commission on Human Rights which expressed "grave concern about reports of killing of unarmed Kurdish civilians, in particular by military attacks during 1988 using, inter alia, chemical weapons and causing mass exodus to neighbouring countries".¹²⁶

135. In 1995, in a statement in the Senate, Australia's Minister of Foreign Affairs said that Australia expressly condemned the use of chemical weapons by terrorist groups.¹²⁷

136. In its oral pleadings before the ICJ in the *Nuclear Weapons case* in 1995, Australia stated that:

Given the ever present threat of destruction that is inherently associated with nuclear weapons, and the way in which that threat is now so universally understood, Australia submits the attitude of the international community is that there are some weapons the very existence of which is inconsistent with fundamental general principles of humanity. In the case of weapons of this type, international law does not merely prohibit their threat or use. It prohibits even their acquisition or manufacture and by extension their possession. Such an attitude has been manifested in the case of other weapons of mass destruction. Both the 1972 Biological Weapons and the 1992 Chemical Weapons Convention do not merely prohibit the use of biological and chemical weapons of mass destruction, but prevent their very existence... Clearly, this is a strong international statement that the use of such weapons would be contrary to fundamental general principles of humanity. The approach of both conventions indicates a further conviction that the threats posed by certain types of weapons are so grave that they should be eliminated altogether, with their mere possession by a State made unlawful.¹²⁸

137. At the First Conference of States Parties to the CWC in 1997, Australia stated that the 1993 CWC would serve both the international community's security and economic interests. It added that it hoped that the CWC would lead to a world free from the scourge of chemical weapons.¹²⁹

¹²⁴ Armenia, Statement at the First Conference of States Parties to the CWC, The Hague, 6–23 May 1997.

¹²⁵ Australia, Statement before the First Committee of the UN General Assembly, UN Doc. A/C.1/SR.1461, 23 November 1966, p. 202.

¹²⁶ Australia, Draft resolution on the situation of human rights in Iraq, UN Doc. E/CN.4/1989/L.82, 3 March 1989, § 2.

¹²⁷ Australia, Senate, Statement by the Minister of Foreign Affairs, 27 March 1995, *Debates*, Vol. 170, p. 2107.

¹²⁸ Australia, Oral pleadings before the ICJ, *Nuclear Weapons case*, 30 October 1995, Verbatim Record CR 95/22, pp. 49–50, §§ 38–40.

¹²⁹ Australia, Statement at the First Conference of States Parties to the CWC, The Hague, 6–23 May 1997.

138. At the 1986 Session of the Conference on Disarmament, Austria stated that "Austria was among the first Parties that signed the 1925 Geneva Protocol. Furthermore, Austria renounced the possession of chemical . . . weapons in the State Treaty of 1955."¹³⁰ At a later Session in 1988, Austria stated that it "does not possess or produce chemical weapons and has no facilities to produce such weapons".¹³¹

139. In 1991, during a debate in the UN Security Council on the situation between Iraq and Kuwait, Austria stated that Resolution 687 was a step "towards the objective of a global ban on chemical weapons".¹³²

140. In 1992, during a debate in the First Committee of the UN General Assembly dealing mainly with the 1993 CWC, the negotiation of which had been concluded by the Conference on Disarmament, Austria stated that the elimination of chemical weapons was important.¹³³

141. In 1991, during a debate in the First Committee of the UN General Assembly, Bahrain stated that the Middle East had to be free from chemical weapons.¹³⁴

142. At the First Conference of States Parties to the CWC in 1997, Bahrain expressed support for the goals of the 1993 CWC and stated its full commitment to the provisions in the Convention and promised full cooperation with the OPCW.¹³⁵

143. At the First Conference of States Parties to the CWC in 1997, Bangladesh stated that it welcomed the entry into force of the 1993 CWC and hoped that it would be the first in a series that would eliminate weapons of mass destruction from the face of the earth.¹³⁶

144. In 1966, during a debate in the First Committee of the UN General Assembly, Belarus supported Hungary's view that the 1925 Geneva Gas Protocol had developed into customary international law and that the use of chemical weapons constituted an international crime.¹³⁷

145. In 1970, in the context of the adoption of UN General Assembly Resolution 2444 (XXIII), Belarus stated that:

¹³⁰ Austria, Statement before the Conference on Disarmament, UN Doc. CD/PV.371, 17 July 1986, p. 5.

¹³¹ Austria, Statement before the Conference on Disarmament, UN Doc. CD/PV.471, 4 August 1988, p. 4.

¹³² Austria, Statement before the UN Security Council, UN Doc. S/PV.2981, 3 April 1991, p. 119-120.

¹³³ Austria, Statement before the First Committee of the UN General Assembly, UN Doc. A/C.1/47/PV.5, 14 October 1992, p. 10.

¹³⁴ Bahrain, Statement before the First Committee of the UN General Assembly, UN Doc. A/C.1/46

/PV.20, 28 October 1991, p. 32.

¹³⁵ Bahrain, Statement at the First Conference of States Parties to the CWC, The Hague, 6-23 May 1997.

¹³⁶ Bangladesh, Statement at the First Conference of States Parties to the CWC, The Hague, 6-23 May 1997.

¹³⁷ Belarus, Statement before the First Committee of the UN General Assembly, UN Doc. A/C.1/SR.1454, 15 November 1966, p. 168.

The need for all States without exception to abide, in any armed conflict, by the existing international conventions defining and limiting the means, ways and methods of waging war assumes particular importance. Among these conventions are . . . the Geneva Protocol of 1925.¹³⁸

146. In 1977, during a debate in the First Committee of the UN General Assembly, Belarus supported a complete ban on chemical weapons.¹³⁹

147. In 1987, during a debate in the First Committee of the UN General Assembly, Belarus stated that it was committed to a global ban on chemical weapons.¹⁴⁰

148. In 1993, during a debate in the First Committee of the UN General Assembly, Belarus referred to a declaration in which all States emerging from the former Soviet Union expressed their support for chemical disarmament.¹⁴¹

149. At the First Conference of States Parties to the CWC in 1997, Belarus pointed out the large amount of work that had already been done by the government of Belarus in the area of chemical weapons destruction. Furthermore, it stated that it was prepared to work closely with the OPCW to contribute to the implementation of the provisions of the 1993 CWC and hence to the strengthening of international peace and security.¹⁴²

150. In 1980, in a statement before the Lower House of Parliament, Belgium's Minister of Foreign Affairs stated that disapproval of the hostile use of chemical agents in combat, as well as the 1925 Geneva Gas Protocol, were part of customary law.¹⁴³

151. In 1987, during a debate in the First Committee of the UN General Assembly, Belgium stated that the use of chemical weapons in the Iran–Iraq War against civilian populations was a “particularly shocking violation of the 1925 Geneva Protocol”.¹⁴⁴

152. In 1989, Belgium co-sponsored a draft resolution in the UN Commission on Human Rights which expressed “grave concern about reports of killing of unarmed Kurdish civilians, in particular by military attacks during 1988

¹³⁸ Belarus, Reply dated 2 March 1970 to the UN Secretary-General regarding the preparation of the study requested in paragraph 2 of General Assembly Resolution 2444 (XXIII), annexed to Report of the Secretary-General on respect for human rights in armed conflicts, UN Doc. A/8052, 18 September 1970, Annex III, p. 118, § 5.

¹³⁹ Belarus, Statement before the First Committee of the UN General Assembly, UN Doc. A/C.1/32/PV.29, 11 October 1977, p. 11.

¹⁴⁰ Belarus, Statement before the First Committee of the UN General Assembly, UN Doc. A/C.1/42/PV.11, 19 October 1987, p. 36.

¹⁴¹ Belarus, Statement before the First Committee of the UN General Assembly, UN Doc. A/C.1/48/SR.8, 22 October 1993, p. 2.

¹⁴² Belarus, Statement at the First Conference of States Parties to the CWC, The Hague, 6–23 May 1997.

¹⁴³ Belgium, Lower House of Parliament, Statement by the Minister of Foreign Affairs, *Bulletin des Questions et Réponses*, 1979–1980 Session, No. 36, 8 August 1980.

¹⁴⁴ Belgium, Statement before the First Committee of the UN General Assembly, UN Doc. A/C.1/42/PV.6, 15 October 1987, p. 42.

using, inter alia, chemical weapons and causing mass exodus to neighbouring countries".¹⁴⁵

153. At the 1989 Session of the Government-Industry Conference against Chemical Weapons, Belgium stated that it:

attaches the greatest importance to the unanimous expression of a willingness to respect the Geneva Gas Protocol on the part of all participants. As we moving towards a treaty which totally prohibits chemical weapons we all have to contribute to the realisation of this goal, the finalisation of the draft treaty, universal adherence and confidence in its being respected.

It added that "Belgium has no chemical weapons and has no intention to acquire any. It is taking the necessary steps to eliminate, in optimal conditions, the chemical bombs dating from the First World War which are periodically found on its soil".¹⁴⁶

154. In 1994, during a debate in the First Committee of the UN General Assembly, Benin urged the elimination of chemical weapons.¹⁴⁷

155. The Report on the Practice of Botswana states that Botswana has no capacity in chemical warfare and that it is opposed to chemical weapons.¹⁴⁸

156. At the 1985 and 1988 sessions of the Conference on Disarmament, Brazil stated that it "does not possess and does not intend to develop, produce or stockpile" chemical weapons.¹⁴⁹

157. In 1993, the Permanent Representative of Brazil to the UN in Geneva stated that "since the time when chemical weapons were first used, the Brazilian Government has consistently argued against the use of these and all other inhumane means of warfare". He added that "the word 'inhumane' is employed here, in accordance with common usage, to mean weapons that cause unnecessary devastation and suffering".¹⁵⁰

158. At the First Conference of States Parties to the CWC in 1997, Brazil emphasised the importance of the 1993 CWC and stated its commitment and its determination to contribute actively to the realisation of the Convention's aims. It reconfirmed its good intentions by once more emphasising its commitment to global chemical disarmament.¹⁵¹

¹⁴⁵ Belgium, Draft resolution on the situation of human rights in Iraq, UN Doc. E/CN.4/1989/L.82, 3 March 1989, § 2.

¹⁴⁶ Belgium, Statement at the Government-Industry Conference against Chemical Weapons, Canberra, 12–22 September 1989, *Final Record*, p. 280, §§ 6 and 8.

¹⁴⁷ Benin, Statement before the First Committee of the UN General Assembly, UN Doc. A/C.1/49/PV.3, 17 October 1994, p. 21.

¹⁴⁸ Report on the Practice of Botswana, 1998, Additional information on Chapter 3.4.

¹⁴⁹ Brazil, Statement before the Conference on Disarmament, UN Doc. CD/PV.323, 23 July 1985; Statement before the Conference on Disarmament, UN Doc. CD/PV.460, 26 April 1988, p. 3.

¹⁵⁰ Celso L. N. Amorim, "The Chemical Weapons Convention and the Security and the Development Needs of Brazil", *Disarmament*, Vol. 16, No. 1, 1993, p. 111.

¹⁵¹ Brazil, Statement at the First Conference of States Parties to the CWC, The Hague, 6–23 May 1997.

159. In 1989, in a reply to a note verbale of the UN Secretary-General on the subject of chemical weapons, Brunei Darussalam declared that it did not possess chemical weapons.¹⁵²

160. In 1966, during a debate in the First Committee of the UN General Assembly, Bulgaria supported Hungary's view that the 1925 Geneva Gas Protocol had developed into customary international law and that the use of chemical weapons constituted an international crime.¹⁵³

161. In 1977, during a debate in the First Committee of the UN General Assembly, Bulgaria stated that chemical weapons had been morally and politically condemned for a long time.¹⁵⁴

162. In 1987, during a debate in the First Committee of the UN General Assembly, Bulgaria stated that it was committed to a global ban on chemical weapons.¹⁵⁵

163. During the 1988 and 1990 sessions of the Conference on Disarmament, Bulgaria stated that it did not possess, manufacture or stockpile chemical weapons.¹⁵⁶

164. In 1991, during a debate in the First Committee of the UN General Assembly, Bulgaria stated that it neither possessed nor produced chemical weapons.¹⁵⁷

165. In a declaration of 1 February 1996, the Bulgarian government stated that "there have not been stockpiles of chemical . . . weapons on the territory of Bulgaria in the past 50 years". The declaration was requested by the 28 member countries of the Australia Group, to which Bulgaria had applied for admission.¹⁵⁸

166. In 1987, during a debate in the First Committee of the UN General Assembly, Burkina Faso stated that it was committed to a global ban on chemical weapons.¹⁵⁹

¹⁵² Brunei Darussalam, Reply to a note verbale of the UN Secretary-General, referred to in Report of the Secretary-General on respect for the right to life: elimination of chemical weapons, prepared in accordance with UN Sub-Commission on Human Rights Resolution 1988/27, UN Doc. E/CN.4/Sub.2/1989/4, 17 August 1989, § 98.

¹⁵³ Bulgaria, Statement before the First Committee of the UN General Assembly, UN Doc. A/C.1/SR.1454, 15 November 1966, p. 165.

¹⁵⁴ Bulgaria, Statement before the First Committee of the UN General Assembly, UN Doc. A/C.1/32/PV.24, 7 October 1977, p. 66.

¹⁵⁵ Bulgaria, Statement before the First Committee of the UN General Assembly, UN Doc. A/C.1/42/PV.22, 27 October 1987, p. 12.

¹⁵⁶ Bulgaria, Statement before the Conference on Disarmament, UN Doc. CD/PV.457, 14 April 1988, p. 8; Statement before the Conference on Disarmament, UN Doc. CD/1017, 19 July 1990, p. 8.

¹⁵⁷ Bulgaria, Statement before the First Committee of the UN General Assembly, UN Doc. A/C.1/46/PV.8, 18 October 1991, p. 35.

¹⁵⁸ Bulgaria, Government declaration, 1 February 1996, BTA News Agency, Sofia, 9 February 1996, as translated in BBC-SWB, 11 February 1996, reprinted in *Chemical Weapons Convention Bulletin*, Issue No. 31, March 1996.

¹⁵⁹ Burkina Faso, Statement before the First Committee of the UN General Assembly, UN Doc. A/C.1/42/PV.30, 3 November 1987, p. 33.

167. In 1977, during a debate in the First Committee of the UN General Assembly, Burma explained that the elimination of chemical weapons was a goal for the Burma Socialist Party.¹⁶⁰

168. At the 1988 Session of the Conference on Disarmament, Burma declared that it “does not possess, develop, produce, stockpile or use chemical weapons. Nor will it do so in the future.”¹⁶¹

169. At the First Conference of States Parties to the CWC in 1997, Cameroon emphasised the importance of the 1993 CWC and stated its commitment to creating a world free of chemical weapons.¹⁶²

170. In 1966, during a debate in the First Committee of the UN General Assembly, Canada supported the principle that international law prohibited the use of chemical weapons as a result of the 1925 Geneva Gas Protocol.¹⁶³

171. At the CDDH, Canada voted against the Philippine amendment (see *infra*) because “the particular weapons are forbidden by international law and their use, other than by way of reprisal, already constitutes a war crime”.¹⁶⁴

172. In 1977, during a debate in the First Committee of the UN General Assembly, Canada, while introducing the draft of UN General Assembly Resolution 32/77, stated that the world community “long ago reached consensus that a high priority should be accorded to early agreement on effective measures for the complete prohibition of the development, production and stockpiling of all chemical weapons and on their destruction”.¹⁶⁵

173. In 1989, Canada co-sponsored a draft resolution in the UN Commission on Human Rights which expressed “grave concern about reports of killing of unarmed Kurdish civilians, in particular by military attacks during 1988 using, inter alia, chemical weapons and causing mass exodus to neighbouring countries”.¹⁶⁶

174. At the First Conference of States Parties to the CWC in 1997, Canada emphasised the importance of the 1993 CWC and stated its commitment and its determination to contribute actively to the realisation of the Convention’s aims. It reconfirmed its good intentions by once more emphasising its commitment to global chemical disarmament.¹⁶⁷

¹⁶⁰ Burma, Statement before the First Committee of the UN General Assembly, UN Doc. A/C.1/32/PV.10, 28 September 1977, p. 2.

¹⁶¹ Burma, Statement before the Conference on Disarmament, UN Doc. CD/PV.452, 29 March 1988, p. 9.

¹⁶² Cameroon, Statement at the First Conference of States Parties to the CWC, The Hague, 6–23 May 1997.

¹⁶³ Canada, Statement before the First Committee of the UN General Assembly, UN Doc. A/C.1/SR.1461, 23 November 1966, p. 203.

¹⁶⁴ Canada, Statement at the CDDH, *Official Records*, Vol. VI, CDDH/SR.44, 30 May 1977, p. 298.

¹⁶⁵ Canada, Statement before the First Committee of the UN General Assembly, UN Doc. A/C.1/32/PV.25, 7 October 1977, p. 51.

¹⁶⁶ Canada, Draft resolution on the situation of human rights in Iraq, UN Doc. E/CN.4/1989/L.82, 3 March 1989, § 2.

¹⁶⁷ Canada, Statement by the Speaker of the Senate at the First Conference of States Parties to the CWC, The Hague, 6–23 May 1997.

175. During the 1990 Session of the Conference on Disarmament, Chile stated that it did not produce or possess chemical weapons.¹⁶⁸

176. At the First Conference of States Parties to the CWC in 1997, Chile emphasised the importance of the 1993 CWC and stated its commitment and its determination to contribute actively to the realisation of the Convention's aims. It reconfirmed its good intentions by once more emphasising its commitment to global chemical disarmament.¹⁶⁹

177. At the Meeting on Human Environment in 1972, China condemned the US for causing "unprecedented damage to the human environment" in South Vietnam through the use of "chemical toxic and poisonous gas".¹⁷⁰

178. In 1986, during a debate in the UN Security Council, China stated that it "consistently opposed the use of chemical and toxic weapons at any place and time".¹⁷¹

179. In 1987, during a debate in the First Committee of the UN General Assembly, China stated that it had "consistently" stood for the complete prohibition of chemical weapons.¹⁷²

180. In 1991, during a debate in the First Committee of the UN General Assembly, China stated that it neither possessed nor produced chemical weapons and that it had always stood for a complete prohibition of chemical weapons.¹⁷³

181. At the signing ceremony of the CWC in 1993, China's Minister of Foreign Affairs stated that "China consistently supports the absolute ban and total destruction of chemical weapons".¹⁷⁴

182. Before the adoption of the 1993 CWC, China unilaterally declared that it would not produce, possess or export chemical weapons.¹⁷⁵

183. At the First Conference of States Parties to the CWC in 1997, China stated that "it always advocated the complete prohibition and thorough destruction of chemical weapons".¹⁷⁶

¹⁶⁸ Chile, Multilateral exchange of data relevant to the Chemical Weapons Convention submitted to the Conference on Disarmament, UN Doc. CD/1042-CD/CW/WP.322, 3 December 1990.

¹⁶⁹ Chile, Statement at the First Conference of States Parties to the CWC, The Hague, 6–23 May 1997.

¹⁷⁰ China, Address to the Meeting on Human Environment, 10 June 1972, *Selected Documents of the Chinese Delegation to the United Nations, 1972*, World Knowledge Press, Beijing, pp. 257–258.

¹⁷¹ China, Statement before the UN Security Council, UN Doc. S/PV.2666, 24 February 1986, pp. 29–30.

¹⁷² China, Statement before the First Committee of the UN General Assembly, UN Doc. A/C.1/42/PV.6, 15 October 1987, p. 32.

¹⁷³ China, Statement before the First Committee of the UN General Assembly, UN Doc. A/C.1/46/PV.9, 21 October 1991, pp. 15 and 19.

¹⁷⁴ China, Address to the signing ceremony of the CWC by the Chinese Foreign Minister, 13 January 1993, *Chinese Yearbook of International Law*, 1994, p. 375.

¹⁷⁵ China, Statement of the Ministry of Foreign Affairs of the People's Republic of China with regard to the Yinhe Incident, 4 September 1993, *Chinese Yearbook of International Law*, 1994, p. 397.

¹⁷⁶ China, Statement at the First Conference of States Parties to the CWC, The Hague, 6–23 May 1997.

184. In 1977, during a debate in the First Committee of the UN General Assembly, Colombia supported a complete ban on chemical weapons.¹⁷⁷

185. At the 1981 Session of the Government-Industry Conference against Chemical Weapons, Colombia stated that:

The Colombian Government, as it represents a country which does not manufacture or possess, nor intends to manufacture or possess, chemical weapons, as well as other weapons of mass destruction weapons, cannot but condemn the production, the possession, transfer and the use of such weapons.¹⁷⁸

186. In 1989, in reply to a note verbale of the UN Secretary-General on the subject of chemical weapons, Colombia declared that it did not possess chemical weapons.¹⁷⁹

187. At the First Conference of States Parties to the CWC in 1997, DRC made statements in support of the object and purpose of the 1993 CWC.¹⁸⁰

188. At the First Conference of States Parties to the CWC in 1997, Côte d'Ivoire made statements in support of the object and purpose of the 1993 CWC.¹⁸¹

189. At the First Conference of States Parties to the CWC in 1997, Croatia stated that it "has never possessed or planned to produce chemical weapons nor even contemplated the idea of adhering to any form or method of chemical warfare, either tactical or strategic". It also stated that it "supports the provisions in the CWC and is in the middle of incorporating parts of it into its own national law".¹⁸²

190. In 1977, during a debate in the First Committee of the UN General Assembly, Cuba supported a complete ban on chemical weapons.¹⁸³

191. In 1991, during a debate in the UN Security Council, Cuba stated that it was in favour of the "universal elimination of . . . chemical . . . weapons".¹⁸⁴

192. During the 1991 Session of the Conference on Disarmament, Cuba stated that:

For Cuba, a country which does not possess chemical weapons, the conclusion of a non-discriminatory convention which prohibits the development, stockpiling, acquisition, transfer and use of these weapons and makes the necessary provision for

¹⁷⁷ Colombia, Statement before the First Committee of the UN General Assembly, UN Doc. A/C.1/32/PV.21, 5 October 1977, p. 11.

¹⁷⁸ Colombia, Final Statement at the Government-Industry Conference against Chemical Weapons, GICCW/P/72 (Prov), Canberra, 21 September 1981, pp. 1-3.

¹⁷⁹ Colombia, Reply to a note verbale of the UN Secretary-General, referred to in Report of the Secretary-General on respect for the right to life: elimination of chemical weapons, prepared in accordance with UN Sub-Commission on Human Rights Resolution 1988/27, UN Doc. E/CN.4/Sub.2/1989/4, 17 August 1989, § 98.

¹⁸⁰ DRC, Statement by the Ambassador at the First Conference of States Parties to the CWC, The Hague, 6-23 May 1997.

¹⁸¹ Côte d'Ivoire, Statement at the First Conference of States Parties to the CWC, The Hague, 6-23 May 1997.

¹⁸² Croatia, Statement at the First Conference of States Parties to the CWC, The Hague, 6-23 May 1997.

¹⁸³ Cuba, Statement before the First Committee of the UN General Assembly, UN Doc. A/C.1/32/PV.23, 6 October 1977, p. 61.

¹⁸⁴ Cuba, Statement before the UN Security Council, UN Doc. S/PV.2994, 17 June 1991, p. 23.

the destruction of existing stockpiles, production facilities and launching systems, is not only of crucial importance but is an essential guarantee in its perception of security.¹⁸⁵

193. In 1991, during a debate in the First Committee of the UN General Assembly, Cuba stated that it neither possessed nor produced chemical weapons.¹⁸⁶

194. At the First Conference of States Parties to the CWC in 1997, Cuba stated that it was in favour of global eradication of chemical weapons and stressed the importance of universal adherence to the 1993 CWC.¹⁸⁷

195. In 1966, during a debate in the First Committee of the UN General Assembly, Cyprus supported the principle that international law prohibits the use of chemical weapons as a result of the 1925 Geneva Gas Protocol.¹⁸⁸

196. In 1966, during a debate in the First Committee of the UN General Assembly, Czechoslovakia supported Hungary's view that the 1925 Geneva Gas Protocol had developed into customary international law and that the use of chemical weapons constituted an international crime.¹⁸⁹

197. In 1989, in reply to a note verbale of the UN Secretary-General on the subject of chemical weapons, Czechoslovakia declared that it did not possess chemical weapons.¹⁹⁰

198. At the 1989 Session of the Conference on Disarmament, Czechoslovakia stated that:

Two days before the Paris Conference, on 5 January, the Government of Czechoslovakia released a statement on issues concerning the prohibition and elimination of chemical weapons. This statement reaffirmed that Czechoslovakia does not possess, manufacture or stockpile on its territory any chemical weapons. Nor does it own facilities for their development or production. All scientific research in this field is oriented exclusively towards protection against the effects of chemical weapons and other peaceful goals.¹⁹¹

199. At the 1992 Session of the Conference on Disarmament, Czechoslovakia said that it had repeatedly stated that "it did not possess chemical weapons, and had declared its intention to become an original signatory of the CWC".¹⁹²

¹⁸⁵ Cuba, Statement before the Conference on Disarmament, UN Doc. CD/PV.603, 22 August 1991, p. 4.

¹⁸⁶ Cuba, Statement before the First Committee of the UN General Assembly, UN Doc. A/C.1/46/PV.10, 21 October 1991, p. 6.

¹⁸⁷ Cuba, Statement at the First Conference of States Parties to the CWC, The Hague, 6–23 May 1997.

¹⁸⁸ Cyprus, Statement before the First Committee of the UN General Assembly, UN Doc. A/C.1/SR.1455, 16 November 1966, p. 175.

¹⁸⁹ Czechoslovakia, Statement before the First Committee of the UN General Assembly, UN Doc. A/C.1/SR.1455, 16 November 1966, p. 172.

¹⁹⁰ Czechoslovakia, Reply to a note verbale of the UN Secretary-General, referred to in Report of the Secretary-General on respect for the right to life: elimination of chemical weapons, prepared in accordance with UN Sub-Commission on Human Rights Resolution 1988/27, UN Doc. E/CN.4/Sub.2/1989/4, 17 August 1989, § 98.

¹⁹¹ Czechoslovakia, Statement before the Conference on Disarmament, UN Doc. CD/PV.488, 21 February 1989, p. 10.

¹⁹² Czechoslovakia, Statement before the Conference on Disarmament, UN Doc. CD/1136, UN Doc. CD/CW/WP.389, 27 February 1992, p. 1.

200. At the 1996 Session of the Conference on Disarmament, the Czech Republic stated that it “has never possessed or produced chemical weapons and neither have they ever been deployed on its territory. The humane idea of their complete ban and elimination has always had our full support.”¹⁹³

201. In 1969, during a debate in the First Committee of the UN General Assembly on the question of chemical and bacteriological (biological) weapons, the representative of Denmark, with respect to UN General Assembly Resolution 2603 (XXIV), stated that:

154. My delegation abstained in the vote on the draft resolution [on chemical and bacteriological (biological) weapons under discussion] on legal grounds. We cannot accept the concept on which the resolution is based, namely, that there exist generally recognized rules of international law according to which the prohibition in the 1925 Geneva [Gas] Protocol is total. Such a concept implies that there is a general, long-standing, well-established practice, as well as a legal conviction, that the resulting conduct manifested by action or inaction is legally binding; that is to say, there exists an *opinio juris*. Today's vote has proved that this is not the case...

155. Having said this, I wish to add that my Government is generally in favour of making the prohibition against chemical and bacteriological weapons as comprehensive as possible.¹⁹⁴

202. In 1988, during a debate in the UN General Assembly, Denmark stated that:

Many have been the calls over the years for a ban on chemical weapons. We appreciate the progress made at the Conference on Disarmament. The abhorrent use of chemical weapons has made even more urgent the task of reaching agreement on a global convention prohibiting such weapons. All sides must take an active part in the negotiations toward this end. Denmark has signed the 1925 Protocol without conditions. We do not have any chemical weapons. We do not want any. This has always been our policy and we have declared it openly. It would be a sign of confidence and an important political signal if all countries declared their policy towards chemical weapons and whether or not they possessed those weapons.¹⁹⁵

203. In 1989, Denmark co-sponsored a draft resolution in the UN Commission on Human Rights which expressed “grave concern about reports of killing of unarmed Kurdish civilians, in particular by military attacks during 1988 using, inter alia, chemical weapons and causing mass exodus to neighbouring countries”.¹⁹⁶

¹⁹³ Czech Republic, Statement before the Conference on Disarmament, UN Doc. CD/PV.733, 28 March 1996, p. 17.

¹⁹⁴ Denmark, Statement before the First Committee of the UN General Assembly, UN Doc. A/C.1/PV.1717, 10 December 1969, §§ 154–155.

¹⁹⁵ Denmark, Statement before the UN General Assembly, UN Doc. A/43/PV.7, 27 September 1988, p. 112.

¹⁹⁶ Denmark, Draft resolution on the situation of human rights in Iraq, UN Doc. E/CN.4/1989/L.82, 3 March 1989, § 2.

204. In 1988, in a statement before the Fifteenth Special Session of the UN General Assembly, Ecuador stated that “among disarmament measures, Ecuador believes that priority should be given to the following: . . . a complete ban on the testing or production of new weapons of mass destruction, including chemical [weapons]”.¹⁹⁷

205. In 1989, in reply to a note verbale of the UN Secretary-General on the subject of chemical weapons, Ecuador declared that it did not possess chemical weapons.¹⁹⁸

206. In 1991, during a debate in the UN Security Council on the situation between Iraq and Kuwait, Ecuador stated that “it is . . . timely to insist on observance of the international agreements which prohibit the use of asphyxiating and toxic gases and bacterial warfare and which seek the universal elimination of chemical and biological weapons”.¹⁹⁹

207. At the First Conference of States Parties to the CWC in 1997, Ecuador stated that it was in favour of global eradication of chemical weapons and stressed the importance of universal adherence to the 1993 CWC.²⁰⁰

208. Egypt is alleged to have used chemical agents in support of republican forces during the civil war in Yemen in the period between 1963 and 1967. The primary sources of these allegations were journalists, royalist sources opposed to the Egyptian intervention, and the ICRC. On 2 June 1967, the UK Prime Minister informed the House of Commons that he had evidence suggesting that poison gas had been used in Yemen.²⁰¹ The Egyptian government denied the allegations concerning the use of chemical agents in Yemen in a communiqué on 1 February 1967, in which the Minister of National Guidance stated that “in the name of the U.A.R. I have been entrusted to affirm once again and in a decisive manner that the U.A.R. has not used poisonous gas at any time and did not resort to using such gas even when there were military operations in Yemen”.²⁰²

209. At the CDDH, Egypt expressed “its disappointment at the failure of the Philippine amendment, establishing as a grave breach the use of prohibited weapons, to be adopted” but noted that Article 74 of draft AP I (now

¹⁹⁷ Ecuador, Statement before the Fifteenth Special Session of the UN General Assembly, UN Doc. A/S-15/PV.2, 1 June 1988, § 158.

¹⁹⁸ Ecuador, Reply to a note verbale of the UN Secretary-General, referred to in Report of the Secretary-General on respect for the right to life: elimination of chemical weapons, prepared in accordance with UN Sub-Commission on Human Rights Resolution 1988/27, UN Doc. E/CN.4/Sub.2/1989/4, 17 August 1989, § 98.

¹⁹⁹ Ecuador, Statement before the UN Security Council, UN Doc. S/PV.2981, 3 April 1991, p. 107.

²⁰⁰ Ecuador, Statement at the First Conference of States Parties to the CWC, The Hague, 6–23 May 1997.

²⁰¹ SIPRI, *The Problem of Chemical and Biological Warfare*, Vol. VI, *The Prevention of CBW*, Almqvist & Wiksell, Stockholm, 1975, p. 231.

²⁰² Egypt, Statement by the Minister for National Guidance, 1 February 1967, reprinted in SIPRI, *The Problem of Chemical and Biological Warfare*, Vol. I, *The Rise of CB Weapons*, Almqvist & Wiksell, Stockholm, 1971, p. 159, footnote 26.

Article 85) “as it stands now does cover the use of such weapons through their effects”.²⁰³

210. During the 1988 Session of the Conference on Disarmament, Egypt stated that:

Egypt views with deep concern the use of chemical weapons anywhere, and considers that reports to that effect should give further impetus to the speedy conclusion by the Conference of a convention in this connection . . . Egypt . . . calls upon all parties to respect international treaties and conventions and reaffirms the importance of adherence to the main principles contained in the 1925 Geneva Protocol . . . Egypt does not produce, develop or stockpile such weapons, which it rightly regards as weapons of mass destruction that should be banned.²⁰⁴

211. During the 1990 Session of the Conference on Disarmament, Egypt reiterated that it neither possessed nor produced chemical weapons.²⁰⁵

212. At the First Conference of States Parties to the CWC in 1997, El Salvador stated that it was in favour of global eradication of chemical weapons and stressed the importance of universal adherence to the 1993 CWC.²⁰⁶

213. In 1977, during a debate in the First Committee of the UN General Assembly, Ethiopia supported a complete ban on chemical weapons.²⁰⁷

214. During the 1989 Session of the Conference on Disarmament, Ethiopia stated that it considered chemical weapons and their complete destruction to be a matter of the utmost priority. Furthermore, it stated that Ethiopia did not produce or stockpile chemical weapons.²⁰⁸

215. At the First Conference of States Parties to the CWC in 1997, Ethiopia emphasised the importance of the 1993 CWC and stated its commitment to creating a world free of chemical weapons.²⁰⁹

216. At the CDDH, Finland stated that it “attached the greatest importance . . . to the prohibition of chemical . . . warfare in the Geneva Protocol of 1925”.²¹⁰

217. In 1991, during a debate in the First Committee of the UN General Assembly, Finland stated that a ban on chemical weapons was an urgent priority.²¹¹

²⁰³ Egypt, Statement at the CDDH, *Official Records*, Vol. VI, CDDH/SR.44, 30 May 1977, p. 300.

²⁰⁴ Egypt, Statement before the Conference on Disarmament, UN Doc. CD/PV.459, 21 April 1988, p. 7.

²⁰⁵ Egypt, Statement before the Conference on Disarmament, UN Doc. CD/958, 23 January 1990, p. 1, § 2.

²⁰⁶ El Salvador, Statement at the First Conference of States Parties to the CWC, The Hague, 6–23 May 1997.

²⁰⁷ Ethiopia, Statement before the First Committee of the UN General Assembly, UN Doc. A/C.1/32/PV.25, 7 October 1977, p. 46.

²⁰⁸ Ethiopia, Statement before the Conference on Disarmament, UN Doc. CD/PV.487, 16 February 1989, p. 11.

²⁰⁹ Ethiopia, Statement at the First Conference of States Parties to the CWC, The Hague, 6–23 May 1997.

²¹⁰ Finland, Statement at the CDDH, *Official Records*, Vol. VI, CDDH/SR.44, 30 May 1977, p. 285, § 34.

²¹¹ Finland, Statement before the First Committee of the UN General Assembly, UN Doc. A/C.1/46/PV.6, 16 October 1991, p. 21.

218. At the First Conference of States Parties to the CWC in 1997, Finland stated that it aligned itself with the position of the EU and added that it looked forward to “wiping all chemical weapons off the face of the earth”.²¹²

219. In 1966, during a debate in the First Committee of the UN General Assembly, France stated that it was opposed to a general prohibition of chemical weapons. It wondered “how could States which had not signed or ratified a treaty be required to undertake to observe its provisions?”²¹³

220. In 1980, during a debate in the First Committee of the UN General Assembly, France stated with respect to Resolution 35/144, which it had sponsored, that:

In sponsoring [Resolution 35/144], the French delegation had only one concern: the strengthening of the [1925 Geneva Gas Protocol], particularly by use of an inquiry procedure. Information from various sources regarding the possible use of chemical weapons suggested that it was appropriate, indeed even necessary for the international community to take a stand in favour of an impartial investigation into compliance with the provisions of the 1925 Protocol.

The French Government, as a depositary of the Geneva Protocol, felt that special attention had to be given to everything related to respect for commitments entered into in that connexion.

...

It seems to us that the authority of the Geneva Protocol, the banning of chemical weapons and the means of successfully ensuring that ban are all such important matters that they require and justify a clear affirmation of the will of the international community.²¹⁴

221. In 1987, in reply to a question in parliament, the French Minister of Foreign Affairs stated that “France attaches the greatest importance to the prohibition and elimination of chemical weapons”.²¹⁵

222. In 1988, the spokesperson for the French Ministry of Foreign Affairs condemned the use by Iraq of chemical gases against Iran. The French authorities reiterated “their absolute condemnation of these practices, in blatant violation of the Geneva Protocol of 1925”.²¹⁶

223. In 1989, in reply to a note verbale of the UN Secretary-General on the subject of chemical weapons, France declared that it did not possess chemical weapons.²¹⁷

²¹² Finland, Statement at the First Conference of States Parties to the CWC, The Hague, 6–23 May 1997.

²¹³ France, Statement before the First Committee of the UN General Assembly, UN Doc. A/C.1/SR.1461, 23 November 1966, p. 205.

²¹⁴ France, Statement before the First Committee of the UN General Assembly, UN Doc. A/C.1/35/PV.45, 26 November 1980, pp. 26–27.

²¹⁵ France, Reply of the Ministry of Foreign Affairs to a question in parliament, 3 August 1987, reprinted in *AFDI*, Vol. 33, 1987, p. 958.

²¹⁶ France, Statement by the spokesperson of the Ministry of Foreign Affairs, 24 March 1988, reprinted in *AFDI*, Vol. 34, 1988, pp. 899–900.

²¹⁷ France, Reply to a note verbale of the UN Secretary-General, referred to in Report of the Secretary-General on respect for the right to life: elimination of chemical weapons, prepared in accordance with UN Sub-Commission on Human Rights Resolution 1988/27, UN Doc. E/CN.4/Sub.2/1989/4, 17 August 1989, § 98.

224. At the 1989 Session of the Conference on Disarmament, France stated that:

First of all, there is now a confirmed link between the present prohibition on use and the future [1993 CWC], a convention which will prohibit not only the use, but also the production, stockpiling and transfer of chemical weapons . . . Beyond the differences in legal commitments that exist between States, according to whether or not they are parties to the 1925 [Geneva Gas] Protocol, or whether they have tabled reservations to it, we now know – you now know – that there is a collective conviction on the part [of] 149 States, a conviction that makes it possible to move from the Protocol of 1925 to a global convention: the universal condemnation of the use of chemical weapons . . .

France possesses no chemical weapons and will not produce any once the [1993 CWC] enters into force.²¹⁸

225. In 1991, during a debate in the UN Security Council on the situation between Iraq and Kuwait, France stated that the ban on the Iraqi possession of chemical weapons was carried out from the perspective of regional and global disarmament.²¹⁹

226. At the 1992 Session of the Conference on Disarmament, France stated that there were no chemical weapons present on its territory, nor did it hold such weapons in the territory of another State. It also stated that it had no chemical weapons production facilities.²²⁰

227. At the First Conference of States Parties to the CWC in 1997, Gambia made statements in support of the object and purpose of the 1993 CWC.²²¹

228. In 1987, during a debate in the First Committee of the UN General Assembly, the FRG noted that the world had called for the elimination of chemical weapons.²²²

229. In 1987, during a debate in the First Committee of the UN General Assembly, the FRG proposed a chemical weapons free zone in Europe.²²³

230. In 1989, the FRG co-sponsored a draft resolution in the UN Commission on Human Rights which expressed “grave concern about reports of killing of unarmed Kurdish civilians, in particular by military attacks during 1988 using, inter alia, chemical weapons and causing mass exodus to neighbouring countries”.²²⁴

²¹⁸ France, Statement before the Conference on Disarmament, UN Doc. CD/PV.484, 7 February 1989, pp. 30 and 33.

²¹⁹ France, Statement before the UN Security Council, UN Doc. S/PV.2981, 3 April 1991, p. 92.

²²⁰ France, Provision of data relevant to the Chemical Weapons Convention submitted to the Conference on Disarmament, UN Doc. CD/1141-CD/CW/WP.390, 3 March 1992, p. 3, Appendix 1.

²²¹ Gambia, Statement at the First Conference of States Parties to the CWC, The Hague, 6–23 May 1997.

²²² FRG, Statement before the First Committee of the UN General Assembly, UN Doc. A/C.1/42/PV.5, 14 October 1987, p. 52.

²²³ FRG, Statement before the First Committee of the UN General Assembly, UN Doc. A/C.1/42/PV.16, 22 October 1987, pp. 19–20.

²²⁴ FRG, Draft resolution on the situation of human rights in Iraq, UN Doc. E/CN.4/1989/L.82, 3 March 1989, § 2.

231. In 1977, during a debate in the First Committee of the UN General Assembly, the GDR said that the socialist States had demanded a comprehensive prohibition of chemical weapons in 1972.²²⁵

232. In 1980, during a debate in the UN General Assembly, the GDR stated with respect to Resolution 35/144 that:

A number of delegations referred to reports concerning the use of chemical agents in the ongoing conflict between Iran and Iraq. Some delegations referred to reports concerning the use of chemical agents by Israel against the Arab population of Jerusalem or the use of chemical agents by the South African racists against the population of Namibia. Were those statements by delegations taken into account in the drafting of the report on the administrative and financial implications?²²⁶

233. In 1988, the Foreign Affairs Committee of the German parliament stated that it was afraid that poison gas could be used by Iraqi forces against the Kurdish population in northern Iraq. The Committee rejected in particular the line of argument that the 1925 Geneva Gas Protocol applied only to international armed conflicts. It called upon the German government to investigate into the alleged involvement of German companies in the production of chemical weapons for Iraq and stated that "in the opinion of the German Parliament, on the way to a universal outlawing of chemical weapons, any use of poison gas must meet the determined resistance of the international community".²²⁷

234. In 1968, during a debate in the First Committee of the UN General Assembly, Ghana supported the view that all chemical weapons should be prohibited.²²⁸

235. In 1987, during a debate in the UN Security Council, Ghana expressed the opinion that the 1925 Geneva Gas Protocol was no longer effective and needed to be reviewed.²²⁹

236. At the First Conference of States Parties to the CWC in 1997, Ghana made statements in support of the object and purpose of the 1993 CWC.²³⁰

237. In 1966, during a debate in the First Committee of the UN General Assembly, Greece supported the principle that international law prohibits the use of chemical weapons as a result of the 1925 Geneva Gas Protocol.²³¹

²²⁵ GDR, Statement before the First Committee of the UN General Assembly, UN Doc. A/C.1/32/PV.14, 30 September 1977, pp. 23–25.

²²⁶ GDR, Statement before the First Committee of the UN General Assembly, UN Doc. A/C.1/35/PV.46, 28 November 1980, p. 12.

²²⁷ Germany, Lower House of Parliament, Recommendation for a decision by the Foreign Affairs Committee concerning the use of poisoned gas by the government of Iraq against Kurds living in Iraq, *BT-Drucksache* 11/2962, 23 September 1988, pp. 1–2.

²²⁸ Ghana, Statement before the First Committee of the UN General Assembly, UN Doc. A/C.1/PV.1614, 21 November 1968, p. 6.

²²⁹ Ghana, Statement before the UN Security Council, UN Doc. S/PV.2750, 20 July 1987, p. 38.

²³⁰ Ghana, Statement at the First Conference of States Parties to the CWC, The Hague, 6–23 May 1997.

²³¹ Greece, Statement before the First Committee of the UN General Assembly, UN Doc. A/C.1/SR.1457, 17 November 1966, p. 187.

238. In 1987, during a debate in the First Committee of the UN General Assembly, Greece proposed a chemical weapons free zone in the Balkans.²³²

239. In 1992, during a debate in the First Committee of the UN General Assembly dealing mainly with the 1993 CWC, the negotiation of which had been concluded by the Conference on Disarmament, Guinea proposed that Africa become a continent free from chemical weapons.²³³

240. In 1987, during a debate in the First Committee of the UN General Assembly, Haiti stated that it was committed to a global ban on chemical weapons.²³⁴

241. At the First Conference of States Parties to the CWC in 1997, Haiti stated that it was in favour of global eradication of chemical weapons and stressed the importance of universal adherence to the 1993 CWC.²³⁵

242. At the First Conference of States Parties to the CWC in 1997, Honduras stated that it was in favour of global eradication of chemical weapons and stressed the importance of universal adherence to the 1993 CWC.²³⁶

243. In 1966, during a debate in the First Committee of the UN General Assembly, Hungary stated that:

33. ... Fascist Italy had used gas in the 1935–1936 war against Ethiopia, although both parties had accepted the provisions of the Geneva Protocol of 1925. Fascist Germany had used gas with unsurpassed savagery in a campaign of mass genocide. Chemical ... weapons were being produced in the present armaments race and some of them were actually being used in the war in Viet-Nam. In a report published by the South Viet-Nam National Liberation Front on 22 July 1966, the Committee for the Denunciation of War Crimes Perpetrated in South Viet-Nam by the United States of America had noted that the 406th mobile unit of the United States Bacterial and Chemical Warfare Institute had been transferred from Japan to South Viet-Nam, and that the number of people killed and poisoned in some of the areas affected by the chemicals used had risen by 30 per cent ...

34. ... A leading authority on international law [Lassa Oppenheim] had stated that the cumulative effect of customary law, and of the existing instruments such as the 1925 Protocol, was probably such as to render the prohibition legally effective upon practically all States ...

35. ... Indeed, the use of such mass weapons verged upon genocide ...

...

37. ... Accordingly, [the Hungarian] delegation had submitted a draft resolution ... in which the General Assembly, after recalling that the Geneva Protocol of 1925 had been recognized by many States, would declare that the

²³² Greece, Statement before the First Committee of the UN General Assembly, UN Doc. A/C.1/42/PV.14, 21 October 1987, p. 8.

²³³ Guinea, Statement before the First Committee of the UN General Assembly, UN Doc. A/C.1/47/PV.3, 12 October 1992, p. 59.

²³⁴ Haiti, Statement before the First Committee of the UN General Assembly, UN Doc. A/C.1/42/PV.17, 22 October 1987, p. 26.

²³⁵ Haiti, Statement at the First Conference of States Parties to the CWC, The Hague, 6–23 May 1997.

²³⁶ Honduras, Statement at the First Conference of States Parties to the CWC, The Hague, 6–23 May 1997.

use of chemical . . . weapons for the purpose of destroying human beings and the means of their existence constituted an international crime.²³⁷

244. In 1987, during a debate in the First Committee of the UN General Assembly, India stated that its efforts to ban chemical weapons predated the birth of the UN.²³⁸

245. In 1989, in reply to a note verbale of the UN Secretary-General on the subject of chemical weapons, India declared that it did not possess chemical weapons.²³⁹

246. At the First Conference of States Parties to the CWC in 1997, India welcomed the entry into force of the 1993 CWC and offered its wholehearted cooperation. It stated that it hoped that the entry into force of the CWC would lead to the total elimination of chemical weapons.²⁴⁰

247. During the 1988 Session of the Conference on Disarmament, the Indonesian Minister of Foreign Affairs stated that Indonesia was a "country which has never possessed chemical weapons".²⁴¹

248. At the Conference of States Parties to the 1925 Geneva Protocol and Other Interested States in 1989, the Indonesia stated that it "never had and never will acquire chemical weapons".²⁴²

249. At the First Conference of States Parties to the CWC in 1997, Indonesia emphasised the importance of the 1993 CWC and stated its commitment and its determination to contribute actively to the realisation of the Convention's aims.²⁴³

250. In 1987, during a debate in the First Committee of the UN General Assembly, Iran stated that it had never retaliated with chemical weapons against Iraq, even though the 1925 Geneva Gas Protocol only prohibited first use. It complained that the world community had not reacted to Iraq's breach of the 1925 Geneva Gas Protocol.²⁴⁴

251. At the Conference of States Parties to the 1925 Geneva Protocol and Other Interested States in 1989, after the ceasefire with Iraq, the Iranian Minister of

²³⁷ Hungary, Statement before the First Committee of the UN General Assembly, UN Doc. A/C.1/SR.1451, 11 November 1966, §§ 33–35 and 37.

²³⁸ India, Statement before the First Committee of the UN General Assembly, UN Doc. A/C.1/42/PV.32, 4 November 1987, p. 33.

²³⁹ India, Reply to a note verbale of the UN Secretary-General, referred to in Report of the Secretary-General on respect for the right to life: elimination of chemical weapons, prepared in accordance with UN Sub-Commission on Human Rights Resolution 1988/27, UN Doc. E/CN.4/Sub.2/1989/4, 17 August 1989, § 98.

²⁴⁰ India, Statement at the First Conference of States Parties to the CWC, The Hague, 6–23 May 1997.

²⁴¹ Indonesia, Statement by the Minister of Foreign Affairs before the Conference on Disarmament, UN Doc. CD/PV.437, 4 February 1988, p. 5.

²⁴² Gordon M. Burck and Charles C. Flowerree, *International Handbook on Chemical Weapons Proliferation*, Greenwood Press, New York, 1991 p. 429.

²⁴³ Indonesia, Statement at the First Conference of States Parties to the CWC, The Hague, 6–23 May 1997.

²⁴⁴ Iran, Statement before the First Committee of the UN General Assembly, UN Doc. A/C.1/42/PV.17, 22 October 1987, pp. 8 and 39–40.

Foreign Affairs declared that Iran "never resorted to chemical weapons use, even in retaliation".²⁴⁵

252. At the 1989 Session of the Government-Industry Conference against Chemical Weapons, Iran declared in its plenary statement that during the war its chemical industry "never took any measure to divert its products for production of chemical weapons".²⁴⁶

253. In 1991, during a debate in the First Committee of the UN General Assembly, Iran stated that it wanted the fourth preambular paragraph and the third operative paragraph of Resolution 46/35 B to not only deplore and call for the elimination of the threat of chemical weapons, but also their use.²⁴⁷

254. At the First Conference of States Parties to the CWC in 1997, Iran stated its commitment to the goals and provisions of the 1993 CWC, but also said it understood why some of the Arab States had not signed or ratified the Convention on the grounds that Israel refused to get rid of its nuclear weapons.²⁴⁸

255. According to the Report on the Practice of Iran, during the war with Iraq, Iran continuously objected to the use of chemical weapons and asked for the condemnation of Iraq's use of these weapons. In its protests, Iran did not confine itself to the 1925 Geneva Gas Protocol, but stated that such use should be condemned by all the countries of the world, irrespective of whether they were parties to the Protocol or not.²⁴⁹

256. At the CDDH, Iraq supported the Philippine amendment (see *infra*), since "the use of . . . gas had been prohibited for a very long time but the user was not liable to criminal proceedings. It was high time that the use of such appalling weapons was made a grave offence."²⁵⁰

257. In 1990, the Iraqi President, halfway through a long speech at a military award ceremony broadcast the next day on Baghdad Radio, stated that "we do not need an atomic bomb. We have the binary chemical [*al-kimawi al-muzdawij*]. Let them take note of this. We have the binary chemical."²⁵¹

²⁴⁵ Iran, Statement at the Conference of States Parties to the 1925 Geneva Gas Protocol, Paris, 7–11 January 1989, referred to in Gordon M. Burck and Charles C. Flowerree, *International Handbook on Chemical Weapons Proliferation*, Greenwood Press, New York, 1991, p. 239.

²⁴⁶ Iran, Plenary statement at the Government-Industry Conference against Chemical Weapons, Doc. GICCW/P/36 (Prov), Canberra, 12–22 September 1989, p. 258.

²⁴⁷ Iran, Statement before the First Committee of the UN General Assembly, UN Doc. A/C.1/46/PV.33, 11 November 1991, p. 63.

²⁴⁸ Iran, Statement at the First Conference of States Parties to the CWC, The Hague, 6–23 May 1997.

²⁴⁹ Report on the Practice of Iran, 1997, Chapter 3.4.

²⁵⁰ Iraq, Statement at the CDDH, *Official Records*, Vol. VI, CDDH/SR.44, 30 May 1977, p. 284, § 24.

²⁵¹ Iraq, Speech by President Saddam Hussein at a ceremony honouring the Iraqi Minister of Defence, the Minister of Industry and Military Industrialization and members of the Armed Forces General Command on 1 April 1990, as in the "full recording" broadcast on Baghdad domestic radio, 2 April 1990, as translated from the Arabic in FBIS-NES-90-064, 3 April 1990, pp. 32–36.

258. In 1991, during a debate in the UN Security Council, Iraq stated that it had “undertaken the unconditional obligation not to use, develop, manufacture or acquire any material referred to in [Security Council Resolution 687 (1991)]”.²⁵²

259. In 1987, during a debate in the First Committee of the UN General Assembly, Ireland condemned the use of chemical weapons against civilians.²⁵³

260. In 1987, during a debate in the First Committee of the UN General Assembly, Israel condemned the use of chemical weapons in the Iran–Iraq War and chemical attacks against the civilian population and expressed alarm that Syria had developed chemical weapons and that Iran had used them.²⁵⁴

261. In 1991, during a debate in the First Committee of the UN General Assembly, Israel stated that it wanted the Middle East to be a zone free from chemical weapons.²⁵⁵

262. In 1995, during a debate in the First Committee of the UN General Assembly, Israel stated that it had repeatedly called for the elimination of chemical weapons.²⁵⁶

263. At the First Conference of States Parties to the CWC in 1997, Israel stated that, although it had not yet ratified the Convention because virtually none of its Arab neighbours had done so, it was nonetheless “strongly committed to the fundamental goal of the Convention, that is, the total elimination of the scourge of chemical weapons from the face of the earth”.²⁵⁷

264. Italy is said to have used gas in the war against Abyssinia.²⁵⁸ Representatives of Abyssinia complained repeatedly to the Council of the League of Nations about alleged use of gas by the Italian army, and on 30 June 1936, the Emperor of Abyssinia himself protested against and denounced the use of gas by the Italian army before the League of Nations.²⁵⁹ The League condemned the use of gas and imposed sanctions against Italy.²⁶⁰

265. In 1966, during a debate in the First Committee of the UN General Assembly, Italy supported the principle that international law prohibits the

²⁵² Iraq, Statement before the UN Security Council, UN Doc. S/PV.2994, 17 June 1991, p. 6.

²⁵³ Ireland, Statement before the First Committee of the UN General Assembly, UN Doc. A/C.1/42/PV.26, 30 October 1987, p. 21.

²⁵⁴ Israel, Statement before the First Committee of the UN General Assembly, UN Doc. A/C.1/42/PV.16, 22 October 1987, p. 22.

²⁵⁵ Israel, Statement before the First Committee of the UN General Assembly, UN Doc. A/C.1/46/PV.19, 28 October 1991, p. 23.

²⁵⁶ Israel, Statement before the First Committee of the UN General Assembly, UN Doc. A/C.1/50/PV.8, 20 October 1995, p. 5.

²⁵⁷ Israel, Statement at the First Conference of States Parties to the CWC, The Hague, 6–23 May 1997.

²⁵⁸ SIPRI, *The Problem of Chemical and Biological Warfare*, Vol. I, *The Rise of CB Weapons*, Almqvist & Wiksell, Stockholm, 1971, pp. 142–146; Wil D. Verwey, *Riot Control Agents and Herbicides in War*, A. W. Sijthoff, Leyden, 1977, pp. 182–183.

²⁵⁹ League of Nations, *Official Journal*, Special Supplement No. 151, Records of the Sixteenth Assembly, Eighteenth Plenary Meeting, 30 June 1936, pp. 22–25.

²⁶⁰ SIPRI, *The Problem of Chemical and Biological Warfare*, Vol. IV, *CB Disarmament Negotiations, 1920–1970*, Almqvist & Wiksell, Stockholm, 1971, pp. 175–189.

use of chemical weapons as a result of the 1925 Geneva Gas Protocol, but expressed reservations about the resolution's bias against the West.²⁶¹

266. At the CDDH, Italy abstained in the vote on the Philippine amendment (see *infra*) stating that "it would not be useful because it dealt with means and methods of warfare which were already prohibited by the existing law".²⁶²

267. In 1987, during a debate in the UN Security Council, Italy called the prohibition of chemical weapons "a great and precious accomplishment of our civilization".²⁶³

268. In 1987, during a debate in the First Committee of the UN General Assembly, Italy stated that it was committed to a global ban on chemical weapons.²⁶⁴

269. According to a commentator, gas was allegedly used by Japan in the Sino-Japanese War (1937–1943), even though Japan has never admitted this.²⁶⁵ China protested several times to the Council of the League of Nations about these breaches of international law.²⁶⁶

270. In 1968, during a debate in the First Committee of the UN General Assembly, Japan argued in favour of prohibiting not only the use of chemical weapons, but also their production and stockpiling.²⁶⁷

271. In 1987, during a debate in the First Committee of the UN General Assembly, Japan stated that it was committed to a global ban on chemical weapons.²⁶⁸

272. In 1988, in a statement before the Fifteenth Special Session of the UN General Assembly, Japan stated that:

Chemical weapons, in particular, are weapons of mass destruction which kill and injure people with their potent toxicity. They are also extremely dangerous because they are easy to produce and use. It is profoundly regrettable that these heinous weapons have actually been used, for example, in the conflict between Iran and Iraq, despite the prohibition of their use in war under an international convention . . . In order to prevent totally the use of these weapons, it is essential that their stockpiling and production be prohibited and, indeed, that they be eliminated globally.²⁶⁹

²⁶¹ Italy, Statement before the First Committee of the UN General Assembly, UN Doc. A/C.1/SR.1457, 17 November 1966, p. 187.

²⁶² Italy, Statement at the CDDH, *Official Records*, Vol. VI, CDDH/SR.44, 30 May 1977, p. 285, § 30.

²⁶³ Italy, Statement before the UN Security Council, UN Doc. S/PV.2750, 20 July 1987, p. 31.

²⁶⁴ Italy, Statement before the First Committee of the UN General Assembly, UN Doc. A/C.1/42/PV.18, 23 October 1987, p. 8.

²⁶⁵ Wil D. Verwey, *Riot Control Agents and Herbicides in War*, A. W. Sijthoff, Leyden, 1977, pp. 183–184.

²⁶⁶ SIPRI, *The Problem of Chemical and Biological Warfare*, Vol. I, *The Rise of CB Weapons*, Almqvist & Wiksell, Stockholm, 1971, pp. 147–152; League of Nations, *Official Journal*, May–June 1938, 101st Session of the Council, Second Meeting, pp. 306–308; League of Nations, *Official Journal*, November 1938, 101st Session of the Council, Fourth Meeting, pp. 863–865.

²⁶⁷ Japan, Statement before the First Committee of the UN General Assembly, UN Doc. A/C.1/PV.1616, 22 November 1968, p. 8.

²⁶⁸ Japan, Statement before the First Committee of the UN General Assembly, UN Doc. A/C.1/42/PV.6, 15 October 1987, p. 6.

²⁶⁹ Japan, Statement before the Fifteenth Special Session of the UN General Assembly, UN Doc. A/S-15/PV.2, 1 June 1988, § 115.

273. In 1993, during a debate in the First Committee of the UN General Assembly, Japan stated that it “attached great importance to the prohibition of chemical weapons”.²⁷⁰

274. In its oral pleadings before the ICJ in the *Nuclear Weapons case* in 1995, Japan referred to the 1925 Geneva Gas Protocol when stating that “the use of weapons of mass destruction . . . is prohibited by international declarations and binding agreements. These principles serve the foundation for the concept of humane treatment.”²⁷¹

275. At the First Conference of States Parties to the CWC in 1997, Japan stated that “in order to effectively achieve the objectives of the Convention to eliminate chemical weapons, it is essential to ensure the universality of this Convention”. For this reason, Japan urged the urgent participation of as many countries as possible in the 1993 CWC. It further reconfirmed its good intentions by once more emphasising its commitment to global chemical disarmament.²⁷²

276. At the CDDH, Jordan supported the principle behind the Philippine amendment (see *infra*) but stated that “it would be more generally acceptable if it were amended to apply only to the first user of weapons prohibited by international conventions”.²⁷³

277. According to the Report on the Practice of Jordan, Jordan does not use, manufacture or stockpile chemical weapons and it does not plan to do so in the future.²⁷⁴

278. In 1980, the Ministry of Foreign Affairs of Kampuchea deplored the fact that “the Vietnamese army is increasingly resorting to toxic chemical products. In addition to the air-spreadings of these toxic chemical products, the Vietnamese army has conducted the systematic shellings of poison gas in every place.”²⁷⁵

279. In 1987, during a debate in the First Committee of the UN General Assembly, Democratic Kampuchea stated that it was committed to a global ban on chemical weapons.²⁷⁶ In 1991, it was reported that in Cambodia “the Phnom Penh government accused the guerillas of using chemical weapons for the first

²⁷⁰ Japan, Statement before the First Committee of the UN General Assembly, UN Doc. A/C.1/48/SR.4, 19 October 1993, p. 6.

²⁷¹ Japan, Oral pleadings before the ICJ, *Nuclear Weapons case*, Verbatim Record CR 95/27, 7 November 1995, p. 30.

²⁷² Japan, Statement at the First Conference of States Parties to the CWC, The Hague, 6–23 May 1997.

²⁷³ Jordan, Statement at the CDDH, *Official Records*, Vol. VI, CDDH/SR.44, 30 May 1977, p. 283, § 21.

²⁷⁴ Report on the Practice of Jordan, 1997, Chapter 3.4.

²⁷⁵ Kampuchea, Ministry of Foreign Affairs, Statement of 5 February 1980 on the intensification by Hanoi in using chemical weapons and committing other criminal activities to exterminate the Kampuchean people, Press Release of the Permanent Mission of Kampuchea to the United Nations in Geneva, No. 21/2/80/E, 21 February 1980.

²⁷⁶ Democratic Kampuchea, Statement before the First Committee of the UN General Assembly, UN Doc. A/C.1/42/PV.13, 20 October 1987, p. 33.

time in the 12 year-old civil war, by referring to artillery shells containing 'toxic substances' being fired".²⁷⁷

280. In 1966, during a debate in the First Committee of the UN General Assembly, Kenya supported the principle that international law prohibits the use of chemical weapons as a result of the 1925 Geneva Gas Protocol.²⁷⁸

281. In 1987, during a debate in the First Committee of the UN General Assembly, Kenya maintained that "all States should co-operate in efforts to prevent the use of chemical weapons, in accordance with the principles and objectives of the Geneva Protocol of 1925" until a general convention prohibiting chemical weapons was enacted.²⁷⁹

282. At the First Conference of States Parties to the CWC in 1997, Kenya made statements in support of the object and purpose of the 1993 CWC.²⁸⁰

283. In a statement in January 1989, the Ministry of Foreign Affairs of North Korea stated that:

The government of the Republic in the future, too, as in the past, will not test, produce, store and introduce from outside nuclear and chemical weapons and will never permit the passage of foreign . . . chemical weapons through our territory and territorial waters and air.²⁸¹

284. In 1995, during a debate in the First Committee of the UN General Assembly, North Korea stated that it was opposed "in principle" to chemical weapons.²⁸²

285. In 1989, in reply to a note verbale of the UN Secretary-General on the subject of chemical weapons, South Korea declared that it did not possess chemical weapons.²⁸³

286. In 1994, during a debate in the First Committee of the UN General Assembly, South Korea stated that it was dedicated to the elimination of chemical weapons.²⁸⁴

287. At the First Conference of States Parties to the CWC in 1997, South Korea emphasised the importance of the 1993 CWC and stated its commitment and

²⁷⁷ *Asian Yearbook of International Law*, Vol. 1, 1991, p. 353.

²⁷⁸ Kenya, Statement before the First Committee of the UN General Assembly, UN Doc. A/C.1/SR.1456, 16 November 1966, p. 179.

²⁷⁹ Kenya, Statement before the First Committee of the UN General Assembly, UN Doc. A/C.1/42/PV.27, 30 October 1987, p. 6.

²⁸⁰ Kenya, Statement at the First Conference of States Parties to the CWC, The Hague, 6–23 May 1997.

²⁸¹ Gordon M. Burck and Charles C. Flowerree, *International Handbook on Chemical Weapons Proliferation*, Greenwood Press, New York, 1991, p. 397.

²⁸² North Korea, Statement before the First Committee of the UN General Assembly, UN Doc. A/C.1/50/PV.7, 19 October 1995, p. 16.

²⁸³ South Korea, Reply to a note verbale of the UN Secretary-General, referred to in Report of the Secretary-General on respect for the right to life: elimination of chemical weapons, prepared in accordance with UN Sub-Commission on Human Rights Resolution 1988/27, UN Doc. E/CN.4/Sub.2/1989/4, 17 August 1989, § 98.

²⁸⁴ South Korea, Statement before the First Committee of the UN General Assembly, UN Doc. A/C.1/49/PV.6, 19 October 1994, p. 12.

its determination to contribute actively to the realisation of the Convention's aims.²⁸⁵

288. According to the Report on the Practice of South Korea, South Korea is of the view that the prohibition on the use of chemical weapons is customary.²⁸⁶

289. In an article published in a military review, a member of the Kuwaiti armed forces stated that, during war, belligerents must:

respect restrictions and limits provided for in international conventions, such as restrictions of the use of some weapons, and prohibition of using others, e.g. chemical . . . weapons . . . This is in application of well-established principles in war, such as considerations of military honour and humanitarian considerations.²⁸⁷

290. At the First Conference of States Parties to the CWC in 1997, Kuwait expressed support for the goals of the 1993 CWC and stated its full commitment to the provisions in the Convention and promised full cooperation with the OPCW.²⁸⁸

291. At the Conference of States Parties to the 1925 Geneva Protocol and Other Interested States in 1989, Laos stated that it would accede to the 1925 Geneva Gas Protocol and noted that "Laos does not produce chemical weapons and does not intend to".²⁸⁹

292. At the First Conference of States Parties to the CWC in 1997, Laos emphasised the importance of the 1993 CWC and stated its commitment and its determination to contribute actively to the realisation of the Convention's aims.²⁹⁰

293. In 1977, during a debate in the UN General Assembly, Lebanon stated that "the Lebanese spirit has always stood against such [chemical] weapons".²⁹¹

294. The Report on the Practice of Lebanon states that Lebanon's refusal to sign the 1993 CWC does not imply that it opposes a prohibition on chemical weapons.²⁹²

295. In its written statement submitted to the ICJ in the *Nuclear Weapons case* in 1995, Lesotho stated that "any use of nuclear weapons, even in self-defense, would violate international humanitarian law, including the Hague and Geneva Conventions, which prohibit as practices of war . . . the use of poisonous gases, liquids and analogous substances".²⁹³

²⁸⁵ South Korea, Statement at the First Conference of States Parties to the CWC, The Hague, 6–23 May 1997.

²⁸⁶ Report on the Practice of South Korea, 1997, Chapter 3.4.

²⁸⁷ Fellah Awad Al-Anzi, "The Law of War", *Homat Al-Watan*, No. 168, p. 57.

²⁸⁸ Kuwait, Statement at the First Conference of States Parties to the CWC, The Hague, 6–23 May 1997.

²⁸⁹ Gordon M. Burck and Charles C. Flowerree, *International Handbook on Chemical Weapons Proliferation*, Greenwood Press, New York, 1991, p. 430.

²⁹⁰ Laos, Statement at the First Conference of States Parties to the CWC, The Hague, 6–23 May 1997.

²⁹¹ Lebanon, Statement before the UN General Assembly, UN Doc. A/51/PV.100, 22 May 1997, p. 3.

²⁹² Report on the Practice of Lebanon, 1998, Chapter 3.4, referring to Speech by advisor to Lebanon's delegation to the UN, 22 May 1997.

²⁹³ Lesotho, Written statement submitted to the ICJ, *Nuclear Weapons case*, 20 June 1995, p. 2.

296. At the First Conference of States Parties to the CWC in 1997, Lesotho made statements in support of the object and purpose of the 1993 CWC.²⁹⁴

297. The day before his address to the Conference of State Parties to the 1925 Geneva Protocol in 1989, the Libyan Minister of Foreign Affairs told a French interviewer that “despite the fact that the production of chemical weapons is not banned by the Geneva agreement, Libya has decided of its own free will that it will not produce, and furthermore does not intend to produce, chemical weapons”.²⁹⁵

298. In 1991, during a debate in the First Committee of the UN General Assembly, Libya expressed its belief that there was a “need to protect the human race from chemical warfare”.²⁹⁶

299. In 1992, during a debate in the First Committee of the UN General Assembly dealing mainly with the 1993 CWC, the negotiation of which had been concluded by the Conference on Disarmament, Libya supported an Egyptian initiative for a Middle Eastern zone free of weapons of mass destruction.²⁹⁷

300. At the First Conference of States Parties to the CWC in 1997, Liechtenstein reconfirmed its good intentions by once more emphasising its commitment to global chemical disarmament.²⁹⁸

301. In 1989, Luxembourg co-sponsored a draft resolution in the UN Commission on Human Rights which expressed “grave concern about reports of killing of unarmed Kurdish civilians, in particular by military attacks during 1988 using, inter alia, chemical weapons and causing mass exodus to neighbouring countries”.²⁹⁹

302. At the First Conference of States Parties to the CWC in 1997, Luxembourg reconfirmed its good intentions by once more emphasising its commitment to global chemical disarmament.³⁰⁰

303. In 1995, during a debate in the First Committee of the UN General Assembly, Malaysia supported a total ban on chemical weapons.³⁰¹

304. In its written statement submitted to the ICJ in the *Nuclear Weapons (WHO) case* in 1995, Malaysia stated that “chemical weapons have been banned”.³⁰² In a part entitled “Principle of Non-Toxicity”, it also referred to the

²⁹⁴ Lesotho, Statement at the First Conference of States Parties to the CWC, 8 May 1997.

²⁹⁵ Gordon M. Burck and Charles C. Flowerree, *International Handbook on Chemical Weapons Proliferation*, Greenwood Press, New York, 1991, p. 268.

²⁹⁶ Libya, Statement before the First Committee of the UN General Assembly, UN Doc. A/C.1/46/PV.22, 29 October 1991, p. 34.

²⁹⁷ Libya, Statement before the First Committee of the UN General Assembly, UN Doc. A/C.1/47/PV.10, 20 October 1992, pp. 9–10.

²⁹⁸ Liechtenstein, Statement at the First Conference of States Parties to the CWC, The Hague, 6–23 May 1997.

²⁹⁹ Luxembourg, Draft resolution on the situation of human rights in Iraq, UN Doc. E/CN.4/1989/L.82, 3 March 1989, § 2.

³⁰⁰ Luxembourg, Statement at the First Conference of States Parties to the CWC, The Hague, 6–23 May 1997.

³⁰¹ Malaysia, Statement before the First Committee of the UN General Assembly, UN Doc. A/C.1/50/PV.3, 16 October 1995, p. 24.

³⁰² Malaysia, Written statement submitted to the ICJ, *Nuclear Weapons (WHO) case*, 19 June 1995, p. 2.

1925 Geneva Gas Protocol and the 1956 New Delhi Draft Rules.³⁰³ Malaysia made the same reference in its oral pleadings in the *Nuclear Weapons case* in 1995.³⁰⁴

305. At the First Conference of States Parties to the CWC in 1997, Malaysia welcomed the entry into force of the 1993 CWC and expressed the hope that it would lead to “a world free of the scourge of chemical weapons and global and regional security for all”.³⁰⁵

306. In 1966, during a debate in the First Committee of the UN General Assembly, Mali supported the principle that international law prohibits the use of chemical weapons as a result of the 1925 Geneva Gas Protocol.³⁰⁶

307. In 1989, in reply to a note verbale of the UN Secretary-General on the subject of chemical weapons, Malta declared that it did not possess chemical weapons.³⁰⁷

308. At the First Conference of States Parties to the CWC in 1997, Malta referred to the enactment of a bill that unanimously authorised the ratification of the 1993 CWC and stated that it was “a tangible attestation of Malta’s unwavering commitment to ensure that our society lives in a tranquil and safe environment free from the menace of chemical weapons”.³⁰⁸

309. At the First Conference of States Parties to the CWC in 1997, Mauritius made statements in support of the object and purpose of the 1993 CWC.³⁰⁹

310. In 1989, in reply to a note verbale of the UN Secretary-General on the subject of chemical weapons, Mexico declared that it did not possess chemical weapons.³¹⁰

311. In 1992, during a debate in the First Committee of the UN General Assembly dealing mainly with the 1993 CWC, the negotiation of which had been concluded by the Conference on Disarmament, Mexico stated that it was very important that the international community was at the point of totally

³⁰³ Malaysia, Written statement submitted to the ICJ, *Nuclear Weapons (WHO) case*, 19 June 1995, pp. 23–24.

³⁰⁴ Malaysia, Oral pleadings before the ICJ, *Nuclear Weapons case*, Verbatim Record CR 95/27, 7 November 1995, p. 57.

³⁰⁵ Malaysia, Statement at the First Conference of States Parties to the CWC, The Hague, 6–23 May 1997.

³⁰⁶ Mali, Statement before the First Committee of the UN General Assembly, UN Doc. A/C.1/SR.1456, 16 November 1966, p. 179.

³⁰⁷ Malta, Reply to a note verbale of the UN Secretary-General, referred to in Report of the Secretary-General on respect for the right to life: elimination of chemical weapons, prepared in accordance with UN Sub-Commission on Human Rights Res. 1988/27, UN Doc. E/CN.4/Sub.2/1989/4, 17 August 1989, § 98.

³⁰⁸ Malta, Statement at the First Conference of States Parties to the CWC, The Hague, 6–23 May 1997.

³⁰⁹ Mauritius, Statement at the First Conference of States Parties to the CWC, The Hague, 6–23 May 1997.

³¹⁰ Mexico, Reply to a note verbale of the UN Secretary-General, referred to in Report of the Secretary-General on respect for the right to life: elimination of chemical weapons, prepared in accordance with UN Sub-Commission on Human Rights Resolution 1988/27, UN Doc. E/CN.4/Sub.2/1989/4, 17 August 1989, § 98.

banning a category of weapons which, despite the restrictions on their use, had been used in several conflicts by States party to the 1925 Geneva Gas Protocol. For Mexico, this proved that those countries that possessed these kinds of weapons were really willing to rid the world of these weapons by signing this new international treaty.³¹¹

312. At the First Conference of States Parties to the CWC in 1997, Mexico stated that it was in favour of global eradication of chemical weapons and stressed the importance of universal adherence to the 1993 CWC.³¹²

313. In 1968, during a debate in the First Committee of the UN General Assembly, Mongolia deplored the use of chemical weapons in South Africa.³¹³

314. In 1987, during a debate in the First Committee of the UN General Assembly, Mongolia stated that it was committed to a global ban on chemical weapons.³¹⁴

315. At the First Conference of States Parties to the CWC in 1997, Morocco made statements in support of the object and purpose of the 1993 CWC.³¹⁵

316. In 1987, during a debate in the First Committee of the UN General Assembly, Nepal stated that it was committed to a global ban on chemical weapons.³¹⁶

317. In 1969, during the debate in the Third Committee of the UN General Assembly on Resolution 2597 (XXIV) reaffirming Resolution 2444 (XXIII), the Netherlands stated that it was "essential to update and broaden . . . the Geneva Protocol and to extend [its] application to cover armed conflicts which are not international in character".³¹⁷

318. In 1989, in reply to a note verbale of the UN Secretary-General on the subject of chemical weapons, the Netherlands declared that it did not possess chemical weapons.³¹⁸

319. In 1989, the Netherlands co-sponsored a draft resolution in the UN Commission on Human Rights which expressed "grave concern about reports of killing of unarmed Kurdish civilians, in particular by military attacks during

³¹¹ Mexico, Statement before the First Committee of the UN General Assembly, UN Doc. A/C.1/47/PV.3, 12 October 1992, p. 16.

³¹² Mexico, Statement at the First Conference of States Parties to the CWC, The Hague, 6–23 May 1997.

³¹³ Mongolia, Statement before the First Committee of the UN General Assembly, UN Doc. A/C.1/PV.1612, 19 November 1968, p. 3.

³¹⁴ Mongolia, Statement before the First Committee of the UN General Assembly, UN Doc. A/C.1/42/PV.11, 19 October 1987, p. 47.

³¹⁵ Morocco, Statement at the First Conference of States Parties to the CWC, The Hague, 6–23 May 1997.

³¹⁶ Nepal, Statement before the First Committee of the UN General Assembly, UN Doc. A/C.1/42/PV.9, 16 October 1987, p. 6.

³¹⁷ Netherlands, Statement before the Third Committee of the UN General Assembly, UN Doc. A/C.3/SR.1733, 11 December 1969, p. 1.

³¹⁸ Netherlands, Reply to a note verbale of the UN Secretary-General, referred to in Report of the Secretary-General on respect for the right to life: elimination of chemical weapons, prepared in accordance with UN Sub-Commission on Human Rights Resolution 1988/27, UN Doc. E/CN.4/Sub.2/1989/4, 17 August 1989, § 98.

1988 using, inter alia, chemical weapons and causing mass exodus to neighbouring countries".³¹⁹

320. In an explanatory memorandum submitted to the Dutch parliament in 1993 in the context of the ratification of the CWC, the government of the Netherlands stated that "the absolute prohibition of the use of chemical weapons (Article 1 § b) should fall within the laws and customs of war, as mentioned in article 8 of the Criminal Law in Wartime Act". It went on to say that "thus, the use of chemical weapons during armed conflict is at all times a violation of article 8, and prosecutions and adjudication of such a violation will therefore take place in accordance with its provisions".³²⁰

321. In 1980, during a debate in the UN General Assembly, New Zealand stated with respect to Resolution 35/144, which it had sponsored, that:

Of course, . . . no territorial limitations [for the investigations to be carried out by the UN Secretary-General into the alleged use of chemical weapons] are proposed. The Secretary-General is simply asked to look, with the assistance of qualified medical and technical experts, into all complaints of the alleged use of chemical weapons in military operations and to examine the evidence brought to his attention with a view to ascertaining the facts.³²¹

322. In 1987, during a debate in the First Committee of the UN General Assembly, New Zealand condemned the use of chemical weapons against civilians.³²²

323. In 1989, in reply to a note verbale of the UN Secretary-General on the subject of chemical weapons, New Zealand declared that it did not possess chemical weapons.³²³

324. In its written statement submitted to the ICJ in the *Nuclear Weapons case* in 1995, New Zealand stated, with reference to customary IHL, that "it is prohibited to use asphyxiating, poisonous or other gases and all analogous materials".³²⁴

325. At the First Conference of States Parties to the CWC in 1997, New Zealand emphasised the importance of the 1993 CWC and stated its commitment and its determination to contribute actively to the realisation of the Convention's aims.³²⁵

³¹⁹ Netherlands, Draft resolution on the situation of human rights in Iraq, UN Doc. E/CN.4/1989/L.82, 3 March 1989, § 2.

³²⁰ Netherlands, Lower House of Parliament, Explanatory memorandum for the ratification of the CWC, 13 January 1993, 1994–1995 Session, Doc. 23 910 (R 1515) No. 3, pp. 34 and 57.

³²¹ New Zealand, Statement before the First Committee of the UN General Assembly, UN Doc. A/C.1/35/PV.45, 26 November 1980, p. 21.

³²² New Zealand, Statement before the First Committee of the UN General Assembly, UN Doc. A/C.1/42/PV.14, 21 October 1987, p. 34.

³²³ New Zealand, Reply to a note verbale of the UN Secretary-General, referred to in Report of the Secretary-General on respect for the right to life: elimination of chemical weapons, prepared in accordance with UN Sub-Commission on Human Rights Resolution 1988/27, UN Doc. E/CN.4/Sub.2/1989/4, 17 August 1989, § 98.

³²⁴ Ecuador, Written statement submitted to the ICJ, *Nuclear Weapons case*, 20 June 1995, § 72.

³²⁵ New Zealand, Statement at the First Conference of States Parties to the CWC, The Hague, 6–23 May 1997.

326. In 1991, a Nigerian national newspaper reported that the Nigerian Ministry of Defence had organised a seminar in the 1990s “with the aim of sensitising the developing world to the adverse effects of a total ban on the production, storage and use of chemical weapons as advocated by the developed nations”.³²⁶

327. In 1995, during a debate in the First Committee of the UN General Assembly, Nigeria stated that it was committed to the total prohibition of chemical weapons.³²⁷

328. In 1989, Norway co-sponsored a draft resolution in the UN Commission on Human Rights which expressed “grave concern about reports of killing of unarmed Kurdish civilians, in particular by military attacks during 1988 using, inter alia, chemical weapons and causing mass exodus to neighbouring countries”.³²⁸

329. At the First Conference of States Parties to the CWC in 1997, Norway reconfirmed its good intentions by once more emphasising its commitment to global chemical disarmament.³²⁹

330. At the First Conference of States Parties to the CWC in 1997, Oman expressed support for the goals of the 1993 CWC and stated its full commitment to the provisions in the Convention and promised full cooperation with the OPCW.³³⁰

331. At the 1986 Session of the Conference on Disarmament, Pakistan declared that it “neither possesses chemical weapons nor desires to acquire them”.³³¹

332. In 1987, during a debate in the First Committee of the UN General Assembly, Pakistan stated that it was committed to a global ban on chemical weapons.³³²

333. Pakistan accused India of using chemical weapons in the Jammu and Kashmir region in 1999.³³³ The allegation was vigorously denied by India, which called it “totally absurd”.³³⁴

³²⁶ “We Need Chemical Weapons”, *National Concord*, Lagos, 6 September 1991.

³²⁷ Nigeria, Statement before the First Committee of the UN General Assembly, UN Doc. A/C.1/50/PV.9, 25 October 1995, p. 18.

³²⁸ Norway, Draft resolution on the situation of human rights in Iraq, UN Doc. E/CN.4/1989/L.82, 3 March 1989, § 2.

³²⁹ Norway, Statement at the First Conference of States Parties to the CWC, The Hague, 6–23 May 1997.

³³⁰ Oman, Statement at the First Conference of States Parties to the CWC, The Hague, 6–23 May 1997.

³³¹ Pakistan, Statement before the Conference on Disarmament, UN Doc. CD/PV.339, 13 February 1986, p. 9.

³³² Pakistan, Statement before the First Committee of the UN General Assembly, UN Doc. A/C.1/42/PV.26, 30 October 1987, p. 48.

³³³ *Dawn*, “India using chemical weapons: PTV”, Karachi, 13 June 1999; Scott McDonald from Islamabad for Reuter, “Pakistan says India using ‘chemical’ shells”, 13 June 1999; Reuter from Islamabad, “Chemical weapons charge”, as in *International Herald Tribune*, 14 June 1999, p. 4.

³³⁴ “India denies Pakistan charge chemical weapons used in Kashmir”, AFP, 13 June 1999; “Kashmiri groups condemn alleged use of chemical weapons”, AFP, 14 June 1999; “Pakistan investigates India’s reported use of chemical weapons”, AFP, 14 June 1999; “Indian army gains in Kashmir”, Doordarshan television, New Delhi, 14 June 1999, as in BBC-SWB, 14 June 1999;

334. In 1989, in reply to a note verbale of the UN Secretary-General on the subject of chemical weapons, Panama declared that it did not possess chemical weapons.³³⁵

335. In 1977, during a debate in the First Committee of the UN General Assembly, Peru supported a complete ban on chemical weapons.³³⁶

336. In 1989, in reply to a note verbale of the UN Secretary-General on the subject of chemical weapons, Peru declared that it did not possess chemical weapons.³³⁷

337. In 1991, during a debate in the First Committee of the UN General Assembly, Peru stated that it had invited the countries of the Rio Group to reach an agreement on the prohibition of chemical weapons.³³⁸

338. In an official communiqué in 1995, Peru denied having used toxic chemical gases in its conflict with Ecuador.³³⁹

339. At the CDDH, the Philippines proposed an amendment to include “the use of weapons prohibited by international Convention, namely: . . . asphyxiating, poisonous or other gases, and all analogous liquids, materials or devices” in the list of grave breaches in Article 74 of draft AP I (now Article 85).³⁴⁰ The proposal was rejected because it failed to obtain the necessary two-thirds majority (41 votes in favour, 25 against and 25 abstentions).³⁴¹

340. In 1991, during a debate in the First Committee of the UN General Assembly, the Philippines stated that it neither possessed nor produced chemical weapons.³⁴²

“Indian army recovers gas masks from Pakistani soldiers”, *Times of India*, Mumbai, Internet version, 15 June 1999; “US rejects Pak claim on chemical arms”, *The Hindu*, New Delhi, 17 June 1999.

³³⁵ Panama, Reply to a note verbale of the UN Secretary-General, referred to in Report of the Secretary-General on respect for the right to life: elimination of chemical weapons, prepared in accordance with UN Sub-Commission on Human Rights Resolution 1988/27, UN Doc. E/CN.4/Sub.2/1989/4, 17 August 1989, § 98.

³³⁶ Peru, Statement before the First Committee of the UN General Assembly, UN Doc. A/C.1/32/PV.16, 3 October 1977, p. 22.

³³⁷ Peru, Reply to a note verbale of the UN Secretary-General, referred to in Report of the Secretary-General on respect for the right to life: elimination of chemical weapons, prepared in accordance with UN Sub-Commission on Human Rights Resolution 1988/27, UN Doc. E/CN.4/Sub.2/1989/4, 17 August 1989, § 98.

³³⁸ Peru, Statement before the First Committee of the UN General Assembly, UN Doc. A/C.1/46/PV.8, 18 October 1991, p. 48.

³³⁹ Peru, Joint Command of the Armed Forces, Official communiqué No. 011 CCFFAA, Lima, 24 February 1995.

³⁴⁰ Philippines, Proposal of amendment to Article 74 of draft AP I submitted to the CDDH, *Official Records*, Vol. III, CDDH/418, 26 May 1977, p. 322.

³⁴¹ CDDH, *Official Records*, Vol. VI, CDDH/SR.44, 30 May 1977, pp. 288–289. (Against: Australia, Belarus, Belgium, Bulgaria, Canada, Czechoslovakia, Denmark, Finland, France, FRG, GDR, Hungary, India, Luxembourg, Monaco, Mongolia, Netherlands, New Zealand, Poland, Portugal, Ukraine, USSR, UK, US and Zaire. Abstaining: Brazil, Cameroon, Cyprus, Cuba, Greece, Guatemala, Indonesia, Iran, Ireland, Israel, Italy, Japan, South Korea, Mauritania, Morocco, Nigeria, Norway, Romania, Spain, Swaziland, Sweden, Thailand, Turkey, Uganda and Vietnam.)

³⁴² Philippines, Statement before the First Committee of the UN General Assembly, UN Doc. A/C.1/46/PV.15, 24 October 1991, p. 24.

341. At the First Conference of States Parties to the CWC in 1997, Philippines emphasised the importance of the 1993 CWC and stated its commitment and its determination to contribute actively to the realisation of the Convention's aims.³⁴³

342. The Report on the Practice of the Philippines states with reference to the prohibition of chemical weapons that "the Philippines is against the use, production, and stockpiling of . . . chemical weapons. In fact, it adheres to peaceful, non-military approaches to conflict and renounces the use of . . . chemical weapons."³⁴⁴

343. In 1966, during a debate in the First Committee of the UN General Assembly, Poland supported Hungary's view that the 1925 Geneva Gas Protocol had developed into customary international law and that the use of chemical weapons constituted an international crime.³⁴⁵

344. In 1989, Portugal co-sponsored a draft resolution in the UN Commission on Human Rights which expressed "grave concern about reports of killing of unarmed Kurdish civilians, in particular by military attacks during 1988 using, inter alia, chemical weapons and causing mass exodus to neighbouring countries".³⁴⁶

345. In 1989, in reply to a note verbale of the UN Secretary-General on the subject of chemical weapons, Qatar declared that it did not possess chemical weapons.³⁴⁷

346. In 1992, during a debate in the First Committee of the UN General Assembly dealing mainly with the 1993 CWC, the negotiation of which had been concluded by the Conference on Disarmament, Qatar stated that the Arab States were especially concerned with the elimination of chemical weapons.³⁴⁸

347. In 1966, during a debate in the First Committee of the UN General Assembly, Romania supported Hungary's view that the 1925 Geneva Gas Protocol had developed into customary international law and that the use of chemical weapons constituted an international crime.³⁴⁹

³⁴³ Philippines, Statement at the First Conference of States Parties to the CWC, The Hague, 6–23 May 1997.

³⁴⁴ Report on the Practice of Philippines, 1997, Answers to additional questions on Chapter 3, referring to Statement by the Department of Foreign Affairs, Office of United Nations and International Organizations (UNIO), Manila, 6 March 1998.

³⁴⁵ Poland, Statement before the First Committee of the UN General Assembly, UN Doc. A/C.1/SR.1455, 16 November 1966, p. 174.

³⁴⁶ Portugal, Draft resolution on the situation of human rights in Iraq, UN Doc. E/CN.4/1989/L.82, 3 March 1989, § 2.

³⁴⁷ Qatar, Reply to a note verbale of the UN Secretary-General, referred to in Report of the Secretary-General on respect for the right to life: elimination of chemical weapons, prepared in accordance with UN Sub-Commission on Human Rights Resolution 1988/27, UN Doc. E/CN.4/Sub.2/1989/4, 17 August 1989, § 98.

³⁴⁸ Qatar, Statement before the First Committee of the UN General Assembly, UN Doc. A/C.1/47/PV.8, 16 October 1992, p. 13.

³⁴⁹ Romania, Statement before the First Committee of the UN General Assembly, UN Doc. A/C.1/SR.1453, 15 November 1966, p. 161.

348. In 1991, during a debate in the First Committee of the UN General Assembly, Romania stated that it neither possessed nor produced chemical weapons.³⁵⁰

349. At the First Conference of States Parties to the CWC in 1997, Romania reconfirmed its good intentions by once more emphasising its commitment to global chemical disarmament.³⁵¹

350. Use of chemical weapons by Russia was alleged during the two conflicts in Chechnya in 1994–1996³⁵² and 1999.³⁵³ These allegations were, however, categorically denied by Russian officials.³⁵⁴

351. At the First Conference of States Parties to the CWC in 1997, Russia stated that, although it had not yet ratified the 1993 CWC, it “intends to refrain from any action that would deprive the Convention of its object and purpose”. It further stated that:

After we signed the Convention we have been honouring and will continue to honour the commitments regarding the non-development and non-production of

³⁵⁰ Romania, Statement before the First Committee of the UN General Assembly, UN Doc. A/C.1/46/PV.8, 18 October 1991, p. 66.

³⁵¹ Romania, Statement at the First Conference of States Parties to the CWC, The Hague, 6–23 May 1997.

³⁵² ITAR-TASS from Moscow, 14 December 1994, as translated from the Russian in FBIS-SOV-94-241, 15 December 1994, p. 38; Oleh Kruk for UNIAN (Kiev), 21 December 1994, as translated from the Ukrainian in FBIS-SOV-94-246, 22 December 1994, pp. 25–26; Ekho Moskvyy radio (Moscow), 22 July 1996, as translated from the Russian in BBC-SWB, Part 1, EE/D2672/B, 24 July 1996.

³⁵³ “Chechen envoy says Russia used chemical arms”, Reuter, Istanbul, 9 December 1999; Representative Office of the Chechen Republic of Ichkeria in Azerbaijan, Press Release, “Chechen office in Azerbaijan reports Russia’s use of chemical weapons”, Baku, 8 December 1999, as in BBC-SWB, 8 December 1999; [For example: Chechens charge Russian troops used chemical arms in Grozny, AFP, Geneva, 8 December 1999; Ian Bruce, “Illegal chemical weapon onslaught to flatten city”, *Herald*, Glasgow, 8 December 1999, p. 13; Opening statement by the Director-General to the Eighteenth Session of the Executive Council, 15 February 2000, via OPCW website as of 22 February 2000; Oleg Stulov, “Chemical spill in Chechnya: was it Maskhadov who spilled something extremely toxic in Chechnya?”, *Kommersant-daily*, Moscow, 11 December 1999, p. 3; “Pro-Chechen web site reports chemical attack on capital”, *Kavkaz-Tsentr* website, 11 December 1999, as translated from the Russian in BBC-SWB, 11 December 1999; “Chechen web site reports Russians preparing to use chemical weapons”, *Kavkaz-Tsentr* website, 23 December 1999, as translated from the Russian in BBC-SWB, 23 December 1999; “Pro-Chechen web site says Russians sprayed gas over Chechen positions”, *Kavkaz-Tsentr* website, 30 December 1999, as translated from the Russian in BBC-SWB, 31 December 1999; “Pro-Chechen web site reports Russians using napalm, chemical weapons”, *Kavkaz-Tsentr* website, 31 December 1999, as translated from the Russian in BBC-SWB, 31 December 1999; “Pro-Chechen web site says about 180 Russians killed in capital”, *Kavkaz-Tsentr* website, 8 January 2000, as translated from the Russian in BBC-SWB, 8 January 2000; “Chechens report fierce fighting for capital, Russians using chemical weapons”, *Kavkaz-Tsentr* website, 18 January 2000, as translated from the Russian in BBC-SWB, 18 January 2000.

³⁵⁴ ITAR-TASS from Moscow, 15 December 1994, as in FBIS-SOV-94-241, 15 December 1994, pp. 40–41; Anatoliy Yurkin from Moscow for ITAR-TASS world service (Moscow), 23 July 1996, as translated from the Russian in BBC-SWB, Part 1, EE/D2672/B, 24 July 1996; “Rebels claim victory over Russians in southwestern village of Bamut”, Radio Russia, Moscow, 24 July 1996, as reported in BBC-SWB, 25 July 1996; “Russian Defence Ministry denies using chemical weapons in Chechnya”, ITAR-TASS, Moscow, 9 December 1999, as in BBC-SWB, 9 December 1999; “Claims that Russia uses chemical weapons in Chechnya lies”, ITAR-TASS, Moscow, 10 December 1999; Russia, Statement of the official representative of the Foreign Ministry of the Russian Federation, 10 December 1999, *Diplomaticheskii vestnik*, No. 1, January 2000.

chemical weapons; their non-transfer, directly or indirectly, to anyone; the non-use of chemical weapons; the renunciation of engaging in any military preparations to use them, of providing assistance, encouraging or inducing in any way, anyone to engage in any activity prohibited by the convention.³⁵⁵

352. According to the Report on the Practice of Rwanda, there is no obvious evidence of a Rwandan *opinio juris* on the issue of chemical weapons. However, it states that, in practice, these types of weapons are not employed in Rwanda.³⁵⁶

353. In 1966, during a debate in the First Committee of the UN General Assembly, Saudi Arabia “whole-heartedly supported [a] Hungarian draft resolution” according to which the UN General Assembly would declare that “the use of chemical . . . weapons for the purpose of destroying human beings and the means of their existence constituted an international crime”.³⁵⁷

354. In 1968, during a debate in the First Committee of the UN General Assembly, Saudi Arabia advocated a total prohibition on the use and production of chemical weapons.³⁵⁸

355. In 1969, during a debate in the First Committee of the UN General Assembly on the question of chemical and bacteriological (biological) weapons and on what was to become Resolution 2603 (XXIV), the representative of Saudi Arabia stated that:

107. . . . Stockpiles of chemical weapons [should] be destroyed by all who have them in their arsenals. I would go further: they should not even be manufactured, let alone stockpiled . . .

108. The [1925 Geneva Gas Protocol] is unequivocal in considering the use of all poison gases and toxic chemical agents to be prohibited . . .

...

110. . . . I hope that in the future the United Nations will consider the use of any gas or germ as a criminal act.³⁵⁹

356. In 1995, during a debate in the First Committee of the UN General Assembly, Saudi Arabia stated that it supported “all treaties and conventions that aim at eliminating all types of weapons of mass destruction, including chemical weapons”.³⁶⁰

357. At the First Conference of States Parties to the CWC in 1997, Saudi Arabia stated its commitment to the goals and provisions of the 1993 CWC, but also said it understood why some of the Arab States had not signed or ratified

³⁵⁵ Russia, Statement at the First Conference of States Parties to the CWC, The Hague, 6–23 May 1997.

³⁵⁶ Report on the Practice of Rwanda, 1997, Chapter 3.4.

³⁵⁷ Saudi Arabia, Statement before the First Committee of the UN General Assembly, UN Doc. A/C.1/SR.1451, 11 November 1966, § 38.

³⁵⁸ Saudi Arabia, Statement before the First Committee of the UN General Assembly, UN Doc. A/C.1/PV.1608, 14 November 1968, p. 7.

³⁵⁹ Saudi Arabia, Statement before the First Committee of the UN General Assembly, UN Doc. A/C.1/PV.1717, 10 December 1969, §§ 107–108 and 110.

³⁶⁰ Saudi Arabia, Statement before the First Committee of the UN General Assembly, UN Doc. A/C.1/50/PV.9, 25 October 1995, p. 12.

the Convention on the grounds that Israel refused to get rid of its nuclear weapons.³⁶¹

358. At the Fifth Conference of States Parties to the CWC in 2000, Slovenia stated that:

In 1999 Slovenia adopted the Penal Code which regulates punishment for offences connected with violations of the Convention on Chemical Weapons and the Law on Chemical Weapons, which stipulates the obligations, interdictions and restrictions regarding chemical weapons in line with the Convention and lays down the basis for adoption of regulations by which this matter will be finally dealt on a legal basis in Slovenia. To Slovenia, as a country which has never had chemical weapons, the Convention on Chemical Weapons is of great importance.³⁶²

359. In its written statement submitted to the ICJ in the *Nuclear Weapons case* in 1995, the Solomon Islands stated that “international law prohibits the use of weapons which: – are chemical”.³⁶³

360. At the First Conference of States Parties to the CWC in 1997, South Africa emphasised the importance of the 1993 CWC and stated its commitment to creating a world free of chemical weapons. It reconfirmed its good intentions by once more emphasising its commitment to global chemical disarmament.³⁶⁴

361. According to the Report on the Practice of South Africa, South Africa considers chemical weapons to be among “certain weapons . . . expressly prohibited by international agreement, treaty or custom”.³⁶⁵

362. In 1975, during discussions in the Ad Hoc Committee on Conventional Weapons established by the CDDH, Sri Lanka stated that it “had consistently stood for total and complete disarmament and for a ban on all weapons of mass destruction, including . . . chemical weapons”.³⁶⁶

363. In 1977, during a debate in the First Committee of the UN General Assembly, Sri Lanka supported a complete ban on chemical weapons.³⁶⁷

364. At the First Conference of States Parties to the CWC in 1997, Sri Lanka emphasised the importance of the 1993 CWC and stated its commitment and its determination to contribute actively to the realisation of the Convention’s aims.³⁶⁸

³⁶¹ Saudi Arabia, Statement at the First Conference of States Parties to the CWC, The Hague, 6–23 May 1997.

³⁶² Slovenia, Statement at the Fifth Conference of States Parties to the CWC, The Hague, May 2000.

³⁶³ Solomon Islands, Written statement submitted to the ICJ, *Nuclear Weapons case*, 19 June 1995, p. 62, § 3.77.

³⁶⁴ South Africa, Statement at the First Conference of States Parties to the CWC, The Hague, 6–23 May 1997.

³⁶⁵ Report on the Practice of South Africa, 1997, Chapter 3.4.

³⁶⁶ Sri Lanka, Statement at the CDDH, *Official Records*, Vol. XVI, CDDH/IV/SR.16, 12 March 1975, p. 154, § 5.

³⁶⁷ Sri Lanka, Statement before the First Committee of the UN General Assembly, UN Doc. A/C.1/32/PV.20, 5 October 1977, p. 56.

³⁶⁸ Sri Lanka, Statement at the First Conference of States Parties to the CWC, The Hague, 6–23 May 1997.

365. At the Fifth Conference of States Parties to the CWC in 2000, Sri Lanka stated that it neither possessed chemical weapons, nor had a chemical industry which could produce them.³⁶⁹

366. Sudan has been accused of using chemical weapons on towns in the south of the country.³⁷⁰ This alleged use has, however, never been officially verified and has always been denied by the Sudanese government.³⁷¹ There are some reports by independent institutes or NGOs, but these, too, are contradictory.³⁷²

367. In 1968, during a debate in the First Committee of the UN General Assembly, Sweden proposed that the UN begin a process leading to a total prohibition of the use, production and stockpiling of chemical weapons.³⁷³

368. In 1969, during a debate in the First Committee of the UN General Assembly on the question of chemical and bacteriological (biological) weapons and on what was to become Resolution 2603 (XXIV), Sweden agreed that "there should be a total ban on the use of chemical and biological weapons".³⁷⁴

369. In 1970, during a debate in the Third Committee of the UN General Assembly, Sweden stated that "the rationale for a comprehensive ban on chemical weapons in international armed conflicts would seem to be equally valid in internal armed conflicts. At all events, there should be no hesitation in imposing a complete ban, in internal conflicts."³⁷⁵

370. In 1971, during a debate in the Fourth Committee of the UN General Assembly, Sweden stated that the use of chemical weapons was "contrary to the generally recognized rules of international law as embodied in the Geneva Protocol of 17 June 1925".³⁷⁶

371. In 1988, in a statement before the Fifteenth Special Session of the UN General Assembly, Sweden stated that:

89. The large-scale use of chemical weapons against the city of Halabja was a flagrant violation of the 1925 Geneva Protocol and of customary international law prohibiting the use of chemical weapons. Such attacks must be universally condemned.

³⁶⁹ Sri Lanka, Statement at the Fifth Conference of States Parties to the CWC, The Hague, May 2000.

³⁷⁰ Chege Mbitiru, "Sudanese rebels accuse government of using chemical or biological bombs", AP from Nairobi, 30 July 1999.

³⁷¹ "Sudan denies using biological or chemical weapons", *Akhbar Al-Youm*, Khartoum, 1 August 1999, as quoted by AP from Khartoum, 1 August 1999.

³⁷² "Confirmed chemical bombing in southern Sudan", Norwegian People's Aid, 2 August 1999, as posted on ReliefWeb, www.reliefweb.int, version current on 14 December 1999; "UN sends doctors to treat survivors of toxic chemicals", IPS from Nairobi, 5 August 1999; MSF, Living under aerial bombardments: Report of an investigation in the Province of Equatoria, Southern Sudan, Geneva, February 2000; Marjatta Rautio and Paula Vanninen, from Helsinki, "Analysis of samples from Sudan", 20 June 2000, as in *ASA Newsletter*, No. 79, 31 August 2000, p. 14.

³⁷³ Sweden, Statement before the First Committee of the UN General Assembly, UN Doc. A/C.1/PV.1609, 18 November 1968, p. 11.

³⁷⁴ Sweden, Statement before the First Committee of the UN General Assembly, UN Doc. A/C.1/PV.1717, 10 December 1969, § 76.

³⁷⁵ Sweden, Statement before the Third Committee of the UN General Assembly, UN Doc. A/C.3/SR.1784, 10 November 1970, p. 273.

³⁷⁶ Sweden, Statement before the Fourth Committee of the UN General Assembly, UN Doc. A/C.4/SR.1961, 3 December 1971, p. 249.

90. . . . The early conclusion of a convention which bans the production, storing and use of all chemical weapons should now be a high priority. All States should commit themselves to adhere to this treaty, thus eliminating the growing threat from chemical weapons.³⁷⁷

372. In 1989, Sweden co-sponsored a draft resolution in the UN Commission on Human Rights which expressed "grave concern about reports of killing of unarmed Kurdish civilians, in particular by military attacks during 1988 using, inter alia, chemical weapons and causing mass exodus to neighbouring countries".³⁷⁸

373. At the First Conference of States Parties to the CWC in 1997, Sweden emphasised the importance of the 1993 CWC and stated its commitment and its determination to contribute actively to the realisation of the Convention's aims.³⁷⁹

374. At the CDDH, Switzerland voted in favour of the Philippine amendment (see *supra*) because:

It would be a step forward to state expressly that any violation of The Hague Declaration of 1899 and the Geneva Protocol of 1925 would constitute a grave breach. The rules laid down in those two instruments were undisputed and indisputable, and the amendment would have a deterrent effect on any State tempted to violate them, by exposing the members of its armed forces to the penalties applicable under the Geneva Conventions.³⁸⁰

375. In 1988, in a note on the prohibition on the use of chemical weapons issued, the Swiss Federal Department of Foreign Affairs stated that "the 1925 [Geneva Gas] Protocol declares a custom". It added that "the 1925 [Geneva Gas] Protocol and custom prohibit the first use of chemical weapons and accept the lawfulness of second use only in the case of reprisals in kind".³⁸¹

376. At the First Conference of States Parties to the CWC in 1997, Switzerland emphasised the importance of the 1993 CWC and stated its commitment to creating a world free of chemical weapons.³⁸²

377. In 1977, during a debate in the First Committee of the UN General Assembly, Syria supported a complete ban on chemical weapons.³⁸³

³⁷⁷ Sweden, Statement at the Fifteenth Special Session of the UN General Assembly, UN Doc. A/S-15/PV.2, 1 June 1988, §§ 89–90.

³⁷⁸ Sweden, Draft resolution on the situation of human rights in Iraq, UN Doc. E/CN.4/1989/L.82, 3 March 1989, § 2.

³⁷⁹ Sweden, Statement at the First Conference of States Parties to the CWC, The Hague, 6–23 May 1997.

³⁸⁰ Switzerland, Statement at the CDDH, *Official Records*, Vol. VI, CDDH/SR.44, 30 May 1977, p. 281, § 9.

³⁸¹ Switzerland, Note of the Directorate for Public International Law of the Federal Department of Foreign Affairs, 15 December 1988, reprinted in *Annuaire Suisse de Droit International*, Vol. 46, 1989, pp. 244–247.

³⁸² Switzerland, Statement at the First Conference of States Parties to the CWC, The Hague, 6–23 May 1997.

³⁸³ Syria, Statement before the First Committee of the UN General Assembly, UN Doc. A/C.1/32/PV.15, 30 September 1977, pp. 11 and 16.

378. In 1987, during a debate in the First Committee of the UN General Assembly, Syria denied that it was developing chemical weapons.³⁸⁴
379. In 1966, during a debate in the First Committee of the UN General Assembly, Tanzania supported Hungary's view that the 1925 Geneva Gas Protocol had developed into customary international law and that the use of chemical weapons constituted an international crime.³⁸⁵
380. In 1974, during discussions in the Ad Hoc Committee on Conventional Weapons established by the CDDH, Tanzania supported a ban on chemical weapons.³⁸⁶
381. At the Conference of States Parties to the 1925 Geneva Protocol and Other Interested States in 1989, Thailand stated that it was strongly opposed to the development, production, stockpiling, and use of chemical weapons in any circumstances for whatever reasons.³⁸⁷
382. In 1991, during a debate in the First Committee of the UN General Assembly, Thailand stated that it neither possessed nor produced chemical weapons.³⁸⁸
383. In 1995, during a debate in the First Committee of the UN General Assembly, Thailand stated that the world community desired a complete elimination of chemical weapons.³⁸⁹
384. At the First Conference of States Parties to the CWC in 1997, Thailand stated its full commitment to the 1993 CWC and emphasised the importance of establishing an effective mechanism to ensure universal compliance with the Convention.³⁹⁰
385. In 1991, during a debate in the First Committee of the UN General Assembly, Tunisia advocated a complete ban on chemical weapons.³⁹¹
386. In 1977, during a debate in the First Committee of the UN General Assembly, Turkey supported a complete ban on chemical weapons.³⁹²
387. At the First Conference of States Parties to the CWC in 1997, Turkey emphasised the importance of the 1993 CWC and stated its commitment and

³⁸⁴ Syria, Statement before the First Committee of the UN General Assembly, UN Doc. A/C.1/42/PV.17, 22 October 1987, p. 41.

³⁸⁵ Tanzania, Statement before the First Committee of the UN General Assembly, UN Doc. A/C.1/SR.1457, 17 November 1966, p. 184.

³⁸⁶ Tanzania, Statement at the CDDH, *Official Records*, Vol. XVI, CDDH/IV/SR.2, 14 March 1974, p. 22, § 26.

³⁸⁷ Gordon M. Burck and Charles C. Flowerree, *International Handbook on Chemical Weapons Proliferation*, Greenwood Press, New York, 1991, p. 435.

³⁸⁸ Thailand, Statement before the First Committee of the UN General Assembly, UN Doc. A/C.1/46/PV.19, 28 October 1991, p. 13.

³⁸⁹ Thailand, Statement before the First Committee of the UN General Assembly, UN Doc. A/C.1/50/PV.5, 17 October 1995, p. 16.

³⁹⁰ Thailand, Statement at the First Conference of States Parties to the CWC, The Hague, 6–23 May 1997.

³⁹¹ Tunisia, Statement before the First Committee of the UN General Assembly, UN Doc. A/C.1/46/PV.11, 22 October 1991, p. 7.

³⁹² Turkey, Statement before the First Committee of the UN General Assembly, UN Doc. A/C.1/32/PV.15, 30 September 1977, p. 21.

its determination to contribute actively to the realisation of the Convention's aims.³⁹³

388. There have been allegations of the use of chemical weapons by Turkey against the country's Kurdish population; the use has not been verified and the allegations were denied by the Turkish government.³⁹⁴

389. In 1966, during a debate in the First Committee of the UN General Assembly, Ukraine supported Hungary's view that the 1925 Geneva Gas Protocol had developed into customary international law and that the use of chemical weapons constituted an international crime.³⁹⁵

390. In 1977, during a debate in the First Committee of the UN General Assembly, Ukraine also referred to the 1972 initiative and stated that the elimination of chemical weapons was one of the most important measures of disarmament.³⁹⁶

391. In 1987, during a debate in the First Committee of the UN General Assembly, Ukraine proposed a chemical weapons free zone in Europe.³⁹⁷

392. In 1991, during a debate in the First Committee of the UN General Assembly, Ukraine stated that it neither possessed nor produced chemical weapons.³⁹⁸

393. In 1994, during a debate in the First Committee of the UN General Assembly, Ukraine stated that it wanted to "rid the densely populated European continent, as well as other regions, of these deadly [chemical] weapons by the beginning of next century".³⁹⁹

394. At the First Conference of States Parties to the CWC in 1997, Ukraine stated that "it must be our general aim to give this document a universal stamp". It further offered its full cooperation with the OPCW and promised to ratify the 1993 CWC as soon as possible.⁴⁰⁰

³⁹³ Turkey, Statement at the First Conference of States Parties to the CWC, The Hague, 6–23 May 1997.

³⁹⁴ "Spokesman denies manufacture, use of chemical weapons", Anatolia news agency, Ankara, 28 October 1999, as translated from the Turkish in BBC-SWB, 30 October 1999; "German TV reports chemical weapons laboratory for Turkey", *ddp/ADN* (*Allgemeiner Deutscher Nachrichtendienst*) news agency, Berlin, 26 October 1999, as translated from the German in BBC-SWB, 27 October 1999; "Chemical weapons lab aid for Turkey from German military", DPA from Berlin, 27 October 1999; "Türkei beim Aufbau von C-Waffen-Labor unterstützt", *Der Spiegel* online 43/1999, 27 October 1999; "Spokesman denies manufacture, use of chemical weapons", Anatolia news agency, Ankara, 28 October 1999, as translated from the Turkish in BBC-SWB, 30 October 1999.

³⁹⁵ Ukraine, Statement before the First Committee of the UN General Assembly, UN Doc. A/C.1/SR.1452, 14 November 1966, p. 154.

³⁹⁶ Ukraine, Statement before the First Committee of the UN General Assembly, UN Doc. A/C.1/32/PV.23, 6 October 1977, p. 2.

³⁹⁷ Ukraine, Statement before the First Committee of the UN General Assembly, UN Doc. A/C.1/42/PV.28, 2 November 1987, p. 17.

³⁹⁸ Ukraine, Statement before the First Committee of the UN General Assembly, UN Doc. A/C.1/46/PV.3, 14 October 1991, p. 86.

³⁹⁹ Ukraine, Statement before the First Committee of the UN General Assembly, UN Doc. A/C.1/49/PV.7, 20 October 1994, p. 17.

⁴⁰⁰ Ukraine, Statement at the First Conference of States Parties to the CWC, The Hague, 6–23 May 1997.

395. In 1970, in the context of the adoption of UN General Assembly Resolution 2444 (XXIII), the USSR stated that:

The use of asphyxiating, poisonous and tear gases and other gases of a similar nature... was prohibited by the Geneva Protocol of 17 June 1925. The United States signed that Protocol, but did not ratify it. However, that does not mean that the prohibition of the use of poisonous substances does not extend to the United States. That prohibition has become a generally recognized rule of international law, and countries which violate it must bear responsibility before the international community.⁴⁰¹

396. In 1970, during a debate in the Third Committee of the UN General Assembly, the USSR stated that the 1925 Geneva Gas Protocol was fully applicable in situations where freedom fighters struggled for liberation against colonial powers.⁴⁰²

397. At the CSCE review meeting in Madrid in 1982, when the US delegation accused the USSR of violating the 1925 Geneva Gas Protocol, the Soviet delegation rejected the charges as "monstrous accusations, false from beginning to end" and denied that the USSR had ever used chemical weapons "anywhere under any circumstances or by any means".⁴⁰³

398. In 1987, during a debate in the First Committee of the UN General Assembly, the USSR strongly supported the global elimination of chemical weapons.⁴⁰⁴

399. In 1989, in reply to a note verbale of the UN Secretary-General on the subject of chemical weapons, the USSR declared that "it had never used chemical weapons or stockpiled them on foreign territories. It had stopped production of chemical weapons."⁴⁰⁵

400. In 1991, during a debate in the UN Security Council on the situation between Iraq and Kuwait, the USSR stated with respect to Resolution 687 (1991) that:

The most acute issue is that of creating an effective barrier against the use of weapons of mass destruction in that region. From that viewpoint, of great importance are the provisions in the resolution regarding Iraq's destruction of chemical... weapons... and in the context of Iraq's confirmation of its obligations of

⁴⁰¹ USSR, Reply dated 30 December 1969 to the UN Secretary-General regarding the preparation of the study requested in paragraph 2 of General Assembly Resolution 2444 (XXIII), annexed to Report of the Secretary-General on respect for human rights in armed conflicts, UN Doc. A/8052, 18 September 1970, Annex III, p. 120.

⁴⁰² USSR, Statement before the Third Committee of the UN General Assembly, UN Doc. A/C.3/SR.1786, 12 November 1970, p. 284.

⁴⁰³ Julian Perry Robinson, "Chemical and biological warfare: developments in 1982", *SIPRI Yearbook 1983: World Armaments and Disarmament*, Taylor & Francis, London, 1983, p. 393.

⁴⁰⁴ USSR, Statement before the First Committee of the UN General Assembly, UN Doc. A/C.1/42/PV.23, 27 October 1987, pp. 16-30.

⁴⁰⁵ USSR, Reply to a note verbale of the UN Secretary-General referred to in Report of the Secretary-General on respect for the right to life: elimination of chemical weapons, prepared in accordance with UN Sub-Commission on Human Rights Resolution 1988/27, UN Doc. E/CN.4/Sub.2/1989/4, 17 August 1989, §§ 98 and 105.

the Geneva Protocol of 1925 to bring into play the International Atomic Energy Agency... It is also important that all Middle Eastern countries accede to... those international agreements prohibiting chemical... weapons.⁴⁰⁶

401. In 1966, during a debate in the First Committee of the UN General Assembly, the UK supported the principle that international law prohibits the use of chemical weapons as a result of the 1925 Geneva Gas Protocol.⁴⁰⁷

402. At the CDDH, the UK voted against the Philippine amendment (see *supra*) because:

A significant number of the States party to the Geneva Protocol of 1925 had entered a reservation thereto; for those States the Protocol contained no absolute prohibition on the use of the weapons mentioned in it, but rather a prohibition on the first use only. Nor was it convincing to state that the Geneva Protocol of 1925 represented no more than the existing customary law of war; ever since the adoption of resolution XXVIII by the XXth International Conference of the Red Cross (Vienna 1965), States had been urged in United Nations resolutions to accede to that Protocol in accordance with its express terms. Such a situation was entirely inconsistent with the contention made in debate that the Geneva Protocol of 1925 reflected existing customary international law. That contention could not be supported.⁴⁰⁸

403. In 1977, during a debate in the First Committee of the UN General Assembly, the UK supported a complete ban on chemical weapons.⁴⁰⁹

404. In 1983, in reply to a question in the House of Lords on the subject of the use of chemical weapons in South-East Asia, the UK Minister of State, FCO, stated that "the use of chemical weapons is a flagrant contradiction of the civilized standards reflected in the 1925 [Geneva Gas] Protocol".⁴¹⁰

405. In 1987, during a debate in the First Committee of the UN General Assembly, the UK stated that it and its allies were committed to a global ban on chemical weapons.⁴¹¹

406. At a press conference held on 30 March 1988, a spokesperson for the UK Foreign and Commonwealth Office stated that the Iraqi use of chemical weapons against Kurdish civilians in Halabja "represents a serious and grave violation of the 1925 Geneva Protocol and international humanitarian law. The UK condemns unreservedly this and all other uses of chemical weapons".⁴¹²

⁴⁰⁶ USSR, Statement before the UN Security Council, UN Doc. S/PV.2981, 3 April 1991, pp. 101–102.

⁴⁰⁷ UK, Statement before the First Committee of the UN General Assembly, UN Doc. A/C.1/SR.1454, 15 November 1966, p. 167.

⁴⁰⁸ UK, Statement at the CDDH, *Official Records*, Vol. VI, CDDH/SR.44, 30 May 1977, p. 282, § 17.

⁴⁰⁹ UK, Statement before the First Committee of the UN General Assembly, UN Doc. A/C.1/32/PV.23, 6 October 1977, p. 21.

⁴¹⁰ UK, House of Lords, Reply by the Minister of State, FCO, *Hansard*, 7 June 1983, Vol. 431, col. 92.

⁴¹¹ UK, Statement before the First Committee of the UN General Assembly, UN Doc. A/C.1/42/PV.5, 14 October 1987, p. 62.

⁴¹² UK, Statement by the FCO Spokesperson at a Press Conference, 30 March 1988, reprinted in *BYIL*, Vol. 59, 1988, p. 579.

407. In 1989, the UK co-sponsored a draft resolution in the UN Commission on Human Rights which expressed "grave concern about reports of killing of unarmed Kurdish civilians, in particular by military attacks during 1988 using, inter alia, chemical weapons and causing mass exodus to neighbouring countries".⁴¹³

408. In 1990, during a debate in the UN Security Council on a peaceful and just post-Cold War world, the UK stated that, under paragraph 13 of Resolution 670 (1990), individuals were held responsible for grave breaches of the Geneva Conventions and that "we should also hold personally responsible those involved in violations of the laws of armed conflict, including the prohibition against initiating the use of chemical . . . weapons contrary to the Geneva Protocol of 1925, to which Iraq is a party".⁴¹⁴

409. In 1991, during a debate in the House of Commons on the Gulf crisis, the UK Prime Minister stated that:

Chemical weapons, already used by Saddam Hussein against his own people, have been deployed. Contrary to international agreements, Iraq has produced and threatened to use both chemical and biological weapons, the use of which would be wholly contrary to international agreements.⁴¹⁵

410. In 1991, in a report submitted to the UN Security Council on operations in the Gulf War, the UK stated that "the Iraqi Ambassador [to the UK] was also reminded of Iraq's obligations under the 1925 Geneva [Gas] Protocol in respect of chemical . . . weapons. The United Kingdom would take the severest view of any use of these weapons by Iraq."⁴¹⁶

411. In 1991, during a debate in the House of Commons on the Gulf crisis, the UK Minister of State, FCO, stated that "we have always recognised that Saddam Hussein possesses chemical weapons and judging from his track record, he may well use them. To do so would be a breach of the 1925 [Geneva Gas Protocol]. It would be a gross crime."⁴¹⁷

412. In 1991, during a debate in the UN Security Council on the situation between Iraq and Kuwait, the UK stated with respect to Resolution 687 (1991) that:

The resolution contains tough provisions for the destruction of Iraqi chemical and biological weapons . . . It is surely right to do so. For Iraq alone in the region has not only developed many of these weapons, it has actually used them both against a

⁴¹³ UK, Draft resolution on the situation of human rights in Iraq, UN Doc. E/CN.4/1989/L.82, 3 March 1989, § 2.

⁴¹⁴ UK, Statement before the UN Security Council, UN Doc. S/PV.2963, 29 November 1990, § 78.

⁴¹⁵ UK, House of Commons, Statement by the Prime Minister, *Hansard*, 15 January 1991, Vol. 183, col. 735.

⁴¹⁶ UK, Letter dated 21 January 1991 to the President of the UN Security Council, UN Doc. S/22117, 21 January 1991, p. 1; see also Statement by FCO spokesperson, 21 January 1991, reprinted in *BYIL*, Vol. 62, 1991, p. 680.

⁴¹⁷ UK, House of Commons, Statement by the Minister of State, FCO, *Hansard*, 22 February 1991, Vol. 186, col. 576.

neighbouring State and against its own population, and it has made the threat of their use part of the daily discourse of its diplomacy as it has attempted to bully and coerce its neighbours . . . But action against Iraq's weapons of mass destruction must clearly not be the end of the affair, a one-off operation, and that is why the resolution so clearly situates this action within the wider framework of work towards a whole region free of weapons of mass destruction and, indeed, towards even wider actions – for example to outlaw chemical weapons worldwide.⁴¹⁸

413. In 1993, during a debate in the House of Commons, the UK Secretary of State for Defence stated that:

We would view with the gravest concern any evidence revealed to the United Nations – which is studying the situation in southern Iraq – that might give it reason to believe that chemical weapons might have been used in that part of the country. Clearly, the use of such weapons is contrary to Iraq's international obligations; moreover, it gives rise to a particular sense of abhorrence which is felt not only by all hon. Members but by the international community as a whole.⁴¹⁹

414. In 1998, in reply to a question in House of Commons about the UK's position on chemical and biological weapons and nuclear weapons at a meeting of the Preparatory Committee for the Establishment of an International Criminal Court, the UK Prime Minister stated that:

The UK delegation supported proposals to include within the jurisdiction of the ICC war crimes under existing customary international law. For that reason, the delegation supported the inclusion of the use of methods of warfare of a nature to cause superfluous injury or unnecessary suffering; these included . . . chemical weapons as referred to in the 1993 Chemical Weapons Convention.⁴²⁰

415. According to the Report on UK Practice, an IFOR restricted document (Legal Standard Operating Procedures) provides for “no use of chemical weapons – other than tightly controlled use in riot control situations”.⁴²¹

416. In 1966, during a debate in the First Committee of the UN General Assembly, the US, in reply to allegations made by Hungary that the US were using chemical weapons in Viet-Nam, stated that “allegations that the United States was using poison gas in Viet-Nam were completely unfounded”.⁴²²

417. In 1966, during a debate in the First Committee of the UN General Assembly, the US stated that it supported the 1925 Geneva Gas Protocol, even though it had not ratified it.⁴²³

⁴¹⁸ UK, Statement before the UN Security Council, UN Doc. S/PV.2981, 3 April 1991, pp. 113–114.

⁴¹⁹ UK, House of Commons, Statement by the Secretary of State for Defence, *Hansard*, 19 November 1993, Vol. 233, col. 181.

⁴²⁰ UK, House of Commons, Reply by the Prime Minister, *Hansard*, 20 January 1998, Vol. 304, Written Answers, col. 477.

⁴²¹ Report on UK Practice, 1997, Chapter 3.4.

⁴²² US, Statement before the First Committee of the UN General Assembly, UN Doc. A/C.1/SR.1451, 11 November 1966, § 41.

⁴²³ US, Statement before the First Committee of the UN General Assembly, UN Doc. A/C.1/SR.1452, 14 November 1966, p. 158.

418. In 1970, during a debate in the Third Committee of the UN General Assembly, the US was criticised by different States for using chemical weapons in Vietnam in violation of the 1925 Geneva Gas Protocol. It rejected the allegations and proclaimed “its intention to abide strictly by [the 1925 Geneva Gas Protocol] terms” even though it was not a party.⁴²⁴

419. At the CDDH, the US voted against the Philippine amendment (see *supra*) because:

Grave breaches were meant to be the most serious type of crime; Parties had an obligation to punish or extradite those guilty of them. Such crimes should therefore be clearly specified, so that a soldier would know if he was about to commit an illegal act for which he could be punished. The amendment, however, was vague and imprecise . . . The amendment would also make it unlawful to use certain gases in retaliation, whereas under Protocol I only first use of such gases was unlawful. It would also punish those who used the weapons, namely, the soldiers, rather than those who made the decision as to their use, namely, Governments.⁴²⁵

420. In 1980, in a memorandum of law on the “Reported Use of Chemical Agents in Afghanistan, Laos, and Kampuchea”, a legal adviser of the US Department of State stressed that:

The prohibition of the first use in war of chemical weapons has, by reason of the practice and affirmations of states, become a part of the rules of customary international law which are binding on all states; and neither the limitations of the [1925 Geneva Gas] Protocol text nor reservations to it can detract from these obligations. Therefore, all states should be regarded as being bound to refrain from such first use, whether or not they or their opponents are parties to the Protocol.

...

In theory, an attempt might also be made to justify the use of chemical weapons in Afghanistan as a lawful reprisal against violations of the general laws of war by Afghan insurgents (such as the summary execution of Soviet prisoners). However, such an argument would face several serious problems. First, the prohibition in the [1925 Geneva Gas] Protocol and in customary international law apparently itself precludes use of chemical weapons in reprisal except in response to enemy use of weapons prohibited by the [1925 Geneva Gas] Protocol.⁴²⁶

The Department of State noted that “the Afghan conflict seems clearly to be an external invasion and occupation to which the rules of international armed conflict, including the rules against first use of chemical weapons, apply”. It added that “the [1925 Geneva Gas] Protocol itself does not apply to the Afghan conflict, because Afghanistan has never adhered to the Protocol . . . However, . . . the

⁴²⁴ US, Statement before the Third Committee of the UN General Assembly, UN Doc. A/C.3/SR.1789, 12 November 1970, p. 289.

⁴²⁵ US, Statement at the CDDH, *Official Records*, Vol. VI, CDDH/SR.44, 30 May 1977, pp. 280–281, § 7.

⁴²⁶ US, Department of State, Memorandum of law by a Legal Adviser on the “Reported Use of Chemical Agents in Afghanistan, Laos, and Kampuchea”, 9 April 1980, reprinted in Marian Nash Leich, *Digest of United States Practice in International Law, 1980*, Department of State Publication 9610, Washington, D.C., 1986, pp. 1027 and 1041, footnote 38.

prohibition on the first use of chemical weapons in war has become a part of customary international law binding on all states, whether or not parties to the Protocol". With respect to the conflict in Laos, the memorandum stated that "the customary law prohibition [has] generally been described as rules applying in international armed conflicts . . . There are at this time no strong precedents establishing that the prohibition on chemical weapons would be regarded as applying to a conflict of this character".⁴²⁷

421. In 1986, during a debate in the UN Security Council, the US stated that "the use of chemical weapons is a serious violation of international law".⁴²⁸

422. In 1987, during a debate in the UN Security Council, the US stated that chemical weapons were not capable of distinguishing between combatants and civilians.⁴²⁹

423. In an executive order issued in 1990, the US President stated that "the proliferation of chemical . . . weapons constitutes an unusual and extraordinary threat to the national security and foreign policy of the United States". The order also provided for the possibility of imposing sanctions against foreign persons and governments found to have "knowingly and materially" contributed to efforts to "use, develop, produce, stockpile or otherwise acquire chemical . . . weapons".⁴³⁰

424. In 1991, in a diplomatic note to Iraq concerning operations in the Gulf War, the US stated that it "expects the Government of Iraq to respect its obligations under the Geneva [Gas] Protocol of 1925 not to use chemical . . . weapons".⁴³¹

425. In 1991, during a debate in the UN Security Council, the US supported the resolution on the elimination of Iraq's chemical weapons in order to keep the region secure.⁴³²

426. In 1991, during a debate in the First Committee of the UN General Assembly, the US stated that a ban on chemical weapons was a top priority in its foreign policy.⁴³³

427. In 1993, during a debate in the First Committee of the UN General Assembly, the US stated that it had worked for the elimination of chemical weapons.⁴³⁴

⁴²⁷ US, Department of State, Memorandum of law by a Legal Adviser on the "Reported Use of Chemical Agents in Afghanistan, Laos, and Kampuchea", 9 April 1980, reprinted in Marian Nash Leich, *Digest of United States Practice in International Law, 1980*, Department of State Publication 9610, Washington, D.C., 1986, pp. 1033 and 1036.

⁴²⁸ US, Statement before the UN Security Council, UN Doc. S/PV.2666, 24 February 1986, p. 27.

⁴²⁹ US, Statement before the UN Security Council, UN Doc. S/PV.2750, 20 July 1987, p. 18.

⁴³⁰ US, Executive Order 12735, Chemical and Biological Weapons Proliferation, 16 November 1990, preamble and Section 4(b)(1), *Federal Register*, Vol. 55, 1990, p. 48587.

⁴³¹ US, Department of State, Diplomatic Note to Iraq, Washington, 19 January 1991, annexed to Letter dated 21 January 1991 to the President of the UN Security Council, UN Doc. S/22122, 21 January 1991, Annex I, p. 2.

⁴³² US, Statement before the UN Security Council, UN Doc. S/PV.2981, 3 April 1991, pp. 86–87.

⁴³³ US, Statement before the First Committee of the UN General Assembly, UN Doc. A/C.1/46/PV.4, 15 October 1991, p. 34.

⁴³⁴ US, Statement before the First Committee of the UN General Assembly, UN Doc. A/C.1/48/SR.5, 19 October 1993, p. 10.

428. At the First Conference of States Parties to the CWC in 1997, the US stated that “the United States recognises the importance of our full participation in the chemical weapons convention at entry into force” and that “the United States stands committed to stopping the spread of weapons of mass destruction and to ensuring that the CWC is implemented effectively”. It further reconfirmed its good intentions by once more emphasising its commitment to global chemical disarmament.⁴³⁵

429. In 1998, in a legal review of Oleoresin Capsicum (OC) pepper spray, the Deputy Assistant Judge Advocate General of the US Department of the Navy stated that:

Like the Biological Weapons Convention, the CWC is an arms control treaty and is not limited to application during international armed conflict (i.e., it applies at all times and under all circumstances unless the treaty indicates otherwise) . . .

. . . The chemical, of course, must be potentially toxic, i.e., have harmful chemical action on life processes. Furthermore, the toxicity must affect humans or animals.⁴³⁶

430. In 1998, CNN alleged that the US used chemical weapons (sarin) to kill defectors in the Vietnam War. The US State Department responded that it had not used sarin in the operation, and that “the US policy since World War II has prohibited the use of lethal chemical agents, including sarin, unless first used by the enemy”.⁴³⁷ Later, the CNN President apologised for the report and stated that “there is insufficient evidence that sarin or any other deadly gas was used”.⁴³⁸

431. At the First Conference of States Parties to the CWC in 1997, Uruguay emphasised the importance of the 1993 CWC and stated its commitment and its determination to contribute actively to the realisation of the Convention’s aims.⁴³⁹

432. In 1989, in reply to a note verbale of the UN Secretary-General on the subject of chemical weapons, Venezuela declared that it did not possess chemical weapons. It furthermore stated that:

In order to ensure strict compliance with the principles and objectives of the Geneva Protocol of 1925, it was essential that the countries which had entered reservations to the 1925 Protocol should withdraw them, because the purpose of most of these reservations was to allow the States that had made them to retain the possibility

⁴³⁵ US, Statement at the First Conference of States Parties to the CWC, The Hague, 6–23 May 1997.

⁴³⁶ US, Department of the Navy, Deputy Assistant Judge Advocate General, International and Operational Law Division, Legal Review of Oleoresin Capsicum (OC) Pepper Spray, 19 May 1998, § 6(c), pp. 11–12.

⁴³⁷ US, Department of Defense, Review of allegations concerning “Operation Tailwind”, 21 July 1998.

⁴³⁸ US, American Forces Press Service, “DoD Welcomes CNN Retraction, Apology for Sarin Report”, July 1998.

⁴³⁹ Uruguay, Statement at the First Conference of States Parties to the CWC, The Hague, 6–23 May 1997.

of using chemical weapons in retaliation, should the need arise. As a result of these reservations, the Geneva Protocol, which was conceived as an instrument to prohibit the use of chemical weapons, had become an instrument of *non-first use*.⁴⁴⁰ [emphasis in original]

433. At the First Conference of States Parties to the CWC in 1997, Venezuela stated that it was in favour of global eradication of chemical weapons and stressed the importance of universal adherence to the 1993 CWC.⁴⁴¹

434. In 1981, in a letter to the UN Secretary-General in reaction to US allegations that charging Vietnam was “using Soviet-supplied toxic chemicals in Laos and Kampuchea”, Vietnam stated that:

The US is . . . supplying toxic chemicals to [others] to be used against the peoples of other countries as is the case in Afghanistan . . . [The charges made by the US are] aimed at covering the crime of the United States of using toxic chemicals on a large scale and for more than ten years during [US activities] against Vietnam . . . The Ministry of Foreign Affairs of the Socialist Republic of Viet Nam completely rejects the above [charges made by the US].⁴⁴²

435. In 1987, during a debate in the First Committee of the UN General Assembly, Vietnam stated that it was committed to a global ban on chemical weapons.⁴⁴³

436. At the 1989 Session of the Conference on Disarmament, Vietnam stated that “on the one hand, Viet Nam has been the victim of the use of chemical weapons on an enormous scale, while on the other it neither produces nor holds any chemical weapon”.⁴⁴⁴

437. In 1991, during a debate in the UN Security Council, Yemen stated that it supported the eradication of weapons of mass destruction in the Middle East, but that the unilateral disarmament of Iraq would create imbalance in the region.⁴⁴⁵

438. In 1977, during a debate in the First Committee of the UN General Assembly, the SFRY supported a complete ban on chemical weapons.⁴⁴⁶

⁴⁴⁰ Venezuela, Reply to a note verbale of the UN Secretary-General, referred to in Report of the Secretary-General on respect for the right to life: elimination of chemical weapons, prepared in accordance with UN Sub-Commission on Human Rights Resolution 1988/27, UN Doc. E/CN.4/Sub.2/1989/4, 17 August 1989, §§ 98 and 103.

⁴⁴¹ Venezuela, Statement at the First Conference of States Parties to the CWC, The Hague, 6–23 May 1997.

⁴⁴² Vietnam, Ministry of Foreign Affairs, Statement of 17 September 1981 by a spokesperson, reprinted in Letter dated 22 September 1981 to the UN Secretary-General, UN Doc. A/36/549, 23 September 1981, pp. 1–2.

⁴⁴³ Vietnam, Statement before the First Committee of the UN General Assembly, UN Doc. A/C.1/42/PV.29, 2 November 1987, p. 18.

⁴⁴⁴ Vietnam, Statement before the Conference on Disarmament, UN Doc. CD/PV.498, 28 March 1989, p. 11.

⁴⁴⁵ Yemen, Statement before the UN Security Council, UN Doc. S/PV.2981, 3 April 1991, p. 42.

⁴⁴⁶ SFRY, Statement before the First Committee of the UN General Assembly, UN Doc. A/C.1/32/PV.13, 29 September 1977, p. 62.

439. It was reported that in 1999, Serb forces used nerve gas against Kosovar Albanians; these claims were under investigation by the FBI.⁴⁴⁷

440. According to the Report on the Practice of the SFRY (FRY), there are unconfirmed reports of the use of chemical weapons by the YPA during the conflict in the former Yugoslavia.⁴⁴⁸ Bosnian Muslim forces⁴⁴⁹ and Serb forces⁴⁵⁰ were also alleged to have used chemical weapons during the conflict in Bosnia and Herzegovina.⁴⁵¹

⁴⁴⁷ Richard Norton-Taylor and Lucy Ward, "Serbs used chemical weapons", *The Guardian*, London, 24 August 1999; "Reports indicate Serbs using chemical weapons against UCK", *Zeri i Popullit*, Tirana, 23 April 1999, p. 14, as translated from Albanian in FBIS-EEU-1999-0424; "Kosovo rebels accuse Serbs of using nerve gas in recent fighting", Kosovapress news agency website, 22 April 1999, as in BBC-SWB, 22 April 1999; "Yugoslav Army denies having chemical weapons", TANJUG, Belgrade, 24 April 1999, as excerpted in BBC-SWB, 26 April 1999; UK, Ministry of Defence briefing, 27 April 1999; M. Binyon, "Volunteers for Kosovo face a grim death", *The Times*, London, 28 April 1999; David Thompson, "Serb killers gassed KLA: Milošević launches chemical warfare attacks in Kosovo", *Scottish Daily Record*, Glasgow, 28 April 1999, pp. 16-17; "Doctor claims to have treated refugees for Serb blister agent attack", AFP from Washington, 28 April 1999; "Serbia: Kosovo rebels report use of chemical weapons", Kosovapress news agency website, 3 May 1999, as in BBC-SWB, 4 May 1999; "UCK accuses Serbs of using nerve gas in Kosovo", AFP from Kukes, Albania, 7 May 1999, as in FBIS-EEU-1999-0507; ATA news agency (Tirana) in English, 8 May 1999, as in BBC-SWB, 8 May 1999; Barbara Demick (from Blace, Macedonia), "Refugees say Serbs rout rebels, possibly with gas", *Philadelphia Inquirer*, Philadelphia, 5 May 1999; Anne Swardson (from Cegrane, Macedonia), with John Ward Anderson (from Kukes) and Steven Pearlstein (from Brussels), "Serbs alleged to have used gas: refugees, KLA sources describe attacks on two villages", *Washington Post*, Washington, D.C., 23 May 1999, p. A24.

⁴⁴⁸ Report on the Practice of SFRY (FRY), 1997, Chapter 3.4.

⁴⁴⁹ "Chemical weapons claims probed", *Jane's Defence Weekly*, London, 21 August 1993, p. 5; "Muslims accused again of using CW rounds", *Jane's Defence Weekly*, London, 23 October 1993, p. 8.

⁴⁵⁰ Radio Bosnia-Herzegovina, Sarajevo, 12 February 1993, as in BBC-SWB, 15 February 1993; Radio Bosnia-Herzegovina, Sarajevo, 30 January 1993, as abstracted in BBC-SWB, 1 February 1993; Radio Bosnia-Herzegovina, Sarajevo, 31 January 1993, as translated in BBC-SWB, 2 February 1993; TANJUG from Belgrade in English, 31 January 1993, as excerpted in BBC-SWB, 2 February 1993; Radio Bosnia-Herzegovina, Sarajevo, 11 February 1993, as translated from the Serbo-Croat in FBIS-EEU-93-027, 11 February 1993, p. 33. (For example, the photograph by Kevin Weaver in *The Independent*, London, 26 February 1993, p. 10; Radio Bosnia-Herzegovina, Sarajevo, 13 March 1993, as translated in BBC-SWB, 15 March 1993; Radio Bosnia-Herzegovina, Sarajevo, 14 March 1993, as translated in BBC-SWB, 16 March 1993; Radio Bosnia-Herzegovina, Sarajevo, 15 March 1993, as translated in BBC-SWB, 17 March 1993; SRNA telephone service, 14 March 1993, as translated from Serbo-Croat in BBC-SWB, 16 March 1993.)

⁴⁵¹ TANJUG Belgrade, 20 June 1994, as in BBC-SWB; "Bosnians said to be using chemical grenades in War", Reuters, UN, 21 October 1993; "UN says non-lethal gas shells fired in Sarajevo", Reuters, UN, 28 July 1993; TANJUG Belgrade, 22 October 1993; Radio Bosnia-Herzegovina, 29 July 1993, as in BBC-SWB; "Bosnia Chief threatens to use poison gas", *The Houston Chronicle*, Houston, 31 October 1992; "2000 Bosnian Serb shells, toxic gas hit Teocak", AFP, Radio Sarajevo, 12 June 1993; "Bosnian Serb Commander charges Moslems make chemical arms", AFP, TANJUG, Belgrade, 12 January 1993; SRNA Review of Evening News, 25 August 1995; Major Garrett, "Mesic to tell senators of gas attacks on Croats", *Washington Times*, Washington, D.C., 27 September 1991, p. A3; Bill Gertz, "Report: Army gassed Croats", *Washington Times*, Washington, D.C., 26 September 1991, pp. A1 and A11; "Yugoslav president warns of CW use", *MEDNews*, Paris, Vol. 4, No. 24, 30 September 1991, p. 5; TANJUG, Belgrade, 26 September 1991, as translated from Serbo-Croat in BBC-SWB, 28 September 1991; TANJUG from Belgrade in English, 27 September 1991, as excerpted in BBC-SWB, 30 September 1991; Mirko Hunjadi from Vinkovici on Radio Croatia (Zagreb), 28 September 1991, as translated from the Serbo-Croat in FBIS-EEU-91-189, 30 September 1991, p. 39; Radio Croatia (Zagreb), 30 September 1991, as excerpted in BBC-SWB, 4 October 1991.

- 441.** In 1977, during a debate in the First Committee of the UN General Assembly, Zaire supported a complete ban on chemical weapons.⁴⁵²
- 442.** At the First Conference of States Parties to the CWC in 1997, Zimbabwe made statements in support of the object and purpose of the 1993 CWC.⁴⁵³
- 443.** According to the Report on the Practice of Zimbabwe, Zimbabwe's acceptance of the prohibition of the use of chemical weapons as part of customary international law may be deduced from its stance in international fora.⁴⁵⁴
- 444.** In 1980, a State denounced and condemned as a war crime the use by another State of chemical weapons during an armed conflict.⁴⁵⁵
- 445.** In 1980, an ambassador confirmed to the ICRC that his country would never use gas as a weapon.⁴⁵⁶

III. Practice of International Organisations and Conferences

United Nations

- 446.** In 1938, with respect to the alleged use of gas by Japan during the Sino-Japanese War (1937–1943) and Chinese protests against this use, the League of Nations recalled that “the use of gas is a method of warfare condemned by international law”.⁴⁵⁷
- 447.** In a resolution adopted in 1938 concerning the protection of civilian populations against air bombardment in case of war, the Assembly of the League of Nations reaffirmed that “the use of chemical . . . methods in the conduct of war is contrary to international law”.⁴⁵⁸
- 448.** In a resolution adopted in 1986, the UN Security Council deplored the use of chemical weapons in the Iran–Iraq War.⁴⁵⁹
- 449.** In a resolution adopted in 1987, the UN Security Council denounced of the use of chemical weapons.⁴⁶⁰
- 450.** In a resolution adopted in 1988 on the use of chemical weapons in the Iran–Iraq War, the UN Security Council stated that:

The Security Council,

...

Dismayed by the mission's [i.e. the Mission Dispatched by the UN Secretary-General to Investigate Allegations of the Use of Chemical Weapons in the Conflict

⁴⁵² Zaire, Statement before the First Committee of the UN General Assembly, UN Doc. A/C.1/32/PV.28, 11 October 1977, p. 4.

⁴⁵³ Zimbabwe, Statement at the First Conference of States Parties to the CWC, The Hague, 6–23 May 1997.

⁴⁵⁴ Report on the Practice of Zimbabwe, 1998, Chapter 3.4.

⁴⁵⁵ ICRC archive document. ⁴⁵⁶ ICRC archive document.

⁴⁵⁷ League of Nations, 101st Session of the Council, Eighth Meeting, *Official Journal*, May–June 1938, pp. 378–379; 102nd Session of the Council, Fourth Meeting, *Official Journal*, November 1938, p. 881.

⁴⁵⁸ League of Nations, Assembly, Resolution adopted on 30 September 1938, § II, *Official Journal*, Special Supplement No. 182, Records of the 19th Ordinary Session of the Assembly, pp. 15–17.

⁴⁵⁹ UN Security Council, Res. 582, 24 February 1986, § 2.

⁴⁶⁰ UN Security Council, Res. 598, 20 July 1987, preamble.

between Iran and Iraq] conclusions that chemical weapons continue to be used in the conflict and that their use has been on an ever more intensive scale than before,

1. *Affirms* the urgent necessity of strict observance of the [1925 Geneva Gas Protocol];
2. *Condemns vigorously* the continued use of chemical weapons in the conflict between the Islamic Republic of Iran and Iraq contrary to obligations under the Geneva Protocol;
3. *Expects* both sides to refrain from the future use of chemical weapons in accordance with their obligations under the Geneva Protocol;
4. *Calls upon* all States to continue to apply or to establish strict control of the export to the parties to the conflict of chemical products serving for the production of chemical weapons.⁴⁶¹ [emphasis in original]

451. In a resolution adopted in 1988, the UN Security Council expressed its concern over the possible use of chemical weapons in the future and its determination to “intensify its efforts to end all use of chemical weapons in violation of international obligations now and in the future”. The meaning of “international obligations” was explained in the second operative paragraph, which encourages the UN Secretary-General to investigate alleged breaches of “the 1925 Geneva Protocol or other relevant rules of customary law”.⁴⁶²

452. In Resolution 687 adopted in 1991 following the cessation of hostilities in the Gulf War, the UN Security Council recalled that:

Iraq has subscribed to the Final Declaration adopted by all States participating in the Conference of States Parties to the 1925 Geneva Protocol and Other Interested States, held in Paris from 7 to 11 January 1989, establishing the objective of universal elimination of chemical and biological weapons.

In Part C of the resolution, the Security Council stated that it:

7. *Invites* Iraq to reaffirm unconditionally its obligations under the [1925 Geneva Gas Protocol] . . .
8. *Decides* that Iraq shall unconditionally accept the destruction, removal, or rendering harmless, under international supervision, of:
 - (a) All chemical and biological weapons and all stocks of agents and all related subsystems and components and all research, development, support and manufacturing facilities related thereto.⁴⁶³ [emphasis in original]

453. In a large number of resolutions adopted between 1968 and 1989, the UN General Assembly called on all States to become parties to the 1925 Geneva Gas Protocol.⁴⁶⁴

⁴⁶¹ UN Security Council, Res. 612, 9 May 1988, preamble and §§ 1–4.

⁴⁶² UN Security Council, Res. 620, 26 August 1988, § 2.

⁴⁶³ UN Security Council, Res. 687, 3 April 1991, Part C, §§ 7–8.

⁴⁶⁴ UN General Assembly, Res. 2444 (XXIII), 19 December 1968, § 5; Res. 2454 (XXIII) A, 20 December 1968, preamble; Res. 2603 (XXIV) B, 16 December 1969, § I(2); Res. 2662 (XXV), 7 December 1970, § 2; Res. 2677 (XXV), 9 December 1970, § 1; Res. 2827 (XXVI) A, 16 December 1971, § 6; Res. 2852 (XXVI), 20 December 1971, § 1; Res. 2853 (XXVI), 20 December 1971, § 1; Res. 2933 (XXVII), 29 December 1972, § 5; Res. 3077 (XXVIII), 6 December 1973, § 5; Res. 3256 (XXIX), 9 December 1974, § 5; Res. 31/65, 10 December 1976, § 4; Res. 32/77,

454. In several resolutions adopted between 1992 and 1999, the UN General Assembly called on all States to become parties to the 1993 CWC.⁴⁶⁵

455. A large number of UN General Assembly resolutions generally call for respect for the 1925 Geneva Gas Protocol or indicate its importance. Seventeen resolutions state that the UN General Assembly “reiterates its call for strict observance by all States of the principles and objectives of the 1925 Protocol”.⁴⁶⁶ Thirteen resolutions repeat this call and condemn “all actions contrary to those objectives”.⁴⁶⁷ Following the alleged use of chemical weapons by Iraq in 1988, the General Assembly further strengthened the language in several resolutions, by adding the word “vigorously” after “condemns”.⁴⁶⁸ In two other resolutions, the General Assembly stated the “need for strict observance of existing international obligations regarding prohibitions on chemical . . . weapons and condemns all actions that contravene these obligations”.⁴⁶⁹ Two resolutions referred to the “continuing importance of the 1925 Geneva Protocol”.⁴⁷⁰ Several resolutions had as their title “Measures to uphold the authority of the 1925 Geneva Protocol”.⁴⁷¹

456. A number of resolutions adopted by the UN General Assembly refer to the 1925 Geneva Gas Protocol as part of the rules of IHL to be respected. In them, the General Assembly calls upon “all parties to armed conflicts to observe the international humanitarian rules which are applicable, in particular . . . the

12 December 1977, § 3; Res. 33/59 A, 14 December 1978, § 4; Res. 35/144 C, 12 December 1980, § 2; Res. 37/98 D, 13 December 1982, § 1; Res. 40/92 A, 12 December 1985, § 5; Res. 41/58 B, 3 December 1986, § 5; Res. 43/74 A, 7 December 1988, § 2; Res. 44/115 B, 15 December 1989, § 2.

⁴⁶⁵ UN General Assembly, Res. 47/39, 30 November 1992, § 3; Res. 51/45 T, 10 December 1996, § 4; Res. 53/77 R, 4 December 1998, § 5; Res. 54/54 E, 1 December 1999, § 5.

⁴⁶⁶ UN General Assembly, Res. 2454 (XXIII) A, 20 December 1968, preamble; Res. 31/65, 10 December 1976, preamble; Res. 35/144 B, 12 December 1980, preamble; Res. 35/144 C, 12 December 1980, § 1; Res. 36/96 A, 9 December 1981, preamble; Res. 37/98 B, 13 December 1982, preamble; Res. 38/187 B, 20 December 1983, preamble; Res. 40/92 B, 12 December 1985, preamble; Res. 40/92 C, 12 December 1985, preamble; Res. 41/58 C, 3 December 1986, preamble; Res. 41/58 D, 3 December 1986, preamble; Res. 45/57 A, 4 December 1990, § 1; Res. 45/57 C, 4 December 1990, § 2; Res. 46/35 B, 6 December 1991, § 2; Res. 46/35 C, 6 December 1991, preamble and § 1; Res. 51/45 P, 10 December 1996, § 1; Res. 53/77 L, 4 December 1998, § 1.

⁴⁶⁷ UN General Assembly, Res. 2162 (XXI) B, 5 December 1966, § 1; Res. 2662 (XXV), 7 December 1970, § 1; Res. 2674 (XXV), 9 December 1970, § 3; Res. 2827 (XXVI) A, 16 December 1971, preamble; Res. 2933 (XXVII), 29 November 1972, preamble; Res. 3077 (XXVIII), 6 December 1973, preamble; Res. 3256 (XXIX), 9 December 1974, preamble; Res. 3465 (XXX), 11 December 1975, preamble; Res. 37/98 E, 13 December 1982, § 2; Res. 39/65 A, 12 December 1984, preamble; Res. 42/37 C, 30 November 1987, § 1; Res. 43/74 A, 7 December 1988, § 1; Res. 44/115 B, 15 December 1989, § 1.

⁴⁶⁸ UN General Assembly, Res. 44/115 B, 15 December 1980, § 1; Res. 45/57 C, 4 December 1990, § 1; Res. 46/35 B, 6 December 1991, § 1.

⁴⁶⁹ UN General Assembly, Res. 40/92 C, 12 December 1985, § 1; Res. 41/58 C, 3 December 1986, § 1. (Similar wording is to be found in Res. 39/65 A, 12 December 1984, § 1.)

⁴⁷⁰ UN General Assembly, Res. 40/92 A, 12 December 1985, preamble; Res. 41/58 B, 3 December 1986, preamble.

⁴⁷¹ UN General Assembly, Res. 37/98 D, 13 December 1982; Res. 42/37 C, 30 November 1987; Res. 44/115 B, 15 December 1989; Res. 45/57 C, 4 December 1990; Res. 46/35 B, 6 December 1991; Res. 51/45 P, 10 December 1996.

1925 Geneva Protocol"⁴⁷² and states that it is "convinced of the continuing value of established humanitarian rules relating to armed conflict, in particular... the 1925 Geneva Protocol".⁴⁷³ Two resolutions recall "the provisions of the 1925 Geneva Protocol and other relevant rules of customary international law".⁴⁷⁴

457. In a resolution adopted in 1969, the UN General Assembly stated that the 1925 Geneva Gas Protocol "embodies the generally recognised rules of international law prohibiting the use in international armed conflicts of all... chemical methods of warfare, regardless of any technical developments". It declared:

as contrary to the generally recognized rules of international law, as embodied in the [1925 Geneva Gas Protocol] the use in international armed conflicts of:

- (a) Any chemical agents of warfare – chemical substances, whether gaseous, liquid or solid – which might be employed because of their direct toxic effects on man, animals or plants.⁴⁷⁵

The large number of States which abstained in the vote on the resolution (36) was partly due to disagreement on the scope of the 1925 Geneva Gas Protocol. Other States thought that the UN General Assembly should not interpret multilateral treaties.⁴⁷⁶

458. In a resolution adopted in 1970, the UN General Assembly called upon "the Government of Portugal not to use chemical... methods of warfare against the peoples of Angola, Mozambique and Guinea (Bissau) contrary to the generally recognised rules of international law embodied in the 1925 Geneva Protocol".⁴⁷⁷

459. In a resolution adopted in 1971, the UN General Assembly reiterated its condemnation of the use of chemical weapons by Portugal against certain

⁴⁷² UN General Assembly, Res. 3032 (XXVII), 18 December 1972, § 2; Res. 3102 (XXVIII), 12 December 1973, § 4; Res. 3319 (XXIX), 14 December 1974, § 3; Res. 3500 (XXX), 15 December 1975, § 1; Res. 31/19, 24 December 1976, § 1.

⁴⁷³ UN General Assembly, Res. 32/44, 8 December 1977, § 6.

⁴⁷⁴ UN General Assembly, Res. 42/37 C, 30 November 1987, preamble; Res. 43/74 A, 7 December 1988, preamble.

⁴⁷⁵ UN General Assembly, Res. 2603 A (XXIV), 16 December 1969, preamble and § (a). The resolution was adopted by 80 votes in favour, 3 against (Australia, Portugal and US) and 36 abstentions (Austria, Belgium, Bolivia, Canada, Chile, China, Denmark, El Salvador, France, Greece, Iceland, Israel, Italy, Japan, Laos, Liberia, Luxembourg, Madagascar, Malawi, Malaysia, Netherlands, New Zealand, Nicaragua, Norway, Paraguay, Philippines, Sierra Leone, Singapore, South Africa, Swaziland, Thailand, Tunisia, Turkey, UK, Uruguay and Venezuela), UN Doc. A/PV.1836, 16 December 1969, p. 4.

⁴⁷⁶ Debates in the First Committee of the UN General Assembly, UN Doc. A/C.1/PV.1716, 9 December 1969; UN Doc. A/C.1/PV.1717, 10 December 1969.

⁴⁷⁷ UN General Assembly, Res. 2707 (XXV), 14 December 1970, § 9. (The resolution was adopted by 94 votes in favour, 6 against and 16 abstentions. The votes against and abstaining appear to have been linked to the colonial question rather than to the evaluation of the value of the 1925 Geneva Gas Protocol as such.)

territories under its administration.⁴⁷⁸ The condemnation was repeated in two further resolutions in 1972 and 1973.⁴⁷⁹

460. In two resolutions adopted in 1971, the UN General Assembly called upon “all parties to any armed conflict to observe the rules laid down . . . in the 1925 Geneva Protocol”.⁴⁸⁰

461. In a resolution adopted in 1974, the UN General Assembly stated that “the use of chemical . . . weapons in the course of military operations constitutes one of the most flagrant violations of the Geneva [Gas] Protocol of 1925 . . . and the principles of international humanitarian law . . . and shall be severely condemned”.⁴⁸¹

462. With a view to reaching an agreement that would provide for the total elimination of chemical weapons, the UN General Assembly expressed support for the goal of a total ban in numerous resolutions.⁴⁸²

463. In 1978, in the Final Document of its Tenth Special Session, the UN General Assembly stated that:

72. All States should adhere to the Protocol for the Prohibition of the Use in War of Asphyxiating, Poisonous or Other Gases, and of Bacteriological Methods of Warfare, signed at Geneva on 17 June 1925.

75. The complete and effective prohibition of the development, production and stockpiling of all chemical weapons and their destruction represents one of the most urgent measures of disarmament. Consequently, the conclusions of a convention to this end, on which negotiations have been going on for several years, is one of the most urgent tasks of multilateral negotiations. After its conclusion, all States should contribute to ensuring the broadest possible application of the convention through its early signature and ratification.⁴⁸³

⁴⁷⁸ UN General Assembly, Res. 2795 (XXVI), 10 December 1971, preamble.

⁴⁷⁹ UN General Assembly, Res. 2918 (XXVII), 14 November 1972, preamble; Res. 3113 (XXVIII), 12 December 1973, § 3.

⁴⁸⁰ UN General Assembly, Res. 2852 (XXVI), 20 December 1971, § 1; Res. 2853 (XXVI), 20 December 1971, § 1.

⁴⁸¹ UN General Assembly, Res. 3318 (XXIX), 14 December 1974, § 2. (Similar language is used in Res. 39/65 E, 12 December 1984, which states in its second preambular paragraph that “the use of such agents in war is universally condemned.” The resolution was adopted without a vote.)

⁴⁸² UN General Assembly, Res. 2662 (XXV), 7 December 1970, § 5(a) and (b); Res. 2827 (XXVI) A, 16 December 1971, § 4; Res. 2827 (XXVI) B, 16 December 1971; Res. 2933 (XXVII), 29 December 1972, preamble, §§ 1 and 3; Res. 3077 (XXVIII), 6 December 1973, § 1; Res. 3256 (XXIX), 9 December 1974, §§ 1 and 2; Res. 3465 (XXX), 11 December 1975, preamble and § 2; Res. 31/65, 10 December 1976, preamble and § 1; Res. 32/77, 12 December 1977, preamble and § 1; Res. 33/59 A, 14 December 1978, preamble; Res. 34/72, 11 December 1979, § 1; Res. 35/144 A, 12 December 1980, § 1(a); Res. 36/96 B, 9 December 1981, § 1; Res. 37/98 A, 13 December 1982, preamble; Res. 37/98 B, 13 December 1982, preamble; Res. 38/187 A, 20 December 1983, preamble; Res. 39/65 A, 12 December 1984, § 3; Res. 39/65 C, 12 December 1984, § 2; Res. 40/92 A, 12 December 1985, preamble; Res. 41/58 B, 3 December 1986, preamble; Res. 41/58 C, 3 December 1986, § 3; Res. 42/37 A, 30 November 1987, § 2; Res. 43/74 C, 7 December 1988, preamble; Res. 44/115 A, 15 December 1989, preamble; Res. 45/57 A, 4 December 1990, preamble; Res. 46/35 C, 6 December 1991, preamble; Res. 47/39, 30 November 1992, preamble; Res. 51/45 P, 10 December 1996, preamble; Res. 51/45 T, 10 December 1996, preamble.

⁴⁸³ UN General Assembly, Final Document of the Tenth Special Session, UN Doc. A/S-10/2, 30 June 1978, III. Programme of Action, §§ 72 and 75.

464. In a resolution adopted in 1982, the UN General Assembly stated that “the use of chemical . . . weapons has been declared incompatible with the accepted norms of civilization”.⁴⁸⁴

465. In a resolution adopted in 1982, the UN General Assembly outlined a procedure for investigations into breaches of the 1925 Geneva Gas Protocol, which involved the UN Secretary-General convening a group of experts to investigate “activities that may constitute a violation of the Protocol or of the relevant rules of customary international law”.⁴⁸⁵ This resolution was adopted in the context of the East-West conflict over the alleged use of chemical weapons in Afghanistan, Kampuchea and Laos. Although the debates were strongly partisan in relation to the actual allegations, there was strong support for the norm prohibiting the use of chemical weapons.⁴⁸⁶

466. In a resolution adopted in 1988, the UN General Assembly expressed “deep dismay at the use of chemical weapons in violation of the 1925 Geneva Protocol and of other rules of customary international law” and requested that the Secretary-General investigate reports of the possible use of chemical weapons in the Iran–Iraq War.⁴⁸⁷ A further request for investigation into the use of chemical weapons was made in a resolution adopted by the UN General Assembly in 1989, which expressed the deep dismay of the UN General Assembly “at the use and risk of use of chemical weapons”.⁴⁸⁸

467. In a resolution adopted in 1991 on the situation of human rights in Iraq, the UN General Assembly stated that it was “deeply concerned by the fact that chemical weapons have been used on the Kurdish population”.⁴⁸⁹

468. In a resolution adopted in 1993, the UN General Assembly stated that it was “deeply concerned by the fact that chemical weapons have been used on the Kurdish population”.⁴⁹⁰

⁴⁸⁴ UN General Assembly, Res. 37/98 E, 13 December 1982, preamble. (Similar language is to be found in Res. 2162 (XXI) B, 5 December 1966, which states in its second preambular paragraph that “weapons of mass destruction constitute a danger to all mankind and are incompatible with the accepted norms of civilisation”. The resolution was adopted by 101 votes in favour, none against and 3 abstentions.)

⁴⁸⁵ UN General Assembly, Res. 37/98 D, 13 December 1982, § 4. (The resolution was adopted by 86 votes in favour, 19 against and 33 abstentions. Against: Afghanistan, Bulgaria, Belarus, Congo, Cuba, Czechoslovakia, Ethiopia, GDR, Grenada, Hungary, Laos, Libya, Mongolia, Poland, Syria, Ukraine, USSR, Vietnam and Democratic Yemen. Abstaining: Algeria, Argentina, Bahrain, Bhutan, Bolivia, Brazil, Burma, Burundi, Cyprus, Finland, Ghana, Guinea, Guinea-Bissau, Guyana, Iraq, Jordan, Kuwait, Madagascar, Mali, Mexico, Mozambique, Nicaragua, Panama, Peru, Qatar, Sierra Leone, Sri Lanka, Tanzania, Uganda, United Arab Emirates, Venezuela, Yemen and SFRY.)

⁴⁸⁶ UN General Assembly, UN Doc. A/37/PV.101, 13 December 1982, pp. 1667–1680.

⁴⁸⁷ UN General Assembly, Res. 43/74 A, 7 December 1988, preamble and § 5. (The resolution was adopted without a vote.)

⁴⁸⁸ UN General Assembly, Res. 44/115 B, 15 December 1989, preamble. (The resolution was adopted without a vote.)

⁴⁸⁹ UN General Assembly, Res. 46/134, 17 December 1991, preamble. The resolution was adopted by 129 votes in favour, one against (Iraq) and 17 abstentions (Bangladesh, Brunei Darussalam, China, Côte d’Ivoire, Cuba, Indonesia, Laos, Lesotho, Malaysia, Morocco, Namibia, Nigeria, Pakistan, Sri Lanka, Uganda, Tanzania and Zimbabwe).

⁴⁹⁰ UN General Assembly, Res. 48/144, 20 December 1993, preamble.

469. In several resolutions adopted between 1996 and 2000, the UN General Assembly stated its determination “to achieve the effective prohibition of the development, production, acquisition, transfer, stockpiling and use of chemical weapons and their destruction”. It stressed the importance of the OPCW and the necessity of universal adherence to the 1993 CWC.⁴⁹¹

470. In a resolution adopted in 1988, the UN Sub-Commission on Human Rights stated that it was “deeply concerned” by reports of the increased use of chemical weapons and called upon all States to “observe strictly the principles and objectives” of the 1925 Geneva Gas Protocol.⁴⁹²

471. In a resolution adopted in 1989, the UN Sub-Commission on Human Rights stated that the use of chemical weapons was “also incompatible with the prohibition against any form of torture or cruel, inhuman or degrading treatment or punishment”. It called upon all States “to abide by their international obligations in this field”.⁴⁹³

472. In a resolution adopted in 1996, the UN Sub-Commission on Human Rights stated that chemical weapons were “weapons of mass destruction or had indiscriminate effects”. It also stated that the use of these weapons was “incompatible with human rights and humanitarian law”.⁴⁹⁴

473. In 1969, in a report on chemical and bacteriological (biological) weapons and the effects of their possible use, the UN Secretary-General urged all UN member States to accede to the 1925 Geneva Gas Protocol, to affirm that the prohibition covered all sorts of chemical weapons and to reach an agreement on the elimination of chemical weapons.⁴⁹⁵

474. In 1981 and 1982, the UN Secretary-General produced reports on chemical and bacteriological (biological) weapons which included the reports of the Group of Experts to Investigate Reports on the Alleged Use of Chemical Weapons in accordance with UN General Assembly Resolutions 35/144 C (1980) and 36/96 C (1981).⁴⁹⁶

475. In 1984, in a message to the Presidents of Iran and Iraq, the UN Secretary-General stated that “it is a deplorable fact that chemical weapons have been used in contravention of the Geneva Protocol of 1925 . . . This drew widespread international condemnation. It is imperative that resort to such weapons should not occur.”⁴⁹⁷

⁴⁹¹ UN General Assembly, Res. 51/45 T, 10 December 1996, preamble and § 2; Res. 52/38 T, 9 December 1997, preamble and § 3; Res. 53/77 R, 4 December 1998, preamble and § 2; Res. 54/54 E, 1 December 1999, preamble and § 2; Res. 55/33 H, 20 November 2000, preamble and § 1.

⁴⁹² UN Sub-Commission on Human Rights, Res. 1988/27, 1 September 1988, preamble and § 1.

⁴⁹³ UN Sub-Commission on Human Rights, Res. 1989/39, 1 September 1989, preamble and § 1.

⁴⁹⁴ UN Sub-Commission on Human Rights, Res. 1996/16, 29 August 1996, § 1 and preamble.

⁴⁹⁵ UN Secretary-General, Report on chemical and bacteriological (biological) weapons and the effects of their possible use, UN Doc. A/7575, 1 July 1969, p. xii, §§ 1–3.

⁴⁹⁶ UN Secretary-General, Report on chemical and bacteriological (biological) weapons, UN Doc. A/36/613, 20 November 1981; Report on chemical and bacteriological (biological) weapons, UN Doc. A/37/259, 1 December 1982.

⁴⁹⁷ UN Secretary-General, Messages dated 29 June 1984 to the President of Iran and to the President of Iraq, UN Doc. S/16663, 6 July 1984, p. 1.

476. In 1988, in a note with regard to a report of the Mission Dispatched by the UN Secretary-General to Investigate Allegations of the Use of Chemical Weapons in the Conflict between Iran and Iraq, the UN Secretary-General stated that:

It is with a sense of dismay and deep regret that the Secretary-General informs the Security Council that, despite many international appeals and world-wide condemnations, chemical weapons continue to be used in the conflict between the Islamic Republic of Iran and Iraq in violation of the [1925 Geneva Gas Protocol] and that, indeed, the use of such weapons may have intensified. This, regrettably, is the conclusion of the mission of the medical specialist with the Secretary-General dispatched recently to the Islamic Republic of Iran and Iraq to investigate the allegations lodged by both Governments of the use of chemical weapons.⁴⁹⁸

477. In 2001, in a report on violence against women perpetrated and/or condoned by the State during times of armed conflict, the Special Rapporteur of the UN Commission on Human Rights on Violence against Women, Its Causes and Consequences stated that:

Modern warfare has often entailed the deployment of chemical weapons, the use of which is now clearly banned by the Rome Statute of the ICC. Use of such weapons is a war crime and a crime against humanity. The Special Rapporteur has recently received a number of testimonies of victims of the use of chemical weapons, especially from Vietnam. The victims have suffered disabilities related to their reproductive organs and have given birth to children with severe disabilities. The consequences resulting from the use of chemical weapons can be devastating, not only for the victim concerned but also for the next generation, unborn at the time of the armed conflict.⁴⁹⁹

Other International Organisations

478. In a resolution on chemical weapons adopted in 1996, the APC-EU Joint Assembly noted that the "CWC prohibits the development, production, stockpiling, circulation and use of chemical weapons, thereby helping to safeguard peace and international security". It called upon all members to ratify the Convention as soon as possible.⁵⁰⁰

⁴⁹⁸ UN Secretary-General, Note on the report of the mission dispatched by the Secretary-General to investigate allegations of the use of chemical weapons in the conflict between Iran and Iraq, UN Doc. S/19823, 25 April 1988, p. 1, § 1; see also the subsequent notes by the UN Secretary-General on the same matter such as UN Doc S/20060, 20 July 1988, p. 1, § 1, UN Doc. S/20063, 25 July 1988, p. 1, § 1, UN Doc. S/20134, 19 August 1988, p. 1, § 1 and Julian Perry Robinson, "The Negotiations on the Chemical Weapons Convention: A Historical Overview", in Michael Bothe, Natalino Ronzitti and Allan Rosas (eds.), *The New Chemical Weapons Convention: Implementation and Prospects*, Kluwer Law International, The Hague, 1998, pp. 19 and 34.

⁴⁹⁹ UN Commission on Human Rights, Special Rapporteur on Violence against Women, Its Causes and Consequences, Report on violence against women perpetrated and/or condoned by the State during times of armed conflict (1997–2000), UN Doc. E/CN.4/2001/73, 23 January 2001, § 46.

⁵⁰⁰ ACP-EU Joint Assembly, Resolution on chemical weapons, 22 March 1996, *Official Journal*, No. C 254, 1996, Item 4.

479. In a resolution adopted in 1985 on war between Iran and Iraq, the Parliamentary Assembly of the Council of Europe called upon all member States to support efforts to put an end to the use of chemical weapons.⁵⁰¹

480. In 1985, in a report on the deteriorating situation in Afghanistan, the Rapporteur of the Parliamentary Assembly of the Council of Europe stated that “according to several concordant accounts, . . . chemical substances and incendiary bombs producing gases of various colours have been discharged”. In this respect, he added that the report of the Special Rapporteur of the UN Commission on Human Rights deserved mention.⁵⁰² In that report, the UN Special Rapporteur had recommended that “the parties to the conflict, namely government and opposition forces, should be reminded that it is their duty to apply fully the rules of international humanitarian law without discrimination”.⁵⁰³

481. In 1986, in a letter on the Iran–Iraq War submitted on behalf of the EC to the UN Secretary-General, the Netherlands stated that the EC member States were “particularly alarmed by renewed violations of humanitarian law and other laws of armed conflict, including the use of chemical weapons, and they condemn such violations wherever they occur”.⁵⁰⁴

482. In 1987, during a debate in the First Committee of the UN General Assembly, Denmark condemned, on behalf of the EC, the use of chemical weapons in the Iran–Iraq War and chemical attacks against the civilian population.⁵⁰⁵

483. The preamble to EEC Regulation No. 428/89 of 20 February 1989 concerning the export of certain chemical products recalls that, at the 1989 international conference in Paris, the EEC strongly condemned the use of chemical weapons.⁵⁰⁶

484. In 1990, during a debate in the First Committee of the UN General Assembly, Italy stated, on behalf of the EC, that it supported “the goal of a total chemical-weapons ban”.⁵⁰⁷

485. In 1991, during a debate in the First Committee of the UN General Assembly, the Netherlands expressed, on behalf of the EC, “the hope that States will make their commitment to the future Chemical Weapon Convention

⁵⁰¹ Council of Europe, Parliamentary Assembly, Resolution 849, 30 September 1985, pp. 103–104, § 10(v).

⁵⁰² Council of Europe, Parliamentary Assembly, Rapporteur, Report on the deteriorating situation in Afghanistan, Doc. 5495, 15 November 1985, pp. 7–8, § 16(e).

⁵⁰³ UN Commission on Human Rights, Special Rapporteur on the Situation of Human Rights in Afghanistan, Report, Recommendations, reprinted in Council of Europe, Parliamentary Assembly, Doc. 5495, Appendix 1, 15 November 1985, p. 11, § 190.

⁵⁰⁴ EC, Letter dated 26 February 1986 from the Netherlands on behalf of the EC to the UN Secretary-General, UN Doc. S/17867, 26 February 1986.

⁵⁰⁵ EC, Statement by Denmark on behalf of the EC before the First Committee of the UN General Assembly, UN Doc. A/C.1/42/PV.4, 13 October 1987, p. 51; EC, Statement by Denmark on behalf of the EC before the First Committee of the UN General Assembly, UN Doc. A/C.1/42/PV.25, 29 October 1987, p. 13.

⁵⁰⁶ European Council, Regulation No. 428/89, *Official Journal of European Community*, No. L50, 20 February 1989, p. 1.

⁵⁰⁷ EC, Statement by Italy on behalf of the EC before the First Committee of the UN General Assembly, UN Doc. A/C.1/45/PV.3, 15 October 1990, p. 22.

unambiguously clear" and declared that "it is important that [chemical] weapons be banned everywhere and forever".⁵⁰⁸

486. In 1995, during a debate in the First Committee of the UN General Assembly, Spain expressed support, on behalf of the EU, for the strengthening of the prohibition against chemical weapons.⁵⁰⁹

487. At the First Conference of States Parties to the CWC in 1997, the Netherlands stated, on behalf of the EU, that "Member states of the Union have worked actively to promote the universality of the Convention. We are committed to ensuring... that the treaty is universal." It reconfirmed its good intentions by once more emphasising its commitment to global chemical disarmament.⁵¹⁰

488. In the Final Communiqué of its 12th Session in 1991, the GCC Supreme Council confirmed "the necessity of making the whole Middle East region free of all sorts of weapons of mass destruction, including... chemical... weapons".⁵¹¹

489. In the Final Communiqué of its 16th Session in 1995, the GCC Supreme Council expressed "its great regret that the Iraqi government continues to produce... chemical and radioactive weapons which are... dangerous and destructive". It called for a zone free of weapons of mass destruction, including chemical weapons, and confirmed "the importance of considering the process of removing Iraqi weapons of mass destruction as a step towards evacuating the whole region of such destructive weapons". It further called for a "ban on the spreading of technology related to the research on weapons of mass destruction and their production in the Gulf region".⁵¹²

490. In a resolution adopted in 1970, the Council of the League of Arab States invited:

the Arab Member States that did not adhere to the 1925 [Geneva Gas Protocol] to adhere to it with the following reservations:

- ...
- (b) If there is a breach of the prohibition provided by the protocol, under any form and by any entity, the adhering State would be freed of its commitment to its provisions.⁵¹³

⁵⁰⁸ EC, Statement by Netherlands on behalf of the EC before the First Committee of the UN General Assembly, UN Doc. A/C.1/46/PV.30, 7 November 1991, p. 22.

⁵⁰⁹ EU, Statement by Spain on behalf of the EU before the First Committee of the UN General Assembly, UN Doc. A/C.1/50/PV.3, 16 October 1995, p. 12.

⁵¹⁰ EU, Statement by Netherlands on behalf of the EU at the First Conference of States Parties to the CWC, The Hague, 6–23 May 1997. (The Member States of the EU, the Associated Countries from Central and Eastern Europe, the Associated Country Cyprus, as well as Norway, Iceland and Liechtenstein aligned themselves with this statement.)

⁵¹¹ GCC, Supreme Council, 12th Session, Kuwait, 23–25 December 1991, Final Communiqué, annexed to Letter dated 30 December 1991 from Kuwait to the UN Secretary-General, UN Doc. A/46/833-S/23336, 30 December 1991.

⁵¹² GCC, Supreme Council, 16th Session, Muscat, 4–6 December 1995, Final Communiqué, annexed to Letter dated 29 December 1995 from Oman to the UN Secretary-General, UN Doc. A/51/56-S/1995/1070, 29 December 1995.

⁵¹³ League of Arab States, Council, Res. 2676, 15 September 1970.

491. In 1994, the OIC expressed its deep concern that “UNPROFOR authorities allowed the Serbs from the UNPA’s in the Republic of Croatia to have at their disposal internationally prohibited weapons such as . . . poisonous gases used for mass killing of civilians”.⁵¹⁴

492. In its report on the implementation of the 1993 CWC in the year 2001, the OPCW stated that:

3. The year 2001 saw a number of significant milestones relating to the destruction of chemical weapons in all chemical weapons possessor States Parties – India, the Russian Federation, the United States of America, and a fourth State Party.
4. During 2001 India and the United States of America completed the destruction of 20% of their Category 1 chemical weapons ahead of the Convention’s timeline of 29 April 2002.
5. The destruction of Category 2 chemical weapons was well underway in 2001 in both India and the Russian Federation. No Category 2 chemical weapons were declared by the United States of America and the fourth chemical weapons possessor State Party.
6. India and the Russian Federation also completed the destruction of all their Category 3 chemical weapons in 2001. Another State Party had completed the destruction of these weapons in 1999. By the end of 2001 the United States of America had completed the destruction of over 99% of its Category 3 chemical weapons.⁵¹⁵

The OPCW further stated that:

Between [the entry into force of the 1993 CWC] and 31 December 2001, OPCW inspectors confirmed the destruction of a total of 6,518 metric tonnes of chemical agent contained in 2,098,013 munitions items (including 4,878 one-ton containers) in the four chemical weapons possessor States Parties [i.e. India, Russia, US and a fourth State Party].⁵¹⁶

International Conferences

493. The 20th International Conference of the Red Cross in 1965 adopted a resolution on the protection of civilian populations against the dangers of indiscriminate warfare which expressly invited “all Governments who have not yet done so to accede to the Geneva Gas Protocol of 1925 which prohibits the use of asphyxiating, poisonous, or other gases, all analogous liquids, materials or devices”.⁵¹⁷

494. In a resolution adopted in 1968 on human rights in armed conflicts, the Teheran International Conference on Human Rights emphasised that

⁵¹⁴ OIC, Declaration of the Enlarged Meeting of the Foreign Ministers of the Contact Group of the OIC and OIC States Contributing Troops to UNPROFOR in Bosnia and Herzegovina, Geneva, 6 December 1994, § 6.

⁵¹⁵ OPCW, Report on the Implementation of the 1993 CWC in the Year 2001, Doc. C-7/3, 10 October 2002, Introduction and Overview, §§ 3–6.

⁵¹⁶ OPCW, Report on the Implementation of the 1993 CWC in the Year 2001, Doc. C-7/3, 10 October 2002, § 2.15.

⁵¹⁷ 20th International Conference of the Red Cross, Vienna, 2–9 October 1965, Res. XXVIII.

“the widespread violence and brutality of our times, including... the use of chemical... means of warfare... erode human rights and engender counter-brutality”.⁵¹⁸

495. The 21st International Conference of the Red Cross in 1969 adopted a resolution on weapons of mass destruction in which it appealed to States to accede to the 1925 Geneva Gas Protocol and “to comply strictly with its provisions”. The Conference further urged governments “to conclude as rapidly as possible an agreement banning the production and stockpiling of chemical... weapons”.⁵¹⁹

496. The 25th International Conference of the Red Cross in 1986 adopted a resolution on protection of the civilian population in armed conflicts in which it deplored “the use of prohibited weapons such as chemical weapons... in violation of the laws and customs of war” and was “deeply concerned by information that prohibited weapons, including chemical weapons, have been used in some conflicts”.⁵²⁰

497. The Final Declaration of the Conference of States Parties to the 1925 Geneva Protocol and Other Interested States in 1989, adopted by consensus of the 149 participating States, stated that:

1. The participating States... are determined to prevent any recourse to chemical weapons by completely eliminating them. They solemnly affirm their commitments not to use chemical weapons and condemn such use...
2. The participating States recognize the importance and continuing validity of the [1925 Geneva Gas Protocol]. The States Parties to the Protocol solemnly reaffirm the prohibition as established in it. They call upon all States which have not yet done so to accede to the Protocol.
3. The participating States stress the necessity of concluding, at an early date, a Convention on the prohibition of the development, production, stockpiling and use of all chemical weapons, and on their destruction. This Convention shall be global and comprehensive and effectively verifiable. It should be of unlimited duration... In order to achieve as soon as possible the indispensable universal character of the Convention, they call upon all States to become parties thereto as soon as it is concluded.⁵²¹

498. During the First Session of the Conference of States Parties to the CWC in 1997, States parties widely acknowledged “a need for greater universality” and emphasized “the importance of ratification by the Russian Federation, States in ‘regions of tension’, and States with significant chemical industries”.⁵²²

⁵¹⁸ International Conference on Human Rights, Teheran, 22 April–13 May 1968, Res. XXIII, 12 May 1968, preamble.

⁵¹⁹ 21st International Conference of the Red Cross, Istanbul, 6–13 September 1969, Res. XIV.

⁵²⁰ 25th International Conference of the Red Cross, Geneva, 23–31 October 1986, Res. I, preamble and Res. VIII, preamble.

⁵²¹ Conference of States Parties to the 1925 Geneva Protocol and Other Interested States, Paris, 7–11 January 1989, Final Declaration, 11 January 1989, §§ 1–3, annexed to letter dated 19 January 1989 from France to the UN Secretary-General, UN Doc. A/44/88, 20 January 1989.

⁵²² Conference of States Parties to the CWC, First Session, The Hague, 6–23 May 1997, *Yearbook of the United Nations*, New York, 1997, Vol. 51, p. 500.

IV. Practice of International Judicial and Quasi-judicial Bodies

499. In the *Tadić* case in 1995, the ICTY discussed the use of chemical weapons in internal conflicts. The Court of Appeal stated that the use of chemical weapons was prohibited in both international and non-international armed conflicts.⁵²³ The basis of the Tribunal's finding was the reaction to the Iraqi use of gas against Kurdish villages. The world community reacted to it with condemnation. The 12 member States of the EC had called for respect for IHL, including the 1925 Geneva Gas Protocol and UN Security Council Resolutions 612 and 620. Germany, UK and US had individually condemned the use of chemical weapons as being a breach of international law. Iraq had denied the allegations. This implied, in the view of the Tribunal, an acceptance that the prohibition also applied to internal conflicts. The Tribunal concluded that:

It is therefore clear that, whether or not Iraq really used chemical weapons against its own Kurdish nationals . . . there undisputedly emerged a general consensus in the international community on the principle that the use of those weapons is also prohibited in internal armed conflicts.⁵²⁴

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

500. To fulfil its task of disseminating IHL, the ICRC has delegates around the world teaching armed and security forces that the use of "asphyxiating, poisonous or other gases [and] all analogous liquids, materials or devices" is prohibited.⁵²⁵

501. In a statement issued on 31 January 1967, the ICRC referred to the "alleged use of poison gas" by Egypt in support of republican forces during the civil war in Yemen and appealed urgently to all parties to "observe the rules of international morality and law".⁵²⁶ On 2 June 1967, an ICRC press release noted that a medical team in North Yemen had "collected various indications pointing to the use of poison gas". The statement went on to say that the ICRC was "extremely disturbed and concerned by these methods of warfare which are absolutely forbidden by codified international and customary law" and that it had "communicated its delegates' reports to all authorities concerned in the Yemen conflict, requesting them to take the solemn engagement not to resort

⁵²³ ICTY, *Tadić* case, Interlocutory Appeal, 2 October 1995, § 120.

⁵²⁴ ICTY, *Tadić* case, Interlocutory Appeal, 2 October 1995, § 124.

⁵²⁵ Frédéric de Mulinen, *Handbook on the Law of War for Armed Forces*, ICRC, Geneva, 1987, § 919(a) and (b).

⁵²⁶ ICRC, Note d'Information No. 91, L'actualité de la Croix-Rouge, 8 February 1967, reprinted in SIPRI, *The Problem of Chemical and Biological Warfare*, Vol. VI, *The Prevention of CBW*, Almqvist & Wiksell, Stockholm, 1975, p. 230, footnote 18.

in any circumstance whatsoever to the use of asphyxiating gases or any other similar toxic substance".⁵²⁷

502. In a memorandum on toxic gas in 1980, the ICRC stated that the prohibition of lethal poison gas was part of customary international law.⁵²⁸

503. At its Rio de Janeiro Session in 1987, the Council of Delegates adopted a resolution on the formal commitment by the Movement to obtain the full implementation of the Geneva Conventions in which it requested the ICRC "to take all necessary steps to enable it to protect and assist . . . victims of the use of prohibited weapons such as chemical weapons".⁵²⁹

504. In a press release issued in 1988 in the context of the Iran–Iraq War, the ICRC stated that:

In a new and tragic escalation of the Iran–Iraq conflict, chemical weapons have been used, killing a great number of civilians in the province of Sulaymaniyah. The use of chemical weapons, whether against military personnel or civilians, is absolutely forbidden by international law and is to be condemned at all times.⁵³⁰

505. In a Memorandum on the Applicability of International Humanitarian Law sent in 1990 to all States party to the Geneva Conventions in the context of the Gulf War, the ICRC stated that "the use of chemical . . . weapons is prohibited (1925 Geneva Protocol); the rules of the law of armed conflict also apply to weapons of mass destruction".⁵³¹

506. In a press release issued in 1991 in the context of the Gulf War, the ICRC reminded the parties that "the use of chemical . . . weapons is prohibited under international humanitarian law . . . Weapons of mass destruction having indiscriminate effects generally cause irreparable damage among the civilian population, which must be kept out of the fighting."⁵³²

507. In a letter to the ICRC in 1991, the Slovene Red Cross protested against "the use of chemical weapons in Croatia by the Yugoslav army".⁵³³

508. In a letter to the ICRC in 1991, the Croatian Red Cross stated that it had "received information from the battlefields that poisonous gas was applied against the defence forces of Croatia and civilians".⁵³⁴

⁵²⁷ ICRC, Press Release No. 829b, *The ICRC and the Yemen Conflict*, 2 June 1967, reprinted in SIPRI, *The Problem of Chemical and Biological Warfare*, Vol. VI, *The Prevention of CBW*, Almquist & Wiksell, Stockholm, 1975, p. 233, footnote 27.

⁵²⁸ ICRC archive document.

⁵²⁹ International Red Cross and Red Crescent Movement, Council of Delegates, Rio de Janeiro Session, 27 November 1987, Res. 5, § 2.

⁵³⁰ ICRC, Press Release No. 1567, *Iran–Iraq conflict: The ICRC condemns the use of chemical weapons*, 23 March 1988.

⁵³¹ ICRC, Memorandum on the Applicability of International Humanitarian Law, 14 December 1990, § II, *IRRC*, No. 280, 1991, p. 25.

⁵³² ICRC, Press Release No. 1658, *Gulf War: ICRC reminds States of their obligations*, 17 January 1991, *IRRC*, No. 280, 1991, p. 26.

⁵³³ Slovene Red Cross, *Protest and appeal of the Slovene Red Cross*, 22 September 1991.

⁵³⁴ Croatian Red Cross, *Appeal by the Croatian Red Cross*, 24 September 1991.

509. In a memorandum issued in 1992, the ICRC expressed the view that the use of chemical weapons undermined the prohibition of the use of inherently indiscriminate weapons.⁵³⁵

510. In 1993, the National Society of a State denounced the use of chemical weapons by another State. It stated that during the siege of a major city, troops of that State used chemical weapons, which killed 22 soldiers of the other State.⁵³⁶

511. At the conference to commemorate the entry into force of the 1993 CWC and the establishment of the OPCW in 1997, the ICRC noted that “despite the occurrence of several hundred conflicts since 1918 the use of chemical weapons has been confirmed in only a few cases, including in one instance by the ICRC”. After retracing the history of the prohibition on the use of chemical weapons, a prohibition which has been observed in the rules of warfare of “diverse moral and cultural systems”, the ICRC concluded that “both the law and public abhorrence have undoubtedly played a role in making poison warfare unacceptable”. The ICRC called upon States to adhere to the 1993 CWC, to work towards its universal application and to withdraw any reservations that they might have to the 1925 Geneva Gas Protocol.⁵³⁷

512. In 1994, in a Memorandum on Respect for International Humanitarian Law in Angola, the ICRC stated that “in particular, the use of chemical . . . weapons . . . is prohibited”.⁵³⁸

VI. Other Practice

513. It is reported that Germany used mustard gas on a large scale in the second Battle of Ypres in April 1915. UK forces reportedly retaliated with gas in September the same year. Approximately 1,000,000 injuries and 91,198 deaths in the First World War were gas-related.⁵³⁹

514. The USSR is reported to have used gas during its incursion into Sinkiang in clashes with the Tungan Mujahideen in 1934.⁵⁴⁰

515. In 1981, an armed opposition group accused the pilots of a State of using “chemical bombs, herbicides and defoliants” against its bases and villages.⁵⁴¹

516. Rule B1 of the Rules Governing the Conduct of Hostilities in Non-international Armed Conflicts, adopted in 1990 by the Council of the IHL,

⁵³⁵ ICRC archive document. ⁵³⁶ ICRC archive document.

⁵³⁷ ICRC, Statement at the First Conference of States Parties to the CWC, The Hague, 6–23 May 1997.

⁵³⁸ ICRC, Memorandum on Respect for International Humanitarian Law in Angola, 8 June 1994, § II, *IRRC*, No. 320, 1997, p. 504.

⁵³⁹ Ann van Wynen Thomas and A. J. Thomas, Jr., *Legal Limits on the Use of Chemical and Biological Weapons*, Southern Methodist University Press, Dallas, 1970, p. 138.

⁵⁴⁰ Julian Perry Robinson, “The changing status of chemical and biological warfare: recent technical, military and political developments”, *SIPRI Yearbook 1982: World Armaments and Disarmament*, Taylor & Francis, London, 1982, p. 336.

⁵⁴¹ ICRC archive document.

states that “the customary rule prohibiting the use of chemical weapons, such as those containing asphyxiating or vesicant agents, . . . is applicable in non-international armed conflicts”.⁵⁴²

517. The Declaration of Minimum Humanitarian Standards, adopted by an expert meeting convened by the Institute for Human Rights of Åbo Akademi University in Turku/Åbo, Finland in 1990, states that “weapons or other material or methods prohibited in international armed conflicts must not be employed in any circumstances”.⁵⁴³

518. In 1990, in a report on human rights in Iraq, Middle East Watch stated with respect to the alleged use by Iraq of chemical weapons against the Kurdish minority in northern Iraq that:

Iraq’s defenders argue that it did not literally violate the Geneva Protocol of 1925 when it used chemical weapons against its Kurdish population. The language of the Protocol simply bans the use of chemical weapons “in war”. Based on the intent of the drafters, some jurists take the view that the Protocol applies only to international armed conflict, since that was the concern at the time of the states that drew it up. The Arab League ambassador to the United Nations . . . sought to use this legal loophole in Iraq’s defence when the United States, Britain, and others condemned Iraq’s use of chemical weapons against the Kurds in August and September 1988. The Arab League envoy pointed out that the 1925 Protocol prohibited the use of chemical weapons only between States and did not say anything about the use of such weapons within sovereign borders. He objected strongly to the United Nations being called upon “to investigate a matter within the prerogatives of sovereignty”. On the other hand, a leading expert on international humanitarian law [Theodor Meron] consulted by Middle East Watch expressed the view that the prohibition on poison-gas attacks had assumed the status of customary international law, and thus would be prohibited in all circumstances, despite the limited scope of the Protocol.⁵⁴⁴

519. On various occasions between 1990 and 1999, UNITA accused Angolan government forces of using chemical weapons against it.⁵⁴⁵ Many of these

⁵⁴² IHL, Rules of International Humanitarian Law Governing the Conduct of Hostilities in Non-international Armed Conflicts, Rule B1, *IRRC*, No. 278, 1990, p. 395.

⁵⁴³ Declaration of Minimum Humanitarian Standards, adopted by an expert meeting convened by the Institute for Human Rights, Åbo Akademi University, Turku/Åbo, 30 November–2 December 1990, Article 5(3), *IRRC*, No. 282, 1991, p. 332.

⁵⁴⁴ Middle East Watch, *Human Rights in Iraq*, 1990, Yale University Press, New Haven, pp. 82–83.

⁵⁴⁵ Voice of the Resistance of the Black Cockerel, 13 June 1993, as translated from the Portuguese in BBC-SWB, 14 June 1993; Voice of the Resistance of the Black Cockerel, 23 June 1993, as translated from the Portuguese in BBC-SWB, 25 June 1993; RDP Antena 1 (Lisbon), 27 June 1993, as translated from the Portuguese in JPRS-TND-93-021, 7 July 1993, p. 1; Carols Verism from Brussels on RDP Antena 1 (Lisbon), 19 July 1994, as excerpted from the Portuguese in BBC-SWB, 22 July 1994; “UNITA claims army is testing chemical weapons”, AFP from Luanda, 27 July 1994; Radio Nacional (Luanda), 27 July 1994, as translated from the Portuguese in FBIS-AFR-94-145, 28 July 1994, pp. 9–10; Chris Gordon (from Luanda), “Angolan bombs destroy UNITA stronghold”, *Mail @ Guardian* website, Johannesburg, 4 October 1999, as in FBIS-AFR-1999-1004; “Fighting razes town in Angola, kills hundreds: rebel spokesman”, AFP from Lisbon, 26 September 1999; “Angolan army ‘takes key town’”, BBC World News website, 26 September 1999; “Angolan army in major offensive against rebel-held Bailundo”, SAP-AFP from Luanda, 27 September 1999; “Angola: UNITA denies Bailundo stronghold fallen into

allegations were not, however, substantiated. The only form of verification of use came from a private European medical team that visited Angola for eight days in 1990 and afterwards announced that the team's "clinical and toxicological study shows clearly that the chemical bombs have gassed the population in this region". The validity of these conclusions is, however, uncertain.⁵⁴⁶

520. In 1996, the United Tajik Opposition accused the government of Tajikistan of wanting to use chemical weapons against it. It stated that "according to reliable information from the sources close to the Dushanbe regime leadership, the authorities approached Russia with a request to apply chemical weapons in Tavildara to physically eliminate every living being in the region".⁵⁴⁷

521. In 1998, the participating experts at a Workshop on International Criminalisation of Biological and Chemical Weapons at the Lauterpacht Research Centre for International Law of Cambridge University formulated a Draft Convention on the Prevention and Punishment of the Crime of Developing, Producing, Acquiring, Stockpiling, Retaining, Transferring or Using Biological and Chemical Weapons. The Draft Convention makes it an international criminal offence to use chemical weapons.⁵⁴⁸

522. It is reported that "in 1999 three of the four states parties that have declared CW stockpiles to the OPCW – India, South Korea and the USA – began destroying these weapons. Russia has not begun the destruction of its CW stockpiles largely owing to a lack of sufficient funding."⁵⁴⁹

523. It is reported that Iraq destroyed chemical agents under UNSCOM supervision.⁵⁵⁰

government hands", RDP Antena 1 radio (Lisbon), 27 September 1999, as translated from the Portuguese in BBC-SWB, 27 September 1999.

⁵⁴⁶ "Chemical War", *The Independent*, London, 22 February 1990, p. 14; "Heyndrickx brengt blitzbezoek aan Angola", *De Morgen*, Brussels, 22 February 1990, p. 10; G. Freilinger, Unofficial Commission for exploration and verification of war gas injuries in the Angola war: preliminary report, Vienna, 3 March 1990; "Dispuut over 'gasoorlog' in Angola houdt aan", *De Standaard*, Brussels, 15 March 1990, p. 4. (See, for example, "Observers evidence use of chemical weapons", *Diary de Notices*, Lisbon, 9 March 1990, p. 14, as translated from the Portuguese in FBIS-AFR-90-077, 20 April 1990, pp. 32–33; "Savimbi, l'Unita et Angola", *Jeune Afrique Economie*, Hors Série, April 1996, collection Marchés nouveau, p. 75.)

⁵⁴⁷ Declaration of the leadership of the United Tajik Opposition addressed to the UN Secretary-General, 5 June 1996.

⁵⁴⁸ Workshop on International Criminalisation of Biological and Chemical Weapons, Lauterpacht Research Centre for International Law, Cambridge, 1–2 May 1998, Draft Convention on the Prevention and Punishment of the Crime of Developing, Producing, Acquiring, Stockpiling, Retaining, Transferring or Using Biological and Chemical Weapons, reprinted in *The CBW Conventions Bulletin*, No. 42, December 1998, pp. 1–5.

⁵⁴⁹ Jean Pascal Zanders and Maria Wahlberg, "Chemical and biological weapon developments and arms control", in *SIPRI Yearbook 2000: Armaments, Disarmament and International Security*, Oxford University Press, Oxford, 2000, p. 513.

⁵⁵⁰ Maria Wahlberg, Milton Leitenberg and Jean Pascal Zanders, "The future of chemical and biological weapon disarmament in Iraq: from UNSCOM to UNMOVIC", in *SIPRI Yearbook 2000: Armaments, Disarmament and International Security*, Oxford University Press, Oxford, 2000, p. 570.

524. An article in the *Bulletin of the Atomic Scientists* in 1997 listed the following States as allegedly possessing chemical weapons: Bosnia and Herzegovina, Bulgaria, Burma, China, Egypt, France, North Korea, South Korea, India, Iran, Iraq, Israel, Libya, Pakistan, Romania, Russia, Saudi Arabia, Syria, Taiwan, US, Vietnam and FRY. The same article alleged that Burma, Iran, Iraq and Libya had used chemical weapons.⁵⁵¹

525. Employment of chemical weapons by at least four States parties has been alleged since the 1993 CWC entered into force for those countries: India,⁵⁵² Russia,⁵⁵³ Sudan⁵⁵⁴ and Turkey.⁵⁵⁵ The allegations remain unresolved in the public record, notwithstanding the verification capacity maintained by the OPCW.⁵⁵⁶

526. According to the Center for Nonproliferation Studies collecting information from open sources, in 2002 Algeria, Cuba, Sudan and Vietnam were possible possessors of chemical weapons. Probable possessors of chemical weapons were China, Egypt, Ethiopia, Israel, Myanmar, Pakistan and Taiwan. Known possessors, according to this source, were Iran, Iraq, North Korea, Libya, Russia and Syria.⁵⁵⁷

B. Riot Control Agents

I. Treaties and Other Instruments

Treaties

527. The 1925 Geneva Gas Protocol provides that:

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

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

⁵⁵¹ E. J. Hogendoorn, "A Chemical Weapons Atlas", *Bulletin of the Atomic Scientists*, Vol. 53, No. 5, September/October 1997, pp. 35–39.

⁵⁵² During the conflict in Jammu and Kashmir, see "8 September 1999", *The CBW Conventions Bulletin*, No. 46, December 1999, p. 27.

⁵⁵³ During the conflict in Chechnya in 1999, see "5 December 1999", *The CBW Conventions Bulletin*, No. 47, March 2000, p. 30.

⁵⁵⁴ In southern Sudan in July and August 1999, see "31 December 1999", *The CBW Conventions Bulletin*, No. 47, March 2000, p. 35.

⁵⁵⁵ When CS munitions were allegedly used by the Turkish army in an attack on a PKK position in south-eastern Turkey on 11 May 1999 that reportedly resulted in the deaths of 20 Kurdish fighters: see "28 October 1999" (Turkey), *The CBW Conventions Bulletin*, No. 46, December 1999, p. 41.

⁵⁵⁶ Julian Perry Robinson, Item 383 of 3 April 2000, "Effectiveness of the international treaties against chemical and biological armament, and experiences worth sharing", *Pugwash Meeting No. 254*, Oegstgeest, 8–9 April 2000, p. 3.

⁵⁵⁷ Monterey Institute of International Studies, Center for Nonproliferation Studies, *Chemical and Biological Weapons: Possession and Programs Past and Present*, last updated in 2002.

Declare:

That the High Contracting Parties, so far as they are not already Parties to Treaties prohibiting such use, accept this prohibition.

No State has at any time ratified or acceded to the Protocol with a reservation or declaration of interpretation limiting the types of chemical weapons to which it applies.

528. Article I(5) of the 1993 CWC states that “each State Party undertakes not to use riot control agents as a method of warfare”.

529. The non-use of riot control agents is subject to the provisions of a number of articles in the 1993 CWC, first of which is the definition of “chemical weapons” in Article II:

1. “Chemical Weapons” means the following, together or separately:
 - (a) Toxic chemicals and their precursors, except where intended for purposes not prohibited under this Convention, as long as the types and quantities are consistent with such purposes.

530. Article II(2) of the 1993 CWC defines the term “toxic chemical” as:

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

531. Article II(7) of the 1993 CWC defines “Riot Control Agent” as “any chemical not listed in a Schedule, which can produce rapidly in humans sensory irritation or disabling physical effects which disappear within a short time following termination of exposure”.

532. Article II(9)(d) of the 1993 CWC provides that:

9. “Purposes Not Prohibited Under this Convention” means:
 - ...
 - (d) Law enforcement including domestic riot control purposes.

The cumulative effect of these provisions is that riot control agents may not be used as a method of warfare but may be used for certain law enforcement purposes including riot control.

Other Instruments

533. Article 7 of the 1938 ILA Draft Convention for the Protection of Civilian Populations against New Engines of War provides that:

- (a) The prohibition of the use of chemical weapons shall apply to the use, by any method whatsoever, for the purpose of injuring an adversary, of any natural or synthetic substance (whether solid, liquid or gaseous) which is harmful to the human or animal organism by reason of its being a toxic, asphyxiating, irritant or vesicant substance.

(b) The said prohibition shall not apply:

...

- III. to smoke or fog used to screen objectives or for other military purposes, provided that such smoke or fog is not liable to produce harmful effects under normal conditions of use;
- IV. to gas that is merely lachrymatory.

II. National Practice

Military Manuals

534. Australia's Commanders' Guide repeats the prohibition of the 1993 CWC, specifying that the use of riot control agents "by ADF members in peacetime requires approval at the highest level of command. Where such approval is given, strict rules of engagement are likely to prescribe the specific situations in which they may be employed."⁵⁵⁸

535. Australia's Defence Force Manual states that:

Riot control agents, including tear gas and other gases which have debilitating but non-permanent effects as a means of warfare, is prohibited in armed conflict under the 1993 Chemical Weapons Convention. This does not mean riot control agents cannot be used in times of conflict (e.g. against rioting prisoners of war). Legal advice should be sought on the occasions when their use is considered.⁵⁵⁹

536. Belgium's Law of War Manual states that "it is uncertain whether... chemical products that do not cause widespread, long-term and severe damage to the environment" are covered by the prohibition on the use of asphyxiating and other analogous gases.⁵⁶⁰

537. Canada's LOAC Manual states that "the use of riot control agents including tear gas and other gases that have debilitating but non-permanent effects, as a means of warfare is prohibited".⁵⁶¹

538. Canada's Code of Conduct provides that "the use of CS gas or pepper spray is lawful and may be used for crowd control purposes, but their use as a means of warfare is illegal".⁵⁶²

539. Germany's Military Manual, under the heading "Chemical Weapons", proscribes "the use of irritant agents for military purposes".⁵⁶³

540. The Military Manual of the Netherlands states that:

Opinion is divided over whether or not the prohibition applies to tear gas, defoliants and other non deadly means. It is said, with regard to tear gas, that it should be prohibited in armed conflicts. It can be used to control order. This should be

⁵⁵⁸ Australia, *Commanders' Guide* (1994), § 312.

⁵⁵⁹ Australia, *Defence Force Manual* (1994), § 413.

⁵⁶⁰ Belgium, *Law of War Manual* (1983), p. 38.

⁵⁶¹ Canada, *LOAC Manual* (1999), p. 5-3, § 27.

⁵⁶² Canada, *Code of Conduct* (2001), Rule 3, § 9.

⁵⁶³ Germany, *Military Manual* (1992), § 434.

distinguished from the use in armed conflict because there it runs the danger of provoking the use of other more dangerous chemicals.⁵⁶⁴

541. New Zealand's Military Manual, in a footnote relating to the 1925 Geneva Gas Protocol, states that "a number of states, including New Zealand, take the view that this does not prevent the use of lachrymose agents, especially if used to maintain or restore discipline in internment or prisoner of war camps".⁵⁶⁵ It further states that "among other war crimes recognised by the customary law of armed conflict are . . . using asphyxiating poisonous and other gases".⁵⁶⁶

542. Spain's LOAC Manual prohibits the use of riot control agents as a means of warfare.⁵⁶⁷

543. The US Field Manual states that:

It is the position of the United States that the Geneva Protocol of 1925 does not prohibit the use in war of . . . riot control agents, which are those agents of a type widely used by governments for law enforcement purposes because they produce, in all but the most unusual circumstances, merely transient effects that disappear within minutes after exposure to the agent has terminated. In this connection, however, the United States has unilaterally renounced, as a matter of national policy, certain uses in war of . . . riot control agents. The policy and provisions of Executive Order No. 11850 do not, however, prohibit or restrict the use of . . . riot control agents by US armed forces either (1) as retaliation in kind during armed conflict or (2) in situations when the United States is not engaged in armed conflict. Any use in armed conflict of . . . riot control agents, however, requires Presidential approval in advance.⁵⁶⁸

544. The US Rules of Engagement for Vietnam stated that:

Riot control agents will be used to the maximum extent possible. CS agents can be effectively employed in inhabited and urban area operations to flush enemy personnel from buildings and fortified positions, thus increasing the enemy's vulnerability to allied firepower while reducing the unnecessary danger to civilians and the likelihood of destruction of civilian property.⁵⁶⁹

545. The US Air Force Pamphlet restates Executive Order No. 11850 of 8 April 1975 and specifies that "the legal effect of this Executive Order is to reflect national policy. It is not intended to interpret the Geneva Protocol of 1925 or change the interpretation of the US that the Protocol does not restrain the use of riot control agents as such."⁵⁷⁰

546. The US Air Force Commander's Handbook states that:

The United States does not regard the Geneva [Gas] Protocol as forbidding use of riot control agents . . . in armed conflict. However, the United States has, as a matter of

⁵⁶⁴ Netherlands, *Military Manual* (1993), p. IV-6/IV-8, § 14.

⁵⁶⁵ New Zealand, *Military Manual* (1992), p. 5-15, § 512, footnote 51.

⁵⁶⁶ New Zealand, *Military Manual* (1992), § 1704(5).

⁵⁶⁷ Spain, *LOAC Manual* (1996), § 3.3.b.(8).

⁵⁶⁸ US, *Field Manual* (1956), § 38(d).

⁵⁶⁹ US, *Rules of Engagement for Vietnam* (1971), § d(2).

⁵⁷⁰ US, *Air Force Pamphlet* (1976), § 6-4(e).

national policy, renounced the first use of riot control agents . . . with certain limited exceptions specified in Executive Order 11850, 8 April 1975. Using . . . riot control agents . . . in armed conflict requires Presidential approval.⁵⁷¹

547. The US Operational Law Handbook states that the prohibition on “using weapons which cause unnecessary suffering, prolonged damage to the natural environment, or poison weapons . . . does preclude the use of . . . riot control agents by US forces in wartime when authorized by the President of the US or his delegate”.⁵⁷²

548. The US Naval Handbook states that:

The United States considers that use of riot control agents in armed conflict was not prohibited by the 1925 Gas Protocol. However, the United States formally renounced first use of riot control agents in armed conflict except in defensive military modes to save lives. Uses of riot control agents in time of armed conflict which the United States considers not to be violative of the 1925 Gas Protocol include:

1. Riot control situations in areas under effective U.S. military control, to include control of rioting prisoners of war.
2. Situations in which civilians are used to mask or screen attacks and civilian casualties can be reduced or avoided.
3. Rescue missions involving downed aircrews or escaping prisoners of war.
4. Protection of military supply depots, military convoys, and other military activities in rear echelon areas from civil disturbances, terrorist activities, or paramilitary operations.

Such employment of riot control agents by U.S. forces in armed conflict requires NCA approval.

Use of riot control agents as a “method of warfare” is prohibited by the 1993 Chemical Weapons Convention. However, that term is not defined by the Convention. The United States considers that this prohibition applies in international as well as internal armed conflict but that it does not apply in normal peacekeeping operations, law enforcement operations, humanitarian and disaster relief operations, counter-terrorist and hostage rescue operations, and non-combatant rescue operations conducted outside of such conflicts.

The United States also considers that it is permissible to use riot control agents against other than combatants in areas under direct U.S. military control, including to control rioting prisoners of war and to protect convoys from civil disturbances, terrorists and paramilitary organizations in rear areas outside the zone of immediate combat.⁵⁷³

National Legislation

549. Australia’s Chemical Weapons (Prohibition) Act provides that “a person must not intentionally or recklessly: . . . use riot control agents as a method of

⁵⁷¹ US, *Air Force Commander’s Handbook* (1980), § 6-3(a).

⁵⁷² US, *Operational Law Handbook* (1993), p. Q-182, § (i).

⁵⁷³ US, *Naval Handbook* (1995), §§ 10.3.2.1.1 and 10.3.2.1.2.

warfare. Penalty: imprisonment for life." It adds, however, that use for "law enforcement including domestic riot control purposes" is not prohibited.⁵⁷⁴

550. Under Hungary's Criminal Code as amended, employing "chemical weapons and chemical instruments of war" as defined in Article II(1) and (7) of the 1993 CWC is a war crime.⁵⁷⁵

551. India's Chemical Weapons Act provides that:

- (1) No person shall
 - ...
 - (b) use riot control agents as a method of warfare;
 - ...
 - (d) assist, encourage or induce, in any manner, any person to engage in
 - (i) the use of any riot control agent as a method of warfare
 - (ii) any other activity prohibited to a State Party under the Convention.⁵⁷⁶

552. New Zealand's Chemical Weapons Act provides that "every person commits an offence who intentionally or recklessly uses riot control agents as a method of warfare, and is liable on conviction on indictment to imprisonment for life or a fine not exceeding \$1,000,000".⁵⁷⁷

553. Romania's Law on the Prohibition of Chemical Weapons provides that:

- (1) It is prohibited for any person, under any circumstance:
 - ...
 - (e) to use riot control agents as a method of warfare.
- (2) Persons means any natural or legal person on the territory of Romania including public authorities.⁵⁷⁸

It further provides that:

- (1) The act of using chemical weapons is considered a criminal act and is punished by imprisonment, for not less than 5 years and not exceeding 15 years, and prohibition of certain rights.
- (2) In the case of an act with serious consequences, the penalty is imprisonment for not less than 10 years and not exceeding 20 years and prohibition of certain rights and if it caused the death of one or more persons, the penalty is life imprisonment or imprisonment for not less than 15 years and not exceeding 25 years and prohibition of certain rights.⁵⁷⁹

554. Singapore's Chemical Weapons (Prohibition) Act provides that:

Any person who:

- (a) uses a chemical weapon;
- ...

⁵⁷⁴ Australia, *Chemical Weapons (Prohibition) Act* (1994), p. 13, Section 12(f) and p. 95, Section 9(d).

⁵⁷⁵ Hungary, *Criminal Code as amended* (1978), Section 160, §A(3)(c).

⁵⁷⁶ India, *Chemical Weapons Act* (2000), Chapter III, § 13.

⁵⁷⁷ New Zealand, *Chemical Weapons Act* (1996), Part II, Section 8.

⁵⁷⁸ Romania, *Law on the Prohibition of Chemical Weapons* (1997), Article 3.

⁵⁷⁹ Romania, *Law on the Prohibition of Chemical Weapons* (1997), Article 50.

(g) uses a riot control agent as a method of warfare

shall be guilty of an offence and shall on conviction be punished with

- (i) imprisonment for a term which may extend to life imprisonment, and
- (ii) a fine not exceeding \$ 1 million.⁵⁸⁰

555. Under Sweden's Penal Code as amended, "use of any weapon prohibited by international law" constitutes a crime against international law.⁵⁸¹ It further states that:

A person who:

- ... uses riot control materials as a means of warfare shall be sentenced, if the act is not regarded as a war crime against international law, for *unlawful handling of chemical weapons* to [punishment].⁵⁸² [emphasis in original]

National Case-law

556. No practice was found.

Other National Practice

557. In 1969, during a debate in the UN General Assembly on the question of chemical and bacteriological (biological) weapons, Australia stated that:

The draft resolution [on chemical and bacteriological (biological) weapons under discussion] would declare as contrary to the [1925 Geneva Gas Protocol] "any chemical agent of warfare" with "direct toxic effects on man, animals and plants". It is the view of the Australian Government that the use of non-lethal substances such as riot control agents... and defoliants does not contravene the Geneva Protocol nor customary international law.⁵⁸³

558. The Report on the Practice of Australia refers to a document of 1971 entitled "Protection of the Civil Population Against the Effects of Certain Weapons", which states that:

In answer to a question in the House of Representatives, the Australian Minister for External Affairs... stated that the use of non-lethal tear gases, C.N., C.S., and C.N.D.M., as used in South Vietnam "would not be contrary to any international convention, nor would it contravene the [1925 Geneva Gas Protocol]"...

Neither lethal nor non-lethal gases are employed at present in any part of [the Australian Military Forces], including [the Pacific Islands Regime]. No soldiers are trained in use of weapons involving the use of either such type of gas. In [Papua

⁵⁸⁰ Singapore, *Chemical Weapons (Prohibition) Act* (2000), Section 8.

⁵⁸¹ Sweden, *Penal Code as amended* (1962), Chapter 22, § 6(1).

⁵⁸² Sweden, *Penal Code as amended* (1962), Chapter 22, § 6a(4).

⁵⁸³ Australia, Statement before the First Committee of the UN General Assembly, UN Doc. A/C.1/PV.1716, 9 December 1969, § 180.

New Guinea] the civil constabulary are trained in the use of and have available non-lethal gas weapons.⁵⁸⁴

In this connection, the report states that “as a state party to the CWC, Australia is obligated not to use riot control agents as a weapon of war. The CWC does, however, explicitly allow the use of such agents for riots and quelling civil disturbances”.⁵⁸⁵

559. In 1971, during a debate in the UN General Assembly, Canada stated that:

Tear gas and other riot- and crowd-control agents were excluded from Canada’s commitment not to develop, produce, acquire, stockpile or use any chemical weapons in warfare . . . Canada’s reservations with regard to the use of these agents in war should be waived.⁵⁸⁶

560. In 1931, during the League of Nations Preparatory Commission for the Disarmament Conference, France, in a note regarding a memorandum submitted by the UK, stated that:

- I. All the texts at present in force or proposed in regard to the prohibition of the use *in war* of asphyxiating, poisonous or similar gases are identical. In the French delegation’s opinion, they apply to all gases employed with a view to toxic action on the human organism, whether the effects of such action are more or less temporary irritation of certain mucous membranes or whether they cause serious or even fatal lesions.
- II. The French military regulations, which refer to the undertaking not to use gas for warfare (*gaz de combat*) subject to reciprocity, classify such gases as suffocating, blistering, *irritant* and poisonous gases in general, and define irritant gases as those causing *tears*, sneezing, etc.
- III. The French Government therefore considers that the use of lachrymatory gases is covered by the prohibition arising out of the Geneva Protocol of 1925 . . .

The fact that, for the maintenance of internal order, the police, when dealing with offenders against the law, sometimes use various appliances discharging irritant gases cannot, in the French delegation’s opinion, be adduced in a discussion on this point, since the Protocol . . . relates only to the use of poisonous or similar gases *in war*.⁵⁸⁷ [emphasis in original]

561. In 1931, during the League of Nations Preparatory Commission for the Disarmament Conference, Italy, with respect to a memorandum submitted by the UK, stated that it “interprets the 1925 Protocol, to mean that ‘other gases’

⁵⁸⁴ Australia, *Protection of the Civil Population Against the Effects of Certain Weapons* (unknown author), Doc. AA-A1838/267, File No. AA-889/702/7/2 Pt 1, May 1971, Report on the Practice of Australia, 1998, Chapter 3.5.

⁵⁸⁵ Report on the Practice of Australia, 1998, Chapter 3.5.

⁵⁸⁶ Canada, Statement before the UN General Assembly, UN Doc A/PV.1827, 11 November 1971, p. 7.

⁵⁸⁷ France, Note by the French Delegation to the League of Nations Preparatory Commission for the Disarmament Conference regarding a British Memorandum, reprinted in League of Nations Doc. C.4.M.4. 1931, IX, Documents of the Preparatory Commission for the Disarmament Conference, Series X, Minutes of the Sixth Session (Second Part), 15 January 1931, p. 311.

include lachrymatory gases – that is to say that, subject to reciprocity, the use of lachrymatory gases is prohibited”.⁵⁸⁸

562. In 1966, during a debate in the First Committee of the UN General Assembly, Hungary stated that:

34. ... It was sometimes argued that the Geneva Protocol referred to circumstances existing in 1925, and not to the present situation when new types of gases, including comparatively harmless riot-control agents, had been invented. But practising riot control and conducting warfare were two distinctly different problems. The former fell within the domestic jurisdiction of each State, whereas the latter was governed by international law.
35. The gases being used in Viet-Nam were intended to undermine morale, destroy health, spread disease and create starvation. They were being used mainly in populated areas where they were likely to affect more people, and more civilians than soldiers. It had been asserted that able-bodied persons could recover quickly from the effects of the gases. But for elderly and sick people, pregnant women and children, the effects were very grave and sometimes fatal. Indeed, the use of such mass weapons verged upon genocide . . .
36. The hollow pretexts given for using riot-control gases in Viet-Nam had been rejected by world public opinion and by the international scientific community, including scholars in the United States itself. Weapons of that kind . . . were difficult to control and might affect those who were using them, as well as those against whom they were used.⁵⁸⁹

563. In 1969, during a debate in the First Committee of the UN General Assembly on the question of chemical and bacteriological (biological) weapons and on what was to become Resolution 2603 (XXIV), the representative of Saudi Arabia stated that:

108. . . I wish to mention a particular gas which is being used in many countries, namely tear gas, which is used inhumanely for breaking up demonstrations. Of course, here we are discussing the question of disarmament, the international aspect of these weapons, but we should not neglect or ignore the covenants of human rights or the Universal Declaration of Human Rights, which in its third article states that “everyone has the right to life, liberty and security of person”. We should at some time in the future go further than prohibiting or trying to prohibit the use of chemical weapons among nations. They should be banned inside every State, even tear gas should be banned.

109. . . If conventional means are not enough and tear gas or any similar gas is used to disperse crowds, then the Government had better fold up and dissolve.

110. . . I hope that in the future the United Nations will consider the use of any gas or germ as a criminal act.⁵⁹⁰

⁵⁸⁸ Italy, Statement before the League of Nations Preparatory Commission for the Disarmament Conference, 15 January 1931, League of Nations Doc. C.4.M.4. 1931, IX, Documents of the Preparatory Commission for the Disarmament Conference, Series X, Minutes of the Sixth Session (Second Part), 15 January 1931, p. 313.

⁵⁸⁹ Hungary, Statement before the First Committee of the UN General Assembly, UN Doc. A/C.1/SR.1451, 11 November 1966, §§ 34–36.

⁵⁹⁰ Saudi Arabia, Statement before the First Committee of the UN General Assembly, UN Doc. A/C.1/PV.1717, 10 December 1969, §§ 108–110.

564. In 1931, during the League of Nations Preparatory Commission for the Disarmament Conference, Turkey, with respect to a memorandum submitted by the UK, stated that “we also consider the use of lachrymatory gases prohibited by the [1925 Geneva Gas] Protocol”.⁵⁹¹

565. In 1931, during the League of Nations Preparatory Commission for the Disarmament Conference, the USSR stated with respect to a memorandum submitted by the UK that:

In 1929, the Soviet delegation proposed not only the renunciation of the use of gases in warfare, but also of their preparation in peace-time; this proposal, however, was rejected by the majority of the Commission.

We interpret this paragraph [of the 1925 Geneva Gas Protocol] to mean that the use of all gases, including irritant gases, is prohibited.

As regards the text proposed by the French delegation [according to which “the use of lachrymatory gases is covered by the prohibition arising out of the Geneva Protocol of 1925” and “the fact that, for the maintenance of internal order, the police, when dealing with offenders against the law, sometimes use various appliances discharging irritant gases cannot . . . be adduced in a discussion on this point, since the Protocol . . . relates only to the use of poisonous or similar gases *in war*”, (emphasis in original)], the Soviet delegation is of [the] opinion that it is not for the Preparatory Commission to legalise the use of these gases by police forces, and it accordingly regards as unacceptable, particularly as one speaker referred to the use of gases by police forces for the purpose of controlling mobs.⁵⁹²

566. In 1970, in the context of the adoption of UN General Assembly Resolution 2444 (XXIII), the USSR stated that:

The use of . . . tear gases and other gases of a similar nature . . . was prohibited by the Geneva Protocol of 17 June 1925. The United States signed that Protocol, but did not ratify it. However, that does not mean that the prohibition of the use of poisonous substances does not extend to the United States. That prohibition has become a generally recognized rule of international law, and countries which violate it must bear responsibility before the international community.⁵⁹³

567. In 1989, the Moscow daily newspaper *Sovetskaya Rossiya* published an interview with the USSR’s Deputy Chief Military Prosecutor who was supervising a criminal investigation into the behaviour of MVD and army troops during

⁵⁹¹ Turkey, Statement before the League of Nations Preparatory Commission for the Disarmament Conference, 15 January 1931, League of Nations Doc. C.4.M.4. 1931, IX, Documents of the Preparatory Commission for the Disarmament Conference, Series X, Minutes of the Sixth Session (Second Part), 15 January 1931, p. 313.

⁵⁹² USSR, Statement before the League of Nations Preparatory Commission for the Disarmament Conference, 15 January 1931, League of Nations Doc. C.4.M.4. 1931, IX, Documents of the Preparatory Commission for the Disarmament Conference, Series X, Minutes of the Sixth Session (Second Part), 15 January 1931, p. 313.

⁵⁹³ USSR, Reply dated 30 December 1969 to the UN Secretary-General regarding the preparation of the study requested in paragraph 2 of General Assembly Resolution 2444 (XXIII), annexed to Report of the Secretary-General on respect for human rights in armed conflicts, UN Doc. A/8052, 18 September 1970, Annex III, p. 120.

their suppression of a demonstration in Tbilisi in April 1988. The Prosecutor stated that:

Special "cheremukha" (27 units) containing chloracetophenone and three units of K-51 containing CS were employed. They are not chemical weapons. In the US and other countries CS is ranked among the so-called "police gases". Let me also note that a USSR Supreme Soviet Presidium decree of 28 July 1988 makes provision for the use of special means . . . The arguments set out were confirmed by UN experts. Experts confirmed that only 30 people had been poisoned in connection with the troops' use of the special means "cheremukha" and K-51. Experts are continuing their studies . . . Nor do the claims that the troops allegedly used chloropicrin correspond with reality. Neither the Soviet Army nor the MVD internal troops have products containing chloropicrin designed for such purposes.⁵⁹⁴

568. In 1931, a memorandum submitted to the League of Nations Preparatory Commission for the Disarmament Conference, the UK government stated that:

Basing itself on this English text [of the 1925 Geneva Gas Protocol], the British Government have taken the view that the use in war of "other gases", including lachrymatory gases, was prohibited. They also considered that the intention was to incorporate the same prohibition in the present Convention [i.e. in a draft convention on disarmament discussed at the Preparatory Commission].⁵⁹⁵

Canada, China, Czechoslovakia, Japan, Romania, Spain and SFRY were among the States which expressly associated themselves with the UK memorandum.⁵⁹⁶

569. In 1970, in reply to a question in the House of Commons, the UK Secretary of State for Foreign and Commonwealth Affairs stated that:

In 1930, the Under-Secretary of State for Foreign Affairs . . . in reply to a Parliamentary Question on the scope of the [1925 Geneva Gas] Protocol said:

"Smoke screens are not considered as poisonous and do not, therefore, come within the terms of the Geneva Gas Protocol. Tear gases and shells producing poisonous fumes are, however, prohibited under the Protocol"

...

That is still the Government's position. However, modern technology has developed CS smoke which, unlike the tear gases available in 1930, is considered to be not significantly harmful to man in other than wholly exceptional circumstances; and we regard CS and other such gases accordingly as being outside the scope of

⁵⁹⁴ N. Belan, *Sovetskaya Rossiya* [Moscow], 13 December 1989, p. 4, as translated in FBIS-SOV-89-246, 26 December 1989, pp. 57-60; David Remnick, "Soviet aides blamed in Georgian deaths", *Washington Post*, Washington, D.C., 22 December 1989, pp. A37 and A39.

⁵⁹⁵ UK, Memorandum by the UK Delegation to the League of Nations Preparatory Commission for the Disarmament Conference, reprinted in League of Nations Doc. C.4.M.4. 1931, IX, Documents of the Preparatory Commission for the Disarmament Conference, Series X, Minutes of the Sixth Session (Second Part), 15 January 1931, p. 311.

⁵⁹⁶ Canada, China, Czechoslovakia, Japan, Romania, Spain and Yugoslavia, Statements before the League of Nations Preparatory Commission for the Disarmament Conference, 15 January 1931, League of Nations Doc. C.4.M.4. 1931, IX, Documents of the Preparatory Commission for the Disarmament Conference, Series X, Minutes of the Sixth Session (Second Part), 15 January 1931, p. 311.

the [1925 Geneva Gas Protocol]. CS is in fact less toxic than the screening smokes which the 1930 statement specifically excluded.⁵⁹⁷

570. In 1992, in reply to a question in the House of Commons asking “what allowances have been made for the retention of disabling agents for riot control purposes under the terms of the [1993 CWC]”, the UK Minister of State, FCO, stated that:

Under the terms of the convention, states parties will be entitled to use toxic chemicals for law enforcement, including domestic riot control purposes, provided that such chemicals are limited to those not listed in the schedules to the convention and which can produce rapidly in humans sensory irritation or disabling physical effects which disappear within a short time following termination of exposure. States parties will undertake not to use riot control agents as a method of warfare.⁵⁹⁸

571. In 1994, in reply to a question in the House of Commons about the use of gas weapons by the police, the UK Parliamentary Under-Secretary of State for Home Affairs stated that:

The Association of Chief Police Officers is considering the possible use of products containing the incapacitating inflammatory agent, oleoresin capsicum . . . The only chemical agent which police forces are currently permitted to use is CS irritant. The considerable research which has been undertaken into this agent was evaluated by the 1969–1971 inquiry into the medical and toxicological aspects of CS . . . Police forces are permitted to use CS in extreme public order incidents where the chief officer of police judges such action to be necessary because of risk of loss of life or serious injury or widespread destruction of property; or against armed besieged criminals or violently insane persons where a senior officer judges that not to use it would endanger lives. There are no current proposals to change arrangements relating to CS.⁵⁹⁹

572. In 1996, the House of Lords addressed a question to the UK government to the effect that:

How is the development and manufacture of chemical weapons for “domestic riot control purposes”, which are included as “Purposes Not Prohibited Under this Convention” in Article (9) of the Chemical Weapons Convention, to be distinguished from the development and manufacture of chemical weapons for purposes prohibited under the convention, and who is to be responsible for making these distinctions, and whether international peacekeeping operations are included among the “Purposes Not Prohibited Under this Convention”.⁶⁰⁰

⁵⁹⁷ UK, House of Commons, Reply by the Secretary of State for Foreign and Commonwealth Affairs, *Hansard*, 2 February 1970, Vol. 795, Written Answers, p. 18.

⁵⁹⁸ UK, House of Commons, Reply by the Minister of State, FCO, *Hansard*, 7 December 1992, Vol. 215, Written Answers, cols. 459–460.

⁵⁹⁹ UK, House of Commons, Reply by the Parliamentary Under-Secretary of State for Home Affairs, *Hansard*, 31 March 1994, Vol. 240, Written Answers, col. 946.

⁶⁰⁰ UK, House of Lords, Question addressed to the Government by Lord Kennet, *Hansard*, 18 June 1996, Vol. 573, Written Answers, cols. 23–24.

In a written answer to this question, the UK Minister of State, FCO, replied that:

The Chemical Weapons Convention prohibits the development and manufacture of any chemical weapons. The term "chemical weapons" includes toxic chemicals except those intended for purposes not prohibited by the convention, including "domestic riot control purposes". Provided that the types and quantities of chemicals used are consistent with the intended permitted purpose they are not prohibited under the convention. Each State Party is obliged to declare details of chemicals held for riot control purposes (commonly known as riot control agents). The convention establishes a verification mechanism to monitor States Parties' compliance with their obligations. The provisions include inspections of declared sites and investigations into allegations that riot control agents have been used in warfare. Inspections and investigations will be carried out by the Organisation for the Prohibition of Chemical Weapons.

The CWC prohibits the use of toxic chemicals as a method of warfare in international peacekeeping operations.⁶⁰¹

573. In 1998, the UK Minister of State for the Armed Forces provided a public explanation of why, in written answers to two parliamentary questions, he had told one questioner that "CS irritant is the only riot control agent held by my Department", having just informed the other questioner that "the Ministry of Defence currently holds stocks of CR gas . . . a riot control agent designed to cause temporary irritation". His explanation was that because the physiological effects of CR are among those which the 1993 CWC uses to define a "riot control agent" – because CR, in the words of Article II(7) 1993 CWC, "can produce rapidly in humans sensory irritation or disabling physical effects which disappear within a short time following termination of exposure" – CR can properly be described as a "riot control agent", even though it is in fact held by the UK Defence Ministry for a purpose other than riot control, namely "maintaining an effective terrorism response capability".⁶⁰²

574. In 1998, in reply to a question in the House of Lords, the UK Parliamentary Under-Secretary of State for Foreign and Commonwealth Affairs stated that the government had recently approved the export to the Netherlands of 2,500 rounds of CS gas and shotgun ammunition for use in riot control by the Dutch contingent to the UN forces in Bosnia and Herzegovina.⁶⁰³

⁶⁰¹ UK, House of Lords, Reply by Minister of State, FCO, *Hansard*, 18 June 1996, Vol. 573, Written Answers, col. 24.

⁶⁰² UK, Letters dated 25 March 1998 from the Minister of State for the Armed Forces addressed to Messrs Harry Cohen and Ken Livingstone, with copies placed in the House of Commons Library.

⁶⁰³ UK, House of Lords, Reply to a question by the Parliamentary Under-Secretary of State for Foreign and Commonwealth Affairs, *Hansard*, 12 January 1998, Vol. 584, Written Answers, cols. 122–123.

575. In 1927, during a debate in the US Senate, an argument against ratification of the 1925 Geneva Gas Protocol was that it outlawed the use of tear gas.⁶⁰⁴

576. In 1931, during the League of Nations Preparatory Commission for the Disarmament Conference, the US representative, with respect to a memorandum submitted by the UK, stated that:

While lachrymatory gases may serve some useful military purpose, for instance as harassing agencies, it is doubtless well-known to all my colleagues that the greatest use of lachrymatory gas is found, not in military service, but in police work either for controlling mobs, in which use it is certainly far more humane and probably more effective than the use of machine guns, sabres, or even truncheons, or it serves the purpose of effecting the capture of a barricaded criminal without bloodshed or loss of life... I think there would be considerable hesitation on the part of many Governments to bind themselves to refrain from the use in war, against an enemy, of agencies which they have adopted for peace-time use against their own population, agencies adopted on the ground that, while causing temporary inconvenience, they cause no real suffering or permanent disability, and are thereby more clearly humane than the use of weapons to which they were formerly obliged to resort to in times of emergency.⁶⁰⁵

577. In 1969, during a debate in the First Committee of the UN General Assembly on the question of chemical and bacteriological (biological) weapons, the US representative stated with respect to the then still draft Resolution 2603 (XXIV) that:

41. ... We do not agree with the interpretation which this resolution would place upon international law as embodied in the [1925 Geneva Gas Protocol]. I note that for the last forty years States have recognized the ambiguity of the Geneva Protocol, as to whether it prohibits the use of riot-control agents. They have not been able to resolve this ambiguity, despite several efforts to do so, and here we must respectfully differ with the Swedish delegation with regard to the conclusive – or we would say “inconclusive” – character of the negotiations leading up to the abortive Disarmament Conference of 1933. For if, as [the Swedish delegation] said... of the Geneva Protocol, “States did not doubt the comprehensive nature of the ban”, one must then ask why in the years after 1925 they continued to debate it.

...

43. We have examined in detail the negotiating histories of the 1899 and 1907 Hague Conventions, the Treaty of Versailles of 1919, the 1922 Washington Treaty, which never entered into force, and the 1925 Geneva Protocol, and we have come to the conclusion that the negotiating histories of these treaties

⁶⁰⁴ US, Senate, Statement by Senator James Reed, Congressional Records, Vol. 68, pp. 141–154, 1927, referred to in Richard R. Baxter and Thomas Buergenthal, “Legal Aspects of the Geneva Protocol of 1925”, *AJIL*, Vol. 64, 1970, p. 861.

⁶⁰⁵ US, Statement before the League of Nations Preparatory Commission for the Disarmament Conference, 15 January 1931, League of Nations Doc. C.4.M.4. 1931, IX, Documents of the Preparatory Commission for the Disarmament Conference, Series X, Minutes of the Sixth Session (Second Part), 15 January 1931, p. 311.

support the view that riot-control agents are not covered by the Geneva Protocol, and that, accordingly, [the draft resolution which became UN General Assembly resolution 2603 (XXIV)] incorrectly interprets the generally recognized rules of international law as embodied in the Geneva Protocol.⁶⁰⁶

578. Executive Order No. 11850, issued by the US President on 8 April 1975, states that:

The United States renounces, as a matter of national policy, . . . first use of riot control agents in war except in defensive military modes to save lives such as:

- a) Use of riot control agents in riot control situations in areas under direct and distinct U.S. military control, to include controlling rioting prisoners of war.
- b) Use of riot control agents in situations in which civilians are used to mask or screen attacks and civilian casualties can be reduced or avoided.
- c) Use of riot control agents in rescue missions in remotely isolated areas, of downed aircrews and passengers, and escaping prisoners.
- d) Use of riot control agents in rear echelon areas outside the zone of immediate combat to protect convoys from civil disturbances, terrorists and paramilitary organizations.

...

Section 1. The Secretary of Defense shall take all necessary measures to ensure that the use by the Armed Forces of the United States of any riot control agents . . . in war is prohibited unless such use has Presidential approval, in advance.⁶⁰⁷

579. Various sources observed that riot control agents were used in the Vietnam War by the US and South Vietnamese forces.⁶⁰⁸ In some circumstances, tear gas was allegedly used in conjunction with fragmentation bombs.⁶⁰⁹ An article in a Swedish newspaper stated that VX gas was used against the North Vietnamese army in Cambodia.⁶¹⁰

580. At the CDDH, the US stated, with regard to the asphyxiating, poisonous or other gases, that "opinions differed as to whether tear gas was covered by the Geneva Protocol of 1925".⁶¹¹

581. In 1980, in a memorandum of law on the "Reported Use of Chemical Agents in Afghanistan, Laos, and Kampuchea", a legal adviser of the US Department of State stressed that:

Although the United States does not regard the prohibition [on first use of chemical weapons] as applying to riot control agents, this view is not shared by the great

⁶⁰⁶ US, Statement before the First Committee of the UN General Assembly, UN Doc. A/C.1/PV.1717, 10 December 1969, §§ 41 and 43.

⁶⁰⁷ US, Executive Order No. 11850, 8 April 1975, *Federal Register*, Vol. 40, 1975, p. 16187.

⁶⁰⁸ Wil D. Verwey, *Riot Control Agents and Herbicides in War*, A. W. Sijthoff, Leyden, 1977, pp. 46–67.

⁶⁰⁹ Guenter Lewy, *America in Vietnam*, Oxford University Press, Oxford, 1978, pp. 248–257.

⁶¹⁰ Wil D. Verwey, *Riot Control Agents and Herbicides in War*, A. W. Sijthoff, Leyden, 1977, p. 185, translation from article in *Dagens Nyheter*, 16 August 1970.

⁶¹¹ US, Statement at the CDDH, *Official Records*, Vol. VI, CDDH/SR.44, 30 May 1977, pp. 280–281, § 7.

majority of states (including the Soviets), and they would presumably regard themselves as being entitled to use chemical agents (including lethal agents) in response to use of riot control agents against them.⁶¹²

582. In 1994, the US President transmitted to the US Senate the findings of his administration's review of the impact of the 1993 CWC on Executive Order No. 11850 concerning US policy on the use of riot control agents in armed conflict. The accompanying message of the President stated that:

Article I(5) of the CWC prohibits Parties from using [riot control agents, RCAs] as a "method of warfare". That phrase is not defined in the CWC. The United States interprets this provision to mean that:

- The CWC applies only to the use of RCAs in international or internal armed conflict. Other peacetime uses of RCAs, such as normal peacekeeping operations, law enforcement operations, humanitarian and disaster relief operations, counter-terrorist and hostage rescue operations, and non-combatant rescue operations conducted outside such conflicts are unaffected by the Convention.
- The CWC does not apply to all uses of RCAs in time of armed conflict. Use of RCAs solely against noncombatants for law enforcement, riot control, or other noncombatant purposes would not be considered as a "method of warfare" and therefore would not be prohibited. Accordingly, the CWC does not prohibit the use of RCAs in riot control situations in areas under direct U.S. military control, including against rioting prisoners of war, and to protect convoys from civil disturbances, terrorists, and paramilitary organizations in rear areas outside the zone of immediate combat.
- The CWC does prohibit the use of RCAs solely against combatants. In addition, according to the current international understanding, the CWC's prohibition on the use of RCAs as a "method of warfare" also precludes the use of RCAs even for humanitarian purposes in situations where combatants and noncombatants are intermingled, such as the rescue of downed air crews, passengers, and escaping prisoners and situations where civilians are being used to mask or screen attacks. However, were the international understanding of this issue to change, the United States would not consider itself bound by this position.⁶¹³

583. In 1996, during hearings on the 1993 CWC before the US Senate's Foreign Relations Committee, the US Secretary of Defense stated that:

The CWC does not prohibit the use of RCAs in riot control situations in areas under direct and distinct US military control, to include controlling rioting prisoners of war, and in rear echelon areas outside the zone of immediate combat to protect convoys from civil disturbance, terrorist and paramilitary organizations. The CWC does prohibit the use of RCAs solely against combatants and, according to the

⁶¹² US, Department of State, Memorandum of law by a Legal Adviser on the "Reported Use of Chemical Agents in Afghanistan, Laos, and Kampuchea", 9 April 1980, reprinted in Marian Nash Leich, *Digest of United States Practice in International Law, 1980*, Department of State Publication 9610, Washington, D.C., 1986, p. 1034.

⁶¹³ US, Message from the US President transmitting the report on the chemical weapons convention, 23 June 1994, *PM*, Vol. 140, PM 129, reprinted in *Congressional Record* (daily edition), 24 June 1994, p. S7635.

understanding of our allies and treaty signatories, even for humanitarian purposes in situations where combatants and non-combatants are intermingled.⁶¹⁴

At the same hearing, the Joint Staff Director of Strategic Plans and Policy stated that "in peacekeeping operations under Chapter six, Chapter seven UN operations, of course, the provisions of this convention don't apply, and we would be able to use riot control agents . . . It's my understanding that we could use riot control agents in Bosnia."⁶¹⁵

584. In 1998, in a legal review of Oleoresin Capsicum (OC) pepper spray, the Deputy Assistant Judge Advocate General of the US Department of the Navy stated that:

Oleoresin Capsicum is not calculated (i.e., designed), nor does it in fact cause unnecessary suffering. It is designed specifically to temporarily incapacitate violent or threatening subjects while reducing human suffering and is in consonance with the DoD [Non-Lethal Weapon] program. Its physiological effects, while relatively painful, are temporary and do not rise to the level of unnecessary suffering contemplated in the prohibition . . . Provided a military necessity justifies its employment, the principle of unnecessary suffering would not preclude employment of OC in appropriate circumstances.

...

The OC system contemplated for acquisition and employment by the Marine Corps is specifically designed to limit its effects only to intended targets. The contemplated OC dispersers utilize a target specific stream of ballistic droplets for controlled delivery and minimal cross contamination (i.e., point target delivery), rather than an aerosolized spray which increases the likelihood of unintended subject impact. Provided the weapon is employed in a discriminating manner, the principle of distinction/discrimination presents no prohibition to acquisition and employment of OC in appropriate circumstances.

...

The second major category of chemicals regulated by the CWC is Riot Control Agents . . .

While the proscriptions imposed by the CWC on *chemical weapons* are stated as absolute, the Convention seems to permit employment of RCAs, provided they are not used as a *method of warfare*. The CWC does not address whether a given substance can be subject to both the restrictions placed on RCAs and those placed on *chemical weapons*. Subsequent analysis in this memorandum concludes that RCAs are only constrained by the *method of warfare* restriction, that is, the CWC Treaty establishes a regime for treatment of RCAs separate from the regime dealing with *chemical weapons*.

. . . The definition of *toxic chemicals* [of the CWC] appears broad enough to include many, if not all, RCAs. Specifically, the use of the term *temporary incapacitation* in the definition of *toxic chemical* is difficult to distinguish from the term

⁶¹⁴ US, Statement by the Secretary of Defense on the Chemical Weapons Convention, Committee hearing, Senate Foreign Relations Committee, 28 March 1996, *FDCH Political Transcripts*, 28 March 1996, via Nexis.

⁶¹⁵ US, Statement by the Joint Staff Director of Strategic Plans and Policy, Committee hearing, Senate Foreign Relations Committee, 28 March 1996, *FDCH Political Transcripts*, 28 March 1996.

disabling effect used in the definition of RCAs. Thus, some contend that RCAs fall under the CWC's definition of *toxic chemical*. If that is the case, then RCAs become subject to the CWC's chemical weapon regime as well as the RCA regime. The consequences of such an interpretation are significant. RCAs would then be a *chemical weapon*, subject to all the limitations applicable to such weapons, unless they were used for a *purpose not prohibited*. This is problematic and would have a major impact on the use of RCAs since the *purposes not prohibited* exclusion for use of *chemical weapons* is an enumerated and apparently exclusive list of four activities only. Alternatively, if the CWC provides for a regime for RCAs separate than that for *chemical weapons*, then the only limitation on their use is that they may not be employed as a *method of warfare*.⁶¹⁶ [emphasis in original]

In a footnote on this point, the Deputy Assistant Judge Advocate General of the Department of the Navy stated that "if RCAs were subject to the chemical weapons regime, then the only 'purpose not prohibited' that would permit employment of RCAs is article II(9)(d) [of the 1993 CWC], the law enforcement exclusion".⁶¹⁷ However, he went on to state that:

It is apparent . . . that the nature of the harm caused by RCAs is generally much less severe and that the toxic effects of RCAs are transient. Thus, it is clear from the definition of RCAs that the CWC envisages RCAs to be a relatively benign category of chemicals. The fact that the definition excludes those chemicals listed on Chemical Annex Schedules, many of which are extremely toxic, bolsters this point. While RCAs may well be toxic chemicals, in establishing a separate regime for a particular category of toxic chemicals, RCAs, the CWC has limited the boundaries of this category by narrowly defining the chemicals that qualify as RCAs.⁶¹⁸

Turning to the 1925 Geneva Gas Protocol, the Deputy Assistant Judge Advocate General stated that:

Disagreement swirled around the Protocol's coverage of RCAs. Since the 1960s, the U.S. has maintained that the Protocol applies only to lethal and incapacitating chemical agents and not to RCAs. The U.S. therefore maintained that RCAs could be used during armed conflict. That view was not universally shared in the international community. The United States' extensive use of RCAs during the Vietnam War brought the differing interpretations to light. As a matter of national policy, however, the U.S., upon ratifying the Protocol in 1975, renounced the first use of RCAs in war except in defensive military modes to save lives. Nonetheless, the U.S. maintained that RCAs were not chemical weapons covered by the Protocol.

. . . Some nations, however, expressed concern that "RCAs would constitute an immediate risk and danger if they were allowed to develop into a new generation of

⁶¹⁶ US, Department of the Navy, Deputy Assistant Judge Advocate General, International and Operational Law Division, Legal Review of Oleoresin Capsicum (OC) Pepper Spray, 19 May 1998, §§ 4-5 and 6(c), pp. 6-7 and 14-15.

⁶¹⁷ US, Department of the Navy, Deputy Assistant Judge Advocate General, International and Operational Law Division, Legal Review of Oleoresin Capsicum (OC) Pepper Spray, 19 May 1998, footnote 37, p. 15.

⁶¹⁸ US, Department of the Navy, Deputy Assistant Judge Advocate General, International and Operational Law Division, Legal Review of Oleoresin Capsicum (OC) Pepper Spray, 19 May 1998, § 6(c), p. 16.

non-lethal but effective chemical agents of warfare, causing insurmountable problems in trying to distinguish between 'real' and 'non-lethal' chemical weapons on the battlefield, as well as 'real' and 'non-lethal' chemical warfare units." The result was a compromise in which the U.S. accepted the CWCs Article I (5) prohibition on the use of RCAs as a "method of warfare" in exchange for their categorization outside the chemical weapon regime.

...

The phrase *method of warfare* is not defined in the CWC or in the negotiating record and has been the subject of significant debate in the United States. The Administration view is that United States Armed Forces must be involved in an armed conflict, either international or non-international, to engage in a *method of warfare*.⁶¹⁹ [emphasis in original]

With respect to Executive Order No. 11850, issued by the US President on 8 April 1975, the Deputy Assistant Judge Advocate General stated that:

U.S. ratification of the Chemical Weapons Convention . . . created a debate regarding the continuing efficacy of [Executive Order] 11850, particularly exceptions (b) and (c) . . . If a use of RCAs constitutes a "method of warfare" then the CWC prohibits such use as a U.S. treaty obligation under international law. The executive order, however, authorizes use of RCAs, *in war* in certain situations. Though not explicitly stated, the apparent intent of the Executive Order permits RCA employment against combatants *in war* in situations like those enumerated in exceptions (b) and (c). Although the CWC does not define the phrase *method of warfare*, the apparent intent seems to prohibit the uses of RCAs contemplated in exceptions (b) and (c) to [Executive Order] 11850.

...

This review reiterates that the continuing efficacy of [Executive Order] 11850 is currently an issue of debate. The draft instruction [i.e., the draft of the Chairman of the Joint Chiefs of Staff Instruction (CJCSI) 3110.07A, Nuclear, Biological, and Chemical (NBC) Defence; Riot Control Agents; and Herbicides Annual Review, of 1 March 1998] and its list of permissible uses of RCAs is, however, currently the U.S. military position. Should appropriate U.S. Government authority determine that [Executive Order] 11850 is no longer valid authority, such a decision would only impact the use of RCAs in war . . . when the U.S. is a party to the conflict. All other uses of RCAs listed in the draft instruction would remain unaffected.⁶²⁰ [emphasis in original]

585. In 1998, a US Department of Defense document discussing the use of chemical agents in the Vietnam War stated that the "use of tear gas, or Riot Control Agents (RCA) as they were sometimes called, was in accordance with US policy at the time".⁶²¹

⁶¹⁹ US, Department of the Navy, Deputy Assistant Judge Advocate General, International and Operational Law Division, Legal Review of Oleoresin Capsicum (OC) Pepper Spray, 19 May 1998, §§ 6(c) and 7, pp. 18–20.

⁶²⁰ US, Department of the Navy, Deputy Assistant Judge Advocate General, International and Operational Law Division, Legal Review of Oleoresin Capsicum (OC) Pepper Spray, 19 May 1998, § 7, pp. 20–21.

⁶²¹ US, Department of Defense, Review of Allegations Concerning "Operation Tailwind", 21 July 1998, § c(3).

*III. Practice of International Organisations and Conferences**United Nations*

586. In a resolution adopted in 1969, the UN General Assembly stated that the 1925 Geneva Gas Protocol “embodies the generally recognised rules of international law prohibiting the use in international armed conflicts of all . . . chemical methods of warfare, regardless of any technical developments”. It declared:

as contrary to the generally recognized rules of international law, as embodied in the [1925 Geneva Gas Protocol] the use in international armed conflicts of:

- (a) Any chemical agents of warfare – chemical substances, whether gaseous, liquid or solid – which might be employed because of their direct toxic effects on man, animals or plants.⁶²²

The large number of abstentions was partly due to disagreement on the scope of the 1925 Geneva Gas Protocol. Other States thought that the UN General Assembly should not interpret multilateral treaties.⁶²³

587. In a resolution adopted in 1988 on the situation in the Palestinian and other Arab territories occupied by Israel, the UN Sub-Commission on Human Rights stated that “acts perpetrated by the Israeli occupation authorities [e.g.] firing gas bombs inside houses, mosques and hospitals . . . constitute grave violations of international law”.⁶²⁴ This statement was repeated in four further resolutions on the same subject between 1991 and 1993. The last two of these added that the acts were violations of the Geneva Conventions, the UDHR, the International Covenant on Economic, Social and Cultural Rights, and the International Covenant on Civil and Political Rights.⁶²⁵

Other International Organisations

588. No practice was found.

International Conferences

589. No practice was found.

⁶²² UN General Assembly, Res. 2603 A (XXIV), 16 December 1969, preamble and § (a). The resolution was adopted by 80 votes in favour, 3 against (Australia, Portugal and US) and 36 abstentions (Austria, Belgium, Bolivia, Canada, Chile, China, Denmark, El Salvador, France, Greece, Iceland, Israel, Italy, Japan, Laos, Liberia, Luxembourg, Madagascar, Malawi, Malaysia, Netherlands, New Zealand, Nicaragua, Norway, Paraguay, Philippines, Sierra Leone, Singapore, South Africa, Swaziland, Thailand, Tunisia, Turkey, UK, Uruguay and Venezuela), UN Doc. A/PV.1836, 16 December 1969, p. 4.

⁶²³ Debates in the First Committee of the UN General Assembly, UN Doc.A/C.1/PV.1716, 9 December 1969; UN Doc. A/C.1/PV.1717, 10 December 1969.

⁶²⁴ UN Sub-Commission on Human Rights, Res. 1988/10, 31 August 1988.

⁶²⁵ UN Sub-Commission on Human Rights, Res. 1989/4, 31 August 1989, p. 20; Res. 1991/6, 23 August 1991, p. 30; Res. 1992/10, 26 August 1992, p. 40; Res. 1993/15, 20 August 1993, p. 45.

IV. Practice of International Judicial and Quasi-judicial Bodies

590. No practice was found.

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

591. No practice was found.

VI. Other Practice

592. SIPRI reported that in 1936, during the Spanish Civil War, Spanish government forces fired tear-gas shells against insurgent positions on the Guadarrama front. Threats by the insurgents to retaliate with their own stocks of "gas" were also reported.⁶²⁶

593. SIPRI reported that in 1949, during the later stages of the Greek Civil War, the Greek War Ministry stated that a respiratory irritant had been used to drive guerrillas out of caves.⁶²⁷

594. SIPRI reported that according to Dean Rusk, US Secretary of State, the South Vietnamese Army used irritant-agent weapons, both in riot control and combat situations.⁶²⁸

595. Robinson has stated that in the war in Bosnia and Herzegovina, CS irritant and perhaps Agent BZ were reportedly used by Serb factions to disrupt resistance and to drive people out of protective cover. He further stated that in Turkey in May 1999, CS grenades were reportedly used by the Turkish army against 20 members of the PKK.⁶²⁹

C. Herbicides*I. Treaties and Other Instruments**Treaties*

596. The 1925 Geneva Gas Protocol provides that:

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

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

⁶²⁶ SIPRI, *The Problem of Chemical and Biological Warfare*, Vol. I, *The Rise of CB Weapons*, Almqvist & Wiksell, Stockholm, 1971, p. 147.

⁶²⁷ SIPRI, *The Problem of Chemical and Biological Warfare*, Vol. I, *The Rise of CB Weapons*, Almqvist & Wiksell, Stockholm, 1971, p. 157.

⁶²⁸ SIPRI, *The Problem of Chemical and Biological Warfare*, Vol. I, *The Rise of CB Weapons*, Almqvist & Wiksell, Stockholm, 1971, p. 185.

⁶²⁹ Julian Perry Robinson, *The General Purpose Criterion and the New Utility of Toxicants as Weapons*, Working paper for the Pugwash Meeting No. 264, 17 June 2001, p. 4.

Declare:

That the High Contracting Parties, so far as they are not already Parties to Treaties prohibiting such use, accept this prohibition.

No State on ratifying the 1925 Geneva Gas Protocol has made a reservation or declaration of interpretation to the effect that the Protocol does not apply to herbicides.

597. Article I(1) of the 1976 ENMOD Convention provides that:

Each State Party to this convention undertakes not to engage in military or any other hostile use of environmental modification techniques having widespread, long-lasting or severe effects as the means of destruction, damage or injury to any other State Party.

598. Article II of the 1976 ENMOD Convention provides that:

As used in article I, the term “environmental modification techniques” refers to any technique for changing – through the deliberate manipulation of natural processes – the dynamics, composition or structure of the Earth, including its biota, lithosphere, hydrosphere and atmosphere, or of outer space.

599. The seventh preambular paragraph of the 1993 CWC reads: “Recognizing the prohibition, embodied in the pertinent agreements and relevant principles of international law, of the use of herbicides as a method of warfare, . . .”.

Other Instruments

600. No practice was found.

II. National Practice

Military Manuals

601. Australia’s Commanders’ Guide states that “it is prohibited to use methods or means of warfare which are intended or may be expected to cause widespread, long-term and severe damage to the natural environment and thereby prejudice the health or survival of the population”.⁶³⁰ It also states that “weapons that cause widespread, long-term and severe damage to the environment are prohibited”.⁶³¹

602. Australia’s Defence Force Manual states that:

Any method or means of warfare which is planned, or expected, to cause widespread, long-term and severe damage to the natural environment and thereby jeopardise the survival or seriously prejudice the health of the population is prohibited . . . Means and methods which are not expected to cause such damage are permitted even if damage results.⁶³²

⁶³⁰ Australia, *Commanders’ Guide* (1994), § 909, see also § 930.

⁶³¹ Australia, *Commanders’ Guide* (1994), § 310.

⁶³² Australia, *Defence Force Manual* (1994), § 713, see also § 545(b).

603. Belgium's Law of War Manual states that it is uncertain whether "chemical products that do not cause widespread, long-term and severe damage to the environment" are covered by the prohibition on the use of asphyxiating and other analogous gases.⁶³³

604. The Military Manual of the Netherlands states that "opinion is divided over whether [the prohibition on the use of chemical weapons] applies to . . . defoliants". Concerning defoliants, the manual states that Article 35 API was drafted in the light of the large-scale use of defoliants in the Vietnam War.⁶³⁴

605. Nigeria's Manual on the Laws of War mentions the 1925 Geneva Gas Protocol and states that "there is no rule to prevent measures being taken to dry up springs and destroy water-wells from which the enemy may draw water or devastate crops by means of chemicals and bacterias which are not harmful to human beings".⁶³⁵

606. The US Field Manual states that:

It is the position of the United States that the Geneva Protocol of 1925 does not prohibit the use in war of . . . chemical herbicides . . . In this connection, however, the United States has unilaterally renounced, as a matter of national policy, certain uses in war of chemical herbicides . . . The policy and provisions of Executive Order No. 11850 do not, however, prohibit or restrict the use of chemical herbicides . . . by US armed forces either (1) as retaliation in kind during armed conflict or (2) in situations when the United States is not engaged in armed conflict. Any use in armed conflict of herbicides . . . however, requires Presidential approval in advance.⁶³⁶

607. The US Air Force Pamphlet restates Executive Order No. 11850 of 8 April 1975 and specifies that "the legal effect of this Executive Order is to reflect national policy. It is not intended to interpret the Geneva Protocol of 1925 or change the interpretation of the US that the Protocol does not restrain the use of chemical herbicides as such."⁶³⁷

608. The US Air Force Commander's Handbook states that:

The United States does not regard the Geneva Protocol as forbidding use of . . . herbicides in armed conflict. However, the United States has, as a matter of national policy, renounced the first use of . . . herbicides, with certain limited exceptions specified in Executive Order 11850, 8 April 1975. Using . . . herbicides in armed conflict requires Presidential approval.⁶³⁸

609. The US Operational Law Handbook states that the prohibition on "using weapons which cause unnecessary suffering, prolonged damage to the natural

⁶³³ Belgium, *Law of War Manual* (1983), p. 38.

⁶³⁴ Netherlands, *Military Manual* (1993), pp. IV-8, § 14 and p. V-9, § 7.

⁶³⁵ Nigeria, *Manual on the Laws of War* (undated), §§ 12 and 6(9).

⁶³⁶ US, *Field Manual* (1956), § 38(d). ⁶³⁷ US, *Air Force Pamphlet* (1976), § 6-4(d).

⁶³⁸ US, *Air Force Commander's Handbook* (1980), § 6-3(a).

environment, or poison weapons...does preclude the use of herbicides... by US forces in wartime when authorized by the President of the US or his delegate".⁶³⁹

610. The US Naval Handbook states that:

The United States considers that use of herbicidal agents in wartime is not prohibited by either the 1925 Gas Protocol or the 1993 Chemical Weapons Convention but has formally renounced the first use of herbicides in time of armed conflict except for control of vegetation within U.S. bases and installations or around their immediate defensive perimeters. Use of herbicidal agents during armed conflict requires NCA approval.⁶⁴⁰

National Legislation

611. Brazil's Military Penal Code prohibits the spreading of epidemics or infestations in a location under military control which could result in damage to forests, crops, grazing pastures or animals used for economic or military purposes.⁶⁴¹

612. Ecuador's National Civil Police Penal Code states that members of the National Civil Police "who use or order to be used...herbicides" commit a punishable offence.⁶⁴²

National Case-law

613. No practice was found.

Other National Practice

614. Following the adoption of the Final Declaration of the Second ENMOD Review Conference by consensus, Argentina and Sweden "expressed their satisfaction with the ban on the use of herbicides as a method of warfare."⁶⁴³

615. In 1969, during a debate in the UN General Assembly on the question of chemical and bacteriological (biological) weapons, Australia stated that:

The draft resolution [on chemical and bacteriological (biological) weapons under discussion] would declare as contrary to the [1925 Geneva Gas Protocol] "any chemical agent of warfare" with "direct toxic effects on man, animals and plants". It is the view of the Australian Government that the use of non-lethal substances such as... herbicides and defoliants does not contravene the Geneva Protocol nor customary international law.⁶⁴⁴

⁶³⁹ US, *Operational Law Handbook* (1993), p. Q-182, § (i).

⁶⁴⁰ US, *Naval Handbook* (1995), § 10.3.3.

⁶⁴¹ Brazil, *Military Penal Code* (1969), Article 278.

⁶⁴² Ecuador, *National Civil Police Penal Code* (1960), Article 117.4.

⁶⁴³ Argentina and Sweden, Statements at the Second ENMOD Review Conference, Geneva, 14-21 September 1992, *United Nations Disarmament Yearbook*, Vol. 17, 1993, p. 234.

⁶⁴⁴ Australia, Statement before the First Committee of the UN General Assembly, UN Doc. A/C.1/PV.1716, 9 December 1969, § 180.

616. Following the adoption of the Final Declaration of the Second ENMOD Review Conference by consensus, Canada stated that “the work of the Conference demonstrated that all was not well with the Convention owing, in large measure, to significant problems with regard to the interpretation of its scope.”⁶⁴⁵ It added that “while some parties maintained that the ENMOD was a futuristic document covering exotic technologies that had yet to be invented, they contended at the same time that it covered the use of herbicides, which was a low-technology environmental modification technique.”⁶⁴⁶ Accordingly, Canada believed that “all environmental modification techniques were covered by the Convention, regardless of the level of technology applied.”⁶⁴⁷

617. In 1972, the head of the Chinese delegation to the Meeting on Human Environment condemned the US for having caused “unprecedented damage to the human environment” in South Vietnam through the use of “chemical, toxic and poisonous gas”, having as a consequence to poison “rivers and other water resources”.⁶⁴⁸

618. In 1980, the Chinese government denounced actions taken by Israel and accused it of having “inhumanely sprayed defoliant on Palestinian lands”.⁶⁴⁹

619. In 1966, during a debate in the First Committee of the UN General Assembly, Hungary stated with respect to the use of chemical weapons by the US in Viet-Nam that “food and drinking water were being poisoned by toxic herbicides”.⁶⁵⁰

620. The Minister of Foreign Affairs of the Netherlands stated in a parliamentary debate in 1995 that:

Generally speaking, the use of herbicides as a means of warfare is prohibited according to international customary law, and also according to the ENMOD treaty and the Geneva Conventions (1949), if this use causes widespread, long-term and severe damage. Then, the prohibition is binding upon all states.⁶⁵¹

⁶⁴⁵ Canada, Statement at the Second ENMOD Review Conference, Geneva, 14–21 September 1992, *United Nations Disarmament Yearbook*, Vol. 17, 1993, p. 233.

⁶⁴⁶ Canada, Statement at the Second ENMOD Review Conference, Geneva, 14–21 September 1992, *United Nations Disarmament Yearbook*, Vol. 17, 1993, p. 233.

⁶⁴⁷ Canada, Statement at the Second ENMOD Review Conference, Geneva, 14–21 September 1992, *United Nations Disarmament Yearbook*, Vol. 17, 1993, p. 233.

⁶⁴⁸ China, Address to the Meeting of Human Environment on Our Government's Position on the Protection and Improvement of Human Environment, 10 June 1972, *Selected Documents of the Chinese Delegation to the United Nations*, The People's Press, Beijing, 1972, pp. 257–258.

⁶⁴⁹ China, Statement on the Issue of Human Rights in the Israeli Occupied Territory, 12 November 1980, *Selected Documents of the Chinese Delegation to the United Nations*, World Knowledge Press, Beijing, 1980, p. 97.

⁶⁵⁰ Hungary, Statement before the First Committee of the UN General Assembly, UN Doc. A/C.1/SR.1451, 11 November 1966, § 35.

⁶⁵¹ Netherlands, Lower House of Parliament, Debate on Chemical Weapons, *Tweede Kamer* 68, 25 April 1995, pp. 68–4105.

621. During the Geneva Conference of 1925, the representative of Poland, a sponsor of the prohibition of biological weapons at this conference, repeatedly stated that unless biological warfare was outlawed, “great masses of men, animals and plants would be exterminated”.⁶⁵²

622. The commander of the Russian Defence Minister RKhB Protection Troops said to reporters in 2000 that “the Russian army is not planning to use any defoliants in the course of the anti-terrorism operation in Chechnya”. He was responding to reports that the army could use chemical herbicides to destroy natural cover throughout the highland areas of Chechnya.⁶⁵³

623. In 1969, during a debate in the UN General Assembly on the question of chemical and bacteriological (biological) weapons, Sweden stated that:

195. It has . . . been said that, in any case, the prohibitory rule [concerning chemical weapons] could not cover anti-plant agents as they were not known in 1925, and that when they were discussed in the General Commission of the Geneva Disarmament Conference of 1933 it was only sought to prohibit the use of anti-plant chemical agents which also were harmful to man or animals.

196. We maintain that the indiscriminate use of anti-plant agents in armed conflict runs counter to the generally recognized rules of international law.⁶⁵⁴

624. In 1969, during a debate in the First Committee of the UN General Assembly on the question of chemical and bacteriological (biological) weapons, the UK stated with respect to the then still draft Resolution 2603 (XXIV) that “the evidence seems to us to be notably inadequate for the assertion that the use in war of chemical substances specifically toxic to plants is prohibited by international law”.⁶⁵⁵

625. In 1966, during a debate in the First Committee of the UN General Assembly, the US stated that it supported the 1925 Geneva Gas Protocol, even though it had not ratified it, but that the use of herbicides in Vietnam was neither covered by the Protocol, nor against accepted norms of behaviour.⁶⁵⁶ In a subsequent debate, the US repeated its opposition to the view that herbicides were included in the scope of the 1925 Geneva Gas Protocol.⁶⁵⁷

626. In 1969, during a debate in the First Committee of the UN General Assembly on the question of chemical and bacteriological (biological) weapons,

⁶⁵² Poland, Statement made on 8 June 1925 at the Conference for the Supervision of the International Trade in Arms and Ammunition and in Implements of War, Geneva, 4 May–17 June 1925, League of Nations, Records of the Conference, Doc. A.13.1925.IX, September 1925, p. 340.

⁶⁵³ “Russian army not to use defoliants in Chechnya”, ITAR-TASS, Moscow, 17 April 2000.

⁶⁵⁴ Sweden, Statement before the First Committee of the UN General Assembly, UN Doc. A/C.1/PV.1716, 9 December 1969, §§ 195–196.

⁶⁵⁵ UK, Statement before the First Committee of the UN General Assembly, UN Doc. A/C.1/PV.1717, 10 December 1969, § 51.

⁶⁵⁶ US, Statement before the First Committee of the UN General Assembly, UN Doc. A/C.1/SR.1452, 14 November 1966, p. 158.

⁶⁵⁷ US, Statement before the UN General Assembly, UN Doc. A/PV.1484, 5 December 1966, p. 4.

the US stated with respect to the then still draft Resolution 2603 (XXIV) that:

Since chemical herbicides, unknown at the time the [1925 Geneva Gas Protocol] was negotiated, were not prohibited by that instrument, it is unwarranted for the General Assembly now to engage in lawmaking by attempting to extend the Geneva Protocol to include herbicides.⁶⁵⁸

627. Executive Order No. 11850, issued by the US President on 8 April 1975, states that:

The United States renounces, as a matter of national policy, first use of herbicides in war except use, under regulations applicable to their domestic use, for control of vegetation within U.S. bases and installations or around their immediate defensive perimeters.

...

Section 1. The Secretary of Defense shall take all necessary measures to ensure that the use by the Armed Forces of the United States of any ... chemical herbicides in war is prohibited unless such use has Presidential approval, in advance.⁶⁵⁹

628. The Report on US Practice states that the possibility of environmental damage caused by the use of herbicides during the Vietnam War was not a major issue in the Kennedy administration.⁶⁶⁰ On the other hand, one commentator notes that environmental concerns played a significant role in President Nixon's decision to end the herbicidal programme.⁶⁶¹

629. In 1998, in a legal review of Oleoresin Capsicum (OC) pepper spray, the Deputy Assistant Judge Advocate General of the US Department of the Navy stated that "the toxicity must affect humans or animals. Thus, herbicides would be excluded from the CWC's proscriptions." In a footnote on this point, he stated that "on the other hand, if a particular herbicide were toxic to humans and was intentionally employed against humans, it would be considered a chemical weapon".⁶⁶²

III. Practice of International Organisations and Conferences

United Nations

630. In a resolution adopted in 1969, the UN General Assembly stated that the 1925 Geneva Gas Protocol "embodies the generally recognised rules of

⁶⁵⁸ US, Statement before the First Committee of the UN General Assembly, UN Doc. A/C.1/PV.1717, 10 December 1969, § 47.

⁶⁵⁹ US, Executive Order No. 11850, 8 April 1975, *Federal Register*, Vol. 40, 1975, p. 16187.

⁶⁶⁰ Report on US Practice, 1997, Chapter 4.4.

⁶⁶¹ William A. Buckingham, *Operation Ranch Hand: The Air Force and Herbicides in Southeast Asia, 1961–1971*, Office of Air Force History, US Air Force, Washington, 1982, pp. 138–140, 163 and 174–175.

⁶⁶² US, Department of the Navy, Deputy Assistant Judge Advocate General, International and Operational Law Division, Legal Review of Oleoresin Capsicum (OC) Pepper Spray, 19 May 1998, § 6(c) and footnote 27, p. 12.

international law prohibiting the use in international armed conflicts of all biological and chemical methods of warfare, regardless of any technical developments". It declared:

as contrary to the generally recognized rules of international law, as embodied in the [1925 Geneva Gas Protocol] the use in international armed conflicts of:

- (a) Any chemical agents of warfare – chemical substances, whether gaseous, liquid or solid – which might be employed because of their direct toxic effects on man, animals or plants.⁶⁶³

The large number of States which abstained in the vote on the resolution (36) was partly due to disagreement on the scope of the 1925 Geneva Gas Protocol.⁶⁶⁴

631. In a resolution adopted in 1992 following the Second Review Conference of the Parties to the ENMOD Convention, the UN General Assembly stated that it:

notes with satisfaction the confirmation by the Review Conference that the military or any other hostile use of herbicides as an environmental modification technique in the meaning of Article II is a method of warfare prohibited by Article I if such use of herbicides upsets the ecological balance of a region, thus causing widespread, long-lasting or severe effects as the means of destruction, damage or injury to any other State party.⁶⁶⁵

Other International Organisations

632. No practice was found.

International Conferences

633. The Final Declaration of the Second Review Conference of the Parties to the ENMOD Convention in 1992 stated that:

The conference reaffirms that the military and any other hostile use of herbicides as an environmental modification technique in the meaning of Article II is a method of warfare prohibited by Article I if such a use of herbicides upsets the ecological balance of a region, thus causing widespread, long-lasting or severe effects as the means of destruction, damage or injury to another State Party.⁶⁶⁶

⁶⁶³ UN General Assembly, Res. 2603 A (XXIV), 16 December 1969, preamble and § (a). The resolution was adopted by 80 votes in favour, 3 against (Australia, Portugal and US) and 36 abstentions (Austria, Belgium, Bolivia, Canada, Chile, China, Denmark, El Salvador, France, Greece, Iceland, Israel, Italy, Japan, Laos, Liberia, Luxembourg, Madagascar, Malawi, Malaysia, Netherlands, New Zealand, Nicaragua, Norway, Paraguay, Philippines, Sierra Leone, Singapore, South Africa, Swaziland, Thailand, Tunisia, Turkey, UK, Uruguay and Venezuela), UN Doc. A/PV.1836, 16 December 1969, p. 4.

⁶⁶⁴ Debates in the First Committee of the UN General Assembly, UN Doc.A/C.1/PV.1716, 9 December 1969; UN Doc. A/C.1/PV.1717, 10 December 1969.

⁶⁶⁵ UN General Assembly, Res. 47/52 E, 9 December 1992, § 3.

⁶⁶⁶ Second Review Conference of the Parties to the ENMOD Convention, Geneva, 14-21 September 1992, Final Declaration, UN Doc. ENMOD/CONF.II/11, 17 September 1992, p. 11.

IV. Practice of International Judicial and Quasi-judicial Bodies

634. No practice was found.

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

635. No practice was found.

VI. Other Practice

636. In 1981, an armed opposition group denounced the use of “chemical bombs, herbicides and defoliants” against its bases and the villages populated by civilians by pilots of a third State involved in the conflict.⁶⁶⁷

637. Robinson alleges that herbicides were used by the UK in Malaya in the 1950s, by France in North Africa in the 1950s, by the US in Indochina in the 1960s, by Portugal in its African colonies in the 1970s and by Ethiopia in Eritrea in the early 1980s.⁶⁶⁸

638. According to an opposition radio broadcast, the Angolan delegate to the Conference of States Parties to the 1925 Geneva Protocol and Other Interested States in 1989 “peremptorily denied having used chemical weapons on Angolan territory”.⁶⁶⁹

⁶⁶⁷ ICRC archive document.

⁶⁶⁸ Julian Perry Robinson, “The changing status of chemical and biological warfare: recent technical, military and political developments”, in *SIPRI Yearbook 1982: World Armaments and Disarmament*, Taylor & Francis, London, 1982, p. 336.

⁶⁶⁹ Voice of Resistance of the Black Cockerel, in Portuguese to Southern and Central Africa, 27 April 1989, JPRS-TAC-89-018, 3 May 1989.

EXPANDING BULLETS

Expanding Bullets (practice relating to Rule 77)

§§ 1–94

Expanding Bullets

I. Treaties and Other Instruments

Treaties

1. The 1899 Hague Declaration concerning Expanding Bullets stipulates that “the Contracting Parties agree to abstain from the use of bullets which expand or flatten easily in the human body, such as bullets with a hard envelope which does not entirely cover the core or is pierced with incisions”.
2. Pursuant to Article 8(2)(b)(xix) of the 1998 ICC Statute, “employing bullets which expand or flatten easily in the human body, such as bullets with a hard envelope which does not entirely cover the core or is pierced with incisions” constitutes a war crime in international armed conflicts.

Other Instruments

3. Article 16(2) of the 1913 Oxford Manual of Naval War provides that it is forbidden

to employ arms, projectiles, or materials calculated to cause unnecessary suffering. Entering especially into this category are . . . bullets which expand or flatten easily in the human body, such as bullets with a hard envelope which does not cover the core entirely or is pierced with incisions.

4. Based on several documents supplying evidence of outrages committed during the First World War, the 1919 Report of the Commission on Responsibility lists violations of the laws and customs of war which should be subject to criminal prosecution, including the “use of . . . expanding bullets”.
5. Section 6.2 of the 1999 UN Secretary-General’s Bulletin provides that “the United Nations force shall respect the rules prohibiting or restricting the use of certain weapons . . . These include, in particular, the prohibition on the use of . . . bullets which . . . expand or flatten easily in the human body”.
6. The 2000 UNTAET Regulation No. 2000/15 establishes panels with exclusive jurisdiction over serious criminal offences, including war crimes.

According to Section 6(1)(b)(xix), “employing bullets which expand or flatten easily in the human body, such as bullets with a hard envelope which does not entirely cover the core or is pierced with incisions” constitutes a war crime in international armed conflicts.

II. National Practice

Military Manuals

7. Australia’s *Commanders’ Guide* states that “use of the following types of weapons is prohibited: . . . (c) bullets with a hard envelope which do not entirely cover the core or are pierced with incisions (dum-dum bullets)”.¹ It also states that “hollow point weapons are prohibited because they cause gaping wounds which lead to unnecessary suffering”.² The *Guide* states that these weapons are included in those which are “totally prohibited. These blanket prohibitions, which may be traced to treaty or customary international law are justified on the grounds that the subject weapons are either indiscriminate in their effect or cause unnecessary suffering.”³ It further states that “the following examples constitute grave breaches or serious war crimes likely to warrant institution of criminal proceedings: . . . using certain unlawful weapons and ammunition such as . . . expanding rounds”.⁴

8. Australia’s *Defence Force Manual* provides that:

Weapons such as irregularly shaped bullets, projectiles filled with broken glass, bullets which have been scored, have had their ends filed, have been altered or which have been smeared with any substance likely to exacerbate a trauma injury are prohibited. “Dum dum” bullets (those with a hard envelope that does not entirely cover the core or which have been pierced with incisions or which have had their points filed off) come within this category of weapon.⁵

The manual further states that “the following examples constitute grave breaches or serious war crimes likely to warrant institution of criminal proceedings: . . . using certain unlawful weapons and ammunition such as . . . expanding rounds”.⁶

9. Belgium’s *Law of War Manual* states, with a reference to the 1899 Hague Declaration concerning Expanding Bullets, that “the use of dum-dum bullets, i.e. bullets which expand or flatten easily in the human body, is banned”.⁷

10. Cameroon’s *Instructors’ Manual* states that:

¹ Australia, *Commanders’ Guide* (1994), § 932(c).

² Australia, *Commanders’ Guide* (1994), § 309.

³ Australia, *Commanders’ Guide* (1994), § 304.

⁴ Australia, *Commanders’ Guide* (1994), § 1305(p).

⁵ Australia, *Defence Force Manual* (1994), § 405.

⁶ Australia, *Defence Force Manual* (1994), § 1315(p).

⁷ Belgium, *Law of War Manual* (1983), p. 37.

These [small calibre] weapons are those which shoot bullets at very high initial speed and which cause excessive trauma comparable to that produced by dum-dum bullets

...

These bullets, unlike traditional bullets, spread or flatten out after entering the body to create a wound larger than their own diameter, thus causing excessive injury.⁸

11. Canada's LOAC Manual states that "bullets that expand or flatten easily in the human body, such as bullets with a hard envelope that not entirely covers the core or is pierced with incisions (i.e., hollow point or 'dum-dum' bullets)," are prohibited.⁹

12. Canada's Code of Conduct provides that "the alteration of ammunition so that it expands or flattens easily when striking the human body is expressly prohibited".¹⁰ It also provides that the use of "bullets designed to expand or flatten easily on contact with the human body (i.e., dum-dum bullets or hollow point bullets)" is forbidden.¹¹

13. The Military Manual of the Dominican Republic strictly prohibits the use of dum-dum bullets.¹²

14. Ecuador's Naval Manual states that:

Weapons which cause superfluous injury or unnecessary suffering are prohibited because the degree of pain, the severity of the injuries and the certainty of death they entail are clearly out of all proportion with the military advantage to be gained by their use... [D]um-dum bullets belong in this category since the small military advantage that may be derived from their use guarantees death due to... the expanding effect of soft-nosed or unjacketed lead bullets.¹³

15. France's LOAC Summary Note states that "it is prohibited to use... projectiles that spread or flatten easily in human body".¹⁴

16. France's LOAC Teaching Note includes dum-dum bullets and other weapons with expanding heads in the list of weapons that "are totally prohibited by the law of armed conflict" because of their inhuman and indiscriminate character.¹⁵

17. France's LOAC Manual incorporates the content of the 1899 Hague Declaration concerning Expanding Bullets.¹⁶ It further includes dum-dum bullets and other weapons with expanding heads in the list of weapons that "are totally prohibited by the law of armed conflict" because of their inhuman and indiscriminate character.¹⁷

⁸ Cameroon, *Instructors' Manual* (1992), p. 125, § 442.1.

⁹ Canada, *LOAC Manual* (1999), p. 5-2, § 12(b).

¹⁰ Canada, *Code of Conduct* (2001), Rule 3, § 4.

¹¹ Canada, *Code of Conduct* (2001), Rule 3, § 10(a).

¹² Dominican Republic, *Military Manual* (1980), pp. 5 and 6.

¹³ Ecuador, *Naval Manual* (1989), § 9.1.1.

¹⁴ France, *LOAC Summary Note* (1992), § 4.6.

¹⁵ France, *LOAC Teaching Note* (2000), p. 6.

¹⁶ France, *LOAC Manual* (2001), p. 28.

¹⁷ France, *LOAC Manual* (2001), p. 54.

18. Germany's Soldiers' Manual provides that "it is prohibited to use means or methods of warfare which are intended or of a nature to cause superfluous injuries or unnecessary suffering (e.g. dum-dum bullets)".¹⁸

19. Germany's Military Manual states that:

It is prohibited to use bullets which expand or flatten easily in the human body (e.g. *dum-dum bullets*) . . . This applies also to the use of *shotguns*, since shot causes similar suffering unjustified from the military point of view. It is also prohibited to use projectiles of a nature:

- to burst or deform while penetrating the human body;
- to tumble early in the human body; or
- to cause shock waves leading to extensive tissue damage or even a lethal shock.¹⁹ [emphasis in original]

20. Germany's IHL Manual states that "international humanitarian law prohibits the use of a number of means of warfare which are of a nature to violate the principle of humanity and to cause unnecessary suffering, e.g. bullets which easily expand or flatten in the human body, so-called dum-dum bullets".²⁰

21. Israel's Manual on the Laws of War includes dum-dum bullets in the list of prohibited weapons.²¹

22. Italy's IHL Manual states that "it is specifically prohibited . . . to use bullets which expand or flatten easily in the human body, or bullets which are pierced with incisions".²²

23. Kenya's LOAC Manual states that "the use of bullets that expand or flatten easily in the human body, such as bullets with a hard envelope which does not entirely cover the core or is pierced with incisions, is prohibited".²³

24. The Military Manual of the Netherlands states that the use of

bullets which expand or transform inside the human body is prohibited; this is the prohibition of the so-called dum-dum bullet. These are bullets with a soft, possibly flattened head. The effect of transformation can also be obtained by using a saw or similar tool to remove the tip of the bullet.²⁴

25. The Military Handbook of the Netherlands prohibits the use of dum-dum bullets.²⁵

26. New Zealand's Military Manual states that the use of "bullets with a hard envelope which does not entirely cover the core, or is pierced with incisions (Dum Dum bullets)" is prohibited.²⁶ It notes that the qualification of the use of poison or poisoned weapons as a war crime "is an old-established rule of

¹⁸ Germany, *Soldiers' Manual* (1991), p. 5.

¹⁹ Germany, *Military Manual* (1992), § 407.

²⁰ Germany, *IHL Manual* (1996), § 305.

²¹ Israel, *Manual on the Laws of War* (1998), pp. 12–13.

²² Italy, *IHL Manual* (1991), Vol. I, § 8(6).

²³ Kenya, *LOAC Manual* (1997), Précis No. 3, p. 5.

²⁴ Netherlands, *Military Manual* (1993), p. IV-7.

²⁵ Netherlands, *Military Handbook* (1995), p. 7-39.

²⁶ New Zealand, *Military Manual* (1992), §§ 510(c) (land warfare) and 617(c) (air warfare).

customary law and applies equally to the use of any forbidden weapon such as expanding (dum-dum) bullets".²⁷

27. Nigeria's Manual on the Laws of War states that "it is expressly forbidden to use . . . irregularly shaped bullets . . . The scoring of the surface of bullets and filing off of the end of their hard case . . . are also prohibited."²⁸ The manual includes "using expanding bullets" in its list of war crimes.²⁹

28. Russia's Military Manual prohibits the use of various weapons that cause unnecessary suffering, including "bullets that expand or flatten easily in the human body".³⁰

29. South Africa's LOAC Manual provides that "weapons which are calculated to cause unnecessary suffering are illegal *per se*. Such weapons include . . . dum-dum bullets."³¹

30. Spain's LOAC Manual imposes an "absolute prohibition on the use of . . . bullets that expand (Dum-Dum) or flatten easily in the human body".³²

31. The UK Military Manual states that the UK engages "to abstain from the use of bullets with a hard envelope which does not entirely cover the core, or is pierced with incisions".³³ It further notes that "it is expressly forbidden to employ arms, projectiles or material calculated to cause unnecessary suffering . . . such . . . as . . . irregularly-shaped bullets".³⁴ The manual also provides that "in addition to the 'grave breaches' of the 1949 Geneva Conventions, . . . the following are examples of punishable violations of the laws of war, or war crimes: . . . using expanding bullets".³⁵

32. The UK LOAC Manual states that "the following are prohibited in *international* armed conflict: . . . b. dum-dum bullets".³⁶ (emphasis in original)

33. The US Field Manual states that "usage, has . . . established the illegality of . . . the scoring of the surface or the filing off of the ends of the hard cases of bullets".³⁷

34. The US Air Force Pamphlet states that:

International law has condemned dum dum . . . bullets because of types of injuries and inevitability of death. Usage and practice has also determined that it is *per se* illegal . . . to use irregularly shaped bullets or to score the surface or to file off the end of the hard cases of the bullets which cause them to expand upon contact and thus aggravate the wound they cause.³⁸

35. The US Instructor's Guide stresses the prohibition of "irregular-shaped bullets such as dum-dum bullets".³⁹ It also provides that "in addition to the

²⁷ New Zealand, *Military Manual* (1992), § 1704(2)(a) and footnote 32.

²⁸ Nigeria, *Manual on the Laws of War* (undated), § 11.

²⁹ Nigeria, *Manual on the Laws of War* (undated), § 6(7).

³⁰ Russia, *Military Manual* (1990), § 6(a). ³¹ South Africa, *LOAC Manual* (1996), § 34(f)(i).

³² Spain, *LOAC Manual* (1996), Vol. I, § 3.2.a.(2). ³³ UK, *Military Manual* (1958), § 109.

³⁴ UK, *Military Manual* (1958), § 110. ³⁵ UK, *Military Manual* (1958), § 626(g).

³⁶ UK, *LOAC Manual* (1981), Section 5, p. 20, § 1(b).

³⁷ US, *Field Manual* (1956), § 34(b).

³⁸ US, *Air Force Pamphlet* (1976), § 6-3(b)(2). ³⁹ US, *Instructor's Guide* (1985), p. 7.

grave breaches of the Geneva Conventions, the following acts are further examples of war crimes: using . . . forbidden arms or ammunition such as dum-dum bullets".⁴⁰

National Legislation

36. Andorra's Decree on Arms prohibits the use of expanding weapons.⁴¹

37. Australia's War Crimes Act considers "any war crime within the meaning of the instrument of appointment of the Board of Inquiry [set up to investigate war crimes committed by enemy subjects]" as a war crime, including the use of expanding bullets.⁴²

38. Australia's ICC (Consequential Amendments) Act incorporates in the Criminal Code the war crimes defined in the 1998 ICC Statute, including "employing prohibited bullets . . . [which] expand or flatten easily in the human body" in international armed conflicts.⁴³

39. Under Burundi's Draft Law on Genocide, Crimes against Humanity and War Crimes, "employing bullets which expand or flatten easily in the human body, such as bullets with a hard envelope which does not entirely cover the core or is pierced with incisions," constitutes a war crime in international armed conflicts.⁴⁴

40. Canada's Crimes against Humanity and War Crimes Act provides that the war crimes defined in Article 8(2) of the 1998 ICC Statute are "crimes according to customary international law" and, as such, indictable offences under the Act.⁴⁵

41. Congo's Genocide, War Crimes and Crimes against Humanity Act defines war crimes with reference to the categories of crimes defined in Article 8 of the 1998 ICC Statute.⁴⁶

42. Ecuador's National Civil Police Penal Code punishes the members of the National Civil Police "who use or order to be used . . . dum-dum bullets".⁴⁷

43. Under Estonia's Penal Code, "use of . . . expanding bullets" is a war crime.⁴⁸

44. Under Georgia's Criminal Code, any war crime provided for by the 1998 ICC Statute, which is not explicitly mentioned in the Code, such as "employing bullets which expand or flatten easily in the human body, such as bullets with a hard envelope which does not entirely cover the core or is pierced with incisions," in international armed conflicts, is a crime.⁴⁹

45. Germany's Law Introducing the International Crimes Code punishes anyone who, in connection with an international or non-international armed

⁴⁰ US, *Instructor's Guide* (1985), p. 13.

⁴¹ Andorra, *Decree on Arms* (1989), Chapter 1, Section 3, Article 2.

⁴² Australia, *War Crimes Act* (1945), Section 3.

⁴³ Australia, *ICC (Consequential Amendments) Act* (2002), Schedule 1, § 268.57.

⁴⁴ Burundi, *Draft Law on Genocide, Crimes against Humanity and War Crimes* (2001), Article 4(B)(r).

⁴⁵ Canada, *Crimes against Humanity and War Crimes Act* (2000), Section 4(1) and (4).

⁴⁶ Congo, *Genocide, War Crimes and Crimes against Humanity Act* (1998), Article 4.

⁴⁷ Ecuador, *National Civil Police Penal Code* (1960), Article 117(4).

⁴⁸ Estonia, *Penal Code* (2001), § 103.

⁴⁹ Georgia, *Criminal Code* (1999), Article 413(d).

conflict, “employs bullets which expand or flatten easily in the human body, in particular bullets with a hard envelope which does not entirely cover the core or is pierced with incisions”.⁵⁰

46. Italy’s Law of War Decree as amended provides that “it is prohibited to . . . use bullets which expand or flatten easily in the human body, such as bullets with a hard envelope which does not entirely cover the core or is pierced with incisions”.⁵¹

47. Under Mali’s Penal Code, “using bullets which expand or flatten easily in the human body, such as bullets with a hard envelope which does not entirely cover the core or is pierced with incisions” is a war crime in international armed conflicts.⁵²

48. The Definition of War Crimes Decree of the Netherlands includes the “use of . . . expanding bullets” in its list of war crimes.⁵³

49. Under the International Crimes Act of the Netherlands, “employing bullets which expand or flatten easily in the human body, such as bullets with a hard envelope which does not entirely cover the core or is pierced with incisions” is a crime, when committed in an international armed conflict.⁵⁴

50. Under New Zealand’s International Crimes and ICC Act, war crimes include the crime defined in Article 8(2)(b)(xix) of the 1998 ICC Statute.⁵⁵

51. Under Trinidad and Tobago’s Draft ICC Act, it is a punishable offence to commit a war crime as defined in Article 8(2)(b)(xix) of the 1998 ICC Statute.⁵⁶

52. Under the UK ICC Act, it is a punishable offence to commit a war crime as defined in Article 8(2)(b)(xix) of the 1998 ICC Statute.⁵⁷

53. Under the Penal Code as amended of the SFRY (FRY), the use of, or the order to use, “means or methods of combat prohibited under the rules of international law, during a war or an armed conflict” is a war crime.⁵⁸ The commentary on the Penal Code as amended adds that “the following weapons and means of combat are considered to be prohibited: . . . projectiles that spread easily when they come in contact with a human body”.⁵⁹

National Case-law

54. In 1995, in a ruling on the constitutionality of AP II, the Constitutional Court of Colombia stated in relation to the prohibition on the use of weapons of a nature to cause unnecessary suffering or superfluous injury that:

⁵⁰ Germany, *Law Introducing the International Crimes Code* (2002), Article 1, § 12(1)(3).

⁵¹ Italy, *Law of War Decree as amended* (1938), Article 35(6).

⁵² Mali, *Penal Code* (2001), Article 31(i)(19).

⁵³ Netherlands, *Definition of War Crimes Decree* (1946), Article 1.

⁵⁴ Netherlands, *International Crimes Act* (2003), Article 5(5)(i).

⁵⁵ New Zealand, *International Crimes and ICC Act* (2000), Section 11(2).

⁵⁶ Trinidad and Tobago, *Draft ICC Act* (1999), Section 5(1)(a).

⁵⁷ UK, *ICC Act* (2001), Sections 50(1) and 51(1) (England and Wales) and Section 58(1) (Northern Ireland).

⁵⁸ SFRY (FRY), *Penal Code as amended* (1976), Article 148(1).

⁵⁹ SFRY (FRY), *Penal Code as amended* (1976), commentary on Article 148(1).

Although none of the treaty rules expressly applicable to internal conflicts prohibits indiscriminate attacks or the use of certain weapons, the Taormina Declaration consequently considers that the bans (established partly by customary law and partly by treaty law) on the use of . . . “dum-dum” bullets . . . apply to non-international armed conflicts, not only because they form part of customary international law but also because they evidently derive from the general rule prohibiting attacks against the civilian population.⁶⁰

Other National Practice

55. At the CDDH, Algeria supported the Philippine amendment (see *infra*), because “it was a simple reaffirmation of the principles of positive humanitarian law”.⁶¹

56. At the CDDH, Canada voted against the Philippine amendment (see *infra*) because “the particular weapons are forbidden by international law and their use, other than by way of reprisal, already constitutes a war crime”.⁶²

57. In 1975, during discussions in the Ad Hoc Committee on Conventional Weapons established by the CDDH on the legality of high-velocity weapons, Colombia stated that “such weapons were indeed comparable to . . . dum-dum bullets . . . It was thus essential to expedite the formulation of rules prohibiting their use.”⁶³

58. At the CDDH, Egypt expressed “its disappointment at the failure of the Philippine amendment, establishing as a grave breach the use of prohibited weapons, to be adopted”, but noted that Article 74 of draft API (now Article 85) “as it stands now does cover the use of such weapons through their effects”.⁶⁴

59. The Report on the Practice of Ethiopia states, with reference to a press release by the Ministry of Defence, that “dum-dum bullets, which expand or flatten easily in the human body, were used during the war with Somalia in 1956”.⁶⁵

60. At the CDDH, Finland stated that it “attached the greatest importance to the prohibition of dum-dum bullets in The Hague Declaration of 1899”.⁶⁶

61. Finnish police are reported to have used hollow-point handgun bullets since 1994.⁶⁷ According to an article by the Finnish Senior Advisor of the Weapons Technology Police Technical Centre, the use of hollow-point expanding

⁶⁰ Colombia, Constitutional Court, *Constitutional Case No. C-225/95*, Judgement, 18 May 1995.

⁶¹ Algeria, Statement at the CDDH, *Official Records*, Vol. VI, CDDH/SR.44, 30 May 1977, p. 286, § 37.

⁶² Canada, Statement at the CDDH, *Official Records*, Vol. VI, CDDH/SR.44, 30 May 1977, p. 298.

⁶³ Colombia, Statement at the CDDH, *Official Records*, Vol. XVI, CDDH/IV/SR.14, 5 March 1975, pp. 132–133, § 9.

⁶⁴ Egypt, Statement at the CDDH, *Official Records*, Vol. VI, CDDH/SR.44, 30 May 1977, p. 300.

⁶⁵ Report on the Practice of Ethiopia, 1998, Chapter 3.1, referring to Ministry of Defence, Press Release, no date available, p. 16.

⁶⁶ Finland, Statement at the CDDH, *Official Records*, Vol. VI, CDDH/SR.44, 30 May 1977, p. 285, § 34.

⁶⁷ Jorma Jussila and Ralph Wilhelm, “Sicher und wirksam: Munition der finnischen Polizei”, *Deutsches Waffen Journal*, No. 9, 2000, p. 132.

handgun bullets presents some advantages, such as the avoidance of danger to bystanders through over-penetration of the bullet or ricochet. The article's author emphasises the existence of "a very common misunderstanding", which is that hollow-point handgun bullets cause much more tissue damage than non-deforming full metal jacket bullets. He states that "the truth, is, however, that a well designed expanding bullet causes less damage than some non-deforming full metal jacket bullet. This is because the latter starts tumbling causing an effect similar to that of an expanding bullet." He adds that:

Even when lethal ammunition are used some injury avoidance criteria must, however, be met. A bullet shall have consistent and controlled penetration thus minimising danger to bystanders while yet providing sufficient penetration in all circumstances. This is technically not possible without some braking mechanism like expansion or terminal ballistic instability. A bullet shall not cause more injury than is unavoidable. It shall not break up to fragments upon impact with soft tissue even when shot through various materials. A bullet shall have controlled trajectory. Upon impact with hard surface it shall not turn into excessively dangerous ricochets and the ricochets must not deflect significantly from the impact surface tangent.⁶⁸

62. According to the Report on the Practice of India, "since India has subscribed to most of the Conventions which specifically declare certain weapons as prohibited, there is no possibility of use . . . of expanding bullets in times of international or internal armed conflicts". In addition, the report states that, according to India's practice, there is "a ban and restriction on the use of . . . expanding bullets".⁶⁹

63. On the basis of an interview with the Director of the Nuclear, Biological and Chemical Weapons Division of the Indonesian Armed Forces, the Report on the Practice of Indonesia states that Indonesia has prohibited the use of expanding bullets.⁷⁰

64. At the CDDH, Iraq supported the Philippine amendment (see *infra*), since "the use of dum-dum bullets . . . had been prohibited for a very long time but the user was not liable to criminal proceedings. It was high time that the use of such appalling weapons was made a grave offence."⁷¹

65. At the CDDH, Italy abstained in the vote on the Philippine amendment (see *infra*) because "it would not be useful because it dealt with means and methods of warfare which were already prohibited by the existing law".⁷²

⁶⁸ Jorma Jussila, "Future Police Operations and Non-Lethal Weapons", *Medicine, Conflict and Survival*, Vol. 17, No. 3, July–September 2001, p. 259.

⁶⁹ Report on the Practice of India, 1997, Chapter 3.4.

⁷⁰ Report on the Practice of Indonesia, 1997, Interview with the Director of Nuclear, Biological and Chemical Weapons Division of the Armed Forces, Chapter 3.4.

⁷¹ Iraq, Statement at the CDDH, *Official Records*, Vol. VI, CDDH/SR.44, 30 May 1977, p. 284, § 24.

⁷² Italy, Statement at the CDDH, *Official Records*, Vol. VI, CDDH/SR.44, 30 May 1977, p. 285, § 30.

66. According to the Report on the Practice of Jordan, Jordan has indicated that it does not use, manufacture or stockpile expanding bullets and it has no intention of possessing nor using such weapons in the future.⁷³

67. At the CDDH, the Philippines proposed an amendment to include “the use of weapons prohibited by International Conventions, namely: bullets which expand or flatten easily in the human body” in the list of grave breaches in Article 74 of draft API (now Article 85).⁷⁴ The proposal was rejected because it failed to obtain the necessary two-thirds majority (41 votes in favour, 25 against and 25 abstentions).⁷⁵

68. In 1977, during a debate in the First Committee of the UN General Assembly, Sweden stated that it, “together with others”, wanted to restate the ban on expanding bullets from 1899, but that the proposal had not met with general approval.⁷⁶

69. In 1975, during discussions in the Ad Hoc Committee on Conventional Weapons established by the CDDH, Sweden stated that:

Several governments, including the US and the UK governments, had avoided a narrow interpretation of The Hague ban; their current military manuals prohibited not merely soft-nose bullets, but also irregularly-shaped bullets . . . It was significant that The Hague ban . . . had even had a decisive influence on the choice of weapons for police use, although it was not formally applicable in the domestic sphere.⁷⁷

70. At the CDDH, Switzerland voted in favour of the Philippine amendment (see *supra*) because:

It would be a step forward to state expressly that any violation of The Hague Declaration of 1899 and the Geneva Protocol of 1925 would constitute a grave breach. The rules laid down in those two instruments were undisputed and indisputable, and the amendment would have a deterrent effect on any State tempted to violate them, by exposing the members of its armed forces to the penalties applicable under the Geneva Conventions.⁷⁸

71. In 1974, in reply to a letter from a member of the US House of Representatives, the Acting General Counsel of the US Department of Defense stated that:

⁷³ Report on the Practice of Jordan, 1997, Chapter 3.4.

⁷⁴ Philippines, Proposal of amendment to Article 74 of draft API submitted to the CDDH, *Official Records*, Vol. III, CDDH/418, 26 May 1977, p. 322.

⁷⁵ CDDH, *Official Records*, Vol. VI, CDDH/SR.44, 30 May 1977, pp. 288–289. (Against: Australia, Belarus, Belgium, Bulgaria, Canada, Czechoslovakia, Denmark, Finland, France, FRG, GDR, Hungary, India, Luxembourg, Monaco, Mongolia, Netherlands, New Zealand, Poland, Portugal, Ukraine, USSR, UK, US and Zaire. Abstaining: Brazil, Cameroon, Cyprus, Cuba, Greece, Guatemala, Indonesia, Iran, Ireland, Israel, Italy, Japan, South Korea, Mauritania, Morocco, Nigeria, Norway, Romania, Spain, Swaziland, Sweden, Thailand, Turkey, Uganda and Vietnam.)

⁷⁶ Sweden, Statement before the First Committee of the UN General Assembly, UN Doc. A/C.1/32/PV.32, 14 November 1977, p. 27.

⁷⁷ Sweden, Statement at the CDDH, *Official Records*, Vol. XVI, CDDH/IV/SR.11, 21 February 1975, p. 111, § 29.

⁷⁸ Switzerland, Statement at the CDDH, *Official Records*, Vol. VI, CDDH/SR.44, 30 May 1977, p. 281, § 9.

The United States is not a party to the agreement prohibiting the use of expanding bullets or “dum-dums”, signed at The Hague, July 29 1899. In that Agreement, the parties agreed “to abstain from the use of bullets which expand or flatten easily in the human body, such as bullets with a hard envelope which does not entirely cover the core, or is pierced with incisions”. The United States has, however, acknowledged that it will abide by the terms of the agreement prohibiting expanding bullets.⁷⁹

72. At the CDDH, the US voted against the Philippine amendment (see *supra*) because:

Grave breaches were meant to be the most serious type of crime; Parties had an obligation to punish or extradite those guilty of them. Such crimes should therefore be clearly specified, so that a soldier would know if he was about to commit an illegal act for which he could be punished. The amendment, however, was vague and imprecise. What standard would be applied, for example, in deciding whether a bullet expanded or flattened “easily” in the human body? . . . It would also punish those who used the weapons, namely, the soldiers, rather than those who made the decision as to their use, namely, Governments.⁸⁰

73. In 1983, in a memorandum on the use of small-caliber armor-piercing incendiary (API) ammunition against enemy personnel, the US Department of the Army emphasised that no US ammunition violated, *inter alia*, the 1899 Hague Declaration concerning Expanding Bullets.⁸¹

74. In 1990, in a memorandum of law on sniper use of open-tip ammunition, the US Department of the Army stated that:

The United States is not a party to [the 1899 Hague Declaration concerning Expanding Bullets], but U.S. officials over the years have taken the position that the armed forces of the United States will adhere to its terms to the extent that its application is consistent with the object and purpose of article 23e of [the 1907 HR].⁸²

He added, however, that:

Wound ballistic research over the past fifteen years has determined that the prohibition contained in the 1899 Hague Declaration [concerning Expanding Bullets] is of minimal to no value, inasmuch as virtually all jacketed military bullets employed since 1899 with pointed ogival spitzer tip shape have a tendency to fragment on impact with soft tissue, harder organs, bone or the clothing and/or equipment worn by the individual soldier.

...

⁷⁹ US, Department of Defense, Acting General Counsel, Reply of 18 January 1974 to a letter of 14 November 1973 of a member of the House of Representatives, Arthur W. Rovine, *Digest of United States Practice in International Law, 1974*, Department of State Publication 8809, Washington, D.C., 1975, pp. 705–706.

⁸⁰ US, Statement at the CDDH, *Official Records*, Vol. VI, CDDH/SR.44, 30 May 1977, pp. 280–281, § 7.

⁸¹ US, Department of the Army, Office of the Judge Advocate General, Memorandum on the use of small-caliber armor-piercing incendiary (API) ammunition against enemy personnel, 15 March 1983, § 2.

⁸² US, Department of the Army, Office of the Judge Advocate General, Sniper Use of Open-Tip Ammunition – Memorandum of Law, 12 October 1990, p. 4, § 3.

Weighing the increased performance of the pointed ogival spitzer tip bullet against the increased injury its break-up may bring, the nations of the world – through almost a century of practice – have concluded that the need for the former outweighs concern for the latter and does not result in unnecessary suffering as prohibited by the 1899 Hague Declaration Concerning Expanding Bullets and the 1907 Hague Convention IV. The 1899 Hague Declaration Concerning Expanding Bullets remains valid for expression of the principle that a nation may not employ a bullet that expands easily on impact for the purpose of unnecessarily aggravating the wound inflicted upon an enemy soldier.⁸³

75. In 1990, in a memorandum of law on sniper use of open-tip ammunition, the US Department of the Army stated that the use of the 7.62 Norma Match ammunition with open-tip bullet is not contrary to the Hague or Geneva rules, since the

purpose of the 7.62mm “open-tip” MatchKing bullet is to provide maximum accuracy at very long range. . . It may fragment upon striking its target, although the probability of its fragmentation is not as great as some military ball bullets currently in use by some nations. Bullet fragmentation is not a design characteristic, however, nor a purpose for use of the MatchKing by U.S. Army snipers. Wounds caused by MatchKing ammunition are similar to those caused by a fully jacketed military ball bullet, which is legal under the law of war. . . The military necessity for its use. . . is complemented by the high degree of discriminate fire it offers.⁸⁴

76. In 1993, in a legal review of the USSOCOM Special Operations Offensive Handgun, the US Department of the Army stated that:

The Hague Declaration Concerning Expanding Bullets of 29 July 1899 prohibits the use in international armed conflict. . . of bullets which expand or flatten easily in the human body, such as bullets with a hard envelope which does not entirely cover the core or is pierced with incisions.

The United States is not a party to this declaration, but has taken the position that it will adhere to the terms of this convention and its conventional military operations to the extent that its application is consistent with the object and purpose of article 23e of the [1907 HR].

...

The conflict spectrum clearly has changed from 1899, and the immediate incapacitation essential to the prevention of the release of dangerous materials or the murder of hostages or prisoners of war necessitates reconsideration of the 1899 prohibition in light of these changed circumstances. The Hague Declaration retains its general validity in limiting use of expanding ammunition by conventional military forces in conventional armed conflict when such use may result in superfluous injury, absent a clear showing of military necessity for its use.⁸⁵

⁸³ US, Department of the Army, Office of the Judge Advocate General, *Sniper Use of Open-Tip Ammunition – Memorandum of Law*, 12 October 1990, pp. 6–7, § 6.

⁸⁴ US, Department of the Army, Office of the Judge Advocate General, *Sniper use of open-tip ammunition – Memorandum of law*, 12 October 1990, p. 7.

⁸⁵ US, Department of the Army, Office of the Judge Advocate General, *Legal Review of USSOCOM Special Operations Offensive Handgun*, 16 February 1993, pp. 12 and 17.

77. In 1996, in a legal review of the Fabrique Nationale 5.7x28mm Weapon System, the US Department of the Army stated that “the United States is not a party to [the 1899 Hague Declaration concerning Expanding Bullets], but has taken the position that it will adhere to the terms of the convention in armed conflict to the extent that its application is consistent with the object and purpose of article 23e of the [1907 HR]”.⁸⁶

78. At the CDDH, the SFRY voted in favour of the Philippine amendment (see *supra*), but because that amendment had been rejected it stated that it

deeply regrets that the use of unlawful methods or means of combat was not included in the grave breaches, particularly since to have done so would merely have been to have codified an already existing rule of customary law, because there can be no doubt that to use prohibited weapons or unlawful methods of making war is already to act unlawfully, that is, it is a war crime punishable by existing international law.⁸⁷

79. In 1991, in a document entitled “Examples of violations of the rules of international law committed by the so-called armed forces of Slovenia”, the Ministry of Defence of the SFRY (FRY) stated that:

The nature of the injuries of some of the members of the Yugoslav People’s Army show that forbidden means have been used in the armed conflict, before all ammunition suitable to inflict disproportionate and needless injuries, that reduce the chances of the injured to survive.

In that respect, the injuries of [a] soldier . . . are characteristic. He was hit in the tip of his right forearm and the round had crumbled and split the forearm bone, the tissue and thus blew the fist of the injured to bits. In the riddled channel and the surrounding tissue, pieces of a fragmented round were found. All that implies for the use of the so-called soft-nosed bullet.⁸⁸

80. In a communication to the ICRC in 1991, a Red Cross Society transmitted a government report which denounced the use of dum-dum bullets in a non-international conflict.⁸⁹

81. In 2000, the government of a State stated that, although the prohibition of expanding bullets applied to military action and not to civil law enforcement, its police “should operate within the *spirit*” of the 1907 Hague Convention (IV) and therefore not cause unnecessary suffering. The justification of discharging a firearm by a police officer is to take immediate and effective action to stop a life-threatening action by an armed offender. In these circumstances, it is important to immediately stop the offender without putting at risk the lives of the officer or of others. Therefore, ammunition must immediately incapacitate and

⁸⁶ US, Department of the Army, Office of the Judge Advocate General, Fabrique Nationale 5.7x28mm Weapon System: Legal Review, 13 May 1996, p. 3.

⁸⁷ SFRY, Statement at the CDDH, *Official Records*, Vol. VI, CDDH/SR.44, 30 May 1977, p. 306.

⁸⁸ SFRY (FRY), Ministry of Defence, Examples of violations of the rules of international law committed by the so-called armed forces of Slovenia, July 1991, § 4.

⁸⁹ ICRC archive document.

minimise the risk of “over-penetration” (i.e. going through the target and perhaps hitting someone else as well). Expanding ammunition helped to slow the projectile on impact with the target; reduced the potential for over-penetration thereby endangering others; and minimised the potential of ricochet should it hit a hard surface. Handgun ammunition used by police forces in the State were jacketed soft-nosed, but when rifle ammunition was used in order to operate over longer ranges, it was usually full-metal jacket and conformed to military specifications. Handgun soft-point or hollow-point ammunition was designed to provide controlled expansion and did not fragment in the same way as “dum-dum” bullets.⁹⁰

III. Practice of International Organisations and Conferences

United Nations

82. In resolutions adopted in 1970 and 1971, the UN General Assembly called upon “all parties to any armed conflict to observe the rules laid down in the Hague Conventions of 1899 and 1907”.⁹¹

83. In a resolution adopted in 1972, the UN General Assembly called upon “all parties to armed conflicts to observe the international humanitarian rules which are applicable, in particular the Hague Conventions of 1899 and 1907”.⁹²

84. In a resolution adopted in 1973, the UN General Assembly reaffirmed the urgent need to ensure full and effective application by all the parties to armed conflicts of existing legal rules relating to such conflicts, in particular the Hague Conventions of 1899 and 1907.⁹³

85. In three resolutions adopted between 1974 and 1976, the UN General Assembly called upon “all parties to armed conflict” to acknowledge and to comply with their obligations under the humanitarian instruments and observe the international humanitarian rules which are applicable, in particular, the Hague Conventions of 1899 and 1907.⁹⁴

86. In 1969, in a report on respect for human rights in armed conflict, the UN Secretary-General stated that some weapons which caused unnecessary suffering “have been prohibited for a long time by the international community

⁹⁰ ICRC archive document.

⁹¹ UN General Assembly, Res. 2677 (XXV), 9 December 1970, § 1; Res. 2852 (XXVI), 20 December 1971, § 1.

⁹² UN General Assembly, Res. 3032 (XXVII), 18 December 1972, § 2. The resolution was adopted by 103 votes in favour, none against and 25 abstentions (Argentina, Australia, Belgium, Bolivia, Brazil, Burma, Canada, Colombia, Cuba, France, Greece, Guatemala, Honduras, Israel, Italy, Japan, Laos, Luxembourg, Malawi, Nepal, Portugal, South Africa, UK, US and Uruguay), UN Doc. A/PV.2114, 18 December 1972, p. 20.

⁹³ UN General Assembly, Res. 3102 (XXVIII), 12 December 1973, preamble. The resolution was adopted by 107 votes in favour, none against and 6 abstentions (Costa Rica, Israel, Paraguay, Portugal, Spain and US), UN Doc. A/PV.2197, 12 December 1973, p. 17.

⁹⁴ UN General Assembly, Res. 3319 (XXIX), 14 December 1974, § 3; Res. 3500 (XXX), 15 December 1975, § 1; Res. 31/19, 24 November 1976, § 1.

(see for instance, the Hague Declaration of 1899 which prohibits the use of bullets 'which expand or flatten in the human body').⁹⁵

87. In 1973, a survey conducted by the UN Secretariat noted that there was a consensus that expanding bullets were prohibited under the 1899 Hague Declaration concerning Expanding Bullets.⁹⁶

Other International Organisations

88. The first OAU/ICRC seminar on IHL for diplomats accredited to the OAU in 1994 recommended that the "Hague Law and relevant provisions regulating the means and methods of warfare such as the use of specific weapons must be applied to both international and non international conflictual situations".⁹⁷

International Conferences

89. No practice was found.

IV. Practice of International Judicial and Quasi-judicial Bodies

90. No practice was found.

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

91. To fulfil its task of disseminating IHL, the ICRC has delegates around the world teaching armed and security forces that "the use of bullets which expand or flatten easily in the human body, such as bullets with a hard envelope which does not entirely cover the core or is pierced with incisions, is prohibited".⁹⁸

92. The ICRC Commentary on the Additional Protocols states that:

1419. The specific applications of the prohibition formulated in Article 23, paragraph 1(e), of the Hague Regulations, or resulting from the Declarations of St. Petersburg and The Hague, are not very numerous. They include:

- ...
2. "dum-dum" bullets, i.e., bullets which easily expand or flatten in the human body, such as bullets with a hard envelope which does not entirely cover the core or is pierced with incisions or bullets of irregular shape or with a hollowed out nose;
- ...

⁹⁵ UN General Assembly, Report of the Secretary-General on respect for human rights in armed conflicts, UN Doc. A/7720, 20 November 1969, p. 59.

⁹⁶ UN Secretariat, Survey on respect for human rights in armed conflicts, Existing rules of international law concerning the prohibition or restriction of the use of specific weapons, UN Doc. A/9215, 7 November 1973, p. 134.

⁹⁷ OAU/ICRC, First seminar on IHL, Addis Ababa, 7 April 1994, Conclusions and Recommendations, § 9.

⁹⁸ Frédéric de Mulinen, *Handbook on the Law of War for Armed Forces*, ICRC, Geneva, 1987, § 917.

1420. The weapons which are prohibited under the provisions of the Hague Law are, *a fortiori*, prohibited under [Article 35(2) AP I].⁹⁹

93. In a communication to the ICRC in 1991, a Red Cross Society denounced the use of dum-dum bullets in an international conflict.¹⁰⁰

VI. Other Practice

94. Rule B2 of the Rules of International Humanitarian Law Governing the Conduct of Hostilities in Non-international Armed Conflicts, adopted in 1990 by the Council of the IIHL, states that “the customary rule prohibiting the use of bullets which expand or flatten easily in the human body, such as dum-dum bullets, is applicable in non-international armed conflicts”.¹⁰¹

⁹⁹ Yves Sandoz *et al.* (eds.), *Commentary on the Additional Protocols*, ICRC, Geneva, 1987, §§ 1419–1420.

¹⁰⁰ ICRC archive document.

¹⁰¹ IIHL, Rules of International Humanitarian Law Governing the Conduct of Hostilities in Non-international Armed Conflicts, Rule B2, *IRRC*, No. 278, 1990, p. 397.

EXPLODING BULLETS

Exploding Bullets (practice relating to Rule 78)

§§ 1–49

Exploding Bullets

I. Treaties and Other Instruments

Treaties

1. The 1868 St. Petersburg Declaration states that “the Contracting Parties engage mutually to renounce, in case of war among themselves, the employment by their military or naval troops of any projectile of a weight below 400 grammes, which is either explosive or charged with fulminating or inflammable substances”. The weight of 400 grammes was chosen since it was the weight of the smallest artillery shell of that time.

Other Instruments

2. Under Article 13(e) of the 1874 Brussels Declaration, “the use of projectiles prohibited by the Declaration of St. Petersburg of 1868” is “especially forbidden”.

3. Article 9(a) of the 1880 Oxford Manual states that “it is forbidden . . . to employ . . . projectiles, . . . calculated to cause superfluous suffering, or to aggravate wounds – notably projectiles of less weight than four hundred grams which are explosive or are charged with fulminating or inflammable substances”.

4. Article 16(2) of the 1913 Oxford Manual of Naval War provides that “it is forbidden . . . to employ . . . projectiles . . . calculated to cause unnecessary suffering. Entering especially into this category are explosive projectiles or those charged with fulminating or inflammable materials, less than 400 grammes in weight.”

5. Based on several documents supplying evidence of outrages committed during the First World War, the 1919 Report of the Commission on Responsibility lists violations of the laws and customs of war which should be subject to criminal prosecution, including the “use of explosive . . . bullets”.

6. Article 18 of the 1923 Hague Rules of Air Warfare provides that “the use of tracer, incendiary or explosive projectiles by or against aircraft is not prohibited.

This provision applies equally to states which are parties to the Declaration of St. Petersburg, 1868, and to those which are not."

7. Section 6.2 of the 1999 UN Secretary-General's Bulletin provides that "the United Nations force shall respect the rules prohibiting... the use of certain weapons... These include, in particular, the prohibition on the use of... bullets which explode... in the human body."

II. National Practice

Military Manuals

8. Australia's Commanders' Guide prohibits the use of "projectiles weighing less than 400 grams which are either explosive or charged with fulminating or inflammable substances (St. Petersburg)".¹

9. Australia's Defence Force Manual states that "bullets or other projectiles weighing less than 400 grams which are either explosive or contain fulminating or inflammable substances (exploding small arms projectiles) are prohibited".²

10. Belgium's Law of War Manual proscribes the use of exploding bullets under 400 grammes, with reference to the 1868 St. Petersburg Declaration.³

11. Canada's LOAC Manual states that "the following types of ammunition are prohibited: a. projectiles of a weight below 400 grams that are either explosive or charged with fulminating (exploding) or inflammable substances".⁴

12. France's LOAC Manual refers to the 1868 St. Petersburg Declaration.⁵

13. Germany's Military Manual states that:

In the 1868 St. Petersburg Declaration the use of explosive and incendiary projectiles under 400 grammes was prohibited, since these projectiles were deemed to cause disproportionately severe injury to soldiers, which is not necessary for putting them out of action. This prohibition is only of limited importance now, since it is reduced by customary law to the use of explosive and incendiary projectiles of a weight significantly lower than 400 grammes which can disable only the individual directly concerned but not any other persons. 20 mm high-explosive grenades and projectiles of a similar calibre are not prohibited.⁶

14. Italy's IHL Manual states that "it is specifically prohibited... to use explosive or incendiary projectiles of a weight below 400 grammes, except for air or anti-air systems."⁷

15. New Zealand's Military Manual prohibits the use of "projectiles weighing less than 400 grams which are either explosive or charged with fulminating or inflammable substances". It adds that:

The use of tracer and incendiary ammunition by the armed forces of belligerents was general during the Second World War and must be considered to be lawful. An argument can be made that the use of such ammunition is illegal if directed

¹ Australia, *Commanders' Guide* (1994), § 932(f).

² Australia, *Defence Force Manual* (1994), § 408.

⁴ Canada, *LOAC Manual* (1999), p. 5-2.

⁶ Germany, *Military Manual* (1992), § 406.

³ Belgium, *Law of War Manual* (1983), p. 37.

⁵ France, *LOAC Manual* (2001), p. 53.

⁷ Italy, *IHL Manual* (1991), Vol. I, § 8(5).

solely against combatant personnel because of the St Petersburg Declaration and [the 1907] HR Art. 23(e). This argument ignores the fact that the UN Conference which negotiated the [1980 Protocol III to the CCW], was unable to agree on any requirement to protect combatants from the effects of incendiary weapons.⁸

16. Russia's Military Manual prohibits the use of various weapons that cause unnecessary suffering, including "projectiles weighing less than 400 grammes, which are either explosive or charged with fulminating or inflammable substances".⁹

17. Spain's LOAC Manual imposes a total prohibition on "the use of projectiles weighing less than 400 grammes which are explosive".¹⁰

18. The UK Military Manual states that:

The international agreements limiting the means of destruction of enemy combatants are contained in [Article 23 of the 1907 HR] and in three Declarations and one Protocol, by which the contracting parties, of which Great Britain is one, engage to:

- (i) "to renounce in case of war amongst themselves, the employment by their military or naval troops of any projectile of a weight below 400 grammes . . . which is either explosive or charged with fulminating or inflammable substances" (Declaration of St. Petersburg, 1868)

...

... This work deals only with land warfare (whether conducted by land, sea or air forces) and therefore is not concerned with air warfare. However, attention must be drawn to the Air Warfare Rules drafted at the Hague in 1923 by a commission of jurists appointed by certain Governments. Art. 18 of that code provides as follows: "The use of tracer, incendiary or explosive projectiles by or against aircraft is not prohibited." This provision applies equally to States which are parties to the Declaration [of St. Petersburg of 1868], and those which are not. During the Second World War such projectiles were used by the air forces of all belligerents . . . The use of tracer and incendiary ammunition by the armed forces of belligerents was general during the Second World War and must be considered to be lawful provided that it is directed solely against inanimate military targets (including aircraft). The use of such ammunition is illegal if directed solely against combatant personnel. This is so for two reasons, first the renunciation contained in the Declaration of St. Petersburg, 1868, referred to and second the prohibition in [Article 23(e) of the 1907 HR].¹¹

19. The UK LOAC Manual states that "the following are prohibited in *international* armed conflict: a. explosive or inflammable bullets for use against personnel".¹² (emphasis in original)

20. The US Air Force Pamphlet states that "international law has condemned . . . exploding bullets because of types of injuries and inevitability of death".¹³

⁸ New Zealand, *Military Manual* (1992), § 510(f) and footnote 49, see also § 617(f) and footnote 37 (air warfare).

⁹ Russia, *Military Manual* (1990), § 6(c). ¹⁰ Spain, *LOAC Manual* (1996), Vol. I, § 3.2.a.(2).

¹¹ UK, *Military Manual* (1956), § 109 and footnote 1.

¹² UK, *LOAC Manual* (1981), Section 5, p. 20, § 1(a).

¹³ US, *Air Force Pamphlet* (1976), § 6-3(b)(2).

National Legislation

21. Andorra's Decree on Arms prohibits the use of exploding bullets.¹⁴
22. Australia's War Crimes Act considers "any war crime within the meaning of the instrument of appointment of the Board of Inquiry [set up to investigate war crimes committed by enemy subjects]" as a war crime, including the use of explosive bullets.¹⁵
23. Ecuador's National Civil Police Penal Code punishes the members of the National Civil Police "who use or order to be used . . . exploding bullets".¹⁶
24. Italy's Law of War Decree as amended provides that "it is prohibited . . . to use explosive or incendiary projectiles of a weight below 400 grammes, except for air or anti-air systems".¹⁷
25. The Definition of War Crimes Decree of the Netherlands includes the "use of explosive . . . bullets" in its list of war crimes.¹⁸
26. Under the Penal Code as amended of the SFRY (FRY), the use of, or the order to use, "means or methods of combat prohibited under the rules of international law, during a war or an armed conflict" is a war crime.¹⁹ The commentary on the Penal Code as amended notes that "the following weapons and means of combat are considered to be prohibited: explosive projectiles under 400 g. that burst or have an incendiary charge".²⁰

National Case-law

27. No practice was found.

Other National Practice

28. At the Second Review Conference of States Parties to the CCW in 2001, Brazil stated that it "shared the concern that the 1868 St. Petersburg Declaration's ban on the use of projectiles that might explode with the human body should not be subverted".²¹
29. In 1975, during discussions in the Ad Hoc Committee on Conventional Weapons established by the CDDH, Colombia stated that "high-velocity small-calibre projectiles . . . were indeed comparable to exploding bullets" and should be prohibited.²²

¹⁴ Andorra, *Decree on Arms* (1989), Chapter 1, Section 3, Article 2.

¹⁵ Australia, *War Crimes Act* (1945), Section 3.

¹⁶ Ecuador, *National Civil Police Penal Code* (1960), Article 117(4).

¹⁷ Italy, *Law of War Decree as amended* (1938), Article 35(5).

¹⁸ Netherlands, *Definition of War Crimes Decree* (1946), Article 1.

¹⁹ SFRY (FRY), *Penal Code as amended* (1976), Article 148(1).

²⁰ SFRY (FRY), *Penal Code as amended* (1976), commentary on Article 148(1).

²¹ Brazil, Statement of 11 December 2001 at the Second Review Conference of States Parties to the CCW, Geneva, 11–21 December 2001, UN Doc. CCW/CONF.II/2, 2001, p. 85, § 71; see also Statement at the Third Preparatory Committee for the Second Review Conference of States Parties to the CCW, Geneva, 24–28 September 2001, UN Doc. CCW/CONF.II/PC.3/PV.1, 5 October 2001, p. 54.

²² Colombia, Statement at the CDDH, *Official Records*, Vol. XVI, CDDH/IV/SR.14, 5 March 1975, pp. 132–133, § 9.

30. According to the Report on the Practice of Indonesia, the use of exploding bullets is prohibited in Indonesia.²³

31. According to the Report on the Practice of Jordan, Jordan does not use, manufacture or stockpile explosive bullets and it has no intention of possessing or using such weapons in the future.²⁴

32. In a letter to the ICRC in 2001, Norway stated that:

We fully recognise the validity of the St. Petersburg Declaration and the customary law established on the basis of the Declaration. The principle set out in the Declaration should, however, be interpreted in the light of more recent international humanitarian law, and in particular the prohibition against employing weapons and ammunition that are of such a nature as to cause superfluous injury or unnecessary suffering. In the assessment of the legality of a particular weapon or kind of ammunition, there has been a clear practice among nations since 1868 of weighing the legality against the intended use of the weapon or ammunition. In such assessments several factors, such as distance from the target, intended target categories and depth of penetration are considered to be relevant when establishing the effect on the target.²⁵

33. At the Second Review Conference of States Parties to the CCW in 2001, Norway stated that it “endorsed all efforts to strengthen the fundamental principle that the development and use of weapons systems deemed contrary to the 1868 St. Petersburg Declaration should be prevented”.²⁶

34. In its written statement submitted to the ICJ in the *Nuclear Weapons case* in 1995, the UK stated that the 1868 St. Petersburg Declaration prohibited projectiles the use of which “was considered to be gratuitously cruel, because it caused horrific and almost invariably fatal injuries, while offering little or no military advantage over the use of ordinary ammunition”.²⁷

35. In 1998, in a legal review of a 12.7 mm explosive bullet, the US Department of the Army stated that “a projectile that will explode on impact with the human body would be prohibited by the law of war from use for anti-personnel purposes. This remains the view of the US.”²⁸ In an update of this legal review in 2000, the Department of the Army stated that “the considerable practice of nations during this century suggests that States accept that an exploding projectile designed exclusively for antipersonnel use would be prohibited, as there is no military purpose for it”.²⁹

36. At the Third Preparatory Committee for the Second Review Conference of States Parties to the CCW in 2001, the US stated that it agreed with the ICRC

²³ Report on the Practice of Indonesia, 1997, Chapter 3.4.

²⁴ Report on the Practice of Jordan, 1997, Chapter 3.4.

²⁵ Norway, Letter to the President of the ICRC, 11 May 2001.

²⁶ Norway, Statement of 11 December 2001 at the Second Review Conference of States Parties to the CCW, Geneva, 11–21 December 2001, UN Doc. CCW/CONF.II/2, 2001, p. 83, § 58.

²⁷ UK, Written statement submitted to the ICJ, *Nuclear Weapons case*, 16 June 1995, § 3.65.

²⁸ US, Department of the Army, Office of the Judge Advocate General, DAJA-IO (27-1A), Subject: Mk211, MOD O, Cal. 50 Multi-purpose Projectiles: Legal Review, 19 February 1998.

²⁹ US, Department of the Army, Office of the Judge Advocate General, DAJA-IO (27-1A), Subject: Mk211, MOD O, Cal. 50 Multipurpose Projectile: Legal Review, 14 January 2000, p. 17.

“that there is no valid military requirement for a bullet designed to explode upon impact with the human body”.³⁰

37. In a statement in 1991, the Supreme Command of the YPA of the SFRY stated that:

The authorities and Armed Forces of the Republic of Slovenia are treating JNA as an occupation army; and are in their ruthless assaults on JNA members and their families going as far as to employ means and methods which were not even used by fascist units and which are prohibited under international law . . . They are . . . using explosive bullets.³¹

III. Practice of International Organisations and Conferences

United Nations

38. No practice was found.

Other International Organisations

39. No practice was found.

International Conferences

40. In 1999, the ICRC organised an Expert Meeting on Exploding Projectiles of 12.7 mm and Below to which military, legal and ballistic governmental experts from Belgium, Norway, Switzerland and US (i.e. countries that produce and/or stock 12.7 mm multipurpose bullets) were invited in their personal capacity. The summary report of the meeting, reviewed and accepted by all participants, stated that there was a general consensus, in relation to projectiles of 12.7 mm and below, that:

The prohibition on the intentional use against combatants of such projectiles which explode upon impact with the human body, which originated in the 1868 St. Petersburg Declaration, continues to be valid.

The targeting of combatants with such projectiles the foreseeable effect of which is to explode upon impact with the human body would be contrary to the object and purpose of the St. Petersburg Declaration.

There is no military requirement for a projectile designed to explode upon impact with the human body.

...

States producing such projectiles notify past and future recipients of these projectiles that their intentional use against combatants is a violation of the Law of Armed Conflict.³²

41. The Final Declaration of the Second Review Conference of States Parties to the CCW in 2001 took note of “the report of the International Committee

³⁰ US, Statement at the Third Preparatory Committee for the Second Review Conference of States Parties to the CCW, Geneva, 24–28 September 2001, UN Doc. CCW/CONF.II/PC.3/PV.1, 5 October 2001, p. 54.

³¹ SFRY (FRY), YPA Supreme Command, Statement, 1 July 1991, TANJUG, Belgrade.

³² Expert Meeting on Exploding Projectiles of 12.7 mm and Below, Geneva, 29–30 March 1999, Summary.

of the Red Cross on 'Ensuring respect for the 1868 St. Petersburg Declaration prohibiting the use of certain explosive projectiles' (dated 18 September 2001)" and invited "States to consider this report and other relevant information, and take any appropriate action".³³

IV. Practice of International Judicial and Quasi-judicial Bodies

42. No practice was found.

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

43. To fulfil its task of disseminating IHL, the ICRC has delegates around the world teaching armed and security forces that "the use of projectiles of a weight below 400 grammes, which are either explosive or charged with fulminating or inflammable substances, is prohibited".³⁴

44. The ICRC Commentary on the Additional Protocols states that:

1419. The specific applications of the prohibition formulated in Article 23, paragraph 1(e), of the Hague Regulations, or resulting from the Declarations of St. Petersburg and The Hague, are not very numerous. They include:

1. explosive bullets...

1420. The weapons which are prohibited under the provisions of the Hague Law are, *a fortiori*, prohibited under [Article 35(2) AP I].³⁵

45. In 1998, in a statement in the First Committee of the UN General Assembly, the ICRC declared that:

The ICRC considers the 1868 St. Petersburg Declaration, renouncing the use of exploding bullets, to be a cornerstone of efforts to protect soldiers from superfluous injury or unnecessary suffering. It is disturbing to learn that some armed forces are considering the use of bullets which will explode on impact with soft targets. The ICRC calls on all States rigorously to review, in accordance with article 36 of the 1977 Additional Protocol I, their procurement policies.³⁶

46. In 1999, in a statement in the First Committee of the UN General Assembly, the ICRC expressed concern about a "multipurpose" bullet, some versions of which exploded on impact with the human body. It further stated that:

The 1868 St. Petersburg Declaration prohibited the use of explosive bullets in order to protect soldiers from suffering which serves no military purpose and is therefore contrary to the laws of humanity. It is disturbing to learn that in recent years bullets capable of exploding on impact with a human body have been produced, sold and

³³ Second Review Conference of States Parties to the CCW, Geneva, 11–21 December 2001, Final Declaration, UN Doc. CCW/CONF.II/2, 2001, p. 9.

³⁴ Frédéric de Mulinen, *Handbook on the Law of War for Armed Forces*, ICRC, Geneva, 1987, § 916.

³⁵ Yves Sandoz *et al.* (eds.), *Commentary on the Additional Protocols*, ICRC, Geneva, 1987, §§ 1419–1420.

³⁶ ICRC, Statement before the First Committee of the UN General Assembly, UN Doc. A/C.1/53/PV.9, 19 October 1998, p. 19.

used. In early 1999 the ICRC hosted a meeting of technical and legal governmental experts, who reaffirmed that the proliferation of such bullets is a serious problem and undermines the very purpose of the St. Petersburg Declaration. We urge all States to refrain from the production and export of such bullets and urge those that possess them to strictly prohibit their use against persons, a practice which violates existing law. The ICRC expects to report on this problem and seek appropriate action during the 2001 CCW Review Conference.³⁷

47. In a report submitted in 2001 to the Third Preparatory Committee for the Second Review Conference of States Parties to the CCW, the ICRC recalled the consensus expressed by the participants in the 1999 Expert Meeting on Exploding Projectiles of 12.7 mm and Below:

calls on *all States* to

- take steps to ensure that explosive projectiles under 400 grams which may explode within the human body are not produced, used or transferred;
- undertake a rigorous review, as required by Article 36 of Protocol I of 1977 Additional to the Geneva Conventions of 1949, before acquiring or developing explosive projectiles under 400 grams and sniper rifles capable of using such projectiles in order to ensure that such projectiles will not explode within the human body.

The ICRC urges *States which produce or transfer explosive projectiles* under 400 grams which may explode within the human body urgently to:

- Inform past recipients of such projectiles that their use against combatants is prohibited under international humanitarian law.
- Suspend the production and export of such projectiles until they have been adapted so as to ensure that their use against combatants will not contravene the object and purpose of the St Petersburg Declaration. This would involve testing, redesign and other steps to ensure that the chance of the projectile's explosion within the human body (whether soft tissue or bone) has been eliminated.³⁸ [emphasis in original]

48. At the Third Preparatory Committee for the Second Review Conference of States Parties to the CCW in 2001, the ICRC stated that “the object and purpose of the 1868 [St. Petersburg] Declaration to protect combatants from unnecessary suffering or death from explosive projectiles remains valid and in the view of the ICRC is part of customary international law”.³⁹

VI. Other Practice

49. No practice was found.

³⁷ ICRC, Statement before the First Committee of the UN General Assembly, UN Doc. A/C.1/54/PV.12, 20 October 1999, p. 31.

³⁸ ICRC, Ensuring respect for the 1868 St Petersburg Declaration: Prohibiting the use of certain explosive projectiles, Report submitted to the Third Preparatory Committee for the Second Review Conference of the States Parties to the CCW, UN Doc. CCW/CONF.II/PC.3/WP.6, 18 September 2001, p. 4.

³⁹ US, Statement at the Third Preparatory Committee for the Second Review Conference of States Parties to the CCW, Geneva, 24–28 September 2001, UN Doc. CCW/CONF.II/PC.3/PV.1, 5 October 2001, p. 54.

WEAPONS PRIMARILY INJURING BY NON-DETECTABLE FRAGMENTS

Weapons Primarily Injuring by Non-Detectable Fragments
(practice relating to Rule 79)

§§ 1–55

Weapons Primarily Injuring by Non-Detectable Fragments

I. Treaties and Other Instruments

Treaties

1. The 1980 Protocol I to the CCW provides that “it is prohibited to use any weapon the primary effect of which is to injure by fragments which in the human body escape detection by X-rays”.
2. Upon ratification of the 1980 CCW, Canada stated that “with respect to [the 1980] Protocol I [to the CCW], it is the understanding of the Government of Canada that the use of plastics or similar materials for detonators or other weapons parts not designed to cause injury is not prohibited”.¹
3. Upon ratification of the 1980 CCW, France stated that:

with reference to the scope of application defined in article 1 of the Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons, . . . it will apply the provisions of the Convention and its three Protocols [I, II and III] to all armed conflicts referred to in articles 2 and 3 common to the Geneva Conventions of 12 August 1949 [international and non-international armed conflicts].²

4. Upon accession to the 1980 CCW, Israel stated that:

With reference to the scope of application defined in article 1 of the Convention, the Government of the State of Israel will apply the provisions of the Convention and those annexed Protocols to which Israel has agreed [I, II and III] become bound to all armed conflicts involving regular forces of States referred to in article 2 common to the Geneva Conventions of 12 August 1949, as well as to all armed conflicts referred to in article 3 common to the Geneva Conventions of 12 August 1949 [international and non-international armed conflicts].³

Israel also declared that “with respect to [the 1980] Protocol I [to the CCW], it is the understanding of the Government of Israel that the use of plastics or

¹ Canada, Declaration made upon ratification of the CCW, 24 June 1994, § 2.

² France, Reservations made upon ratification of the CCW, 4 March 1988.

³ Israel, Declarations and understandings made upon accession to the CCW, 22 March 1995, § (a).

similar materials for detonators or other weapon parts not designed to cause injury is not prohibited".⁴

5. Upon ratification of the 1980 CCW, the US declared that:

with reference to the scope of application defined in article 1 of the Convention, that the United States will apply the provisions of the Convention, Protocol I, and Protocol II to all armed conflicts referred to in articles 2 and 3 common to the Geneva Conventions for the Protection of War Victims of August 12, 1949 [international and non-international armed conflicts].⁵

6. In 2001, States parties to the 1980 CCW decided to amend Article 1 of the Convention, governing its scope. This amendment states that:

1. This Convention and its annexed Protocols shall apply in the situations referred to in Article 2 common to the Geneva Conventions of 12 August 1949 for the Protection of War Victims, including any situation described in paragraph 4 of Article I of Additional Protocol I to these Conventions.
2. This Convention and its annexed Protocols shall also apply, in addition to situations referred to in paragraph 1 of this Article, to situations referred to in Article 3 common to the Geneva Conventions of 12 August 1949. This Convention and its annexed Protocols shall not apply to situations of internal disturbances and tensions, such as riots, isolated and sporadic acts of violence, and other acts of a similar nature, as not being armed conflicts.
3. In case of armed conflicts not of an international character occurring in the territory of one of the High Contracting Parties, each party to the conflict shall be bound to apply the prohibitions and restrictions of this Convention and its annexed Protocols.

Other Instruments

7. Section 6.2 of the 1999 UN Secretary-General's Bulletin provides that "the use of certain conventional weapons, such as non-detectable fragments, ... is prohibited".

II. National Practice

Military Manuals

8. Argentina's Law of War Manual provides that it is prohibited "to use any weapon the primary effect of which is to injure by fragments which in the human body escape detection by X-ray".⁶

9. Australia's Commanders' Guide states that "munitions which produce fragments undetectable by X-ray machines, such as glass, are prohibited based upon the principle of unnecessary suffering".⁷ It provides that the use of "weapons which injure by fragments which, in the human body, escape detection by

⁴ Israel, Declarations and understandings made upon accession to the CCW, 22 March 1995, § (b).

⁵ US, Declaration made upon ratification of the CCW, 24 March 1995.

⁶ Argentina, *Law of War Manual* (1989), § 4.16.

⁷ Australia, *Commanders' Guide* (1994), § 308.

X-rays" is prohibited.⁸ The guide also states that these weapons are included in those which "are totally prohibited. These blanket prohibitions, which may be traced to treaty or customary international law, are justified on the grounds that the subject weapons are either indiscriminate in their effect or cause unnecessary suffering."⁹

10. Australia's Defence Force Manual states that "weapons which cause injury by the use of fragments which are undetectable by X-ray in the human body are prohibited".¹⁰ It also states that these weapons are included in those which "are totally prohibited. These blanket prohibitions, which may be traced to treaty or customary international law, are justified on the grounds that the subject weapons are either indiscriminate in their effect or cause unnecessary suffering."¹¹

11. Belgium's Law of War Manual states that "the use of any weapon the primary effect of which is to injure by fragments which in the human body escape detection by X-ray is prohibited".¹²

12. Canada's LOAC Manual provides that "weapons that cause injury by the use of fragments undetectable by X-ray in the human body are prohibited".¹³

13. Ecuador's Naval Manual states that "the incorporation in the ammunition of materials which are difficult to detect or undetectable by X-ray equipment, such as glass or clear plastic, is prohibited, since they unnecessarily inhibit the treatment of wounds".¹⁴

14. France's LOAC Teaching Note includes weapons that injure by non-detectable fragments in the list of weapons that "are totally prohibited by the law of armed conflict" because of their inhuman and indiscriminate character.¹⁵

15. France's LOAC Manual includes weapons that injure by non-detectable fragments in the list of weapons that "are totally prohibited by the law of armed conflict" because of their inhuman and indiscriminate character.¹⁶

16. Germany's Military Manual prohibits the use of "any weapon the primary effect of which is to injure by fragments which in the human body escape detection by X-rays".¹⁷

17. Germany's IHL Manual states that:

International humanitarian law prohibits the use of a number of means of warfare, which are of a nature to violate the principle of humanity and to cause unnecessary suffering, e.g. . . . weapons whose primary effect is to injure by fragments

⁸ Australia, *Commanders' Guide* (1994), § 932(d).

⁹ Australia, *Commanders' Guide* (1994), § 304.

¹⁰ Australia, *Defence Force Manual* (1994), § 407.

¹¹ Australia, *Defence Force Manual* (1994), § 404.

¹² Belgium, *Law of War Manual* (1983), p. 39.

¹⁴ Ecuador, *Naval Manual* (1989), § 9.1.1.

¹⁶ France, *LOAC Manual* (2001), pp. 53–54.

¹³ Canada, *LOAC Manual* (1999), p. 5-3, § 21.

¹⁵ France, *LOAC Teaching Note* (2000), p. 6.

¹⁷ Germany, *Military Manual* (1992), § 408.

which in the human body escape detection by X-rays, e.g. plastic or glass ammunition.¹⁸

18. Israel's Manual on the Laws of War states, regarding the use of weapons that injure by non-detectable fragments, that "the resultant injury is far in excess of what is required, hence forbidden".¹⁹

19. Italy's IHL Manual states that "it is specifically prohibited...to use...bullets radiologically invisible."²⁰

20. Kenya's LOAC Manual states that "the use of any weapon the primary effect of which is to injure by fragments which in the human body escape detection by X-ray is prohibited."²¹

21. The Military Manual of the Netherlands provides that:

Weapons whose primary effect is to cause wounds by means of elements (splinters or fragments) which cannot be detected by X-rays in the human body are prohibited...

The meaning of this prohibition, however, is limited. It is in fact what remains of attempts to get a prohibition for more categories of explosive ammunition, such as projectiles with pre-fragmented jacket, or filled with very small bullets (pellets) or with needle-like objects (fléchettes). These kinds of ammunition are not prohibited; in essence they do not differ from long existing and widely used high explosive shells.²²

22. New Zealand's Military Manual prohibits the use of "weapons the primary effect of which is to injure by fragments which in the human body escape detection by X-rays".²³

23. Nigeria's Manual on the Laws of War states that "it is expressly forbidden to use...projectiles with broken glass".²⁴

24. Russia's Military Manual prohibits the use of weapons that may cause superfluous injury or suffering and refers to the 1980 Protocol I to the CCW.²⁵

25. South Africa's LOAC Manual states that "weapons which are calculated to cause unnecessary suffering are illegal per se. Such weapons include...weapons filled with glass."²⁶

26. Spain's LOAC Manual imposes an "absolute prohibition on the use of...weapons the primary effect of which is to injure by fragments which in the human body escape detection by X-rays".²⁷

27. Sweden's IHL Manual states that "[the 1980] Protocol I to the CCW relates to certain fragmentation weapons. The Protocol forbids the use of weapons

¹⁸ Germany, *IHL Manual* (1996), § 305. ¹⁹ Israel, *Manual on the Laws of War* (1998), p. 13.

²⁰ Italy, *IHL Manual* (1991), Vol. I, § 8(6).

²¹ Kenya, *LOAC Manual* (1997), Précis No. 3, p. 6.

²² Netherlands, *Military Manual* (1993), p. IV-7.

²³ New Zealand, *Military Manual* (1992), §§ 510(d) (land warfare) and 617(d) (air warfare).

²⁴ Nigeria, *Manual on the Laws of War* (undated), § 11.

²⁵ Russia, *Military Manual* (1990), § 6. ²⁶ South Africa, *LOAC Manual* (1996), § 34(f)(i).

²⁷ Spain, *LOAC Manual* (1996), Vol. I, § 3.2.a.(2).

whose primary effect is to injure by fragments which cannot be detected by X-raying the injured person.”²⁸

28. Under Switzerland’s Basic Military Manual, “it is prohibited to use weapons the primary effect of which is the formation of fragments non-detectable in the human body by X-rays”.²⁹

29. The UK Military Manual prohibits the use of projectiles filled with broken glass.³⁰

30. The UK LOAC Manual, under the heading “Future Developments”, considers the possibility, thanks to the 1980 CCW, of “a ban on weapons whose main purpose is to produce fragments that cannot be detected by X-ray”.³¹

31. The US Air Force Pamphlet states that “usage and practice has also determined that it is *per se* illegal to use projectiles filled with glass or other materials inherently difficult to detect medically”.³²

32. The US Air Force Commander’s Handbook states that “using clear glass as the injuring mechanism in an explosive projectile or bomb is prohibited, since glass is difficult for surgeons to detect in a wound and impedes treatment”.³³

33. The US Instructor’s Guide states that the principle of unnecessary suffering “outlawed the use of . . . projectiles filled with glass”.³⁴

34. The US Naval Handbook provides that “using materials that are difficult to detect or undetectable by field x-ray equipment, such as glass or clear plastic, as the injuring mechanism in military ammunition is prohibited, since they unnecessarily inhibit the treatment of wounds”.³⁵

National Legislation

35. Under Estonia’s Penal Code, “use of . . . weapons injuring by fragments invisible by X-ray” is a war crime.³⁶

36. Under Hungary’s Criminal Code as amended, employing “weapons causing injury by fragments which cannot be detected by X-ray” as defined in the 1980 Protocol I to the CCW is a war crime.³⁷

National Case-law

37. No practice was found.

Other National Practice

38. In 1977, in the Ad Hoc Committee on Conventional Weapons established by the CDDH, Austria, Colombia, Denmark, Mexico, Norway, Spain, Sweden, Switzerland and SFRY presented a draft article for AP I stipulating that “it

²⁸ Sweden, *IHL Manual* (1991), Section 3.3.2, p. 79.

²⁹ Switzerland, *Basic Military Manual* (1987), Article 23(a).

³⁰ UK, *Military Manual* (1958), § 110. ³¹ UK, *LOAC Manual* (1981), Section 11, p. 40, § 4(c).

³² US, *Air Force Pamphlet* (1976), § 6-3(b)(2).

³³ US, *Air Force Commander’s Handbook* (1980), § 6-2(a)(2).

³⁴ US, *Instructor’s Guide* (1985), p. 7.

³⁵ US, *Naval Handbook* (1995), § 9.1.1. ³⁶ Estonia, *Penal Code* (2001), § 103.

³⁷ Hungary, *Criminal Code as amended* (1978), Section 160/A(3)(b)(1).

is prohibited to use any weapon the primary effect of which is to injure by fragments which in the human body escape detection by X-rays".³⁸ The proposal received support from FRG, US and Venezuela.³⁹

39. During the CCW preparatory conference in 1979, Australia, Austria, Belarus, Belgium, Bulgaria, Canada, Cuba, Denmark, Finland, France, FRG, GDR, Greece, Hungary, Ireland, Italy, Jamaica, Mexico, Morocco, Netherlands, New Zealand, Norway, Panama, Philippines, Poland, Portugal, Romania, Spain, Sudan, Sweden, Switzerland, Syria, Togo, Ukraine, USSR, UK, US, Venezuela, SFRY and Zaire unanimously sponsored a proposal on the prohibition of weapons that primarily injure by non-detectable fragments, identical to the earlier consensus proposal.⁴⁰

40. At the First Review Conference of States Parties to the CCW in 1995, Australia stated that "the restrictions laid down in the Convention regarding the use of . . . weapons which injured by non-detectable fragments were strong and clear".⁴¹

41. At the Third Preparatory Committee for the Second Review Conference of States Parties to the CCW in 2001, India indicated that it "fully supported the idea of expanding the scope of the CCW to cover armed internal conflicts".⁴²

42. According to the Report on the Practice of India, in India there is "a ban and restriction on the use of . . . weapons primarily wounding by non-detectable fragments".⁴³

43. Referring to an interview with the Director of Nuclear, Biological and Chemical Weapons Division of the Indonesian Armed Forces, the Report on the Practice of Indonesia affirms that Indonesia prohibits the use of weapons primarily injuring by non-detectable fragments.⁴⁴

44. According to the Report on the Practice of Jordan, Jordan does not use, manufacture or stockpile weapons primarily wounding by non-detectable

³⁸ Austria, Colombia, Denmark, Mexico, Norway, Spain, Sweden, Switzerland and SFRY, Draft article entitled "Non-detectable fragments" submitted to the Ad Hoc Committee on Conventional Weapons established by the CDDH, *Official Records*, Vol. XVI, CDDH/408/Rev.1, 17 March–10 June 1977, p. 539.

³⁹ FRG, Statement at the Ad Hoc Committee on Conventional Weapons established by the CDDH, *Official Records*, Vol. XVI, CDDH/IV/SR.40, 19 May 1976, p. 407, § 20; US, Statement at the Ad Hoc Committee on Conventional Weapons established by the CDDH, *Official Records*, Vol. XVI, CDDH/IV/SR.32, 1 June 1976, p. 334, § 15; Venezuela, Statement at the Ad Hoc Committee on Conventional Weapons established by the CDDH, *Official Records*, Vol. XVI, CDDH/IV/SR.25, 13 May 1976, p. 257, § 23.

⁴⁰ Preparatory Conference for the CCW, 19 March–12 April 1979, Draft proposal concerning non-detectable fragments, UN Doc. A/CONF.95/PREP.CONF/L.10, 12 September 1978; Draft proposal concerning non-detectable fragments, UN Doc. A/CONF.95/PREP.CONF/L.10/Add. 1, 13 September 1978; Draft proposal concerning non-detectable fragments, UN Doc. A/CONF.95/PREP.CONF/L.10/Add. 2, 15 September 1978; Draft proposal concerning non-detectable fragments, UN Doc. A/CONF.95/PREP.CONF/L.10/Add. 3, 10 April 1979.

⁴¹ Australia, Statement at the First Review Conference of States Parties to the CCW, Vienna, 25 September–13 October 1995, UN Doc. CCW/CONF.I/SR 3, 2 October 1995, § 25.

⁴² India, Statement of 24 September 2001 at the Third Preparatory Committee for the Second Review Conference of States Parties to the CCW, Geneva, 24–28 September 2001.

⁴³ Report on the Practice of India, 1997, Answers to additional questions on Chapter 3.4.

⁴⁴ Report on the Practice of Indonesia, 1997, Interview with the Director of Nuclear, Biological and Chemical Weapons Division of the Armed Forces, Chapter 3.4.

fragments and it has no intention of possessing nor of using such weapons in the future.⁴⁵

45. In 1992, during a debate in the First Committee of the UN General Assembly, the Netherlands implied that universal adherence to the 1980 CCW would give it effect in internal conflicts.⁴⁶

46. In 1979, in a legal review of the Maverick Alternate Warhead, the US Department of the Air Force stated that "it is generally accepted... that... only weapons designed to injure through non detectable fragments would be prohibited. Incidental effects arising from the use of a few plastic parts in a munition would still be considered lawful."⁴⁷

III. Practice of International Organisations and Conferences

United Nations

47. In a resolution adopted in 1980, the UN General Assembly welcomed the successful conclusion of the 1980 CCW and its Protocols and commended the Convention and the three annexed Protocols to all States "with a view to achieving the widest possible adherence to these instruments".⁴⁸

48. In numerous resolutions adopted between 1981 and 1998, the UN General Assembly urged all States that had not done so to accede to the 1980 CCW and its Protocols.⁴⁹

Other International Organisations

49. In a resolution adopted in 1996, the Parliamentary Assembly of the Council of Europe invited,

in particular, the governments of the member states of the Council of Europe, of the states whose parliaments enjoy or have applied for special guest status with the Assembly, of the states whose parliaments enjoy observer status, namely Israel, and of all other states to:

...

- b. ratify, if they have not done so, ... the United Nations Convention of 1980 on the prohibitions or restrictions on the use of certain conventional weapons and its protocols ...

...

⁴⁵ Report on the Practice of Jordan, 1997, Chapter 3.4.

⁴⁶ Netherlands, Statement before the First Committee of the UN General Assembly, UN Doc. A/C.1/47/PV.26, 5 November 1992, p. 21.

⁴⁷ US, Air Force, Judge Advocate General, Legal Review of Maverick Alternate Warhead, (AGM-65E), 4 January 1979, § 3.

⁴⁸ UN General Assembly, Res. 35/153, 12 December 1980, § 4.

⁴⁹ UN General Assembly, Res. 36/93, 9 December 1981, § 1; Res. 37/79, 9 December 1982, § 1; Res. 38/66, 15 December 1983, § 3; Res. 39/56, 12 December 1984, § 3; Res. 40/84, 12 December 1985, § 3; Res. 41/50, 3 December 1986, § 3; Res. 42/30, 30 November 1987, § 3; Res. 43/67, 7 December 1988, § 3; Res. 45/64, 4 December 1990, § 3; Res. 46/40, 6 December 1991, § 3; Res. 47/56, 9 December 1992, § 3; Res. 48/79, 16 December 1993, § 3; Res. 49/79, 15 December 1994, § 3; Res. 50/74, 12 December 1995, § 3; Res. 51/49, 10 December 1996, § 3; Res. 52/42, 9 December 1997, § 3; Res. 53/81, 4 December 1998, § 5.

- j. promote extension of the aforesaid United Nations Convention of 1980 to non-international armed conflicts, and inclusion in its provisions of effective procedures for verification and regular inspection.⁵⁰

50. In a resolution adopted in 1994 on respect for IHL and support for humanitarian action in armed conflicts, the OAU Council of Ministers invited “all States that have not yet become party to the...[1980] CCW, to consider, or reconsider, without delay the possibility of doing so in the near future”.⁵¹

51. In two resolutions adopted in 1994 and 1996 on respect for IHL, the OAS General Assembly urged member States to accede to the 1980 CCW.⁵²

International Conferences

52. In 1976, the Rapporteur of the Working Group of the Ad Hoc Committee on Conventional Weapons established by the CDDH noted that “there had been agreement on the proposal” to prohibit the use of any weapon the primary effect of which is to injure by fragments non-detectable by X-ray.⁵³

IV. Practice of International Judicial and Quasi-judicial Bodies

53. No practice was found.

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

54. To fulfil its task of disseminating IHL, the ICRC has delegates around the world teaching armed and security forces that “the use of any weapon the primary effect of which is to injure by fragments which in the human body escape detection by X-rays is prohibited”.⁵⁴

VI. Other Practice

55. No practice was found.

⁵⁰ Council of Europe, Parliamentary Assembly, Res. 1085, 24 April 1996, § 8(b) and (j).

⁵¹ OAU, Council of Ministers, Res. 1526 (LX), 6–11 June 1994, § 6.

⁵² OAS, General Assembly, Res. 1270 (XXIV-O/94), 10 June 1994, § 1; Res. 1408 (XXVI-O/96), 7 June 1996, § 1.

⁵³ CDDH, Ad Hoc Committee on Conventional Weapons, Statement by the Rapporteur of the Working Group, *Official Records*, Vol. XVI, CDDH/IV/SR.40, 19 May 1976, p. 403, § 2.

⁵⁴ Frédéric de Mulinen, *Handbook on the Law of War for Armed Forces*, ICRC, Geneva, 1987, § 920.

BOOBY-TRAPS

Booby-Traps (practice relating to Rule 80)

§§ 1–100

Booby-Traps*I. Treaties and Other Instruments**Treaties*

1. Article 2(2) of the 1980 Protocol II to the CCW and Article 2(4) of the 1996 Amended Protocol II to the CCW define a booby-trap as “any device or material which is designed, constructed or adapted to kill or injure, and which functions unexpectedly when a person disturbs or approaches an apparently harmless object or performs an apparently safe act”.

2. Article 4 of the 1980 Protocol II to the CCW provides that:

1. This Article applies to:

...
(b) booby-traps; ...

2. It is prohibited to use weapons to which this Article applies in any city, town, village or other area containing a similar concentration of civilians in which combat between ground forces is not taking place or does not appear to be imminent, unless either: (a) they are placed on or in the close vicinity of a military objective belonging to or under the control of an adverse party; or (b) measures are taken to protect civilians from their effects, for example, the posting of warning signs, the posting of sentries, the issue of warnings or the provision of fences.

3. Article 6(2) of the 1980 Protocol II to the CCW and Article 3(3) of the 1996 Amended Protocol II to the CCW prohibit the use of booby-traps which are designed to cause or of a nature to cause superfluous injury or unnecessary suffering.

4. Article 3(4) of the 1980 Protocol II to the CCW and Article 3(10) of the 1996 Amended Protocol II to the CCW provide that:

All feasible precautions shall be taken to protect civilians from the effects of weapons to which this Article applies. Feasible precautions are those precautions which are practicable or practically possible taking into account all circumstances ruling at the time, including humanitarian and military considerations.

Article 3(10) of the Protocol adds that:

These circumstances include, but are not limited to:

- ...
- (b) possible measures to protect civilians (for example, fencing, signs, warning and monitoring);
 - (c) the availability and feasibility of using alternatives.

Article 3(11) provides that "effective advance warning shall be given of any emplacement of... booby-traps... which may affect the civilian population, unless circumstances do not permit".

5. Article 6(1)(b) of the 1980 Protocol II to the CCW and Article 7(1) of the 1996 Amended Protocol II to the CCW list the categories of booby-traps that are banned. They provide that it is prohibited in all circumstances to use booby-traps and other devices which are in any way attached to or associated with:

- (a) internationally recognized protective emblems, signs or signals;
- (b) sick, wounded or dead persons;
- (c) burial or cremation sites or graves;
- (d) medical facilities, medical equipment, medical supplies or medical transportation;
- (e) children's toys or other portable objects or products specially designed for the feeding, health, hygiene, clothing or education of children;
- (f) food or drink;
- (g) kitchen utensils or appliances except in military establishments, military locations or military supply depots;
- (h) objects clearly of a religious nature;
- (i) historic monuments, works of art or places of worship which constitute the cultural or spiritual heritage of peoples; or
- (j) animals or their carcasses.

6. Article 6(1)(a) of the 1980 Protocol II to the CCW and Article 7(2) of the 1996 Amended Protocol II to the CCW provide that "it is prohibited to use booby-traps or other devices in the form of apparently harmless portable objects which are specifically designed and constructed to contain explosive material".

7. Articles 7 and 9 of the 1980 Protocol II to the CCW and Articles 9 and 10 of the 1996 Amended Protocol II to the CCW contain detailed provisions on the recording and use of information on booby-traps and on the removal of booby-traps.

8. Upon signature of the 1980 CCW, China stated that:

The Protocol [to the CCW] on Prohibitions or Restrictions on the Use of Mines, Booby Traps and Other Devices fails to lay down strict restrictions on the use of such weapons by the aggressor on the territory of his victim and to provide

adequately for the right of a state victim of an aggressor to defend itself by all necessary means.¹

9. Upon ratification of the 1980 CCW, France stated that:

With reference to the scope of application defined in article 1 of the Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons, . . . it will apply the provisions of the Convention and its three Protocols [I, II and III] to all armed conflicts referred to in articles 2 and 3 common to the Geneva Conventions of 12 August 1949.²

10. Upon accession to the 1980 CCW, Israel stated that:

With reference to the scope of application defined in article 1 of the Convention, the Government of the State of Israel will apply the provisions of the Convention and those annexed Protocols to which Israel has agreed [I, II and III] to become bound to all armed conflicts involving regular forces of States referred to in article 2 common to the Geneva Conventions of 12 August 1949, as well as to all armed conflicts referred to in article 3 common to the Geneva Conventions of 12 August 1949.³

11. Upon ratification of the 1980 CCW, the US declared that:

With reference to the scope of application defined in article 1 of the Convention, . . . the United States will apply the provisions of the Convention, Protocol I, and Protocol II to all armed conflicts referred to in articles 2 and 3 common to the Geneva Conventions for the Protection of War Victims of August 12, 1949.⁴

12. Upon ratification of the 1980 CCW, the US stated that "the United States understands that article 6(1) of the Protocol II [to the CCW] does not prohibit the adaptation for use as booby-traps of portable objects created for a purpose other than as a booby-trap if the adaptation does not violate paragraph (1)(b) of the article".⁵

13. Article 3(2) of the 1996 Amended Protocol II to the CCW provides that:

Each High Contracting Party or party to a conflict is, in accordance with the provisions of this Protocol, responsible for all . . . booby-traps . . . employed by it and undertakes to clear, remove, destroy or maintain them as specified in Article 10 of this Protocol.

14. Article 3(5) of the 1996 Amended Protocol II to the CCW prohibits the use of booby-traps that are designed to detonate "by the presence of commonly available mine detectors".

¹ China, Declaration made upon signature of the CCW, 14 September 1981, § 3.

² France, Reservations made upon ratification of the CCW, 4 March 1988.

³ Israel, Declarations and understandings made upon accession to the CCW, 22 March 1995, § (a).

⁴ US, Declaration made upon ratification of the CCW, 24 March 1995.

⁵ US, Statements of understanding made upon ratification of the CCW, 24 March 1995.

15. Article 7(3) of the 1996 Amended Protocol II to the CCW provides that:

3. Without prejudice to the provisions of Article 3, it is prohibited to use weapons to which this Article applies in any city, town, village or other area containing a similar concentration of civilians in which combat between ground forces is not taking place or does not appear to be imminent, unless either:
 - a) they are placed on or in the close vicinity of a military objective; or
 - b) measures are taken to protect civilians from their effects, for example, the posting of warning sentries, the issuing of warnings or the provision of fences.

16. Article 1(2) of the 1996 Amended Protocol II to the CCW provides that:

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

17. Upon acceptance of the 1996 Amended Protocol II to the CCW, Austria, Denmark, Finland, France, Germany, Ireland, Italy, South Africa and Sweden stated that "the provisions of the amended Protocol which by their contents or nature may be applied also in peacetime, shall be observed at all times".⁶

18. Upon acceptance of the 1996 Amended Protocol II to the CCW, Belgium declared that "the provisions of Protocol II as amended which by their contents or nature may be applied also in peacetime, shall be observed at all times".⁷

19. Upon acceptance of the 1996 Amended Protocol II to the CCW, Canada stated that "it is understood that the provisions of Amended Protocol II shall, as the context requires, be observed at all times".⁸

20. Upon acceptance of the 1996 Amended Protocol II to the CCW, Greece declared that "it is understood that the provisions of the protocol shall, as the context requires, be observed at all times".⁹

⁶ Austria, Declaration made upon acceptance of Amended Protocol II to the CCW, 27 July 1998; Denmark, Declaration made upon acceptance of Amended Protocol II to the CCW, 30 April 1997; Finland, Declaration made upon acceptance of Amended Protocol II to the CCW, 3 April 1998; France, Declarations made upon acceptance of Amended Protocol II to the CCW, 23 July 1998; Germany, Declarations made upon acceptance of Amended Protocol II to the CCW, 2 May 1997; Ireland, Declaration made upon acceptance of Amended Protocol II to the CCW, 27 March 1997; Italy, Declarations made upon acceptance of Amended Protocol II to the CCW, 13 January 1999; South Africa, Declaration made upon acceptance of Amended Protocol II to the CCW, 26 June 1998; Sweden, Declaration made upon acceptance of Amended Protocol II to the CCW, 16 July 1997.

⁷ Belgium, Interpretative declarations made upon acceptance of Amended Protocol II to the CCW, 10 March 1999.

⁸ Canada, Statements of understanding made upon acceptance of Amended Protocol II to the CCW, 26 June 1998, § 1.

⁹ Greece, Declarations made upon acceptance of Amended Protocol II to the CCW, 20 January 1999.

21. Upon acceptance of the 1996 Amended Protocol II to the CCW, Liechtenstein stated that “the provisions of the amended Protocol II which by their contents or nature may also be applied in peacetime, shall be observed at all times”.¹⁰

22. Upon acceptance of the 1996 Amended Protocol II to the CCW, the Netherlands declared that “the provisions of the Protocol which, given their content or nature, can also be applied in peacetime, must be observed in all circumstances”.¹¹

23. Upon acceptance of the 1996 Amended Protocol II to the CCW, Pakistan stated that “the provisions of the Protocol must be observed at all times, depending on the circumstances”.¹²

24. Upon acceptance of the 1996 Amended Protocol II to the CCW, the US declared that:

- (A) the prohibition contained in Article 7(2) of the Amended Mines Protocol [1996 Amended Protocol II to the CCW] does not preclude the expedient adaptation or adaptation in advance of other objects for use as booby-traps or other devices;
- (B) a trip-wired hand grenade shall be considered a “booby-trap” under Article 2(4) of the Amended Mines Protocol and shall not be considered a “mine” or an “anti-personnel mine” under Article 2(1) or Article 2(3), respectively; and
- (C) none of the provisions of the Amended Mines Protocol, including Article 2(5), applies to hand grenade other than trip-wired hand grenades.¹³

25. In 2001, States parties to the 1980 CCW decided to amend Article 1 of the Convention, governing its scope. This amendment states that:

1. This Convention and its annexed Protocols shall apply in the situations referred to in Article 2 common to the Geneva Conventions of 12 August 1949 for the Protection of War Victims, including any situation described in paragraph 4 of Article 1 of Additional Protocol I to these Conventions.
2. This Convention and its annexed Protocols shall also apply, in addition to situations referred to in paragraph 1 of this Article, to situations referred to in Article 3 common to the Geneva Conventions of 12 August 1949. This Convention and its annexed Protocols shall not apply to situations of internal disturbances and tensions, such as riots, isolated and sporadic acts of violence, and other acts of a similar nature, as not being armed conflicts.
3. In case of armed conflicts not of an international character occurring in the territory of one of the High Contracting Parties, each party to the conflict shall be bound to apply the prohibitions and restrictions of this Convention and its annexed Protocols.

¹⁰ Liechtenstein, Declaration upon acceptance of Amended Protocol II to the CCW, 19 November 1997.

¹¹ Netherlands, Declaration made upon acceptance of Amended Protocol II to the CCW, 25 March 1999, § 1.

¹² Pakistan, Declarations made upon acceptance of Amended Protocol II to the CCW, 9 March 1999, § 3.

¹³ US, Statements of understanding made upon acceptance of Amended Protocol II to the CCW, 24 May 1999, § (6)(A)–(C).

Other Instruments

26. Paragraph 6 of the 1991 Memorandum of Understanding on the Application of IHL between Croatia and the SFRY requires that hostilities be conducted in accordance with the 1980 Protocol II to the CCW.

27. Paragraph 2.5 of the 1992 Agreement on the Application of IHL between the Parties to the Conflict in Bosnia and Herzegovina requires that hostilities be conducted in accordance with the 1980 Protocol II to the CCW.

28. Section 6.2 of the 1999 UN Secretary-General's Bulletin states that the UN force is prohibited from using certain conventional weapons, such as booby-traps.

*II. National Practice**Military Manuals*

29. Argentina's Law of War Manual reproduces the content of Articles 2(2) and (4), 3, 4, 6 and 7 of the 1980 Protocol II to the CCW.¹⁴

30. Australia's Commanders' Guide states that "the primary concern with the employment of . . . booby traps is that they could be disturbed by innocent parties. Their use is permitted if they can be confined to areas where only lawful combatants would encounter them."¹⁵ It also states that:

Booby traps . . . may not be directed against civilians under any circumstances and they may not be used indiscriminately. Indiscriminate use is placement of such weapons which:

- a. is not on, or directed at, a military objective; or
- b. employs a method or means of delivery which cannot be directed at a specific military objective; or
- c. may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated.¹⁶

The Guide adds that:

There are also restrictions on the use of . . . booby traps . . . These weapons may not be used in any city, town, village or other area containing a similar concentration of civilians in which combat between ground forces is not taking place or does not appear to be imminent, unless either:

- (a) they are placed on or in the vicinity of a military objective belonging to or under the control of an enemy; or
- (b) measures are taken to protect civilians from their effects, e.g. posting of warning signs or sentries, issue of warnings or provision of fences.¹⁷

¹⁴ Argentina, *Law of War Manual* (1989), §§ 4.17, 4.18, 4.19, 4.20, 4.21, 4.23 and 4.24(2).

¹⁵ Australia, *Commanders' Guide* (1994), § 316.

¹⁶ Australia, *Commanders' Guide* (1994), § 937.

¹⁷ Australia, *Commanders' Guide* (1994), § 939.

The Guide further states that:

941. The use of the following types of booby traps is prohibited:
- a. any booby traps in the form of an apparently harmless portable object which is specifically designed and constructed (prefabricated) to contain explosive material and to detonate when it is disturbed or approached or,
 - b. booby traps which are in any way attached to or associated with:
 - (1) internationally recognized protective emblems and signs or signals;
 - (2) sick, wounded or dead persons;
 - (3) burial or cremation sites or graves;
 - (4) medical facilities, medical equipment, medical supplies or medical transportation;
 - (5) children's toys or other portable objects or products specially designed for the feeding, health, hygiene, clothing or education of children;
 - (6) food or drink;
 - (7) kitchen utensils or appliances except in military establishment, military locations or military supply depots;
 - (8) objects clearly of a religious nature;
 - (9) historic monuments, works of art or places of worship which constitute the cultural or spiritual heritage of peoples; and
 - (10) animals or their carcasses.

942. The location of . . . areas where there is use of booby traps is to be recorded.¹⁸

31. Australia's Defence Force Manual states that:

All feasible precautions must be taken to protect civilians from the effects of . . . booby traps . . . They must not be directed at civilians nor may they be used indiscriminately. It is indiscriminate to place them so that they are not on or not directed at a military objective, to use them as a means of delivery which cannot be directed at a military target, or to place them so that they may be expected to cause excessive collateral damage, that is injury, loss or damage to civilians which is excessive in relation to the concrete and direct military advantage anticipated.¹⁹

The manual further repeats the prohibitions contained in Article 6 of the 1980 Protocol II to the CCW.²⁰ It adds that "when booby-traps are not prohibited, those that are used must not be designed to cause unnecessary injury or suffering".²¹ It also emphasises that "all feasible precautions must be taken to protect civilians from the effects of . . . booby-traps . . . They must not be directed at civilians nor may they be used indiscriminately." The manual further states that:

Booby traps . . . must not be used in areas containing civilian concentrations if combat between ground forces is neither imminent nor actually taking place unless they are placed on, or in the vicinity, of an enemy military objective or there are

¹⁸ Australia, *Commanders' Guide* (1994), §§ 941 and 942.

¹⁹ Australia, *Defence Force Manual* (1994), § 421.

²⁰ Australia, *Defence Force Manual* (1994), § 427.

²¹ Australia, *Defence Force Manual* (1994), § 428.

protective measures for civilians such as warning signs, sentries, fences or other warnings to civilians.²²

Lastly, the manual provides that “the location of . . . areas in which there has been large scale and pre-planned use of booby-traps must be recorded. A record should also be kept of all other . . . booby traps so that they may be disarmed when they are no longer required.”²³

32. Belgium’s Law of War Manual, under the heading “Mines and traps (booby traps)”, states that they “must only be used against military objectives”. It further states that:

Traps looking like portable inoffensive objects are prohibited.

It is also prohibited to attach traps to or associate them with:

- 1) internationally recognised protective emblems, signs or signals;
- 2) sick, wounded or dead persons;
- 3) burial sites;
- 4) medical material, medical installations etc.;
- 5) children’s toys, children’s food and children’s clothes;
- 6) food or drink;
- 7) kitchen utensils or appliances except in military establishments.²⁴

33. Bosnia and Herzegovina’s Military Instructions states that “all means and methods of warfare are allowed, except for the ones which are prohibited or restricted by the international law of war”.²⁵

34. Cameroon’s Instructors’ Manual provides that it is prohibited to use booby-traps of a nature to cause superfluous injuries (1980 Protocol II to the CCW, Article 6(2)), such as “perforation, impaling, crushing, poisoning, strangulation”. It also prohibits the use of booby-traps in the form of apparently harmless portable objects for daily use, such as food, or those associated with the sick, wounded or dead.²⁶

35. Canada’s Rules of Engagement for Operation Deliverance states that “unattended means of force, including booby traps . . . are not authorised”.²⁷

36. Canada’s LOAC Manual states that “explosive booby-traps are not to be employed as, or used as, a substitute for antipersonnel mines. Where booby-traps are lawfully used, they must not cause unnecessary injury or suffering.”²⁸ The manual provides an exhaustive list of prohibited objects to which booby-traps must not be attached. It states that:

Booby traps and other devices, attached to or associated with the following objects, are prohibited:

²² Australia, *Defence Force Manual* (1994), §§ 421 and 422.

²³ Australia, *Defence Force Manual* (1994), § 423.

²⁴ Belgium, *Law of War Manual* (1983), pp. 38–39.

²⁵ Bosnia and Herzegovina, *Military Instructions* (1992), Item 5, § 1.

²⁶ Cameroon, *Instructors’ Manual* (1992), p. 123, § 441.1(c).

²⁷ Canada, *Rules of Engagement for Operation Deliverance* (1992), § 28.

²⁸ Canada, *LOAC Manual* (1999), p. 5-4, § 40.

- (a) internationally recognized protective emblems and signs;
- (b) sick, wounded or dead persons;
- (c) burial or cremation sites or graves;
- (d) medical facilities, equipment, supplies or transportation;
- (e) children's toys or objects designed for feeding, health, hygiene, clothing or education of children;
- (f) food or drink;
- (g) kitchen utensils or appliances (except those in military establishment, locations or supply depots);
- (h) objects of a religious nature;
- (i) historic monuments, works of art or places of worship which constitute the cultural or spiritual heritage of peoples; or
- (j) animals or their carcasses.²⁹

The manual adds that: "it is prohibited to use booby-traps . . . in the form of apparently harmless portable objects which are specifically designed and construed to contain explosive material".³⁰ It also lists some restrictive rules about the use of booby-traps:

All feasible precautions must be taken to protect civilians from the effects of . . . booby traps. They must not be directed at civilians nor may they be used indiscriminately. It is indiscriminate to:

- (a) place . . . booby traps so that they are not on or not directed at a legitimate target;
- (b) use a means of delivery for . . . booby traps that cannot be directed at a legitimate target; and
- (c) place . . . booby traps so that they may be expected to cause collateral civilian damage that is excessive in relation to the concrete and direct military advantage anticipated.³¹

The manual further states that:

Booby traps . . . must not be used in areas containing civilian concentrations if combat between ground forces is neither imminent nor actually taking place unless: (a) they are placed on, or in the vicinity of, an enemy military objective; or (b) measures are taken to protect civilians (e.g. warning signs, sentries, fences or other warnings to civilians).³²

According to the manual, "the location of . . . areas in which there has been large scale and pre-planned use of booby traps must be recorded. A record should also be kept of all other . . . booby traps so that they may be disarmed when they are no longer required."³³ Lastly, the manual states that:

It is prohibited to use . . . booby traps that employ a mechanism or device specifically designed to detonate the munition by the presence of commonly available mine detectors as a result of their magnetic or other non-contact influence during normal use in detection operations.³⁴

²⁹ Canada, *LOAC Manual* (1999), p. 5-4, § 38.

³¹ Canada, *LOAC Manual* (1999), p. 5-5, § 44.

³³ Canada, *LOAC Manual* (1999), p. 5-5, § 46.

³⁰ Canada, *LOAC Manual* (1999), p. 5-4, § 39.

³² Canada, *LOAC Manual* (1999), p. 5-5, § 45.

³⁴ Canada, *LOAC Manual* (1999), p. 5-5, § 47.

37. Canada's Code of Conduct provides that "booby traps are lawful but can only be used in very limited circumstances, and in particular must be directed only at military objectives".³⁵

38. Ecuador's Naval Manual states that:

Booby traps...are not unlawful, provided they are not designed to cause unnecessary suffering. Devices that are designed to simulate items likely to attract and injure non-combatants...are prohibited. Attaching booby traps to protected persons or objects, such as the wounded and sick, dead bodies, or medical facilities and supplies, is similarly prohibited.³⁶

39. France's LOAC Summary Note prohibits the use of booby-traps which are associated with: wounded and dead persons; protective emblems, signs or signals; toys or other objects designed for children; food or drink; objects clearly of a religious nature; works of art; and animals or their carcasses.³⁷

40. France's LOAC Teaching Note provides that "the use of booby-traps is permitted only on condition that they are laid outside areas where civilians are concentrated and that they are directed against military targets"³⁸

41. France's LOAC Manual quotes Articles 2(2) and 6 of the 1980 Protocol II to the CCW and specifies that "the use of booby-traps is permitted only on condition that they are laid outside areas where civilians are concentrated and that they are directed against military targets".³⁹

42. Germany's Military Manual states that "it is prohibited in all circumstances to use any booby-traps in the form of an apparently harmless portable object" and refers to the 1980 Protocol II to the CCW. It also prohibits:

booby-traps which are in any way attached to or associated with internationally recognized protective emblems, signs or signals, sick, wounded or dead persons, burial or cremation sites or graves, medical facilities, medical transportation, medical equipment or medical supplies, food or drink, objects of a religious nature, cultural objects and children's toys, and all other objects related to children, animals or their carcasses.

The manual further prohibits the use of "booby-traps designed to cause superfluous injury or unnecessary suffering", again with reference to the 1980 Protocol II to the CCW.⁴⁰ It adds that "this prohibition does not apply to fixed demolition appliances and portable demolition devices lacking harmless appearances".⁴¹ The manual further provides that "the location of... booby-traps shall be recorded: the parties to the conflict shall retain these records and whenever possible, by mutual agreement, provide for their publication".⁴²

³⁵ Canada, *Code of Conduct* (2001), Rule 3, § 7.

³⁶ Ecuador, *Naval Manual* (1989), § 9.5.

³⁷ France, *LOAC Summary Note* (1992), § 4.6.

³⁸ France, *LOAC Teaching Note* (2000), p. 6.

³⁹ France, *LOAC Manual* (2001), pp. 96 and 55.

⁴⁰ Germany, *Military Manual* (1992), § 415.

⁴¹ Germany, *Military Manual* (1992), § 416.

⁴² Germany, *Military Manual* (1992), § 417.

43. Germany's IHL Manual states that:

International humanitarian law prohibits the use of a number of means of warfare which are of a nature to violate the principle of humanity and to cause unnecessary suffering, e.g. . . . explosive traps, when used in the form of an apparently harmless portable object, e.g. disguised as children's toys.⁴³

44. Israel's Manual on the Laws of War states that "within the framework of the [1980] CCW Convention, it was decided to prohibit the exposure of the civilian population to booby traps and booby-trapped objects". It adds that:

The Protocol enumerates the objects and places where booby-trapping is severely and absolutely forbidden:

1. Innocent-looking objects (transistors, televisions)
2. Objects bearing international protection signs (a cross, crescent or red Magen David, U.N. emblems, etc.) or tied to them
3. Wounded, sick or dead, as well as interment or cremation sites. The booby trapping of the wounded or dead conflicts with the duty prescribed by the laws of war to administer treatment to the wounded and to see to the proper interment of the dead. Therefore, it was also prohibited to abuse the special treatment accorded them.
4. Hospitals, clinics, medical equipment, medical transports
5. Objects connected with children (toys, clothes, food, care utensils etc.)
6. Food, drink, eating utensils (except for eating utensils and preparation equipment in army facilities)
7. Objects connected with religious ritual
8. Historical sites, objets d'art or ritual articles, constituting the cultural or religious heritage of a people
9. Animals and their carcasses

In any event, the laws of war ban the use of a booby-trap designed to cause needless damage and suffering (also in cases where it is permitted to use booby traps against combatants).⁴⁴

45. Kenya's LOAC Manual prohibits the use of booby-traps which are:

in any way attached to or associated with internationally recognised protective emblems, signs or signals; sick, wounded or dead persons; burial or cremation sites or graves; medical facilities, medical equipment, medical supplies or medical transportation; children's toys or other portable objects or products specially designed for the feeding, health, hygiene, clothing or education of children; food or drinks; kitchen utensils or appliances except in military establishments, military locations or military supply depots; objects clearly of a religious nature; historic monuments, works of art or places of worship which constitute the cultural or spiritual heritage of peoples; animals or their carcasses.

The manual further provides that booby-traps and other devices may only be used (except those quoted previously) in populated areas "when they are placed on or in the close vicinity of a military objective belonging to or under the

⁴³ Germany, *IHL Manual* (1996), § 305.

⁴⁴ Israel, *Manual on the Laws of War* (1998), pp. 15–16.

control of the enemy; or when measures are taken to protect civilian persons (e.g. warning signs, sentries, issue of warnings, provision of fences)". Lastly, it states that "the location shall be recorded of: . . . areas where large scale and pre-planned use is made of booby-traps, other . . . booby-traps, when the tactical situation permits".⁴⁵

46. The Military Manual of the Netherlands cites the prohibitions contained in Article 6 of the 1980 Protocol II to the CCW.⁴⁶

47. New Zealand's Military Manual restricts the use of booby-traps. It refers expressly to and reproduces the content of Articles 3, 4, 5 and 6 of the 1980 Protocol II to the CCW. It adds that "all feasible efforts will be made to record the location of all areas where there is a large-scale use of booby-traps".⁴⁷

48. Russia's Military Manual prohibits the use of weapons that are by nature indiscriminate. It refers to the 1980 Protocol II to the CCW.⁴⁸

49. South Africa's LOAC Manual does not prohibit booby-traps as such. It does, however, state that the main concern is whether indiscriminate use endangers the civilian population. When employing booby-traps, it says, the military must therefore consider what or who is the likely target.⁴⁹

50. Spain's LOAC Manual makes reference to Articles 3, 6 and 7 of the 1980 Protocol II to the CCW as the principal body of law concerning the restriction and prohibition of the use of booby-traps.⁵⁰ It also states that:

Independent of the type of target, its location, the kind of military operation, the given mission or any other circumstances, it is prohibited to use this type of weapon [i.e., among others, booby traps] . . . wherever its location is indiscriminate . . . wherever it cannot be guided towards a specific military target and wherever there is reason to believe that it will cause disproportionate collateral damage.⁵¹

51. Sweden's IHL Manual states that booby-traps cannot be "used against civilian populations or individual civilians, which is in full agreement with AP I (Art. 51)". It adds that "should it be necessary to use booby-traps against objectives within populated areas, special restrictions on delivery exist to protect the civilian population". It stresses that:

During the conflicts of recent years it has been possible to discern an increasing use of booby-traps. It has become common to use booby-traps even against persons and objects already afforded protection under earlier conventions. . . . This has led an increased terror effect in warfare, but with little or no military significance.

⁴⁵ Kenya, *LOAC Manual* (1997), Précis No. 3, pp. 3–5.

⁴⁶ Netherlands, *Military Manual* (1993), pp. IV-6/IV-10.

⁴⁷ New Zealand, *Military Manual* (1992), § 514.

⁴⁸ Russia, *Military Manual* (1990), § 6(h).

⁴⁹ South Africa, *LOAC Manual* (1996), Article 34(f)(iv).

⁵⁰ Spain, *LOAC Manual* (1996), §§ 2.4.c.(2) and 3.2.a.(4).

⁵¹ Spain, *LOAC Manual* (1996), § 3.2.a.(3).

The manual refers to Articles 6 and 7 of the 1980 Protocol II to the CCW.⁵²

52. Switzerland's Military Manual states that "it is prohibited to use a booby-trap which functions unexpectedly when one moves or touches an apparently harmless object".⁵³

53. Switzerland's Basic Military Manual states that:

It is forbidden to use booby-traps wherever they can be expected directly to endanger the physical integrity and the lives of civilians. They must not be set up in a perfidious manner, that is be attached or connected in some way to protective signs or signals, protected persons, animals, food or protected installations.

It refers to the 1980 Protocol II to the CCW.⁵⁴

54. Switzerland's Teaching Manual provides that "it is prohibited to use booby-traps which can be triggered unexpectedly". It gives the example of a transistor radio.⁵⁵

55. The UK LOAC Manual, under the heading "Future Developments", considers the possibility of a treaty imposing "restrictions on the use of booby-traps".⁵⁶

56. The US Air Force Pamphlet states that:

Mines in the nature of booby-traps are frequently unlawfully used, such as when they are attached to objects under the protection of international law, e.g., wounded and sick, dead bodies and medical facilities. Also objectionable are portable booby traps in the form of fountain pens, watches and trinkets which suggest treachery and unfairly risk injuries to civilians likely to be attracted to the objects.⁵⁷

57. The US Rules of Engagement for Operation Desert Storm states that "booby traps may be used to protect friendly positions or to impede the progress of enemy forces. They may not be used on civilian personal property. They will be recovered or destroyed when the military necessity for their use no longer exists."⁵⁸

58. The US Naval Handbook states that:

Booby traps... are not unlawful, provided they are not designed to cause unnecessary suffering or employed in an indiscriminate manner... Attaching booby traps to protected persons or objects, such as the wounded and sick, dead bodies, or medical facilities and supplies, is similarly prohibited. Belligerents are required to record the location of booby traps... in the same manner as land mines.⁵⁹

⁵² Sweden, *IHL Manual* (1991), Section 3.3.2, pp. 80–81.

⁵³ Switzerland, *Military Manual* (1984), p. 11.

⁵⁴ Switzerland, *Basic Military Manual* (1987), Article 23(b).

⁵⁵ Switzerland, *Teaching Manual* (1986), pp. 19–22.

⁵⁶ UK, *LOAC Manual* (1981), Section 11, p. 40, § 4(b).

⁵⁷ US, *Air Force Pamphlet* (1976), § 6-6(d).

⁵⁸ US, *Rules of Engagement for Operation Desert Storm* (1991), § E.

⁵⁹ US, *Naval Handbook* (1995), § 9.6.

National Legislation

59. Under Estonia's Penal Code, "use of... booby-traps, i.e. explosives disguised as small harmless objects" is a war crime.⁶⁰

60. Under Hungary's Criminal Code as amended, employing "booby-traps" as defined in Article 2 of the 1980 Protocol II to the CCW is a war crime.⁶¹

61. South Korea's Conventional Weapons Act provides that:

No one is allowed to use or transfer a weapon that falls under any of the following categories:

- (1) ... booby-traps... made to detonate resulting from the magnetism of a mine-destruction device or other cause without physical contact of person or device during detection operation with standard mine detection devices available in Korea.⁶²

The Act further prohibits the use of certain booby-traps:

which are attached to or associated with the following persons, things, or places:

1. Emblems, signs or signals protected under international laws including military flags, Red Cross emblems, civilian protective force emblems,
2. Sick, wounded or dead persons,
3. Cremation or burial sites or graves,
4. Medical facilities, medical equipment, medical supplies or medical transportation,
5. Children's toys or other portable objects or products specially designed for the feeding, health, hygiene, clothing or education of children,
6. Food or drink,
7. Kitchen utensils or appliances not in the military unit, base or supply depot facilities,
8. Objects obviously used for religious purposes,
9. Historic monuments, works of art or places of worship which constitute the cultural or spiritual heritage of human beings, or
10. Animals or their carcasses.⁶³

The Act also provides that the "commander of the military unit that emplaces... booby-traps... must take all necessary measures including advance warning so as to prevent damage to the life, body, and property of the civilians residing in vicinity".⁶⁴ Lastly, it adds that:

1. The commander of the military unit that emplaced... booby-traps... must record and maintain the following information on the emplaced field:
 - a. Precise location and boundary of the emplaced area;
 - b. Type, number, emplacing method, type of fuse and life time of the emplaced... booby-traps ... , and
 - c. Location of every emplaced... booby-trap...

⁶⁰ Estonia, *Penal Code* (2001), § 103.

⁶¹ Hungary, *Criminal Code as amended* (1978), Section 160/A(3)(b)(2).

⁶² South Korea, *Conventional Weapons Act* (2001), Article 3.

⁶³ South Korea, *Conventional Weapons Act* (2001), Article 4.

⁶⁴ South Korea, *Conventional Weapons Act* (2001), Article 6.

2. The commander of the emplacing unit must manage the information which was recorded and maintained as per the paragraph 1 in accordance with the Military Secret Protection Act.⁶⁵

National Case-law

62. In 1995, in a ruling on the constitutionality of AP II, Colombia's Constitutional Court stated with respect to the prohibition on the use of weapons of a nature to cause unnecessary suffering or superfluous injury that:

Although none of the treaty rules expressly applicable to internal conflicts prohibits indiscriminate attacks or the use of certain weapons, the Taormina Declaration consequently considers that the bans (established partly by customary law and partly by treaty law) on the use of . . . booby-traps . . . apply to non-international armed conflicts, not only because they form part of customary international law but also because they evidently derive from the general rule prohibiting attacks against the civilian population.⁶⁶

Other National Practice

63. At the Conference of Government Experts on Weapons which may Cause Unnecessary Suffering or have Indiscriminate Effects held in Lucerne in 1974, Australia advocated a specific definition of "perfidiously used weapons" which included "explosives perfidious by nature" (toys and objects in daily life) and "booby traps which in the circumstances in which they are used present an actual danger to the civilian population".⁶⁷

64. At the CCW Preparatory Conference in 1978, Australia, Austria, Denmark, France, FRG, Mexico, Netherlands, New Zealand, Norway, Spain and UK submitted a similar proposal to one presented during the CDDH. However, the authors returned to using the expression "booby-trap" instead of "explosive or non-explosive device".⁶⁸ Mexico advocated "limitation of the use of . . . booby-traps to military targets and their immediate surroundings, with effective precautions to protect civilians".⁶⁹

65. In the Ad Hoc Committee on Conventional Weapons established by the CDDH, Denmark, France, Netherlands and UK submitted a proposal building on an earlier proposal from the Conference of Government Experts on the Use of Certain Conventional Weapons in Lugano in 1976 entitled "The Regulation

⁶⁵ South Korea, *Conventional Weapons Act* (2001), Article 8.

⁶⁶ Colombia, Constitutional Court, *Constitutional Case No. C-225/95*, Judgement, 18 May 1995, § 23.

⁶⁷ Australia, Statement of 17 October 1974 at the Conference of Government Experts on Weapons which may Cause Unnecessary Suffering or have Indiscriminate Effects, Lucerne, 24 September–18 October 1974.

⁶⁸ Austria, Denmark, France, Mexico, Netherlands, Spain, Sweden, Switzerland and UK, Proposal submitted at the CCW Preparatory Conference, A/CONF.95/PREP.CONF./L.9, 12 September 1978 and A/CONF.95/PREP.CONF./L.9/Add.1, 13 September 1978; see also the proposal by the same States submitted at the CDDH, *Official Records*, Vol. XVI, CDDH/408/Rev.1, Appendix II, Working Group Document CDDH/IV/GT/4, p. 546, § 6.

⁶⁹ CCW Preparatory Conference, A/CONF.95/PREP.CONF./I/SR.3, 4 September 1978, pp. 3–4.

of the Use of Land-Mines and Other Devices". Article 5 ("Prohibitions on the Use of Certain Explosive and Non-Explosive Devices") read:

1. It is forbidden in any circumstance to use any apparently harmless portable object (other than an item of military equipment or supplies) which is specifically designed and constructed to obtain explosive material and to detonate when it is disturbed or approached.
2. It is forbidden in any circumstances to use any explosive or non-explosive device or other material which is deliberately placed to kill or injure when a person disturbs or approaches an apparently harmless object or performs an apparently safe act and which is in any way attached to or associated with:
 - (a) internationally recognized protective emblems, signs or signals;
 - (b) sick, wounded or dead persons;
 - (c) burial or cremation sites or graves;
 - (d) medical facilities, medical equipment, medical supplies or medical transport; or
 - (e) children's toys.
3. It is forbidden in any circumstances to use any non-explosive device or any material which is deliberately placed to kill or injure when a person disturbs or approaches an apparently harmless object or performs an apparently safe act and which is designed to kill or injure by stabbing, impaling, crushing, strangling, infecting or poisoning the victim.⁷⁰

66. In 1974, during discussions in the Ad Hoc Committee on Conventional Weapons established by the CDDH, the representative of Egypt stated that:

14. It was generally agreed that time-delay weapons such as . . . booby traps, often placed far from the combat areas, could injure civilians as well as combatants and were therefore indiscriminate. Moreover, such devices generally exploded close to the victims, causing grave injuries; they also slowed up the evacuation of the sick and wounded from mined areas, thus increasing their suffering. His delegation called for prohibition of the use of weapons of that category.
15. Booby traps, often disguised as harmless devices such as pens or transistor radios, exposed civilians as well as combatants to the danger of injury from explosion and should therefore be banned.⁷¹

67. According to the Report on the Practice of Egypt, Egypt considers that, owing to their drastic effects, some weapons, such as delayed-action weapons and booby-traps, should be prohibited in any circumstances.⁷²

68. In 1994, at the Third Session of the Meeting of Governmental Experts prior to the CCW Review Conference, France and Germany advocated a total ban

⁷⁰ Denmark, France, Netherlands and UK, Article 5 of the proposal entitled "The Regulation of the Use of Land-Mines and Other Devices" submitted to the Ad Hoc Committee on Conventional Weapons established by the CDDH, *Official Records*, Vol. XVI, CDDH/IV/213 within CDDH/IV/226, pp. 590–591.

⁷¹ Egypt, Statement at the CDDH, *Official Records*, Vol. XVI, CDDH/IV/SR.6, 22 March 1974, p. 49, §§ 14–15.

⁷² Report on the Practice of Egypt, 1997, Chapter 3.4.

on the use of booby-traps. Their proposal provided a revision of Article 6 of the draft (1996) Amended Protocol II to the CCW as follows:

1. It is prohibited to [develop, manufacture, stockpile] use [or transfer, directly or indirectly]:
 - the booby-traps [defined in article 2, paragraph 2 of this Protocol] and . . .
2. The States Parties undertake to destroy weapons to which this article applies and which are in their ownership and possession.⁷³

69. In 1976, during discussions in the Ad Hoc Committee on Conventional Weapons established by the CDDH, the FRG supported a proposal restricting the use of booby-traps.⁷⁴

70. In 1987, a member of the German parliament condemned the use of booby-traps by Russian forces in Afghanistan. He stated that “the USSR, in Afghanistan, uses so called butterfly-bombs against children, which the children mistake to be toys because of their small size and their slowly floating down from the sky”. The speaker continued that “this war against children is a shame”. His speech met with the approval of the majority of the members of parliament.⁷⁵

71. At the Third Preparatory Committee for the Second Review Conference of States Parties to the CCW in 2001, India indicated that it “fully supported the idea of expanding the scope of the CCW to cover armed internal conflicts”.⁷⁶

72. According to the Report on the Practice of India, in India there is “a ban and restriction on the use of . . . certain booby traps”.⁷⁷

73. According to the Report on the Practice of Indonesia, Indonesia has prohibited the use of certain booby-traps.⁷⁸

74. The Report on the Practice of Jordan states that Jordan does not use, manufacture or stockpile booby-traps and it does not plan to do so in the future.⁷⁹

75. In 1977, during discussions in the Ad Hoc Committee on Conventional Weapons established by the CDDH, Libya supported the proposal restricting the use of booby-traps submitted by Denmark, France, Netherlands and UK.⁸⁰

76. Mexico, Switzerland and SFRY submitted a draft article on booby traps to the Ad Hoc Committee on Conventional Weapons established by the CDDH, which summarised previous proposals from the Conference of Government

⁷³ France and Germany, Proposal submitted to the Meeting of Governmental Experts to Prepare the First Review Conference of States Parties to the CCW, Third Session, Geneva, 8–19 August 1994, UN Doc. CCW/CONF.I/GE/CRP.2/Rev.1, 28 June 1994, Geneva, 8–19 August 1994.

⁷⁴ FRG, Statement at the CDDH, *Official Records*, Vol. XVI, CDDH/IV/SR.30, 26 May 1976, p. 308, § 13.

⁷⁵ Germany, Lower House of Parliament, Statement by a Member of Parliament, Dr. Todenhöfer, 11 December 1987, *Plenarprotokoll* 11/50, p. 3570.

⁷⁶ India, Statement of 24 September 2001 at the Third Preparatory Committee for the Second Review Conference of States Parties to the CCW, Geneva, 24–28 September 2001.

⁷⁷ Report on the Practice of India, 1997, Answers to additional questions on Chapter 3.4.

⁷⁸ Report on the Practice of Indonesia, 1997, Chapter 3.4.

⁷⁹ Report on the Practice of Jordan, 1997, Chapter 3.4.

⁸⁰ Libya, Statement at the CDDH, *Official Records*, Vol. XVI, CDDH/IV/SR.40, 19 May 1977, p. 411, § 38.

Experts on the Use of Certain Conventional Weapons in Lugano in 1976. The draft article provided, *inter alia*, that:

2. Booby-traps may only be used when they are placed inside or outside military objects. The civilian population in the proximity of such a site shall be given warning of danger.
3. It is prohibited in any circumstances to attach or connect booby-traps to the dead, sick or wounded, to first aid installations, equipment and supplies, to children's toys or to objects of current use among the civilian population.⁸¹

77. In 1992, during a debate in the First Committee of the UN General Assembly, the Netherlands implied that universal adherence to the 1980 CCW would give it effect in internal conflicts.⁸²

78. The Report on the Practice of the Netherlands states that the Netherlands is of the opinion that the use of "booby traps connected with the emblem of the Red Cross, wounded or dead persons, medical goods or children's toys is prohibited".⁸³

79. At the International Conference on the Protection of Victims of War in Geneva in 1993, Russia declared that, in order to protect the civilian population against indiscriminate weapons, booby-traps should be completely banned in internal conflicts.⁸⁴

80. In 1976, during discussions in the Ad Hoc Committee on Conventional Weapons established by the CDDH, the US welcomed proposals by other States to restrict the use of booby-traps and stated that "it was clearly desirable to place certain restrictions on the use of land-mines and other devices, including booby-traps". It added that the US "welcomed and shared the concern evidenced in the various proposals for the protection of the civilian population against the effects of mines and similar devices, and believed that those proposals constituted a good basis for the formulation of an effective agreement".⁸⁵

81. Venezuela presented a proposal concerning booby traps to the Ad Hoc Committee on Conventional Weapons established by the CDDH, which read:

2. Booby traps may only be used when they are placed inside or outside clearly defined military objectives. In all cases, the civilian population in the proximity of booby traps shall be given warning of the danger.
3. It shall be prohibited in all circumstances to set or place booby traps on the dead, wounded or sick, on installations, vehicles or equipment used for relief

⁸¹ Mexico, Switzerland and SFRY, Draft article entitled "Booby-traps" submitted to the Ad Hoc Committee on Conventional Weapons established by the CDDH, *Official Records*, Vol. XVI, CDDH/IV/209 within CDDH/IV/226, p. 583.

⁸² Netherlands, Statement before the First Committee of the UN General Assembly, UN Doc. A/C.1/47/PV.26, 5 November 1992, p. 21.

⁸³ Report on the Practice of the Netherlands, 1997, Chapter 3.4.

⁸⁴ Russia, Statement by Andrey Kozyrev, Minister of Foreign Affairs, at the International Conference on the Protection of Victims of War, Geneva, 30 August–1 September 1993.

⁸⁵ US, Statement at the CDDH, *Official Records*, Vol. XVI, CDDH/IV/SR.29, 25 May 1976, p. 300, §§ 34–36.

purposes, on children's toys or on objects of common or domestic use for the civilian population.⁸⁶

82. In 1976, during discussions in the Ad Hoc Committee on Conventional Weapons established by the CDDH, Venezuela stated that, regardless of its own proposal restricting the use of booby traps, it "was willing to support the proposal" made by Mexico, Switzerland and SFRY on the same issue.⁸⁷

83. According to the Report on the Practice of Zimbabwe, in Zimbabwe it is military practice not to use booby-traps.⁸⁸

84. During an armed conflict between two States, another State condemned the use by one of the States of a lethal incendiary booby-trap particularly attractive to children. In a report, the State emphasised that:

Children frequently are killed or maimed by bombs disguised as toys. The majority of these antipersonnel weapons are designed to maim rather than kill. However, reports of a new incendiary bomb describe a transparent, plastic tube shaped like a circle... It is filled with brightly coloured liquid and the device explodes when shaken. The victim is usually burned to death within minutes. These devices... are particularly attractive to children. We can only surmise that the targeting of children is part of the [State's] effort to demoralize the civilian population which overwhelmingly supports the freedom fighters.⁸⁹

III. Practice of International Organisations and Conferences

United Nations

85. In a resolution adopted in 1996 on the situation in Cyprus, the UN Security Council called upon the military authorities on both sides "to clear all... booby-trapped areas inside the buffer zone without further delay, as requested by UNFICYP".⁹⁰

86. In a resolution adopted in 1980, the UN General Assembly welcomed the successful agreement upon the 1980 CCW and its Protocols. It commended the Convention agreed upon "with a view to achieving the widest possible adherence to these instruments".⁹¹

87. Many resolutions of the UN General Assembly have urged "all States which have not yet done so to take all measures to become parties" to the 1980 CCW and its Protocols.⁹²

⁸⁶ Venezuela, Draft article entitled "Booby traps" submitted to the Ad Hoc Committee on Conventional Weapons established by the CDDH, *Official Records*, Vol. XVI, CDDH/IV/212 within CDDH/IV/226.

⁸⁷ Venezuela, Statement at the CDDH, *Official Records*, Vol. XVI, CDDH/IV/SR.28, 20 May 1976, p. 291, § 29.

⁸⁸ Report on the Practice of Zimbabwe, 1998, Chapter 3.5.

⁸⁹ ICRC archive document.

⁹⁰ UN Security Council, Res. 1062, 28 June 1996, § 6(c).

⁹¹ UN General Assembly, Res. 35/153, 12 December 1980, § 4.

⁹² UN General Assembly, Res. 36/93, 9 December 1981, § 1; Res. 37/79, 9 December 1982, § 1; Res. 38/66, 15 December 1983, § 3; Res. 39/56, 12 December 1984, § 3; Res. 40/84, 12 December 1985, § 3; Res. 41/50, 3 December 1986, § 3; Res. 42/30, 30 November 1987, § 3; Res. 43/67,

88. In a resolution adopted in 1993, the UN General Assembly stated that it was “desirous of reinforcing international co-operation in the area of prohibitions or restrictions on the use of certain conventional weapons, in particular for the removal of . . . booby-traps”.⁹³

89. In several resolutions adopted between 1997 and 1999, the UN General Assembly expressed its satisfaction at the many ratifications of the 1996 Amended Protocol II to the CCW and urgently called upon all States that had not yet done so to become parties to the 1980 CCW and its Protocols, in particular Amended Protocol II.⁹⁴

90. In 1986, in a report on the situation of human rights in Afghanistan, the Special Rapporteur of the UN Commission on Human Rights condemned the booby-trapping of children’s toys.⁹⁵

Other International Organisations

91. In 1985, in a report on the deteriorating situation in Afghanistan, the Parliamentary Assembly of the Council of Europe noted that “children of all ages . . . have been the victims of . . . ‘booby-trapped toys’”.⁹⁶

92. In a resolution adopted in 1996, the Parliamentary Assembly of the Council of Europe invited:

in particular, the governments of the member states of the Council of Europe, of the states whose parliaments enjoy or have applied for special guest status with the Assembly, of the states whose parliaments enjoy observer status, namely Israel, and of all other states to:

- ...
- b. ratify, if they have not done so, . . . the United Nations Convention of 1980 on the prohibitions or restrictions on the use of certain conventional weapons [1980 CCW] and its protocols . . .
 - j. promote extension of the aforesaid United Nations Convention of 1980 to non-international armed conflicts, and inclusion in its provisions of effective procedures for verification and regular inspection.⁹⁷

7 December 1988, § 3; Res. 45/64, 4 December 1990, § 3; Res. 46/40, 6 December 1991, § 3; Res. 47/56, 9 December 1992, § 3; Res. 48/79, 16 December 1993, § 3; Res. 49/79, 15 December 1994, § 3; Res. 50/74, 12 December 1995, § 3; Res. 51/49, 10 December 1996, § 3; Res. 52/42, 9 December 1997, § 3; Res. 53/81, 4 December 1998, § 5.

⁹³ UN General Assembly, Res. 48/79, 16 December 1993, preamble; see also Res. 49/79, 15 December 1994, preamble, Res. 50/74, 12 December 1995, preamble and Res. 51/49, 10 December 1996, preamble.

⁹⁴ UN General Assembly, Res. 52/42, 9 December 1997, §§ 1 and 2; Res. 53/81, 4 December 1998, §§ 1 and 5 and Res. 54/58, 1 December 1999, preamble and § III(3).

⁹⁵ UN Commission on Human Rights, Special Rapporteur on the Situation of Human Rights in Afghanistan, Report, UN Doc. E/CN.4/1986/24, 17 February 1986, §§ 88–89 and 119.

⁹⁶ Council of Europe, Parliamentary Assembly, Report on the deteriorating situation in Afghanistan, Doc. 5495, 15 November 1985, p. 7.

⁹⁷ Council of Europe, Parliamentary Assembly, Res. 1085, 24 April 1996, § 8b and j.

93. In a resolution adopted in 1994 on respect for IHL and support for humanitarian action in armed conflicts, the OAU Council of Ministers invited "all States that have not yet become party to the ... [1980] CCW, to consider, or reconsider, without delay the possibility of doing so in the near future".⁹⁸

94. In two resolutions adopted in 1994 and 1996, the OAS General Assembly urged all member States to accede to the 1980 CCW.⁹⁹

International Conferences

95. The 25th International Conference of the Red Cross in 1986 adopted a resolution in which it urged all States to become parties to the 1980 CCW and its Protocols "as early as possible so as ultimately to obtain universality of adherence". It noted "the dangers to civilians caused by ... booby-traps ... employed during an armed conflict and the need for international co-operation in this field consistent with Article 9 of Protocol II attached to the 1980 Convention".¹⁰⁰

96. The 26th International Conference of the Red Cross and Red Crescent in 1995 adopted a resolution in which it urged "all States which have not yet done so to become party to the [1980 CCW] and in particular to its Protocol II on landmines[, booby-traps and other devices], with a view to achieving universal adherence thereto" and underlined "the importance of respect for its provisions by all parties to armed conflict".¹⁰¹

IV. Practice of International Judicial and Quasi-judicial Bodies

97. No practice was found.

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

98. To fulfil its task of disseminating IHL, the ICRC has delegates around the world teaching armed and security forces that:

The use of any booby-trap in the form of an apparently harmless portable object which is specifically designed and constructed to contain explosive material and to detonate when it is disturbed or approached, is prohibited.

The use of any booby-trap which is designed to cause superfluous or unnecessary suffering is prohibited.

The use of booby-traps which are in any way attached or associated with the following persons or objects is prohibited:

⁹⁸ OAU, Council of Ministers, Res. 1526 (LX), 6–11 June 1994, § 6.

⁹⁹ OAS, General Assembly, Res. 1270 (XXIV-O/94), 10 June 1994, § 1; Res. 1408 (XXVI-O/96), 7 June 1996, § 1.

¹⁰⁰ 25th International Conference of the Red Cross, Geneva, 23–31 October 1986, Res. VII, §§ B(2) and B(5).

¹⁰¹ 26th International Conference of the Red Cross and Red Crescent, Geneva, 3–7 December 1995, Res. II, § G(g).

- (a) internationally recognized protective emblems, signs or signals;
- (b) sick, wounded or dead persons;
- (c) burial or cremation sites or graves;
- (d) medical facilities, medical equipment, medical supplies or medical transportation;
- (e) children's toys or other portable objects or products specially designed for the feeding, health, hygiene, clothing or education of children;
- (f) food or drink;
- (g) kitchen utensils or appliances except in military establishments, military locations or military supply depots;
- (h) objects clearly of a religious nature;
- (i) historic monuments, works of art or places of worship which constitute the cultural or spiritual heritage of peoples; or
- (j) animals or their carcasses.

... Booby-traps ... may be used in populated areas:

- a) when they are placed on or in the close vicinity of a military objective belonging to or under the control of the enemy; or
- b) when measures are taken to protect civilians persons (e.g. warning signs, sentries, issue of warnings, provision of fences).

The location shall be recorded of:

- ...
- b) areas where large-scale and pre-planned use is made of booby-traps.¹⁰²

VI. Other Practice

99. In 1986, in a report on the use of landmines in the conflicts in El Salvador and Nicaragua, Americas Watch listed the following uses of booby-traps among those that "should be prohibited in the conduct of hostilities in both countries":

- 1. Their direct use against individual or groups of unarmed civilians where no legitimate military objective, such as enemy combatants or war material, is present. Such uses of these weapons are indiscriminate.
- 2. The direct use against civilian objects, i.e., towns, villages, dwellings or buildings dedicated to civilian purposes where no military objective is present. Such weapons' use is also indiscriminate.
- ...
- 4. The use of ... booby-traps in or near a civilian locale containing military objectives which are deployed *without* any precaution, markings or other warnings, or which do *not* self-destruct or are *not* removed once their military purpose has been served. Such uses are similarly indiscriminate.¹⁰³ [emphasis in original]

¹⁰² Frédéric de Mulinen, *Handbook on the Law of War for Armed Forces*, ICRC, Geneva, 1987, §§ 921–923 and 928–929.

¹⁰³ Americas Watch, *Land Mines in El Salvador and Nicaragua: The Civilian Victims*, New York, December 1986, pp. 100–101.

100. Rule B4 of the Rules of International Law Governing the Conduct of Hostilities in Non-international Armed Conflicts, adopted in 1990 by the Council of the IHHL, states that:

In application of the general rules listed in section A above, especially those on the distinction between combatants and civilians and on the immunity of the civilian population, . . . booby-traps . . . may not be directed against the civilian population as such or against individual civilians, nor used indiscriminately.

The prohibition of booby-traps listed in Article 6 of that Protocol II extends to their use in non-international armed conflicts, in application of the general rules on the distinction between combatants and civilians, the immunity of the civilian population, the prohibition of superfluous injury or unnecessary suffering, and the prohibition of perfidy.

To ensure the protection of the civilian population referred to in the previous paragraphs, precautions must be taken to protect them from attacks in the form of . . . booby-traps.¹⁰⁴

¹⁰⁴ IHHL, Rules of International Humanitarian Law Governing the Conduct of Hostilities in Non-international Armed Conflicts, Rule B4, *IRRC*, No. 278, 1990, p. 399.

LANDMINES

- | | |
|---|------------|
| A. Prohibition of Certain Types of Landmines | §§ 1–190 |
| B. Restrictions on the Use of Landmines (practice relating to Rule 81) | §§ 191–339 |
| C. Measures to Reduce the Danger Caused by Landmines (practice relating to Rules 82 and 83) | §§ 340–427 |

A. Prohibition of Certain Types of Landmines

I. Treaties and Other Instruments

Treaties

1. Article 3(3) of the 1996 Amended Protocol II to the CCW prohibits the use of any mine “which is designed or of a nature to cause superfluous injury or unnecessary suffering”.
2. Article 3(5) of the 1996 Amended Protocol II to the CCW prohibits the use of mines “which employ a mechanism or device specifically designed to detonate the munition by the presence of commonly available mine detectors as a result of their magnetic or other non-contact influence during normal use in detection operations”.
3. Article 3(6) of the 1996 Amended Protocol II to the CCW prohibits the use of a “self-deactivating mine equipped with an anti-handling device that is designed in such a manner that the anti-handling device is capable of functioning after the mine has ceased to be capable of functioning”.
4. Article 4 of the 1996 Amended Protocol II to the CCW provides that “it is prohibited to use anti-personnel mines which are not detectable, as specified in paragraph 2 of the Technical Annex”.
5. Article 6(2) of the 1996 Amended Protocol II to the CCW prohibits the use of remotely delivered anti-personnel mines which are not equipped with self-destruction and self-deactivation devices.
6. Article 6(3) of the 1996 Amended Protocol II to the CCW provides that:

It is prohibited to use remotely-delivered mines other than anti-personnel mines, unless, to the extent feasible, they are equipped with an effective self-destruction or self-neutralization mechanism and have a back-up self-deactivation feature, which

is designed so that the mine will no longer function as a mine when the mine no longer serves the military purpose for which it was placed in position

7. Upon ratification of the 1996 Amended Protocol II to the CCW, the UK declared that “nothing in the present declaration or in Protocol II as amended shall be taken as limiting the obligations of the United Kingdom under the . . . [1997 Ottawa Convention] nor its rights in relation to other Parties to that Convention”.¹

8. Article 1 of the 1997 Ottawa Convention provides that:

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

9. Article 2 of the 1997 Ottawa Convention contains the following definitions:

- (1) “Anti-personnel mine” means a mine designed to be exploded by the presence, proximity or contact of a person and that will incapacitate, injure or kill one or more persons. Mines designed to be detonated by the presence, proximity or contact of a vehicle as opposed to a person, that are equipped with anti-handling devices, are not considered anti-personnel mines as a result of being so equipped.
...
- (3) “Anti-handling device” means a device intended to protect a mine and which is part of, linked to, attached to or placed under the mine and which activates when an attempt is made to tamper with or otherwise intentionally disturb the mine.

10. In 2001, States parties to the 1980 CCW decided to amend Article 1 of the Convention, governing its scope. This amendment states that:

1. This Convention and its annexed Protocols shall apply in the situations referred to in Article 2 common to the Geneva Conventions of 12 August 1949 for the Protection of War Victims, including any situation described in paragraph 4 of Article I of Additional Protocol I to these Conventions.
2. This Convention and its annexed Protocols shall also apply, in addition to situations referred to in paragraph 1 of this Article, to situations referred to in Article 3 common to the Geneva Conventions of 12 August 1949. This Convention and its annexed Protocols shall not apply to situations of internal disturbances and tensions, such as riots, isolated and sporadic acts of violence, and other acts of a similar nature, as not being armed conflicts.

¹ UK, Declaration made upon ratification of the 1996 Amended Protocol II to the CCW, 11 February 1999, § (c).

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

Other Instruments

11. Article III(8) of the 1992 N'Sele Ceasefire Agreement provides that "cease-fire" shall imply "a ban on any mine-laying operations".

12. Section 6.2 of the 1999 UN Secretary-General's Bulletin provides that:

The United Nations force shall respect the rules prohibiting or restricting the use of certain weapons and methods of combat under the relevant instruments of international humanitarian law . . . The use of certain conventional weapons . . . such as anti-personnel mines . . . is prohibited.

II. National Practice

Military Manuals

13. Canada's LOAC Manual states that:

The possession or use of anti-personnel mines is prohibited by the Anti-Personnel Mines Convention signed in 1997 by over 100 states. Canada has already ratified the Convention. While many other nations may continue to possess and use anti-personnel land mines, the CF is bound not to do so.²

It adds that "the use of an anti-personnel mine that is manually detonated (e.g., by land line or electronic signal from a remote or protected position) by a CF member is not prohibited". The manual places certain restrictions on the use of "horizontal fragmentation weapons which propel fragments in a horizontal arc of less than 90 degrees", including that they "may be used for a maximum period of 72 hours if they are located in the immediate proximity to the military unit that emplaced them, and the area is monitored by military personnel to ensure the effective exclusion of civilians".³ The manual also states that "it is prohibited to use mines . . . that employ a mechanism or device specifically designed to detonate the munition by the presence of commonly available mine detectors as a result of their magnetic or other non-contact influence during normal use in detection operations".⁴ It also states that "self-deactivating mines" are "lawful unless they are used with an anti-handling device that continues to function after the mine has stopped functioning". It adds, however, that "under Canadian doctrine, anti-handling devices are used only with tank-mines".⁵

14. Canada's Code of Conduct provides that "the use of land mines, other than anti-personnel mines, is lawful, but is subject to strict regulation . . . The use of

² Canada, *LOAC Manual* (1999), p. 5-2, § 13. ³ Canada, *LOAC Manual* (1999), p. 5-2, § 19.

⁴ Canada, *LOAC Manual* (1999), p. 5-5, § 47.

⁵ Canada, *LOAC Manual* (1999), p. 5-5, §§ 48 and 49.

all but manually detonated anti-personnel mines (e.g., Claymore mine that is manually detonated) by CF members is prohibited.”⁶

15. Colombia’s Basic Military Manual states that the use of weapons which “cause unnecessary and indiscriminate, extensive, lasting and serious damage to people and the environment” is prohibited. It adds that “the use as well as the production, possession and importation of cruel means of war such as anti-personnel mines is banned”.⁷

16. France’s LOAC Teaching Note includes anti-personnel mines in the list of weapons that “are totally prohibited by the law of armed conflict” because of their inhuman and indiscriminate character.⁸

17. France’s LOAC Manual includes anti-personnel mines in the list of weapons that “are totally prohibited by the law of armed conflict” because of their inhuman and indiscriminate character.⁹ It notes that France is a party to the 1997 Ottawa Convention and summarises the provisions of the Convention prohibiting the use, stockpiling, production and transfer of anti-personnel mines “in or by ratifying States”.¹⁰

18. Israel’s Manual on the Laws of War underlines the existence of “a wide international movement . . . with a view to bring about an absolute prohibition of the use of anti-personnel mines”. It states that “Israel has not joined the Convention, just as the Arab states have not. Nevertheless Israel has declared a moratorium on the manufacture and export of anti-personnel mines.”¹¹

19. Russia’s Military Manual prohibits the use of weapons that are by nature indiscriminate or which cause unnecessary suffering. It refers to the 1980 Protocol II to the CCW.¹²

20. Spain’s LOAC Manual, referring to the use of mines, states that:

Independent of the type of target, its location, the kind of military operation, the given mission or any other circumstances, it is prohibited to use this type of weapon . . . wherever its location is indiscriminate . . . wherever it cannot be guided towards a specific military target and wherever there is reason to believe that it will cause disproportionate collateral damage.¹³

National Legislation

21. Numerous States have passed national legislation enacting comprehensive prohibitions on the use, stockpiling, production and transfer of anti-personnel mines, including: Albania,¹⁴ Australia,¹⁵ Austria,¹⁶ Belgium,¹⁷

⁶ Canada, *Code of Conduct* (2001), Rule 3, §§ 8 and 11.

⁷ Colombia, *Basic Military Manual* (1995), pp. 49–50.

⁸ France, *LOAC Teaching Note* (2000), p. 6. ⁹ France, *LOAC Manual* (2001), p. 54.

¹⁰ France, *LOAC Manual* (2001), pp. 83–84.

¹¹ Israel, *Manual on the Laws of War* (1998), pp. 13–14.

¹² Russia, *Military Manual* (1990), § 6(h).

¹³ Spain, *LOAC Manual* (1996), § 3.2.a.(3).

¹⁴ Albania, *Anti-Personnel Mines Decision* (2000), §§ 1, 2, 3 and 4.

¹⁵ Australia, *Anti-Personnel Mines Convention Act* (1998).

¹⁶ Austria, *Anti-Personnel Mines Law* (1997).

¹⁷ Belgium, *Anti-Personnel Mines Convention Law* (1998).

Brazil,¹⁸ Burkina Faso,¹⁹ Cambodia,²⁰ Canada,²¹ Costa Rica,²² Czech Republic,²³ France,²⁴ Germany,²⁵ Guatemala,²⁶ Honduras,²⁷ Italy,²⁸ Japan,²⁹ Luxembourg,³⁰ Malaysia,³¹ Mali,³² Mauritius,³³ Monaco,³⁴ New Zealand,³⁵ Nicaragua,³⁶ Norway,³⁷ Spain,³⁸ Switzerland,³⁹ Trinidad and Tobago,⁴⁰ UK⁴¹ and Zimbabwe.⁴²

22. Regarding the implementation in domestic legislation of the 1997 Ottawa Convention as required by Article 9, the *Landmine Monitor Report 2001* states that:

Some countries have deemed existing domestic law to be sufficient to implement the treaty. These laws cover civilian possession of armaments and explosives. Included among these are Andorra,⁴³ Denmark,⁴⁴ Ireland,⁴⁵ Jordan,⁴⁶ Lesotho,⁴⁷ Liechtenstein,⁴⁸ Namibia,⁴⁹ Netherlands,⁵⁰ and Peru.⁵¹ Another seven States Parties indicate that the legislation used for ratification is sufficient because international treaties become self-executing in those countries: Mexico, Portugal, Rwanda, Seychelles, Slovakia, Slovenia, and Yemen.⁵² [footnotes added]

¹⁸ Brazil, *Anti-Personnel Mines Act* (2001), Article 1.

¹⁹ Burkina Faso, *Anti-Personnel Mines Decree* (2001), Article 1.

²⁰ Cambodia, *Law Banning Anti-Personnel Mines* (1999).

²¹ Canada, *Anti-Personnel Mines Act* (1997).

²² Costa Rica, *Law on the Prohibition of Anti-Personnel Mines* (2002).

²³ Czech Republic, *Act on Anti-Personnel Mines* (1999).

²⁴ France, *Anti-Personnel Mines Law* (1998).

²⁵ Germany, *Law on Anti-Personnel Mines* (1998).

²⁶ Guatemala, *Law on the Prohibition of Anti-Personnel Mines* (1997).

²⁷ Honduras, *Anti-Personnel Mines Law* (2000).

²⁸ Italy, *Law on the Prohibition of Anti-Personnel Mines* (1997).

²⁹ Japan, *Law Prohibiting Anti-Personnel Landmines* (1998).

³⁰ Luxembourg, *Law on the Prohibition of Anti-Personnel Mines* (1999).

³¹ Malaysia, *Anti-Personnel Mines Act* (2000).

³² Mali, *Anti-Personnel Mines Order* (2000).

³³ Mauritius, *Anti-Personnel Mines (Prohibition) Act* (2001).

³⁴ Monaco, *Anti-Personnel Mines Order* (1999).

³⁵ New Zealand, *Anti-Personnel Mines Act* (1998).

³⁶ Nicaragua, *Law on the Prohibition of Anti-Personnel Mines* (1999).

³⁷ Norway, *Anti-Personnel Mines Act* (1998).

³⁸ Spain, *Law on the Prohibition of Anti-Personnel Mines* (1998).

³⁹ Switzerland, *Federal Law on War Equipment as amended* (1996); *Message from the Federal Council on the prohibition of the use, stockpiling, production and transfer of anti-personnel mines and on their destruction* (1998).

⁴⁰ Trinidad and Tobago, *Anti-Personnel Mines Act* (2000).

⁴¹ UK, *Landmines Act* (1998).

⁴² Zimbabwe, *Anti-Personnel Mines (Prohibition) Act* (2000).

⁴³ Andorra, *Decree on Arms* (1989), Chapter 1, Section 3, Article 2.

⁴⁴ Denmark, *Executive Order on Weapons and Ammunition* (1995); *Military Criminal Code as amended* (1978), § 25.

⁴⁵ Ireland, *Explosives(Landmine)Order* (1996).

⁴⁶ Jordan, *Law on Explosive Material* (1953).

⁴⁷ Lesotho, *Internal Security Act* (1984).

⁴⁸ Liechtenstein, *Ordinance on the Indirect Transfer of War Material* (1999).

⁴⁹ Namibia, *Constitution* (1990), Article 144.

⁵⁰ Netherlands, *Import and Export Act* (1962).

⁵¹ Peru, *Penal Code as amended* (1991); *Law against the Possession of War Weapons* (1998); *Order against the Possession of War Weapons* (1998).

⁵² ICBL, *Landmine Monitor Report 2001*, Human Rights Watch, New York, August 2001, p. 25.

23. Hungary's Criminal Code as amended provides that:

The following shall be construed as weapons prohibited by international treaty:

- ...
- b) the following weapons listed in the protocols to the [1980 CCW]...
- ...
- 2. mines, remotely-delivered mines, anti-personnel mines, booby-traps and other devices specified in Points 1–5 of Article 2 of the Amended Protocol II...
- d) anti-personnel mines specified in Point 1 of Article 2 of the convention signed at Oslo on 18 September 1997 on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel Mines and on their Destruction.⁵³

24. Prior to adhering to the 1997 Ottawa Convention, Ireland enacted the Explosives (Landmine) Order, which provides that:

- 3. (1) No person shall manufacture, keep, import into the State, convey or sell any land mine.
- (2) In this Article "land mine" means any munition designed to be placed under, on or near the ground or other surface area and designed to be detonated or exploded by the presence or proximity of, or contact with, a person or vehicle.⁵⁴

25. South Korea's Conventional Weapons Act provides that:

No one is allowed to use or transfer a weapon that falls under any of the following:

- 1. Mines ... or other devices made to detonate resulting from the magnetism of a mine-detection device or other cause without physical contact of a person or device during detection operations with standard mine-detection devices available in Korea.
- 2. Anti-personnel mines that are undetectable by standard mine-detection devices available in Korea and that do not respond with a signal, which is detected from 8 grams or more of iron.
- 3. Remotely-delivered anti-personnel mines that do not fulfil any of the following:
 - (a) Over 90 percent of the total amount shot or dropped shall automatically detonate within 30 days.
 - (b) Over 99.9 percent of the total amount shot or dropped shall automatically detonate or otherwise lose its function as a mine within 120 days.⁵⁵

26. In 1998, Mexico adopted and published its Decree on the Ratification of the Ottawa Convention.⁵⁶ According to Mexico's Constitution, it is thereby considered as a Supreme Law in all the territory.⁵⁷

27. Portugal's Ministry of Foreign Affairs acknowledged in October 2000 that Portugal's official publication of the 1997 Ottawa Convention on 23 November

⁵³ Hungary, *Criminal Code as amended* (1978), Section 160/A(3).

⁵⁴ Ireland, *Explosives (Landmine) Order* (1996), Article 3(1) and (2).

⁵⁵ South Korea, *Conventional Weapons Act* (2001), Article 3.

⁵⁶ Mexico, *Decree on the Ratification of the Ottawa Convention* (1998).

⁵⁷ Mexico, *Constitution* (1917), Article 133.

1999 “does not achieve total legislative implementation of the Treaty through the imposition of penal sanctions and this matter should be handled at an inter-ministry level”.⁵⁸ In January 2001, the Ministries of Foreign Affairs and Defence stated that Portugal “is currently studying the way, in coordination with the different competent entities, to create internal legislation on this matter”. Nevertheless, they pointed out that Portugal had existing legislation which punished the possession, transportation, selling or production of explosive devices and substances.⁵⁹

28. An official of Slovakia stated that national implementation was achieved when the Slovak parliament approved ratification of the 1997 Ottawa Convention on 4 June 1999, making it part of national legislation.⁶⁰ It was published as a new law in the official bulletin of the Ministry of Justice.⁶¹

29. South Africa’s Anti-Personnel Mines Bill provides that it is one of “the principal objects of the Act . . . to prohibit the use, stockpiling, production, development, acquisition and transfer of anti-personnel mines and ensure the destruction thereof”. It adds that “neither an Organ of State nor a person within the Republic or any South African citizen outside the Republic may . . . place an anti-personnel mine”.⁶²

30. Under Sweden’s Penal Code as amended, “a person who uses, develops, manufactures, acquires, possesses or transfers anti-personnel mines [as defined in the 1997 Ottawa Convention] shall be sentenced for unlawful dealings with mines to imprisonment . . . unless the act is to be considered as a crime against international law”.⁶³

National Case-law

31. In 1995, in a ruling on the constitutionality of AP II, Colombia’s Constitutional Court stated in relation to the prohibition on the use of weapons of a nature to cause unnecessary suffering or superfluous injury that:

Although none of the treaty rules expressly applicable to internal conflicts prohibits indiscriminate attacks or the use of certain weapons, the Taormina Declaration consequently considers that the bans (established partly by customary law and partly by treaty law) on the use of . . . mines . . . apply to non-international armed conflicts, not only because they form part of customary international law but also because they evidently derive from the general rule prohibiting attacks against the civilian population.⁶⁴

⁵⁸ ICBL, *Landmines Monitor Report 2001*, August 2001, p. 761.

⁵⁹ Portugal, *Penal Code* (1996), Article 275(1).

⁶⁰ ICBL, *Landmine Monitor Report 2000*, August 2000, p. 711.

⁶¹ Slovakia, *Law on the Ratification of the Ottawa Convention* (1999).

⁶² South Africa, *Anti-Personnel Mines Bill* (2001), Sections 3(c) and 4(a).

⁶³ Sweden, *Penal Code as amended* (1962), Chapter 22, § 6b.

⁶⁴ Colombia, Constitutional Court, *Constitutional Case No. C-225/95*, Judgement, 18 May 1995.

Other National Practice

32. Between 1994 and September 1997, 117 States declared their support for a global ban on the production, stockpiling, transfer and use of anti-personnel mines. These States were: Afghanistan, Algeria, Angola, Antigua and Barbuda, Argentina, Australia, Austria, Bahamas, Barbados, Belgium, Belize, Benin, Bolivia, Bosnia and Herzegovina, Botswana, Brazil, Burkina Faso, Cambodia, Cameroon, Canada, Cape Verde, Chad, Chile, Colombia, Congo, Costa Rica, Côte d'Ivoire, Croatia, Czech Republic, Denmark, Dominica, Dominican Republic, Ecuador, El Salvador, Estonia, Ethiopia, Fiji, France, Gabon, Georgia, Germany, Ghana, Grenada, Guatemala, Guinea, Guyana, Haiti, Holy See, Honduras, Hungary, Iceland, Ireland, Italy, Jamaica, Japan, Jordan, Kenya, Kuwait, Laos, Lesotho, Liechtenstein, Luxembourg, FYROM, Malaysia, Malawi, Mali, Malta, Mauritania, Mauritius, Mexico, Moldova, Monaco, Mozambique, Namibia, Netherlands, New Zealand, Nicaragua, Nigeria, Norway, Panama, Papua New Guinea, Paraguay, Peru, Philippines, Poland, Portugal, Qatar, Rwanda, St. Kitts and Nevis, St. Vincent and the Grenadines, San Marino, St. Lucia, Senegal, Seychelles, Sierra Leone, Slovakia, Slovenia, South Africa, Spain, Sudan, Surinam, Swaziland, Sweden, Switzerland, Tanzania, Togo, Trinidad and Tobago, Turkmenistan, Uganda, United Arab Emirates, UK, US, Uruguay, Venezuela, Yemen, Zambia and Zimbabwe.⁶⁵

33. The Final Declaration of the 1997 Brussels Conference on Anti-personnel Landmines, which called for the "early conclusion of a comprehensive ban on anti-personnel landmines" and welcomed "the convening of a Diplomatic Conference by the Government of Norway in Oslo on 1 September 1997 to negotiate such an agreement", was supported by 111 States. These were: Algeria, Angola, Antigua and Barbuda, Argentina, Australia, Austria, Bahamas, Barbados, Belgium, Belize, Benin, Bolivia, Bosnia and Herzegovina, Botswana, Brazil, Burkina Faso, Cambodia, Cameroon, Canada, Cape Verde, Chad, Chile, Colombia, Congo, Costa Rica, Côte d'Ivoire, Croatia, Czech Republic, Denmark, Dominica, Dominican Republic, Ecuador, El Salvador, Ethiopia, Fiji, France, Gabon, Germany, Ghana, Grenada, Guatemala, Guinea, Guyana, Haiti, Holy See, Honduras, Hungary, Iceland, Ireland, Italy, Jamaica, Japan, Jordan, Kenya, Kuwait, Lesotho, Liechtenstein, Luxembourg, Former Yugoslav Republic of Macedonia, Malaysia, Malawi, Mali, Malta, Mauritania, Mauritius, Mexico, Moldova, Monaco, Mozambique, Namibia, Netherlands, New Zealand, Nicaragua, Norway, Panama, Papua New Guinea, Paraguay, Peru, Philippines, Poland, Portugal, Qatar, Rwanda, St. Kitts and Nevis, St. Vincent and the Grenadines, San Marino, St. Lucia, Senegal, Seychelles, Slovakia, Slovenia, South Africa, Spain, Sudan, Surinam, Swaziland, Sweden, Switzerland,

⁶⁵ ICRC, List of States unilaterally supporting a global ban on the production, stockpiling, transfer and use of anti-personnel mines, 18 September 1997 (public declarations on file with the ICRC).

Tanzania, Togo, Trinidad and Tobago, Turkmenistan, Uganda, United Arab Emirates, UK, US, Uruguay, Venezuela, Yemen, Zambia and Zimbabwe.⁶⁶

34. Between 1994 and September 1997, 29 States unilaterally prohibited the production of anti-personnel mines. These were: Australia, Austria, Belgium, Burkina Faso, Cambodia, Canada, Colombia, Congo, France, Germany, Ghana, Honduras, Ireland, Italy, Jamaica, Luxembourg, Mexico, Mozambique, Netherlands, New Zealand, Norway, Philippines, Portugal, Slovenia, South Africa, Sweden, Switzerland, UK and Zimbabwe.⁶⁷

35. Between 1994 and September 1997, 30 States unilaterally prohibited the use of anti-personnel mines by their own forces. These were: Australia, Austria, Belgium, Cambodia, Canada, Colombia, Congo, Croatia, Denmark, Fiji, France, Georgia, Germany, Haiti, Honduras, Ireland, Italy, Jamaica, Luxembourg, Mexico, Mozambique, Netherlands, New Zealand, Norway, Philippines, Portugal, South Africa, Sweden, Switzerland and UK.⁶⁸

36. At the Second Meeting of States Parties to the Ottawa Convention in 2000, several States in their interventions accused signatories, in particular Angola, Burundi, Sudan and some of the forces active in the DRC, of continuing to use mines in violation of their international obligations. In reply, Burundi denied any use of anti-personnel mines by its forces and welcomed an international fact-finding mission to its territory to investigate further, while Angola readily admitted its use of mines to defend military positions and requested understanding in light of its special circumstances.⁶⁹

37. At the First Meeting of States Parties to the Ottawa Convention in 1999, numerous States condemned the continued use of anti-personnel mines and, in particular, the use by treaty signatories including Angola and Senegal.⁷⁰

38. At the 27th International Conference of the Red Cross and Red Crescent in 1999, Albania stated that it would "continue working on ratifying as soon as possible the Ottawa treaty".⁷¹

39. In 1995, during a debate in the First Committee of the UN General Assembly, Australia stated that it was "committed to the elimination of all anti-personnel land-mines as an ultimate goal".⁷²

⁶⁶ ICRC, Published list of signatories to the Brussels Declaration, 18 September 1997 (on file with the ICRC.)

⁶⁷ ICRC, List of States unilaterally supporting a global ban on the production, stockpiling, transfer and use of anti-personnel mines, Section on unilateral production bans, 18 September 1997 (public declarations on file with the ICRC).

⁶⁸ ICRC, List of States unilaterally supporting a global ban on the production, stockpiling, transfer and use of anti-personnel mines, Section on unilateral prohibition of use of anti-personnel mines, 18 September 1997 (public declarations on file with the ICRC).

⁶⁹ ICRC internal document.

⁷⁰ ICRC internal document.

⁷¹ Albania, Statement at the 27th International Conference of the Red Cross and Red Crescent, Geneva, 31 October–6 November 1999.

⁷² Australia, Statement before the First Committee of the UN General Assembly, UN Doc. A/C.1/50/PV.5, 17 October 1995, p. 6.

40. At the 27th International Conference of the Red Cross and Red Crescent in 1999, Australia stated that it would “promote the achievement of increased adherence to the Ottawa Convention, the commencement of negotiations for a transfer ban on landmines”.⁷³

41. At the Second Review Conference of States Parties to the CCW in 2001, Australia reiterated its “commitment to universal adherence both to the Convention on Conventional Weapons and its annexed protocols, and to the Ottawa Convention” and urged “all States which had not yet done so to accede to those important instruments”.

42. At the First Meeting of States Parties to the Ottawa Convention in 1999, Austria condemned the laying of new mines in “Kosovo, Angola and some other places”.⁷⁴

43. At the 27th International Conference of the Red Cross and Red Crescent in 1999, Austria (together with the EU) stated that it would “support efforts to improve the humanitarian standards of the Protocol II to the 1980 CCW”.⁷⁵

44. At the Landmines Treaty Signing Conference in Ottawa in December 1997, Belarus stated that it “completely shares the objectives of the Convention” and that it would “search for financial resources for destruction of the existing millions of anti-personnel mines stockpiled in Belarus in order to achieve complete elimination of this weapon”.⁷⁶

45. At the First Annual Conference of High Contracting Parties to Amended Protocol II to the CCW in 1999, Belarus stated that it had “established a moratorium on exports” of anti-personnel landmines and that it “does not produce and does not expect to produce or modernize mines in the future, neither anti-personnel nor any other mines”, nor did it “use mines to protect the state border or for any other purposes”.⁷⁷

46. In 1995, during a debate in the First Committee of the UN General Assembly, Benin declared that there was an “imperative need for a ban on the manufacture and use of anti-personnel land-mines”.⁷⁸

47. In 1995, during a debate in the First Committee of the UN General Assembly, Burkina Faso stated that it supported an eventual ban on anti-personnel mines.⁷⁹

⁷³ Australia, Statement at the 27th International Conference of the Red Cross and Red Crescent, Geneva, 31 October–6 November 1999.

⁷⁴ Austria, Statement at the First Meeting of the States Parties to the Ottawa Convention, Maputo, 3–7 May 1999.

⁷⁵ Austria (together with the EU), Statement at the 27th International Conference of the Red Cross and Red Crescent, Geneva, 31 October–6 November 1999.

⁷⁶ Belarus, Statement at the Landmines Treaty Signing Conference, Ottawa, 3 December 1997.

⁷⁷ Belarus, Statement at the First Annual Conference of High Contracting Parties to Amended Protocol II to the CCW, Geneva, 17 December 1999.

⁷⁸ Benin, Statement before the First Committee of the UN General Assembly, UN Doc. A/C.1/50/PV.10, 26 October 1995, p. 24.

⁷⁹ Burkina Faso, Statement before the First Committee of the UN General Assembly, UN Doc. A/C.1/50/PV.8, 20 October 1995, p. 10.

48. In 1995, during a debate in the First Committee of the UN General Assembly, Canada stated that it continued “to advocate the elimination of land-mines, recognizing that this goal will take a considerable time to achieve”.⁸⁰

49. At the 27th International Conference of the Red Cross and Red Crescent in 1999, Canada (together with the Canadian Red Cross and Norway) stated that it would “continue support for the universalization and full implementation of the Ottawa Convention”.⁸¹

50. At the Second Meeting of States Parties to the Ottawa Convention in 2000, Canada stated that it was:

deeply concerned by reports that Angola, a treaty signatory, continues to deploy new mines – increasing the scale of human tragedy for peoples who have already suffered after years of civil war. We are also concerned about allegations of new mine use by Burundi and Sudan, also treaty signatories. We urge these states to clarify these matters quickly and in a manner consistent with the political and moral obligations they undertook when they signed this Convention. There are also allegations that parties to the conflict in the Democratic Republic of the Congo have deployed mines. The fact the some of the states with forces engaged in the DRC are States Parties to this Convention underscores the need for these states to clarify the facts surrounding these allegations.

Canada further noted that:

Beyond the immediate community bound by this Convention, mines are still being used by governments and non-state actors to an extent that merits our collective condemnation. It is important to highlight the indiscriminate use of landmines by both Russian and Chechen forces in Chechnya – surely one of the most serious setbacks for the already minimal norms regarding mine use contained within the Landmines Protocol of the Convention on Certain Conventional weapons... We call upon all states, signatory and non-signatory alike, to work co-operatively to clarify compliance issues in a manner that will build greater respect for the norms we have worked so long and hard to create.⁸²

51. At the 27th International Conference of the Red Cross and Red Crescent in 1999, Chile stated that it would “make every effort to ensure that lawmakers incorporate those offences and those set forth in the Ottawa landmines treaty... into domestic legislation”.⁸³

52. In 1998, in a White Paper on China’s National Defence, China stated that it was “in favour of imposing proper and rational restrictions on the use and

⁸⁰ Canada, Statement before the First Committee of the UN General Assembly, UN Doc. A/C.1/50/PV.8, 20 October 1995, p. 6.

⁸¹ Canada (together with Norway), Statement at the 27th International Conference of the Red Cross and Red Crescent, Geneva, 31 October–6 November 1999.

⁸² Canada, Statement at the Second Meeting of the States Parties to the Ottawa Convention, Geneva, 11–15 September 2000.

⁸³ Chile, Statement at the 27th International Conference of the Red Cross and Red Crescent, Geneva, 31 October–6 November 1999.

transfer of APLs in a bid to achieve the ultimate objective of a comprehensive prohibition of such landmines through a phased approach".⁸⁴

53. At the First Meeting of States Parties to the Ottawa Convention in 1999, China, attending the meeting as an observer, expressed the hope that "the international community could make joint efforts to further improve the international security environment, and to create favourable conditions for the ultimate goal of a complete ban on APLs in a bid to eliminate the threat to innocent civilians by APLs".⁸⁵

54. At the Second Annual Conference of High Contracting Parties to Amended Protocol II to the CCW in 2000, China stated in relation to anti-personnel landmines that "complete prohibition is undoubtedly the best solution . . . However, it should also be recognized that given the divergence of national conditions, countries may differ in terms of their respective security concerns and military technological development levels."⁸⁶

55. In 1995, during a debate in the First Committee of the UN General Assembly, Colombia reiterated its "support for the initiative of an international moratorium on the production and transfer of anti-personnel land-mines, with a view to their complete elimination".⁸⁷

56. At the 27th International Conference of the Red Cross and Red Crescent in 1999, Costa Rica stated that it would promote "the struggle to clear the land of all anti-personnel mines".⁸⁸

57. In 1995, during a debate in the First Committee of the UN General Assembly, Côte d'Ivoire stated that it felt it was "time to think about an international agreement prohibiting the production, utilization and transfer of mines".⁸⁹

58. In 1995, during a debate in the First Committee of the UN General Assembly, Ecuador encouraged "new international efforts to find solutions to the problems caused by these weapons with a view to their total elimination".⁹⁰

59. In 1974, during discussions in the Ad Hoc Committee on Conventional Weapons established by the CDDH, Egypt stated that:

It was generally agreed that time-delay weapons such as anti-personnel weapons, land-mines and aircraft, artillery and naval gun-delivered mines and booby traps, often placed far from the combat areas, could injure civilians as well as combatants

⁸⁴ China, Information Office of the State Council, White Paper: China's National Defence, 27 July 1998, cited in ICBL, *Landmine Monitor Report 2000*, August 2000, p. 481, footnote 3.

⁸⁵ China, Statement at the First Meeting of the States Parties to the Ottawa Convention, Maputo, 3–7 May 1999.

⁸⁶ China, Statement at the Second Annual Conference of High Contracting Parties to Amended Protocol II to the CCW, Geneva, 11 December 2000.

⁸⁷ Colombia, Statement before the First Committee of the UN General Assembly, UN Doc. A/C.1/50/PV.9, 25 October 1995, p. 20.

⁸⁸ Costa Rica, Statement at the 27th International Conference of the Red Cross and Red Crescent, Geneva, 31 October–6 November 1999.

⁸⁹ Côte d'Ivoire, Statement before the First Committee of the UN General Assembly, UN Doc. A/C.1/50/PV.6, 18 October 1995, p. 2.

⁹⁰ Ecuador, Statement before the First Committee of the UN General Assembly, UN Doc. A/C.1/50/PV.3, 16 October 1995, p. 19.

and were therefore indiscriminate. Moreover, such devices generally exploded close to the victims, causing grave injuries; they also slowed up the evacuation of the sick and wounded from mined areas, thus increasing their suffering. His delegation called for prohibition of the use of weapons of that category.⁹¹

60. In 2000, during a debate in the First Committee of the UN General Assembly, Egypt stated that while it recognised the “humanitarian goal” of the 1997 Ottawa Convention, it continued “to maintain that the Ottawa Convention lacks the vision necessary to deal comprehensively with all aspects related to landmines”.⁹²

61. In 1995, during a debate in the First Committee of the UN General Assembly, Ethiopia stated that there was “a compelling need for a total ban on these insidious weapons”.⁹³

62. In 1997, the Finnish government released a fact sheet in which it explained its position on the use of anti-personnel mines:

APLs are an integral part of the Finnish territorial defence doctrine. They would only be used in response to armed aggression against Finland. Given their importance to Finland’s defence, any decision to destroy APLs and to bear the considerable cost of providing the same defensive impact with other means would have to be made in the context of such a total ban that Finland regards as responding to the global landmine crisis.⁹⁴

63. In a speech addressed to the UN General Assembly in 1995, the German Minister of Foreign Affairs stated that “anti-personnel mines . . . are ‘weapons of mass destruction’. Day in, day out, they are taking a terrible toll on human life, and many of the victims are women and, above all, innocent children. If any kind of weapon must be outlawed, then this one should be.”⁹⁵

64. In 2001, Greece and Turkey made a joint statement in which they declared that:

They also recognize that a total ban on these [anti-personnel] mines is an important confidence building measure that would contribute to security and stability in the region. With these considerations in mind, the Minister of Foreign Affairs of the Republic of Turkey . . . and the Minister of Foreign Affairs of the Hellenic Republic . . . have emphasized the desirability of the adherence of all states to the Convention on Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel Mines and on Their Destruction, namely the Ottawa Convention. In this context, they have decided to concurrently start the procedures that will make

⁹¹ Egypt, Statement at the CDDH, *Official Records*, Vol. XVI, CDDH/IV/SR.6, 22 March 1974, p. 49, § 14.

⁹² Egypt, Statement before the First Committee of the UN General Assembly, UN Doc. A/C.1/55/PV.4, 3 October 2000, p. 23.

⁹³ Ethiopia, Statement before the First Committee of the UN General Assembly, UN Doc. A/C.1/50/PV.9, 25 October 1995, p. 15.

⁹⁴ Finland, Position on Anti-Personnel Landmines: Fact Sheet of the Finnish Ministry for Foreign Affairs, Political Department, 26 August 1997, reprinted in *YIHL*, Vol. 1, 1998, p. 562.

⁹⁵ Germany, Statement by the German Minister of Foreign Affairs before the UN General Assembly, UN Doc. A/50/PV.8, 27 September 1995, p. 7.

both sides parties to the Ottawa Convention. For this purpose, while Greece initiates ratification process, Turkey will start accession procedures. It is also agreed that the instruments of ratification by Greece and accession by Turkey will be simultaneously deposited with the Secretary General of the United Nations in due course.⁹⁶

65. In 1995, during a debate in the First Committee of the UN General Assembly, India stated that:

Having agreed to the extension of the scope of the Protocol to non-international armed conflicts as defined in the Geneva Conventions, [India] has proposed a ban on the use of land-mines in such conflicts and a ban on the transfer of these weapons . . . We would, therefore, be happy to join other sponsors of the draft resolution on a moratorium on the export of land-mines, with the goal of their eventual elimination as viable and humane alternatives are developed.⁹⁷

66. At the First Annual Conference of High Contracting Parties to Amended Protocol II to the CCW in 1999, India stated that it:

remains committed to the objective of a non-discriminatory, universal and global ban on anti-personnel mines through a phased process that addresses the legitimate defence requirements of States, while at the same time ameliorating the humanitarian crises that have resulted from an irresponsible transfer and indiscriminate use of landmines.⁹⁸

67. At the First Meeting of States Parties to the Ottawa Convention in 1999, Israel, attending the meeting as an observer, Israel stated that it “wholeheartedly supports the ultimate goal of this Convention” and that it:

supports a gradual process in which each state will begin doing its part to reduce the indiscriminate use of landmines, toward the eventual goal of a total ban . . . The first step should be the elimination of the production of APLs to be followed by finding appropriate replacements for landmines and then, later on, when security circumstances allow, a total ban on the use of APLs.⁹⁹

68. In 2001, during a debate in the First Committee of the UN General Assembly, Israel stated that:

Israel supports the ultimate humanitarian goal of the Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-personnel Mines and on Their Destruction, aimed at eliminating the consequences of indiscriminate use of anti-personnel landmines . . . [Israel] is still required to resort to defensive operations

⁹⁶ Greece and Turkey, Joint Statement by the Minister of Foreign Affairs of the Republic of Turkey and the Minister of Foreign Affairs of the Hellenic Republic on Anti-Personnel Land Mines, Ankara, 6 April 2001.

⁹⁷ India, Statement before the First Committee of the UN General Assembly, UN Doc. A/C.1/50/PV.11, 26 October 1995, p. 20.

⁹⁸ India, Statement at the First Annual Conference of High Contracting Parties to Amended Protocol II to the CCW, Geneva, 15 December 1999.

⁹⁹ Israel, Statement at the First Meeting of the States Parties to the Ottawa Convention, Maputo, 3–7 May 1999.

against terrorists in order to prevent attacks on its civilians. Therefore, we remain at present unable to support an immediate enactment of a total ban on landmines.¹⁰⁰

69. At the First Meeting of States Parties to the Ottawa Convention in 1999, Japan stated that it was deeply concerned about the use of anti-personnel landmines in Kosovo and called upon “all parties involved in the Kosovo question to refrain from the use of anti-personnel landmines”.¹⁰¹

70. In 2000, during a debate in the First Committee of the UN General Assembly, Kazakhstan stated that:

Kazakhstan fully supports the humanitarian orientation of the Ottawa Convention, whose goal is the complete elimination of anti-personnel mines . . . However, in our view, the movement for the complete prohibition of anti-personnel mines should be an ongoing and step-by-step process based on the mine Protocol to the Convention on inhumane weapons.¹⁰²

71. In 1995, during a debate in the First Committee of the UN General Assembly, Kenya declared its support for a ban on anti-personnel mines.¹⁰³

72. At the International Strategy Conference Towards a Global Ban on Anti-Personnel Mines in 1996, South Korea stated that it “in principle supports the ultimate goal of eliminating APLs” but that due to the “unique security situation” on the Korean Peninsula, it “cannot fully subscribe to the total and unconditional ban of APLs”.¹⁰⁴

73. At the 27th International Conference of the Red Cross and Red Crescent in 1999, FYROM stated that it would “work with the States and the relevant international bodies on a total elimination of anti-personnel landmines globally and in the region”.¹⁰⁵

74. In 1995, during a debate in the First Committee of the UN General Assembly, Mali stated that it was “urgent to put an end to the production of land-mines and to . . . plan for their progressive destruction”.¹⁰⁶

75. In 1993, during a debate in the First Committee of the UN General Assembly, Mexico stated that it supported an export moratorium on anti-personnel mines as “a step in the direction of the ultimate prohibition of anti-personnel mines and their destruction”.¹⁰⁷

¹⁰⁰ Israel, Statement before the First Committee of the UN General Assembly, UN Doc. A/C.1/56/PV.19, 31 October 2001, p. 6.

¹⁰¹ Japan, Statement at the First Meeting of the States Parties to the Ottawa Convention, Maputo, 3–7 May 1999.

¹⁰² Kazakhstan, Statement before the First Committee of the UN General Assembly, UN Doc. A/C.1/55/PV.12, 12 October 2000, p. 13.

¹⁰³ Kenya, Statement before the First Committee of the UN General Assembly, UN Doc. A/C.1/50/PV.6, 18 October 1995, p. 15.

¹⁰⁴ South Korea, Statement at the International Strategy Conference Towards a Global Ban on Anti-Personnel Mines, Ottawa, 3–5 October 1996.

¹⁰⁵ FYROM, Statement at the 27th International Conference of the Red Cross and Red Crescent, Geneva, 31 October–6 November 1999.

¹⁰⁶ Mali, Statement before the First Committee of the UN General Assembly, UN Doc. A/C.1/50/PV.5, 17 October 1995, p. 17.

¹⁰⁷ Mexico, Statement before the First Committee of the UN General Assembly, UN Doc. A/C.1/48/SR.28, 18 November 1993, p. 9.

76. At the 27th International Conference of the Red Cross and Red Crescent in 1999, Mexico stated that it would “redouble efforts and step up coordination with other governments and with civilian organizations for the universality and implementation of the Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-personnel Mines and on their Destruction”.¹⁰⁸

77. In 1995, during a debate in the First Committee of the UN General Assembly, New Zealand stated that it remained “committed to the goal of the elimination of all anti-personnel land-mines”.¹⁰⁹

78. At the 27th International Conference of the Red Cross and Red Crescent in 1999, New Zealand stated that it would “continue to play a constructive role in international de-mining efforts and in encouraging the universal ratification of the Ottawa Convention”.¹¹⁰

79. In 1995, during a debate in the First Committee of the UN General Assembly, Nicaragua emphasised that “the definitive solution to the problem created by mines and other devices in various parts of the world lies in a total ban on the production, stockpiling, exportation and proliferation of such inhumane weapons”.¹¹¹

80. At the 27th International Conference of the Red Cross and Red Crescent in 1999, Nicaragua stated that it would “work for prompt ratification of the 1980 United Nations Convention on Certain Conventional Weapons and its Protocols... [and] continue to work unsparingly for mine clearance with a view to making the region a mine-free zone and help mine-blast victims fully reintegrate into society”.¹¹²

81. In 1995, during a debate in the First Committee of the UN General Assembly, Norway stated that it would “continue to work for a total ban on the production, stockpiling, trade and use of anti-personnel land-mines”.¹¹³

82. At the First Annual Conference of High Contracting Parties to Amended Protocol II to the CCW in 1999, Pakistan declared its hope that the international community would continue working towards “the objective of the complete elimination of anti-personnel mines everywhere”.¹¹⁴

83. In 1999, in a letter to the ICBL, Pakistan stated that while it “remains fully committed to the cause of eventual elimination of anti-personnel

¹⁰⁸ Mexico, Statement at the 27th International Conference of the Red Cross and Red Crescent, Geneva, 31 October–6 November 1999.

¹⁰⁹ New Zealand, Statement before the First Committee of the UN General Assembly, UN Doc. A/C.1/50/PV.9, 25 October 1995, p. 3.

¹¹⁰ New Zealand, Statement at the 27th International Conference of the Red Cross and Red Crescent, Geneva, 31 October–6 November 1999.

¹¹¹ Nicaragua, Statement before the First Committee of the UN General Assembly, UN Doc. A/C.1/50/PV.11, 26 October 1995, p. 14.

¹¹² Nicaragua, Statement at the 27th International Conference of the Red Cross and Red Crescent, Geneva, 31 October–6 November 1999.

¹¹³ Norway, Statement before the First Committee of the UN General Assembly, UN Doc. A/C.1/50/PV.6, 18 October 1995, p. 9.

¹¹⁴ Pakistan, Statement at the First Annual Conference of High Contracting Parties to Amended Protocol II to the CCW, Geneva, 17 December 1999.

landmines, defence requirements do not allow it to join the Ottawa Convention at present".¹¹⁵

84. In 2000, during a debate in the First Committee of the UN General Assembly, Pakistan stated that:

The issue of anti-personnel landmines has particular importance for Pakistan because we witnessed at first hand the plight and the suffering of innocent victims as a result of the massive saturation of Afghanistan with anti-personnel landmines. Millions of mines have still not been cleared in Afghanistan . . . Although our security environment does not permit us to accept a comprehensive ban on anti-personnel landmines, Pakistan will strictly abide by its commitments and obligations under the amended Protocol II on landmines, to the Convention on Certain Conventional Weapons. We will continue to work with other States parties to promote universal acceptance of Protocol II.¹¹⁶

85. At the First Session of the First Review Conference of States Parties to the CCW in 1995, Peru stated that it supported a prohibition on the use of landmines which were not equipped with self-destruct mechanisms.¹¹⁷

86. In 1995, during a debate in the First Committee of the UN General Assembly, Peru stated that it was essential that the international community adopt the necessary measures to eliminate anti-personnel landmines.¹¹⁸

87. At the 27th International Conference of the Red Cross and Red Crescent in 1999, Peru stated that it would "support and work in favour of any initiatives launched to fortify the international system for the total prohibition of antipersonnel landmines".¹¹⁹

88. Prior to the international conference on "New Steps for a Mine-Free Future: Political, Military and Humanitarian Aspects", held in Moscow in May 1998, Russia stated in a press release issued by the Ministry of Defence that it was "in favour of a complete prohibition of antipersonnel landmines" and that it supported "a stage-by-stage and gradual progress towards this goal".¹²⁰

89. Slovenia, with a view to ensuring the effective national implementation of the 1997 Ottawa Convention, enacted two administrative measures concerning in particular the destruction of anti-personnel mines.¹²¹

¹¹⁵ Pakistan, Letter to the UN addressed to the Chair, ICBL Treaty Working Group, 15 November 1999, cited in ICBL, *Landmine Monitor Report 2000*, August 2000, p. 522.

¹¹⁶ Pakistan, Statement before the First Committee of the UN General Assembly, UN Doc. A/C.1/55/PV.13, 13 October 2000, p. 12.

¹¹⁷ Peru, Statement at the First Review Conference of States Parties to the CCW (First Session), Vienna, 25 September–13 October 1995, UN Doc. CCW/CONF/SR 5, 3 October 1995, §§ 67–69.

¹¹⁸ Peru, Statement before the First Committee of the UN General Assembly, UN Doc. A/C.1/50/PV.9, 25 October 1995, p. 11.

¹¹⁹ Peru, Statement at the 27th International Conference of the Red Cross and Red Crescent, Geneva, 31 October–6 November 1999.

¹²⁰ Russia, Ministry of Defence, Press Release, Elimination of antipersonnel mines: position of Russia, 26 May 1998.

¹²¹ Slovenia, Execution Plan confirmed by Minister of Defence, 1998; Order by the Chief of General Staff of the Slovenian Army concerning the Destruction of Anti-Personnel Mines in the Slovenian Army, 1999.

90. In its report on “gross violations of human rights” committed between 1960 and 1993, South Africa’s Truth and Reconciliation Commission found that the ANC’s use of landmines in the rural areas of Northern and Eastern Transvaal in the period 1985–1987 “cannot be condoned in that it resulted in gross violations of human rights – causing injuries to and loss of lives of civilians, including farm labourers and children”. The Commission further noted that “the use of landmines inevitably leads to civilian casualties as it does not discriminate between military and civilian targets” and that “to its credit, the ANC abandoned the landmine campaign in the light of the high civilian casualty rate”.¹²²

91. At the 27th International Conference of the Red Cross and Red Crescent in 1999, South Africa stated that it would “promulgate legislation implementing the Ottawa Convention into domestic law”.¹²³

92. At the 27th International Conference of the Red Cross and Red Crescent in 1999, Thailand stated that it would “take concrete steps towards elimination of anti-personnel mines and assistance to mine victims in accordance with the 1997 Ottawa Convention”.¹²⁴

93. In 1995, during the debate in the First Committee of the UN General Assembly on Resolution 50/70, which encouraged “further immediate international efforts to seek solutions to the problems caused by anti-personnel landmines, with a view to the eventual elimination of anti-personnel landmines”, Turkey stated that it understood the definition of “eventual elimination” in that paragraph as “a political goal that we must strive to attain in the future”. Turkey further noted that it had joined the consensus on the basis of its understanding of the paragraph on eventual elimination but that it would have abstained had the paragraph been put to a separate vote.¹²⁵

94. At the First Meeting of States Parties to the Ottawa Convention in 1999, the Turkish representative, attending the meeting as an observer, declared that “the security situation around Turkey so far precludes my country from signing the Ottawa Convention”. However, the delegate announced the government’s intention “to sign the Ottawa Convention at the beginning of the next decade if present conditions do not change adversely”.¹²⁶

95. In 2001, during a debate in the First Committee of the UN General Assembly, Turkey stated that:

¹²² South Africa, Truth and Reconciliation Commission Report, 1998, Vol. 2, p. 335.

¹²³ South Africa, Statement at the 27th International Conference of the Red Cross and Red Crescent, Geneva, 31 October–6 November 1999.

¹²⁴ Thailand, Statement at the 27th International Conference of the Red Cross and Red Crescent, Geneva, 31 October–6 November 1999.

¹²⁵ Turkey, Statement before the First Committee of the UN General Assembly, UN Doc. A/C.1/50/PV.26, 17 November 1995, p. 18.

¹²⁶ Turkey, Statement at the First Meeting of States Parties to the Ottawa Convention, Maputo, 3–7 May 1999.

Turkey is fully conscious of the casualties and the ensuing human suffering caused by the irresponsible and indiscriminate use of mines. We attach importance to the mine-ban Treaty and consider it to be one of the major achievements of the international community towards the total elimination of anti-personnel mines. However, the security situation around Turkey is distinctly different from that faced by the proponents of the Ottawa process. This has prevented us from signing the Treaty. However, our commitment to the Treaty's goals was manifested by our participation in the First, Second and Third Meetings of the States Parties... Furthermore, Turkey has initiated a number of contacts with some neighbouring countries with a view to seeking the establishment of special regimes in order to keep our common borders free of anti-personnel mines... I would like to stress once more my Government's determination to become a party to the Ottawa Convention.¹²⁷

96. In a press release issued in March 2002, the Turkish Minister of Foreign Affairs declared that:

Turkey has come to the stage of submitting the Convention to the Turkish Grand National Assembly for finalization of the accession procedures. In the meantime, the duration of Turkey's national moratorium on the export and transfer of anti-personnel land mines expired in January 2002. Turkey has decided to extend once again her moratorium on the export and transfer of anti-personnel land mines, this time indefinitely, as an expression of her sincere commitment to becoming party to the Ottawa Convention.¹²⁸

97. At the 27th International Conference of the Red Cross and Red Crescent in 1999, Turkmenistan stated that it would "continue practical efforts to increase the number of governments joining the Ottawa Convention. As a country strongly backing the Ottawa process, Turkmenistan is committing itself to be in the lead of the Movement for complete elimination of land-mines."¹²⁹

98. At the First Annual Conference of High Contracting Parties to Amended Protocol II to the CCW in 1999, Ukraine declared that:

Being an active participant of the Ottawa process, which by no means has the intention to compete with the Amended Protocol II, Ukraine follows consequent policy directed to the prohibition and elimination of APLs, as exemplified in spring 1998 by destruction of 100 thousands of PFM-1 type mines in stocks, signing on 24 February 1999 the Ottawa convention as well as prolongation for subsequent four years of the moratorium on export of all types of APLs, that originally was introduced by governmental Decree in September 1995.¹³⁰

99. In 1995, during a debate in the First Committee of the UN General Assembly, the US stated that "we must renew our commitment to clear, control

¹²⁷ Turkey, Statement before the First Committee of the UN General Assembly, UN Doc. A/C.1/56/PV.11, 17 October 2001, pp. 14–15.

¹²⁸ Turkey, Minister of Foreign Affairs, Press Release, 15 March 2002.

¹²⁹ Turkmenistan, Statement at the 27th International Conference of the Red Cross and Red Crescent, Geneva, 31 October–6 November 1999.

¹³⁰ Ukraine, Statement at the First Annual Conference of High Contracting Parties to Amended Protocol II to the CCW, Geneva, 17 December 1999.

and eventually eliminate these indiscriminate killers and we must act on this commitment now".¹³¹

100. In 1996, in a White House fact sheet announcing its anti-personnel landmine policy, the US stated that it would "aggressively pursue an international agreement to ban use, stockpiling, production, and transfer of anti-personnel landmines with a view to completing the negotiation as soon as possible".¹³²

101. In 1998, US Presidential Decision Directive (PDD) 64 stated that the US would sign the 1997 Ottawa Convention by 2006 if it succeeded in developing suitable alternatives to anti-personnel mines and mixed anti-tank systems by that time. It also stated that the US would end the use of anti-personnel landmines outside Korea by 2003.¹³³

III. Practice of International Organisations and Conferences

United Nations

102. In a resolutions adopted in 1996, the UN Security Council called upon "the Government of Angola and UNITA to signal their commitment to peace by destroying their stockpiles of landmines".¹³⁴ In a further resolution adopted the same year, the Security Council reiterated "the need for continued commitment to peace by destruction of stockpiles of landmines monitored and verified by UNAVEM III".¹³⁵

103. In a resolution adopted in 1997 on the situation in Georgia, the UN Security Council stated that it condemned "the continued laying of mines, including new types of mines, in the Gali region, which has already caused several deaths and injuries among the civilian population and the peacekeepers and the observers of the international community". It called upon the parties "to take all measures in their power to prevent mine-laying and intensified activities by armed groups".¹³⁶ In another resolution adopted several months later, the UN Security Council repeated this call.¹³⁷

104. In a resolution adopted in 1998 on the situation in Angola, the UN Security Council called on the government of Angola and in particular UNITA "to cease minelaying activity".¹³⁸

105. In two resolutions adopted in 1999 and 2000 on the protection of civilians in armed conflict, the UN Security Council took note of the entry into force

¹³¹ US, Statement before the First Committee of the UN General Assembly, UN Doc. A/C.1/50/PV.13, 6 November 1995, p. 4.

¹³² US, Memorandum No. 102-M, Fact Sheets from the White House on Anti-Personnel Land Mines, 17 May 1996.

¹³³ The substance of the Directive is contained in a public letter from the US National Security Advisor to Senator Patrick Leahy, 15 May 1998, cited in ICBL, *Landmine Monitor Report 2000*, August 2000, pp. 333-334.

¹³⁴ UN Security Council, Res. 1055, 8 May 1996, § 18.

¹³⁵ UN Security Council, Res. 1087, 11 December 1996, § 17.

¹³⁶ UN Security Council, Res. 1096, 30 January 1997, § 14.

¹³⁷ UN Security Council, Res. 1124, 31 July 1997, § 14.

¹³⁸ UN Security Council, Res. 1213, 3 December 1998, § 7.

of the 1997 Ottawa Convention and of the 1996 Amended Protocol II to the CCW and recalled “the relevant provisions contained therein”. It further noted “the beneficial effects that their implementation will have on the safety of civilians”.¹³⁹

106. In a resolution adopted in 1980, the UN General Assembly welcomed the successful conclusion of the 1980 CCW and its Protocols and commended the Convention and the three annexed Protocols to all States “with a view to achieving the widest possible adherence to these instruments”.¹⁴⁰

107. In numerous resolutions adopted between 1981 and 1998, the UN General Assembly urged all States that had not done so to accede to the 1980 CCW and its Protocols.¹⁴¹

108. In two resolutions adopted in 1994 and 1995 on the moratorium on the export of anti-personnel landmines, the UN General Assembly stated that it encouraged “further immediate international efforts to seek solutions to the problems caused by anti-personnel land-mines, with a view to the eventual elimination of anti-personnel land-mines”.¹⁴²

109. In three resolutions adopted between 1994 and 1996, the UN General Assembly urged the Cambodian government to ban all anti-personnel landmines.¹⁴³

110. In a resolution adopted in 1996, the UN General Assembly recalled with satisfaction “its resolutions 49/75 D and 50/70 O, in which it, *inter alia*, established as a goal of the international community, the eventual elimination of anti-personnel landmines”. The General Assembly declared that it recognised the need to pursue “an effective, legally binding international agreement to ban the use, stockpiling, production and transfer of anti-personnel landmines”.¹⁴⁴

111. In a resolution adopted in 1997, the UN General Assembly urged all States to adhere to the 1997 Ottawa Convention. It stressed the need to work towards universalisation of this Convention in all relevant fora.¹⁴⁵

¹³⁹ UN Security Council, Res. 1265, 17 September 1999, § 18; Res. 1296, 19 April 2000, § 20.

¹⁴⁰ UN General Assembly, Res. 35/153, 12 December 1980, § 4.

¹⁴¹ UN General Assembly, Res. 36/93, 9 December 1981, § 1; Res. 37/79, 9 December 1982, § 1; Res. 38/66, 15 December 1983, § 3; Res. 39/56, 12 December 1984, § 3; Res. 40/84, 12 December 1985, § 3; Res. 41/50, 3 December 1986, § 3; Res. 42/30, 30 November 1987, § 3; Res. 43/67, 7 December 1988, § 3; Res. 45/64, 4 December 1990, § 3; Res. 46/40, 6 December 1991, § 3; Res. 47/56, 9 December 1992, § 3; Res. 48/79, 16 December 1993, § 3; Res. 49/79, 15 December 1994, § 3; Res. 50/74, 12 December 1995, § 3; Res. 51/49, 10 December 1996, § 3; Res. 52/42, 9 December 1997, § 3; Res. 53/81, 4 December 1998, § 5.

¹⁴² UN General Assembly, Res. 49/75 D, 15 December 1994, preamble and § 6; Res. 50/70 O, 12 December 1995, § 6.

¹⁴³ UN General Assembly, Res. 49/199, 23 December 1994; Res. 50/178, 22 December 1995; Res. 51/98, 12 December 1996.

¹⁴⁴ UN General Assembly, Res. 51/45 S, 10 December 1996, preamble. (The resolution was adopted by 155 votes in favour, none against and 10 abstentions. Abstaining: Belarus, China, Cuba, North Korea, South Korea, Israel, Pakistan, Russia, Syria and Turkey.)

¹⁴⁵ UN General Assembly, Res. 52/38 A, 9 December 1997, preamble. (The resolution was adopted by 142 votes in favour, none against and 18 abstentions. Abstaining: Azerbaijan, China, Cuba, Egypt, India, Iran, Israel, Kazakhstan, South Korea, Mongolia, Morocco, Myanmar, Pakistan, Russia, Syria, Tajikistan, Turkey and US.)

112. In a resolution adopted in 1997, the UN General Assembly urged “all States and regional organizations to intensify their efforts to contribute to the objective of the elimination of anti-personnel landmines”.¹⁴⁶

113. In a resolution adopted in 1998, the UN General Assembly reiterated its invitation to all States to accede to or ratify the 1997 Ottawa Convention.¹⁴⁷

114. In two resolutions adopted in 1999 and 2000 respectively, the UN General Assembly emphasised the “desirability of attracting the adherence of all States to the [Ottawa] Convention” and stated its determination “to work strenuously towards the promotion of its universalization”. The General Assembly also invited “all States that have not ratified the Convention or acceded to it to provide, on a voluntary basis, information to make global mine action efforts more effective”.¹⁴⁸

115. In a resolution adopted in 1996 on the situation of human rights in Cambodia, the UN Commission on Human Rights welcomed “the intention of the Government of Cambodia to ban all anti-personnel landmines”.¹⁴⁹

116. In two resolutions adopted in 1995 and 1996 respectively, the UN Sub-Commission on Human Rights urged States that had not yet done so to sign and ratify the 1980 CCW and its Protocols and declared itself “in favour of a total ban on the production, marketing and use of anti-personnel landmines”. In the second resolution, the Sub-Commission declared that it favoured a total ban on anti-personnel landmines “as a means to protect the right to life” and urged all States “to modify, where necessary, their legislation in order to prohibit the production, marketing and use of anti-personnel land-mines in and from their territories”.¹⁵⁰

117. In 1994, in a report on assistance in mine clearance, the UN Secretary-General stated that the “best and most effective way to halt the proliferation of mines is to ban completely the production, use and transfer of all landmines.

¹⁴⁶ UN General Assembly, Res. 52/38 H, 9 December 1997, § 1. (The resolution was adopted by 147 votes in favour, none against and 15 abstentions. Abstaining: Benin, Botswana, Cuba, Eritrea, Indonesia, Kenya, Malawi, Mexico, Mozambique, Namibia, Philippines, South Africa, Togo, Zambia and Zimbabwe.)

¹⁴⁷ UN General Assembly, Res. 53/77 N, 4 December 1998, § 1. (The resolution was adopted by 147 in favour, none against and 21 abstentions. Abstaining: Azerbaijan, China, Cuba, Egypt, India, Iran, Israel, Kazakhstan, Libya, Marshall Islands, Micronesia, Morocco, Myanmar, Pakistan, South Korea, Russia, Syria, Tajikistan, US, Vietnam and Yemen.)

¹⁴⁸ UN General Assembly, Res. 54/54 B, 1 December 1999, preamble and § 5 (the resolution was adopted by 139 in favour, one against and 20 abstentions. Against: Lebanon. Abstaining: Azerbaijan, China, Cuba, Egypt, India, Iran, Israel, Kazakhstan, South Korea, Libya, Marshall Islands, Micronesia, Morocco, Myanmar, Pakistan, Russia, Syria, US, Uzbekistan and Vietnam); Res. 55/33 V, December 2000, preamble and § 5 (the resolution was adopted by 143 votes in favour, none against and 22 abstentions. Abstaining: Azerbaijan, China, Cuba, Egypt, India, Iran, Israel, Kazakhstan, South Korea, Kyrgyzstan, Lebanon, Libya, Marshall Islands, Micronesia, Morocco, Myanmar, Pakistan, Russia, Syria, US, Uzbekistan and Vietnam).

¹⁴⁹ UN Commission on Human Rights, Res. 1996/54, 19 April 1996, § 22.

¹⁵⁰ UN Sub-Commission on Human Rights, Res. 1995/24, 24 August 1995, §§ 2 and 7; Res. 1996/15, 23 August 1996, preamble and §§ 1, 2 and 3.

Member States are invited to consider establishing such a ban as a matter of urgency."¹⁵¹

118. In 1994, in an article on landmines in *Foreign Affairs*, the UN Secretary-General stated that "the nature of mines makes them indiscriminate as to their effect; as such, they are prohibited under international humanitarian law, and practical measures should be taken to put that prohibition into general practice". He went on to suggest that the aim of any future international mines treaty should be "to reach agreement on a total ban on the production, stockpiling, trade and use of mines and their components".¹⁵²

119. In 1995, in a report on assistance in mine clearance, the UN Secretary-General emphasised that "the ultimate goal must be a total ban on the production, transfer and use of landmines. Only a total ban will stop their spread."¹⁵³

120. In 1996 and again in 1997, the UN Secretary-General reported that a total ban on landmines remained the ultimate objective of his office.¹⁵⁴

121. In 1996, in a report on the impact of armed conflict on children, the UN Secretary-General stated that "the only viable long-term solution to the global land-mine epidemic is a total and immediate ban on all land-mines, beginning with anti-personnel mines" and commended an initiative for a statutory ban on landmines.¹⁵⁵

122. In 1998, in a report on assistance in mine clearance, the UN Secretary-General emphasised the importance of the 1997 Ottawa Convention and of the 1996 Amended Protocol II to the CCW, as well as the desirability of attracting the adherence of all States to both instruments.¹⁵⁶

123. In 1997, in a report on the situation of human rights in Cambodia, the Special Representative of the UN Commission on Human Rights stated that the use of anti-personnel landmines by any party to the conflict must be stopped. He recommended an initiative for a statutory ban on landmines.¹⁵⁷

Other International Organisations

124. In a resolution on landmines in Angola adopted at its Dakar Session in 1995, the ACP-EU Joint Assembly state that it supported "all current appeals,

¹⁵¹ UN Secretary-General, Report on Assistance in Mine Clearance, UN Doc. A/49/357, 6 September 1994, § 22.

¹⁵² Boutros Boutros-Ghali, "The Land Mine Crisis", *Foreign Affairs*, Vol. 73, No. 5, September–October 1994, p. 13.

¹⁵³ UN Secretary-General, Report on Assistance in Mine Clearance, UN Doc. A/50/408, 6 September 1995, §§ 106–107.

¹⁵⁴ UN Secretary-General, Report on Assistance in Mine Clearance, UN Doc. A/51/540, 23 October 1996, § 100; Report on Assistance in Mine Clearance, UN Doc. A/52/679, 11 December 1997, § 96.

¹⁵⁵ UN Secretary-General, Report on the impact of armed conflict on children, UN Doc E/CN.4/1996/110, 5 February 1996, § 35.

¹⁵⁶ UN Secretary-General, Report on Assistance in Mine Clearance, UN Doc. A/53/496, 14 October 1998, pp. 4 and 27.

¹⁵⁷ UN Commission on Human Rights, Special Representative on the Situation of Human Rights in Cambodia, Report, UN Doc. E/CN.4/1997/85, 31 January 1997, § 54.

namely within the framework of the United Nations, to ban globally all use, production and export of anti-personnel land mines".¹⁵⁸

125. In a resolution on landmines adopted at its Brussels Session in 1995, the ACP-EU Joint Assembly called for a "total ban on the sale, production, transfer, export and use of land mines and their components". It further urged that:

Pending the adopting and implementation of all necessary national and international legal instruments, manufacturers and national suppliers of land mines should be held responsible as reflected, for example, by the introduction of a tax intended to fund the destruction of these mines.¹⁵⁹

126. In a resolution on anti-personnel mines adopted at its Windhoek Session in March 1996, the ACP-EU Joint Assembly expressed regret that the First Review Conference of States Parties to the CCW in 1995 had not reached an agreement to ban anti-personnel mines. It called on all ACP and EU member States "to draw up and adopt without delay national legislation placing an outright ban on the production, stockpiling, transfer, sale, import, export and use of anti-personnel land mines and/or their component parts" and called for "the destruction of existing stockpiles wherever they may be held, and whatever their type or particular characteristics".¹⁶⁰

127. In a resolution adopted in 1996, the Parliamentary Assembly of the Council of Europe emphasised that it "appreciates... [the] diplomatic efforts [of the ICRC] to secure the banning of certain particularly cruel weapons, such as antipersonnel mines".¹⁶¹ It also invited:

in particular, the governments of the member states of the Council of Europe, of the states whose parliaments enjoy or have applied for special guest status with the Assembly, of the states whose parliaments enjoy observer status, namely Israel, and of all other states to:

- ...
- i. support total prohibition of the transfer and use of land-based antipersonnel mines, and to ban their export immediately.¹⁶²

128. In a press release issued in 1996, the Parliamentary Assembly of the Council of Europe demanded a total ban on the transfer, exportation and use of anti-personnel landmines.¹⁶³

129. In 1995, in answer to a question from the European Parliament, the EU Council of Ministers stated that member States welcomed the adoption of a

¹⁵⁸ ACP-EU Joint Assembly, Resolution on land mines in Angola, Doc. OJSE 95/C 245/04, Dakar, 2 February 1995, § 1.

¹⁵⁹ ACP-EU Joint Assembly, Resolution on land mines, Doc. 95/C 61/04, Brussels, 28 September 1995, §§ 1 and 5.

¹⁶⁰ ACP-EU Joint Assembly, Resolution on anti-personnel mines, Doc. OJSE 96/C 254/04, Windhoek, 22 March 1996, § 1.

¹⁶¹ Council of Europe, Parliamentary Assembly, Res. 1085, 24 April 1996, § 6.

¹⁶² Council of Europe, Parliamentary Assembly, Res. 1085, 24 April 1996, § 8i.

¹⁶³ Council of Europe, Parliamentary Assembly, Press Release, Ref. 233(96), 24 April 1996.

resolution declaring the elimination of landmines as a goal of the 49th Session of the UN General Assembly.¹⁶⁴

130. In 1995, in answer to a question from the European Parliament, the European Commission stated that it was conscious of the suffering inflicted by landmines and that it supported “further measures for the curtailment of the availability and use of anti-personnel landmines, through multilateral action, with an effective regime of control and verification and with the ultimate goal of eliminating such weapons”.¹⁶⁵

131. In 1996, the EU Council of Ministers adopted a joint action on anti-personnel landmines in order to achieve their complete elimination. The way to reach this objective, it stated, was through raising the issue in the appropriate international fora. It declared that member States would “endeavour to implement national restrictions or bans additional to those contained in the 1996 Amended Protocol II to the CCW, particularly on the operational use of anti-personnel landmines”.¹⁶⁶

132. In a resolution adopted in 1995 on the failure of the international conference on anti-personnel mines, the European Parliament reiterated “its demand for a total ban on anti-personnel mines and spare parts, to cover the production, storage, transfer, sale, export and use of such weapons”. It called on “all Member States to establish immediately such a ban in the European Union as a joint action under the Common Foreign and Security Policy”.¹⁶⁷

133. In a resolution adopted in 1996 on the Ottawa Conference on anti-personnel landmines, the European Parliament reiterated its demand “for a total ban on anti-personnel mines to cover the production, storage, transfer, sale, export and use of such weapons” and called on the EU and its member States to unilaterally ban the production and use of all mines.¹⁶⁸

134. In 1995, during a debate in the First Committee of the UN General Assembly, the EU called on all participating States at the Review Conference of States Parties to the CCW:

to spare no effort to ensure a satisfactory outcome of the Review Conference, which will significantly reduce the dangers posed by the indiscriminate use of landmines and contribute to the eventual elimination of anti-personnel landmines, as viable and humane alternatives are developed, as the ultimate goal of efforts in this field.¹⁶⁹

¹⁶⁴ EU, Council of Ministers, Answer to Written Question E-2570/94 from the European Parliament, Doc. 95/C 55/120, 23 January 1995.

¹⁶⁵ European Commission, Answer to Written Question E-1384/95 from the European Parliament, Doc. 95/C 257/59, 30 June 1995.

¹⁶⁶ EU, Council, Decision on Joint Action 96/588/CFSP adopted by the Council on the basis of Article J.3 of the Treaty of the European Union on anti-personnel landmines, 1 October 1996, *Official Journal of the European Communities*, No. L 260/1, 12 October 1996, p. 1.

¹⁶⁷ European Parliament, Resolution on the failure of the international conference on anti-personnel mines and laser weapons, 16 November 1995, § 1.

¹⁶⁸ European Parliament, Resolution on the Ottawa Conference on anti-personnel landmines, 24 October 1996, §§ 3 and 5.

¹⁶⁹ EU, Statement by Spain on behalf of the EU before the First Committee of the UN General Assembly, UN Doc. A/C.1/50/PV.3, 16 October 1995, p. 13.

135. At the First Annual Conference of High Contracting Parties to Amended Protocol II to the CCW in 1999, the EU stated that “the total elimination of anti-personnel mines remains a key objective, as provided for in the Ottawa Convention”.¹⁷⁰

136. In 2000, during a debate in the First Committee of the UN General Assembly, the EU welcomed the large number of signatories to the 1997 Ottawa Convention and called upon “all States to work together to achieve the total elimination of anti-personnel landmines throughout the world”.¹⁷¹

137. In a resolution adopted in 1994 on respect for IHL and support for humanitarian action in armed conflicts, the OAU Council of Ministers invited “all States that have not yet become party to the ... [1980] CCW, to consider, or reconsider, without delay the possibility of doing so in the near future”.¹⁷²

138. In a resolution adopted in 1995 on the 1980 CCW and problems posed by the proliferation of anti-personnel mines in Africa, the OAU Council of Ministers stated that it was concerned by the indiscriminate use of landmines worldwide, and especially in Africa. It urged all members “to defend an African common position ... particularly: (i) the total ban on the manufacture and use of mines”.¹⁷³

139. In a resolution adopted in 1996 on the revision of the 1980 CCW and the problems posed by the proliferation of anti-personnel mines in Africa, the OAU Council of Ministers noted that Africa had the largest presence of landmines of all continents. It therefore called upon African sub-regional organisations to take initiatives to ban landmines.¹⁷⁴

140. In a resolution adopted in 1996 on international humanitarian law, water and armed conflict in Africa, the OAU Council of Ministers reaffirmed Africa’s common position supporting a total ban on anti-personnel landmines.¹⁷⁵

141. In 1997, in a decision based on the report of the OAU Secretary-General on the issue of anti-personnel mines and the efforts undertaken at the international level to achieve a global prohibition, the OAU Council of Ministers urged its members to participate fully and actively in the Ottawa process in order to sign a treaty completely banning landmines.¹⁷⁶

142. In the recommendations of the second OAU/ICRC seminar on IHL for diplomats accredited to the OAU held in 1995, the participants expressed “their deep concern about the scourge of mines and their generalised and indiscriminate use and the attendant harmful consequences”. They recommended the “establishment and adoption within that perspective, of an African common position on the following issues: a total ban of the manufacture and use of

¹⁷⁰ EU, Statement at the First Annual Conference of High Contracting Parties to Amended Protocol II to the CCW, Geneva, 15 December 1999.

¹⁷¹ EU, Statement by France on behalf of the EU before the First Committee of the UN General Assembly, UN Doc. A/C.1/55/PV.3, 2 October 2000, p. 18.

¹⁷² OAU, Council of Ministers, Res. 1526 (LX), 6–11 June 1994, § 6.

¹⁷³ OAU, Council of Ministers, Res. 1593 (LXII), 21–23 June 1995, preamble and § 4.

¹⁷⁴ OAU, Council of Ministers, Res. 1628 (LXIII), 26–28 February 1996, § 10.

¹⁷⁵ OAU, Council of Ministers, Res. 1662 (LXIV), 1–5 July 1996, § 7.

¹⁷⁶ OAU, Council of Ministers, Dec. 363 (LXVI), 28–31 May 1997, § g.

mines; the extension of the scope of implementation of the 1980 Convention to non-international armed conflict".¹⁷⁷

143. In the recommendations of the third OAU/ICRC seminar on IHL for diplomats accredited to the OAU held in 1996, the participants reaffirmed "the African common position on the total ban on anti-personnel mines as contained in Resolution CM/Res. 1628 (LXIII)" and deplored "the mixed outcome" of the 1996 CCW Review Conference. They stressed "the necessity to adopt purposeful measures at both national and regional levels to ensure a total ban on anti-personnel mines".¹⁷⁸

144. In the recommendations of the fourth OAU/ICRC seminar on IHL for diplomats accredited to the OAU held in 1997, the participants stated that they "appreciated the efforts made by the ICRC and the OAU for the total elimination of anti-personnel mines, that is, the total ban on their production, transfer, stockpiling". They further expressed their support for "the Ottawa process aimed at the conclusion of a Treaty on the total ban on mines in December 1997 and called upon the African countries to contribute fully to it".¹⁷⁹

145. In 1997, the OAU Secretary-General reported that the government of Mozambique, during the Fourth International Conference of NGOs on Land Mines, held in Maputo in February 1997, had announced its decision to prohibit, with immediate effect, the production, marketing, utilisation and unauthorised transportation of anti-personnel mines. The Secretary-General further noted that:

This announcement, which came after the decision made by South Africa on 19th of February to prohibit the utilization, development, production and storage of mines, was warmly welcomed by the participants. The meeting also commended the OAU for the resolutions it adopted and, through which, it unanimously stood for a total ban on mines. . . . At the end of the meeting, the participants adopted a declaration calling upon all governments to proceed resolutely with the signing of the [Ottawa] Treaty.¹⁸⁰

146. In April 1998, in a report on the OAU and Rappane's Continental Conference on Children in Situations of Armed Conflict, the OAU Secretary-General stated that member States should give their full support to the 1997 Ottawa Convention and that "the use of landmines by persons involved in armed conflict, whether by rebel forces or any other group, should be condemned and the perpetrators treated as the authors of crimes against humanity and punished in accordance with the law in force".¹⁸¹

¹⁷⁷ OAU/ICRC, Second seminar on IHL, Addis Ababa, 11–12 April 1995, Recommendations, § 3(c).

¹⁷⁸ OAU/ICRC, Third seminar on IHL, Addis Ababa, 2–3 May 1996, Recommendations, § 3.2.

¹⁷⁹ OAU/ICRC, Fourth seminar on IHL, Addis Ababa, 29–30 April 1997, Recommendations, § 7.

¹⁸⁰ OAU, Council of Ministers, Harare, 26–30 May 1997, Report of the Secretary-General on the activities of the General Secretary covering the period February–May 1997, Doc. CM/2000 (LXVI) Part I, p. 31–32, §§ 106 and 107.

¹⁸¹ OAU, Labour and Social Affairs Commission, Secretary-General's Report on the OAU and Rappane's Continental Conference on Children in Situations of Armed Conflict, 13–18 April 1998, 21st Ordinary Session, Pretoria, Doc. LSC/3(b) (XXI), p. 10.

147. In an introductory note to the proceedings of the OAU Conference of Heads of State and Government and the Council of Ministers held in Burkina Faso in June 1998, the OAU Secretary-General wrote that the Council of Ministers "invites its members to sign and ratify the Ottawa treaty".¹⁸²

148. In two resolutions adopted in 1994 and 1996 on respect for IHL, the OAS General Assembly urged member States to accede to the 1980 CCW.¹⁸³

149. In a resolution adopted in 1995 on respect for international humanitarian law, the OAS General Assembly urged all member States to take part in the Review Conference of States Parties to the CCW "with a view to promoting, in such countries as consider doing so desirable, the eventual prohibition of anti-personnel mines".¹⁸⁴

150. In a resolution adopted in 1996, the OAS General Assembly set as its goal "the global elimination of anti-personnel landmines and conversion of the Western Hemisphere into an antipersonnel-landmine-free zone". It also encouraged member States to adopt, as a preliminary step towards a complete ban, domestic legislation to prohibit private possession and transfer of landmines.¹⁸⁵

151. In a resolution adopted in 1998, the OAS General Assembly reaffirmed its goal "of the global elimination of antipersonnel land mines and the conversion of the Western Hemisphere into an antipersonnel-landmine-free zone". It urged "member States that have not yet signed or ratified the Ottawa Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel Mines and on their Destruction to consider doing so as soon as possible to ensure its earliest possible entry to force".¹⁸⁶

152. In two resolutions on the elimination of anti-personnel mines and mine-clearing operations adopted in 1995 and 1996 respectively, the OIC expressed its "deep concern over the consequences of the use of anti-personnel mines on the security of civilian populations and their economic development". It asked "OIC member states to take part in the efforts aimed at adopting effective measures to put an end to the indiscriminate use of anti-personnel mines, for their complete elimination".¹⁸⁷

International Conferences

153. In a resolution adopted in 1995 on challenges posed by calamities arising from armed conflicts, the 93rd Inter-Parliamentary Conference called on States

¹⁸² OAU, Secretary-General, Introductory remarks, Conference of Heads of State and Government, 34th Ordinary Session, Ouagadougou, 1–10 June 1998, p. 36.

¹⁸³ OAS, General Assembly, Res. 1270 (XXIV-O/94), 10 June 1994, § 1; Res. 1408 (XXVI-O/96), 7 June 1996, § 1.

¹⁸⁴ OAS, General Assembly, Res. 1335 (XXV-O/95), 9 June 1995, § 1.

¹⁸⁵ OAS, General Assembly, Res. 1411 (XXVI-O/96), 7 June 1996, §§ 1 and 5.

¹⁸⁶ OAS, General Assembly, Res. 1569 (XXVIII-O/98), 2 June 1998, §§ 1 and 6.

¹⁸⁷ OIC, Conference of Ministers of Foreign Affairs, Res. 36/23-P, 9–12 December 1995; Res. 27/24-P, 9–13 December 1996; see also Res. 28/25-P, 15–17 March 1998.

“to lay down a ban on anti-personnel mines” during the review of the 1980 CCW.¹⁸⁸

154. In a resolution adopted in 1995 on health and war, the Conference of African Ministers of Health requested member States “to decree the ban on anti-personnel mines on the review of the CCW . . . and to extend the Convention to cover all internal conflicts”.¹⁸⁹

155. During the First Session of the First Review Conference of States Parties to the CCW in November 1995, the effort to create a global ban on anti-personnel landmines was supported by “sixteen States, the UN Secretary-General, the heads of numerous UN agencies, the Council of Ministers of the Organization of African Unity, the European Parliament and Pope John Paul II”.¹⁹⁰

156. The 26th International Conference of the Red Cross and Red Crescent in 1995 adopted a resolution on the protection of the civilian population in period of armed conflict in which it took note of the fact that “the Movement and a growing number of States, international, regional and non-governmental organizations have undertaken to work urgently for the total elimination of anti-personnel landmines”. It further noted that “the ultimate goal of States is to achieve the eventual elimination of anti-personnel landmines as viable alternatives are developed that significantly reduce the risk to the civilian population”.¹⁹¹

157. In 1996, the Canadian government hosted an International Strategy Conference, held in Ottawa, entitled “Towards a Global Ban on Anti-personnel Mines”. The conference was attended by 50 pro-ban States, which became known as the Ottawa Group,¹⁹² as well as by numerous inter-governmental and non-governmental organisations. The Final Declaration of the Ottawa Conference committed all those present to work together to ensure “the earliest possible conclusion of a legally binding international agreement to ban anti-personnel mines” and for this purpose noted that a follow-on conference would be held in Brussels in 1997 “to review the progress of the international

¹⁸⁸ 93rd Inter-Parliamentary Conference, Madrid, 27 March–1 April 1999, Resolution on the International Community in the Face of the Challenges posed by Calamities Arising from Armed Conflicts and by Natural or Man-made Disasters: The Need for a Coherent and Effective Response through Political and Humanitarian Assistance Means and Mechanisms Adapted to the Situation, § 16.

¹⁸⁹ Conference of African Ministers of Health, Cairo, 26–28 April 1995, Res. 14 (V), § 3.

¹⁹⁰ ICRC, Position Paper No. 2, Landmine Negotiations: Impasse in Vienna Highlights Urgency of National and Regional Measures, November 1995, reprinted in Louis Maresca and Stuart Maslen (eds.), *The Banning of Anti-Personnel Landmines*, Cambridge University Press, Cambridge, 2000, pp. 394–398.

¹⁹¹ 26th International Conference of the Red Cross and Red Crescent, Geneva, 3–7 December 1995, Res. II, § G(b) and (c).

¹⁹² Angola, Australia, Austria, Belgium, Bolivia, Bosnia and Herzegovina, Burkina Faso, Cambodia, Cameroon, Canada, Colombia, Croatia, Denmark, Ethiopia, Finland, France, Gabon, Germany, Greece, Guatemala, Guinea, Honduras, Hungary, Iceland, Iran, Ireland, Italy, Japan, Luxembourg, Mexico, Mozambique, Netherlands, New Zealand, Nicaragua, Norway, Peru, Philippines, Poland, Portugal, Slovakia, Slovenia, South Africa, Spain, Sweden, Switzerland, Trinidad and Tobago, UK, US, Uruguay and Zimbabwe.

community in achieving a global ban on anti-personnel mines".¹⁹³ The Ottawa Conference also adopted a detailed Global Plan of Action which laid out "concrete activities to be undertaken by the international community – on an immediate and urgent basis – to build upon the Ottawa Declaration and to move this process ahead in preparation for the follow-up meeting". The Global Plan of Action stated that "building the necessary political will for a new legally-binding international agreement banning AP mines will require more nations to adopt national bans or moratoria on the production, stockpiling, use and transfer of AP mines".¹⁹⁴

158. In a resolution adopted in 1996 on a worldwide ban on anti-personnel mines and the need for mine clearance for humanitarian purposes, the 96th Inter-Parliamentary Conference called on parliamentarians "to urge their governments to ban anti-personnel mines . . . and support international efforts to achieve a binding international agreement on a global ban". It requested the UN "to strengthen its efforts to secure the elimination of anti-personnel landmines".¹⁹⁵

159. The Final Declaration of the 1997 Brussels Conference on Anti-personnel Landmines, which was signed by over 100 States, recalled UN General Assembly Resolution 51/45 S and urged the vigorous pursuit of "an effective, legally binding international agreement to ban the use, stockpiling, production and transfer of anti-personnel landmines". The Declaration also welcomed "the convening of a Diplomatic Conference by the Government of Norway in Oslo on 1 September 1997 to negotiate such an agreement".¹⁹⁶

160. The Maputo Declaration, adopted by the First Meeting of States Parties to the Ottawa Convention in 1999, reaffirmed their "unwavering commitment to the total eradication of an insidious instrument of war and terror: anti-personnel mines". The Declaration also called upon "those who continue to use, develop, produce, otherwise acquire, stockpile, retain and transfer these weapons: cease now, and join us in this task". The parties to the 1997 Ottawa Convention further declared:

In this spirit, we voice our outrage at the unabated use of anti-personnel mines in conflicts around the world. To those few signatories who continue to use these

¹⁹³ International Strategy Conference, Towards a Global Ban on Anti-personnel Mines, Ottawa, 3–5 October, Declaration, reprinted in Louis Maresca and Stuart Maslen (eds.), *The Banning of Anti-Personnel Landmines*, Cambridge University Press, Cambridge, 2000, pp. 480–481.

¹⁹⁴ International Strategy Conference, Towards a Global Ban on Anti-personnel Mines, Ottawa, 3–5 October, Global Plan of Action, reprinted in Louis Maresca and Stuart Maslen (eds.), *The Banning of Anti-Personnel Landmines*, Cambridge University Press, Cambridge, 2000, pp. 481–487.

¹⁹⁵ 96th Inter-Parliamentary Conference, Beijing, 16–20 September 1996, Resolution on a Worldwide Ban on Anti-Personnel Mines and the Need for Mine Clearance for Humanitarian Purposes, §§ 1 and 5.

¹⁹⁶ Brussels Conference on Anti-Personnel Landmines, Declaration, 27 June 1997, reprinted in Louis Maresca and Stuart Maslen (eds.), *The Banning of Anti-Personnel Landmines*, Cambridge University Press, Cambridge, 2000, pp. 545–546.

weapons, this is a violation of the object and purpose of the Convention that you solemnly signed. We call upon you to respect your commitments.¹⁹⁷

161. In a resolution adopted on the occasion of the 50th anniversary of the Geneva Conventions in 1999 on the contribution of parliaments to ensuring respect for and promoting International humanitarian law, the 102nd Inter-Parliamentary Conference stressed “the serious threat posed by the widespread use of landmines, which have brought dead to many innocent civilians and hindered the return of refugees, the provision of infrastructure and reconstruction in the affected areas long after hostilities have ended”. It therefore stated that it:

10. Also calls on States to accede to or ratify the Ottawa Convention on Anti-Personal Mines, if they have not done so;
- ...
12. Calls on States to assist, at the international level, in efforts to eliminate the use of landmines, and to monitor compliance with the provisions of the Ottawa Convention;
- ...
14. Condemns those States and non-State actors that produce, use or export these obnoxious weapons in defiance of the Ottawa Convention;
15. Urges States that produce or use this pernicious weapons, to cease production immediately.¹⁹⁸

162. The Declaration adopted by the Second Meeting of States Parties to the Ottawa Convention in 2000 stated that:

5. We deplore the continued use of anti-personnel mines. Such acts are contrary to the aims of the Convention and exacerbate the humanitarian problems already caused by the use of these weapons. We call upon all those who continue to use anti-personnel mines, as well as those who develop, produce, otherwise acquire, stockpile, retain and transfer these weapons, to cease now and to join us in the task of eradicating these weapons.
6. We implore those States that have declared their commitment to the object and purpose of the Convention and that continue to use anti-personnel mines to recognize that this is a clear violation of their solemn commitment. We call upon all States concerned to respect their commitments.¹⁹⁹

163. In the Final Declaration of the Second Review Conference of States Parties to the CCW in 2001, the participants expressed:

their conviction that all States should strive towards the goal of the eventual elimination of anti-personnel mines globally and in this regard [noted] that a significant

¹⁹⁷ First Meeting of States Parties to the Ottawa Convention, Maputo, 3–7 May 1999, Declaration, UN Doc. APLC/MSP.1/1999/1, 20 May 1999, §§ 1, 6 and 11, see also § 3.

¹⁹⁸ 102nd Inter-Parliamentary Conference, Berlin, 10–15 October 1999, Resolution on the contribution of parliaments to ensuring respect for and promoting international humanitarian law on the occasion of the 50th anniversary of the Geneva Conventions, preamble and §§ 10, 12, 14 and 15.

¹⁹⁹ Second Meeting of States Parties to the Ottawa Convention, Geneva, 11–15 September 2000, Declaration, UN Doc. APLC/MSP.2/2000/L.8, 13 September 2000, p. 12, §§ 5–6.

number of States Parties have formally committed themselves to a prohibition of the use, stockpiling, production and transfer of anti-personnel mines and on their destruction.²⁰⁰

The following 65 States participated in the conference as parties to the 1980 CCW: Argentina, Australia, Austria, Bangladesh, Belarus, Belgium, Benin, Bolivia, Bosnia and Herzegovina, Brazil, Bulgaria, Canada, China, Colombia, Croatia, Cuba, Cyprus, Czech Republic, Denmark, Estonia, Finland, France, Germany, Greece, Guatemala, Holy See, Hungary, India, Ireland, Israel, Italy, Japan, Jordan, South Korea, Latvia, Liechtenstein, Lithuania, Luxembourg, Malta, Mauritius, Mexico, Monaco, Mongolia, Netherlands, New Zealand, Norway, Pakistan, Peru, Philippines, Poland, Portugal, Romania, Russian Federation, Senegal, Slovakia, Slovenia, South Africa, Spain, Sweden, Switzerland, Tunisia, Ukraine, UK, US and SFRY (FRY); the following four States participated as Signatory States: Egypt, Morocco, Turkey and Vietnam; the following 18 States not parties to the 1980 CCW participated as observers: Albania, Armenia, Bahrain, Chile, Eritrea, Honduras, Iran, Kuwait, Libya, Oman, Saudi Arabia, Singapore, Sri Lanka, Tanzania, Thailand, Tonga, Venezuela and Yemen.²⁰¹

164. The Final Declaration of the African Parliamentary Conference on International Humanitarian Law for the Protection of Civilians during Armed Conflict in 2002 emphasised that the participants were “worried in the face of the rapid expansion of arms trade and the uncontrolled proliferation of weapons, notably those which can have indiscriminate effects or cause unnecessary suffering, like antipersonnel mines”.²⁰²

IV. Practice of International Judicial and Quasi-judicial Bodies

165. In its Final Report to the ICTY Prosecutor in 2000, the Committee Established to Review the NATO Bombing Campaign Against the Federal Republic of Yugoslavia stated that “whether antipersonnel landmines are prohibited under current customary law is debatable, although there is a strong trend in that direction”.²⁰³

166. In a resolution on anti-personnel mines adopted in 1995, the ACiHPR urged African States to “participate in large numbers in the 1996 CCW Review Conference to press for the introduction of a clause on the prohibition or restriction of the use of mines in that Convention”.²⁰⁴

²⁰⁰ Second Review Conference of States Parties to the CCW, Geneva, 11–21 December 2001, Final Declaration, UN Doc. CCW/CONF.II/2, 25 January 2002, p. 11.

²⁰¹ Second Review Conference of States Parties to the CCW, Geneva, 11–21 December 2001, UN Doc. CCW/CONF.II/2, Final Document, §§ 20–22.

²⁰² African Parliamentary Conference on International Humanitarian Law for the Protection of Civilians during Armed Conflict, Niamey, 18–20 February 2002, Final Declaration, preamble.

²⁰³ ICTY, Final Report to the Prosecutor by the Committee Established to Review the NATO Bombing Campaign Against the Federal Republic of Yugoslavia, The Hague, 14 June 2000, § 27.

²⁰⁴ ACiHPR, Res. 4 (XVII), 13–22 March 1995, §§ 1 and 2.

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

167. In 1993, in a publication entitled "Mines: A Perverse Use of Technology", the ICRC condemned the indiscriminate use of anti-personnel mines. The foreword by the ICRC President urged "all States, humanitarian organizations and peoples of the world... to unite their energies to eradicate this scourge".²⁰⁵

168. In February 1994, prior to the First Preparatory Meeting of a group of governmental experts for the Review Conference of the CCW, the ICRC President stated that "from a humanitarian point of view, we believe that a world-wide ban on anti-personnel mines is the only, truly effective solution".²⁰⁶

169. In May 1994, at the Second Session of the Meeting of Governmental Experts prior to the CCW Review Conference, the ICRC presented several alternative proposals on landmines. The ICRC described its proposal calling for a prohibition on the use, manufacture, stockpiling or transfer of anti-personnel mines as the way to "most effectively deal with the problems caused by landmines".²⁰⁷

170. In 1994, in a statement before the First Committee of the UN General Assembly, the ICRC declared that it was "firmly of the opinion that the only really effective measure is to ban the use and production of anti-personnel landmines".²⁰⁸

171. In 1995, in a position paper released following the final meeting of the group of governmental experts that proposed amendments for the First Session of the CCW Review Conference, the ICRC expressed its conviction that the "only clear and effective means of ending the suffering inflicted on civilians by anti-personnel landmines is their total prohibition".²⁰⁹

172. At the UN International Meeting on Mine Clearance in 1995, the ICRC President stated that "it is essential that the forthcoming Vienna Review Conference of the 1980 UN Convention on Certain Conventional Weapons reaches

²⁰⁵ ICRC, *Mines: A Perverse Use of Technology*, Geneva, 1993, extracts reprinted in Louis Maresca and Stuart Maslen (eds.), *The Banning of Anti-Personnel Landmines*, Cambridge University Press, Cambridge, 2000, pp. 257–263.

²⁰⁶ ICRC, Statement by the President, A Total Ban on Anti-personnel Mines and Blinding Weapons is the Best Option, Geneva, 24 February 1994, reprinted in Louis Maresca and Stuart Maslen (eds.), *The Banning of Anti-Personnel Landmines*, Cambridge University Press, Cambridge, 2000, pp. 264–265.

²⁰⁷ ICRC, Proposals on Prohibitions and Restrictions submitted to the Meeting of Governmental Experts to Prepare the First Review Conference of the CCW (Second Session), UN Doc. CCW/CONF.I/GE/CRP.24, 27 May 1994, reprinted in Louis Maresca and Stuart Maslen (eds.), *The Banning of Anti-Personnel Landmines*, Cambridge University Press, Cambridge, 2000, pp. 322–324.

²⁰⁸ ICRC, Statement before the First Committee of the UN General Assembly, UN Doc. A/C.1/49/PV.10, 24 October 1994, p.11.

²⁰⁹ ICRC, Position Paper No. 1, Landmines and Blinding Weapons: From Expert Group to the Review Conference, February 1995, reprinted in Louis Maresca and Stuart Maslen (eds.), *The Banning of Anti-Personnel Landmines*, Cambridge University Press, Cambridge, 2000, pp. 328–331.

the goal, endorsed by the 49th UN General Assembly, of the elimination of anti-personnel mines".²¹⁰

173. In 1995, in a statement before the First Committee of the UN General Assembly, the ICRC expressed its disappointment at the failure of the First Review Conference of States Parties to the CCW to reach agreement on a strengthened Protocol II and appealed to States "to evaluate whether measures short of a total ban on anti-personnel landmines will in fact put a stop to the present situation".²¹¹

174. In 1995, in a position paper on landmines, the ICRC reiterated its earlier position stating that it remained convinced that "the only effective means of ending the scourge of anti-personnel landmines is to entirely prohibit their production, transfer and use".²¹²

175. In November 1995, the ICRC, together with National Red Cross and Red Crescent Societies, launched an international media campaign calling for a ban on anti-personnel landmines under the slogan "Landmines must be stopped".²¹³

176. At its Geneva Session in 1995, the Council of Delegates adopted a resolution on anti-personnel landmines in which it expressed its "great concern about the indiscriminate effects of anti-personnel landmines and the consequences for civilian populations and humanitarian action" and urged all components of the Movement "to work for a total ban on anti-personnel landmines".²¹⁴

177. At the Second Session of the First Review Conference of States Parties to the CCW in 1996, the ICRC stated that "only a total ban on anti-personnel landmines can solve the problem".²¹⁵

178. In a press release issued at the end of the Second Session of the First Review Conference of States Parties to the CCW in May 1996, the ICRC described the 1996 Amended Protocol II to the CCW as "woefully inadequate" in its

²¹⁰ ICRC, Statement by the President at the UN International Meeting on Mine Clearance, Geneva, 6 July 1995, reprinted in Louis Maresca and Stuart Maslen (eds.), *The Banning of Anti-Personnel Landmines*, Cambridge University Press, Cambridge, 2000, pp. 349–351.

²¹¹ ICRC, Statement before the First Committee of the UN General Assembly, UN Doc. A/C.1/50/PV.11, 26 October 1995, pp. 25–26.

²¹² ICRC, Position Paper No. 2, Landmine Negotiations: Impasse in Vienna Highlights Urgency of National and Regional Measures, November 1995, reprinted in Louis Maresca and Stuart Maslen (eds.), *The Banning of Anti-Personnel Landmines*, Cambridge University Press, Cambridge, 2000, pp. 394–398.

²¹³ ICRC, Statement by the President at the Launch of the International Media Campaign against Anti-personnel Landmines by the ICRC and National Red Cross and Red Crescent Societies, Geneva, 22 November 1995, reprinted in Louis Maresca and Stuart Maslen (eds.), *The Banning of Anti-Personnel Landmines*, Cambridge University Press, Cambridge, 2000, pp. 404–406.

²¹⁴ International Red Cross and Red Crescent Movement, Council of Delegates, Geneva Session, 1–2 December 1995, Res. 10, §§ 1 and 2.

²¹⁵ ICRC, Statement at the First Review Conference of States Parties to the CCW (Second Session), Geneva, January 1996, reprinted in Louis Maresca and Stuart Maslen (eds.), *The Banning of Anti-Personnel Landmines*, Cambridge University Press, Cambridge, 2000, pp. 411–414.

limitations on the use of anti-personnel mines and called for “ongoing work towards a total ban” to be undertaken at national and regional levels.²¹⁶

179. At the International Strategy Conference Towards a Global Ban on Anti-Personnel Mines in 1996, the ICRC President stated that “anti-personnel mines must not only be outlawed, but their use must also be stigmatized, so that whatever their understanding of the law combatants will choose not to use them because they are considered abhorrent to the societies in which they operate”.²¹⁷

180. In 1996, in the First Committee of the UN General Assembly, the ICRC welcomed the establishment of the Ottawa Group and the Canadian initiative to invite foreign ministers to Ottawa to sign a mine ban treaty in December 1997. The ICRC stated that it would promote adherence to the 1996 Amended Protocol II to the CCW, but urged States “to go far beyond the provisions of the Protocol and to renounce the production, transfer and use of anti-personnel mines”. The ICRC also called for the UN General Assembly to adopt a strong resolution unequivocally supporting “a global ban on, and the elimination of, anti-personnel mines”.²¹⁸

181. At its Seville Session in 1997, the Council of Delegates adopted a resolution on peace, international humanitarian law and human rights in which it urgently called upon National Societies to promote the signing by their governments of the 1997 Ottawa Convention, “to work for the earliest possible ratification of this treaty to ensure its rapid entry into force, and to encourage their governments to take all appropriate additional means to achieve the total elimination of all anti-personnel mines”.²¹⁹

182. In a statement at the First Meeting of States Parties to the Ottawa Convention in 1999, the ICRC voiced its “concern about the reports of new use of landmines in some countries. There is clearly a need for a collective response from States Parties on this issue. This concern is particularly acute when such use involves a signatory State.” The ICRC urged “the conference to send a clear message that anti-personnel mines are no longer an acceptable weapon of warfare and to remind any signatory State using them that such use is contrary to the spirit and purpose of the Ottawa treaty”.²²⁰

²¹⁶ ICRC, Statement at the First Review Conference of States Parties to the CCW (Second Session), ICRC Views Amended Landmine Protocol as “Woefully Inadequate”, Geneva, 3 May 1996, reprinted in Louis Maresca and Stuart Maslen (eds.), *The Banning of Anti-Personnel Landmines*, Cambridge University Press, Cambridge, 2000, pp. 448–449.

²¹⁷ ICRC, Statement by the President at the International Strategy Conference Towards a Global Ban on Anti-Personnel Mines, Ottawa, 3–5 October 1996, reprinted in Louis Maresca and Stuart Maslen (eds.), *The Banning of Anti-Personnel Landmines*, Cambridge University Press, Cambridge, 2000, pp. 474–479.

²¹⁸ ICRC, Statement before the First Committee of the UN General Assembly, UN Doc. A/C.1/51/PV.8, 18 October 1996, p. 9.

²¹⁹ International Red Cross and Red Crescent Movement, Council of Delegates, Seville Session, 25–27 November 1997, Res. 8, Section 3, § 1.

²²⁰ ICRC, Statement by the Vice President at the First Meeting of States Parties to the Ottawa Convention, Maputo, 3–7 May 1999.

183. At its Geneva Session in 1999, the Council of Delegates adopted a resolution in which it approved the Movement's Strategy on Landmines, one of the core elements of which was to "achieve universal adherence to and effective implementation of the norms established by the Ottawa Convention and amended Protocol II to the 1980 Convention on Certain Conventional Weapons".²²¹

VI. Other Practice

184. In 1993, an armed opposition group stated that it had never used landmines.²²²

185. In the Final Declaration of the ICRC Regional Seminar for Asian Military and Strategic Studies Experts in 1997, the participants called upon States of the Asian region to consider the following urgent measures, especially:

1. The adoption of national prohibitions on the production, stockpiling, transfer and use of anti-personnel mines . . .
5. The rapid adoption of a regional agreement to prohibit remotely delivered anti-personnel mines in Asia so as to prevent an escalation of mine warfare in the region and even higher levels of civilian casualties
6. Participation in upcoming negotiations aimed at the conclusion of a new treaty comprehensively prohibiting anti-personnel landmines by the end of 1997.

The participants further appealed to the international community:

1. To pursue as a matter of urgency the prohibition and elimination of anti-personnel mines . . .
3. To recognise that the use of anti-personnel landmines in internal armed conflicts, either by State or non-State actors, should not be condoned
4. To explore how non-State actors involved in internal armed conflicts can be encouraged to end the use of anti-personnel mines.²²³

186. In its statement to the First Meeting of States Parties to the Ottawa Convention in 1999, the ICBL noted the use of mines in 13 conflicts and allegations of such use in 5 other conflicts during the period December 1997–May 1999.²²⁴

187. The ICBL's *Landmine Monitor Report 1999* noted that while there was no evidence of anti-personnel landmine use by any of the States parties to the 1997 Ottawa Convention, there was evidence to suggest that mines had been used in 13 conflicts during the period December 1997–March 1999 and there were allegations of such use in five other conflicts in the same period. According to

²²¹ International Red Cross and Red Crescent Movement, Council of Delegates, Geneva Session, 29–30 October 1999, Res. 10, § 1.

²²² ICRC archive document.

²²³ ICRC Regional Seminar for Asian Military and Strategic Studies Experts, Manila, 20–23 July 1997, Final Declaration, Anti-personnel Mines: What Future for Asia?, p. 3–4.

²²⁴ ICBL, Statement at the First Meeting of States Parties to the Ottawa Convention, Maputo, 3–7 May 1999.

the report, there was alleged new use of anti-personnel mines by government forces in this period in: Angola, Burma, DRC, Eritrea, Guinea-Bissau, Senegal, Sri Lanka, Sudan, Turkey and FRY.²²⁵

188. In presenting the *Landmine Monitor Report* at the First Meeting of States Parties to the Ottawa Convention in 1999, the ICBL highlighted the use of anti-personnel mines by three States signatory to the 1997 Ottawa Convention:

Angola's continued use has been properly noted and criticised by many yesterday and today. Guinea-Bissau also used mines in its internal conflict in 1998, and it is likely that the forces of Senegal used mines as well in that conflict. . . Yugoslavia has rightly been criticised for recent mine use, but non-signatories and non-state actors are still using mines on a near daily basis in places such as Burma and Sri Lanka, and on occasion in such rarely noticed places as Djibouti.²²⁶

189. At the Second Meeting of States Parties to the Ottawa Convention in 2000, the ICBL delivered a statement in which it urged pro-ban governments "not only to criticise and stigmatise mine users consistently, but also to take concrete steps to penalise them, diplomatically or otherwise – while taking care not to penalise civilians living in mined areas". In the same statement, while noting the overall decrease in anti-personnel mine use throughout the world, the ICBL highlighted the "disturbing" use of mines by Ottawa Convention signatories Angola, Burundi and Sudan and stated that even though these countries have yet to ratify the treaty "they are in violation of international law because they engage in activities that defeat the object and purpose of the treaty that they have signed".²²⁷

190. The ICBL's *Landmine Monitor Report 2000* identified 11 governments and dozens of armed opposition groups that had used mines since the 1997 Ottawa Convention entered into force in March 1999. Non-State actors named in the report as having used anti-personnel mines between 1999 and 2000 were identified in the following regions: Angola, Afghanistan, Chechnya, Colombia, DRC, Georgia, northern Iraq, Kashmir, southern Lebanon, Nepal, Philippines, Senegal, Somalia, Sri Lanka, Sudan, Turkey and Uganda.²²⁸

B. Restrictions on the Use of Landmines

I. Treaties and Other Instruments

Treaties

191. Article 2(1) of the 1980 Protocol II to the CCW defines a mine "any munition placed under, on or near the ground or other surface area and designed

²²⁵ ICBL, *Landmine Monitor Report 1999*, 1999, Executive Summary, p. 5.

²²⁶ ICBL, *Landmine Monitor Report 2000*, August 2000, Executive Summary, pp. 7–9.

²²⁷ ICBL, Statement at the Second Meeting of States Parties to the Ottawa Convention, Geneva, 11–15 September 2000.

²²⁸ ICBL, *Landmine Monitor Report 2000*, August 2000, pp. 4–6.

to be detonated or exploded by the presence, proximity or contact of a person or vehicle”.

192. Article 3(4) of the 1980 Protocol II to the CCW and Article 3(10) of the 1996 Amended Protocol II to the CCW require parties to take “all feasible precautions” to protect civilians from mines. “Feasible precautions” are defined in both the original and amended protocol as “those precautions which are practicable or practically possible taking into account all circumstances ruling at the time, including humanitarian and military considerations”. Amended Protocol II lists these circumstances as including, but not being limited to:

- (a) the short- and long-term effect of mines upon the local civilian population for the duration of the minefield;
- (b) possible measures to protect civilians (for example, fencing, signs, warning and monitoring);
- (c) the availability and feasibility of using alternatives; and
- (d) the short- and long-term military requirements for a minefield.

193. Article 3(2) of the 1980 Protocol II to the CCW and Article 3(7) of the 1996 Amended Protocol II to the CCW prohibit the use of mines against the civilian population by way of reprisal.

194. Articles 4 and 5 of the 1980 Protocol II to the CCW provide that:

Article 4

1. This Article applies to:
 - (a) mines other than remotely delivered mines;
 - ...
2. It is prohibited to use weapons to which this Article applies in any city, town, village or other area containing a similar concentration of civilians in which combat between ground forces is not taking place or does not appear to be imminent, unless either:
 - (a) they are placed on or in the close vicinity of a military objective belonging to or under the control of an adverse party; or
 - (b) measures are taken to protect civilians from their effects, for example, the posting of warning signs, the posting of sentries, the issue of warnings or the provision of fences.

Article 5

1. The use of remotely delivered mines is prohibited unless such mines are only used within an area which is itself a military objective or which contains military objectives, and unless:
 - (a) their location can be accurately recorded in accordance with Article 7(1)(a); or
 - (b) an effective neutralizing mechanism is used on each such mine, that is to say, a self-actuating mechanism which is designed to render a mine harmless or cause it to destroy itself when it is anticipated that the mine will no longer serve the military purpose for which it was placed in position, or a remotely-controlled mechanism which is designed to render harmless or destroy a mine when the mine no longer serves the military purpose for which it was placed in position.

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

195. Upon signature of the 1980 CCW, China stated that:

The Protocol [to the CCW] on Prohibitions or Restrictions on the Use of Mines, Booby Traps and Other Devices fails to lay down strict restrictions on the use of such weapons by the aggressor on the territory of his victim and to provide adequately for the right of a state victim of an aggressor to defend itself by all necessary means.²²⁹

196. Upon ratification of the 1980 CCW, France stated that:

With reference to the scope of application defined in article 1 of the Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons, . . . it will apply the provisions of the Convention and its three Protocols [I, II and III] to all armed conflicts referred to in articles 2 and 3 common to the Geneva Conventions of 12 August 1949 [international and non-international armed conflicts].²³⁰

197. Upon accession to the 1980 CCW, the Holy See declared that:

The Holy See . . . reiterates the objective hoped for by many parties: an agreement that would totally ban anti-personnel mines, the effects of which are tragically well-known.

In this regard, the Holy See considers that the modifications made so far in the second Protocol are insufficient and inadequate. It wishes, by means of its own accession to the Convention, to offer support to every effort aimed at effectively banning anti-personnel mines . . .²³¹

198. Upon accession to the 1980 CCW, Israel stated that:

With reference to the scope of application defined in article 1 of the [1980 CCW], the Government of the State of Israel will apply the provisions of the Convention and those annexed Protocols to which Israel has agreed [I, II and III] to become bound to all armed conflicts involving regular forces of States referred to in article 2 common to the Geneva Conventions of 12 August 1949, as well as to all armed conflicts referred to in article 3 common to the Geneva Conventions of 12 August 1949.²³²

199. Upon ratification of the 1980 CCW, the US declared that:

With reference to the scope of application defined in article 1 of the Convention, . . . the United States will apply the provisions of the Convention, Protocol I,

²²⁹ China, Declaration made upon signature of the CCW, 14 September 1981, § 3.

²³⁰ France, Reservations made upon ratification of the CCW, 4 March 1988.

²³¹ Holy See, Declaration made upon accession to the CCW, 22 July 1997.

²³² Israel, Declarations and statements of understanding made upon accession to the CCW, 22 March 1995, § a.

and Protocol II to all armed conflicts referred to in articles 2 and 3 common to the Geneva Conventions for the Protection of War Victims of August 12, 1949 [international and non-international armed conflicts].²³³

200. Article 1(2) of the 1996 Amended Protocol II to the CCW provides that:

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

201. Article 2 of the 1996 Amended Protocol II to the CCW contains the following definitions:

For the purpose of this Protocol:

1. "Mine" means a munition placed under, on or near the ground or other surface area and designed to be exploded by the presence, proximity or contact of a person or vehicle.
- ...
3. "anti-personnel mine" means a mine primarily designed to be exploded by the presence, proximity or contact of a person and that will incapacitate, injure or kill one or more persons.

202. Article 3(11) of the 1996 Amended Protocol II to the CCW provides that "effective advance warning shall be given of any emplacement of mines... which may affect the civilian population, unless circumstances do not permit".

203. Articles 5 and 6 of the 1996 Amended Protocol II to the CCW provide that:

Article 5

1. This Article applies to anti-personnel mines other than remotely-delivered mines.
2. It is prohibited to use weapons to which this Article applies which are not in compliance with the provisions on self-destruction and self-deactivation in the Technical Annex, unless:
 - (a) such weapons are placed within a perimeter-marked area which is monitored by military personnel and protected by fencing or other means, to ensure the effective exclusion of civilians from the area. The marking must be of a distinct and durable character and must at least be visible to a person who is about to enter the perimeter-marked area; and
 - (b) such weapons are cleared before the area is abandoned, unless the area is turned over to the forces of another State which accept responsibility for the maintenance of the protections required by this Article and the subsequent clearance of those weapons.

²³³ US, Declaration made upon ratification of the CCW, 24 March 1995.

3. A party to a conflict is relieved from further compliance with the provisions of sub-paragraphs 2 (a) and 2 (b) of this Article only if such compliance is not feasible due to forcible loss of control of the area as a result of enemy military action, including situations where direct enemy military action makes it impossible to comply. If that party regains control of the area, it shall resume compliance with the provisions of sub-paragraphs 2 (a) and 2 (b) of this Article.
4. If the forces of a party to a conflict gain control of an area in which weapons to which this Article applies have been laid, such forces shall, to the maximum extent feasible, maintain and, if necessary, establish the protections required by this Article until such weapons have been cleared.
5. All feasible measures shall be taken to prevent the unauthorized removal, defacement, destruction or concealment of any device, system or material used to establish the perimeter of a perimeter-marked area.
6. Weapons to which this Article applies which propel fragments in a horizontal arc of less than 90 degrees and which are placed on or above the ground may be used without the measures provided for in sub-paragraph 2 (a) of this Article for a maximum period of 72 hours, if:
 - (a) they are located in immediate proximity to the military unit that emplaced them; and
 - (b) the area is monitored by military personnel to ensure the effective exclusion of civilians.

Article 6

1. It is prohibited to use remotely-delivered mines unless they are recorded in accordance with sub-paragraph I (b) of the Technical Annex.
2. It is prohibited to use remotely-delivered anti-personnel mines which are not in compliance with the provisions on self-destruction and self-deactivation in the Technical Annex.
3. It is prohibited to use remotely-delivered mines other than anti-personnel mines, unless, to the extent feasible, they are equipped with an effective self-destruction or self-neutralization mechanism and have a back-up self-deactivation feature, which is designed so that the mine will no longer function as a mine when the mine no longer serves the military purpose for which it was placed in position.
4. Effective advance warning shall be given of any delivery or dropping of remotely-delivered mines which may affect the civilian population, unless circumstances do not permit.

204. Upon acceptance of the 1996 Amended Protocol II to the CCW, Austria, Denmark, Finland, France, Germany, Ireland, South Africa and Sweden stated that:

The provisions of the amended Protocol which by their contents or nature may be applied also in peacetime, shall be observed at all times . . .

It is the understanding of [the State in question] that the word "primarily" is included in article 2, paragraph 3 of the amended Protocol to clarify that mines designed to be detonated by the presence, proximity or contact of a vehicle as opposed to a person, that are equipped with anti-handling devices are not considered anti-personnel mines as a result of being so equipped.²³⁴

²³⁴ Austria, Declaration made upon acceptance of Amended Protocol II to the CCW, 27 July 1998; Denmark, Declaration made upon acceptance of Amended Protocol II to the CCW, 30 April

205. Upon acceptance of the 1996 Amended Protocol II to the CCW, Belgium stated that:

It is the understanding of the Government of the Kingdom of Belgium that the provisions of Protocol II as amended which by their contents or nature may be applied also in peacetime, shall be observed at all times.

...

It is the understanding of the Government of the Kingdom of Belgium that the word "primarily" is included in article 2, paragraph 3 of amended Protocol II to clarify that mines designed to be detonated by the presence, proximity or contact of a vehicle as opposed to a person, that are equipped with anti-handling devices, are not considered anti-personnel mines as a result of being so equipped.²³⁵

206. Upon acceptance of the 1996 Amended Protocol II to the CCW, Canada made the following reservation: "Canada reserves the right to transfer and use a small number of mines prohibited under this Protocol to be used exclusively for training and testing purposes. Canada will ensure that the number of such mines shall not exceed that absolutely necessary for such purposes."²³⁶ Canada also declared that:

1. It is understood that the provisions of Amended Protocol II shall, as the context requires, be observed at all times.
2. It is understood that the word "primarily" is included in Article 2, paragraph 3 of Amended Protocol II to clarify that mines designed to be detonated by the presence, proximity or contact of a vehicle as opposed to a person, that are equipped with anti-handling devices, are not considered anti-personnel mines as a result of being so equipped.
3. It is understood that the maintenance of a minefield referred to in Article 10, in accordance with the standards on marking, monitoring and protection by fencing or other means set out in Amended Protocol II, would not be considered as a use of the mines contained therein.²³⁷

207. Upon acceptance of the 1996 Amended Protocol II to the CCW, China declared that:

[T]he word "primarily" is included in article 2, paragraph 3 of the amended Protocol to clarify that mines designed to be detonated by the presence, proximity or contact of a vehicle as opposed to a person, that are equipped with anti-handling devices are not considered anti-personnel mines as a result of being so equipped.²³⁸

1997; Finland, Declaration made upon acceptance of Amended Protocol II to the CCW, 3 April 1998; France, Declarations made upon acceptance of Amended Protocol II to the CCW, 23 July 1998; Germany, Declarations made upon acceptance of Amended Protocol II to the CCW, 2 May 1997; Ireland, Declaration made upon acceptance of Amended Protocol II to the CCW, 27 March 1997; South Africa, Declaration made upon acceptance of Amended Protocol II to the CCW, 26 June 1998; Sweden, Declaration made upon acceptance of Amended Protocol II to the CCW, 16 July 1997.

²³⁵ Belgium, Interpretative declarations made upon acceptance of Amended Protocol II to the CCW, 10 March 1999.

²³⁶ Canada, Reservation made upon acceptance of Amended Protocol II to the CCW, 26 June 1998.

²³⁷ Canada, Statements of understanding made upon acceptance of Amended Protocol II to the CCW, 26 June 1998, §§ 1–3.

²³⁸ China, Declaration made upon acceptance of Amended Protocol II to the CCW, 4 November 1998.

208. Upon acceptance of the 1996 Amended Protocol II to the CCW, Germany, Greece, South Africa and Sweden stated that:

It is understood that article 5, paragraph 2(b) does not preclude agreement among the states concerned, in connection with peace treaties or similar arrangements, to allocate responsibilities under paragraph 2(b) in another manner which nevertheless respects the essential spirit and purpose of the article.²³⁹

209. Upon acceptance of the 1996 Amended Protocol II to the CCW, Greece stated that:

It is understood that the provisions of the protocol shall, as the context requires, be observed at all times . . .

It is the understanding of Greece that the word "primarily" is included in article 2, paragraph 3 of the amended Protocol to clarify that mines designed to be detonated by the presence, proximity or contact of a vehicle as opposed to a person, that are equipped with anti-handling devices are not considered anti-personnel mines as a result of being so equipped.²⁴⁰

210. Upon acceptance of the 1996 Amended Protocol II to the CCW, Hungary declared that:

The Republic of Hungary . . .

- 4) announces a total ban on the development, production, acquisition, export and transfer of all types of anti-personnel landmines;
- ...
- 9) reiterates her commitment to promote the early conclusion of and wide adherence to an international convention stipulating a total and comprehensive ban on anti-personnel landmines, by reaffirming her determination to contribute actively to the success of international efforts furthering this goal.²⁴¹

211. Upon acceptance of the 1996 Amended Protocol II to the CCW, Italy stated that:

The provisions of the amended Protocol which by their contents or nature may be applied also in peacetime, shall be observed at all times . . .

Under article 2 of the amended Protocol II, in order to fully address the humanitarian concerns raised by anti-personnel land-mines, the Italian Parliament has enacted and brought into force a legislation containing a far more stringent definition of those devices. In this regard, while reaffirming its commitment to promote the further development of international humanitarian law, the Italian Government confirms its understanding that the word "primarily" is included in article 2,

²³⁹ Germany, Declarations made upon acceptance of Amended Protocol II to the CCW, 2 May 1997; Greece, Declarations made upon acceptance of Amended Protocol II to the CCW, 20 January 1999; South Africa, Declaration made upon acceptance of Amended Protocol II to the CCW, 26 June 1998; Sweden, Declarations made upon acceptance of Amended Protocol II to the CCW, 16 July 1997.

²⁴⁰ Greece, Declarations made upon acceptance of Amended Protocol II to the CCW, 20 January 1999.

²⁴¹ Hungary, Declaration made upon acceptance of Amended Protocol II to the CCW, 30 January 1998, §§ 4 and 9.

paragraph 3 of the amended Protocol to clarify that mines designed to be detonated by the presence, proximity or contact of a vehicle as opposed to a person, that are equipped with anti-handling devices are not considered anti-personnel mines as a result of being so equipped.²⁴²

212. Upon acceptance of the 1996 Amended Protocol II to the CCW, Liechtenstein declared that “the provisions of the amended Protocol II which by their contents or nature may also be applied in peacetime, shall be observed at all times”.²⁴³

213. Upon acceptance of the 1996 Amended Protocol II to the CCW, the Netherlands stated that:

With regard to Article 1, paragraph 2:

The Government of the Kingdom of the Netherlands takes the view that the provisions of the Protocol which, given their content or nature, can also be applied in peacetime, must be observed in all circumstances.

...

With regard to Article 2, paragraph 3:

The Government of the Kingdom of the Netherlands takes the view that the word “primarily” means only that mines that are designed to be exploded by the presence, proximity or contact of a vehicle and that are equipped with an anti-handling device are not regarded as anti-personnel mines because of that device.²⁴⁴

214. Upon acceptance of the 1996 Amended Protocol II to the CCW, Pakistan stated that:

Article 1:

...

The provisions of the Protocol must be observed at all times, depending on the circumstances...

Article 2 (paragraph 3):

In the context of the word “primarily”, it is understood that such anti-tank mines which use anti-personnel mines as a fuse but do not explode on contact with a person are not anti-personnel mines.²⁴⁵

215. Upon acceptance of the 1996 Amended Protocol II to the CCW, Switzerland declared that it “interprets the definition of ‘anti-personnel mine’ as excluding any mine designed to explode in the presence or proximity of, or upon contact with, a vehicle, when such mine is equipped with an anti-handling device”.²⁴⁶

²⁴² Italy, Declarations made upon acceptance of Amended Protocol II to the CCW, 13 January 1999.

²⁴³ Liechtenstein, Declaration made upon acceptance of Amended Protocol II to the CCW, 19 November 1997.

²⁴⁴ Netherlands, Declaration made upon acceptance of Amended Protocol II to the CCW, 25 March 1999, §§ 1 and 2.

²⁴⁵ Pakistan, Declarations made upon acceptance of Amended Protocol II to the CCW, 9 March 1999, §§ 3 and 4.

²⁴⁶ Switzerland, Declaration made upon acceptance of Amended Protocol II to the CCW, 24 March 1998.

216. Upon acceptance of the 1996 Amended Protocol II to the CCW, the US declared that:

- (2) **EFFECTIVE EXCLUSION.** – The United States understands that, for the purposes of Article 5(6)(b) of the Amended Mines Protocol, the maintenance of observation over avenues of approach where mines subject to that Article are deployed constitutes one acceptable form of monitoring to ensure the effective exclusion of civilians.
- ...
- (5) **PEACE TREATIES.** – The United States understands that the allocation of responsibilities for landmines in Article 5(2)(b) of the Amended Mines Protocol does not preclude agreement, in connection with peace treaties or similar arrangements, to allocate responsibilities under that Article in a manner that respects the essential spirit and purpose of the Article.
- (6) **BOOBY-TRAPS AND OTHER DEVICES.** – For the purposes of the Amended Mines Protocol, the United States understands that –
 - ...
 - (B) a trip-wired hand grenade shall be considered a “booby-trap” under Article 2(4) of the Amended Mines Protocol and shall not be considered a “mine” or an “anti-personnel mine” under Article 2(1) or Article 2(3), respectively; and
 - (C) none of the provisions of the Amended Mines Protocol, including Article 2(5), applies to hand grenade other than trip-wired hand grenades.²⁴⁷

217. At the Second Session of the First Review Conference of States Parties to the CCW in 1996, Australia, Bulgaria, Canada, Czech Republic, Denmark, France, Germany, Greece, Hungary, Ireland, Italy, Latvia, Netherlands, Norway, Poland, Romania, South Africa, Sweden, UK and US each made statements of understanding concerning the word “primarily” in Article 2(3) of Amended Protocol II. All stated in similar terms that mines designed to be detonated by the presence, proximity or contact of a vehicle, as opposed to a person, that are equipped with anti-handling devices shall not be considered to be anti-personnel mines as a result of being so equipped.²⁴⁸

218. In 2001, States parties to the 1980 CCW decided to amend Article 1 of the Convention, governing its scope. This amendment, not yet in force, states that:

1. This Convention and its annexed Protocols shall apply in the situations referred to in Article 2 common to the Geneva Conventions of 12 August 1949 for the Protection of War Victims, including any situation described in paragraph 4 of Article I of Additional Protocol I to these Conventions.
2. This Convention and its annexed Protocols shall also apply, in addition to situations referred to in paragraph 1 of this Article, to situations referred to in Article 3 common to the Geneva Conventions of 12 August 1949. This Convention and its annexed Protocols shall not apply to situations of internal

²⁴⁷ US, Statements of understanding made upon acceptance of Amended Protocol II to the CCW, 24 May 1999, §§ 2, 5 and 6(B)–(C).

²⁴⁸ First Review Conference of States Parties to the CCW (Second Session), Interpretative statements on article 2 of Amended Protocol II, UN Doc. CCW/CONF.I/SR.14, 3 May 1996, pp. 3 and 4, § 8.

disturbances and tensions, such as riots, isolated and sporadic acts of violence, and other acts of a similar nature, as not being armed conflicts.

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

Other Instruments

219. Paragraph 6 of the 1991 Memorandum of Understanding on the Application of IHL between Croatia and the SFRY requires that hostilities be conducted in accordance with the 1980 Protocol II to the CCW.

220. Paragraph 2.5 of the 1992 Agreement on the Application of IHL between the Parties to the Conflict in Bosnia and Herzegovina requires that hostilities be conducted in accordance with the 1980 Protocol II to the CCW.

II. National Practice

Military Manuals

221. Argentina's Law of War Manual reproduces the content of Articles 2(1) and (4), 3, 4 and 5 of the 1980 Protocol II to the CCW.²⁴⁹

222. Australia's Commanders' Guide lists mines under the heading "Limitations on lawful weapons" and states that "the primary concern with the employment of mines and booby traps is that they could be disturbed by innocent parties". It states, however, that the use of mines is permitted "if they can be confined to areas where only lawful combatants would encounter them".²⁵⁰ It refers to the restrictions on the use of mines contained in Article 3(3) and (4) and Article 4 of the 1980 Protocol II to the CCW. The Guide also states that:

Mines . . . may not be directed against civilians under any circumstances and they may not be used indiscriminately. Indiscriminate use is placement of such weapons which:

- a. is not on, or directed at, a military objective; or
- b. employs a method or means of delivery which cannot be directed at a specific military objective; or
- c. may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated.²⁵¹

The Guide further provides that:

Remotely delivered mines may only be used within an area which is a military objective or which contains military objectives. Either the location of minefields containing remotely delivered mines must be accurately recorded or the mines

²⁴⁹ Argentina, *Law of War Manual* (1989), §§ 4.17–4.22.

²⁵⁰ Australia, *Commanders' Guide* (1994), § 316.

²⁵¹ Australia, *Commanders' Guide* (1994), § 937.

themselves must be equipped with an effective neutralising mechanism which destroys or renders them harmless after a period of time. If circumstances permit, the civilian population should be warned in advance of the delivery of remotely delivered mines which may affect them.²⁵²

223. Australia's Defence Force Manual provides that:

All feasible precautions must be taken to protect civilians from the effects of land mines . . . and similar devices. They must not be directed at civilians nor may they be used indiscriminately. It is indiscriminate to place them so that they are not on or not directed at a military objective, to use a means of delivery which cannot be directed at a military target, or to place them so that they may be expected to cause excessive collateral damage, that is, injury, loss or damage to civilians which is excessive in relation to the concrete and direct military advantage anticipated.²⁵³

The manual adds that:

Land mines (other than remotely delivered mines) . . . must not be used in areas containing civilian concentrations if combat between ground forces is neither imminent nor actually taking place unless they are placed on, or in the vicinity, of an enemy military objective or there are protective measures for civilians such as warning signs, sentries, fences or other warnings to civilians.²⁵⁴

With respect to remotely delivered landmines, the manual states that they "can be used within the area of a military objective if their location can be accurately recorded and they can be neutralised when they no longer serve the military purpose of which they were placed in position". It further states that "if circumstances permit, effective advance warning should be given where remotely delivered mines are likely to affect civilians".²⁵⁵

224. Belgium's Law of War Manual states, with reference to Article 3 of the 1980 Protocol II to the CCW, that mines can only be used against military objectives. It also states, with reference to Article 5 of the 1980 CCW, that remotely delivered minefields are only permitted if the location of the mines is mapped and if the mines are fitted with self-neutralising devices. The manual adds that the civilian population must be warned in advance of the emplacement of remotely delivered mines unless circumstances do not permit.²⁵⁶

225. Cameroon's Instructors' Manual states that the restrictions contained in the 1980 Protocol II to the CCW must be scrupulously applied in order to avoid civilian casualties. The manual provides, therefore, that the use of mines, booby-traps and other devices must follow the rules on the prohibition of indiscriminate use and on the taking of all feasible precautions to protect civilians as provided for in Article 3 of the 1980 Protocol II to the CCW.²⁵⁷

²⁵² Australia, *Commanders' Guide* (1994), § 940.

²⁵³ Australia, *Defence Force Manual* (1994), § 421.

²⁵⁴ Australia, *Defence Force Manual* (1994), § 422.

²⁵⁵ Australia, *Defence Force Manual* (1994), § 425.

²⁵⁶ Belgium, *Law of War Manual* (1983), p. 38.

²⁵⁷ Cameroon, *Instructors' Manual* (1992), p. 123, § 441.

226. Canada's LOAC Manual, under the heading "Use of authorized land mines", states that states that:

All feasible precautions must be taken to protect civilians from the effects of land mines . . . They must not be directed at civilians nor may they be used indiscriminately. It is indiscriminate to:

- (a) place mines . . . so that they are not on or not directed at a legitimate target;
- (b) use a means of delivery for mines . . . that cannot be directed at a legitimate target; and
- (c) place mines . . . so that they may be expected to cause collateral civilian damage that is excessive in relation to the concrete and direct military advantage anticipated.²⁵⁸

With respect to remotely delivered mines, the manual provides that they

can only be used within the area of a military objective if their location can be accurately recorded, and they can be neutralized when they no longer serve the military purpose for which they were placed in position. Each mine must have: (a) an effective self neutralizing or destroying mechanism; or (b) a remotely controlled mechanism designed to render the mine harmless or destroy it.²⁵⁹

227. France's LOAC Teaching Note states that:

The use of mines except from anti-personnel mines is allowed on the condition that the exact location of mine fields is recorded. All feasible precautions must be taken to protect civilians from the effects of these mines.²⁶⁰

228. According to France's LOAC Manual, employing landmines (except anti-personnel mines) is allowed on condition that all feasible precautions are taken to protect civilians from the effects of these mines. At the end of hostilities, the mine fields have to be indicated and as far as possible neutralised.²⁶¹

229. Germany's Military Manual states that the "use of mines and other devices on land is, in principle, permissible". It adds that:

It is prohibited to direct the above mentioned munitions – neither by way of reprisals – against the civilian population as such or against individual civilians. Any indiscriminate use of these weapons is prohibited. All feasible precautions shall be taken to protect civilians also from unintended effects of these munitions.²⁶²

The manual further provides that:

Mines and other devices shall not be used in any built-up area or other area predominantly inhabited by civilians in which combat between ground forces is neither taking place nor imminent. Exceptions are permissible if: these munitions are placed on or in the close vicinity of a military objective; or measures are taken to

²⁵⁸ Canada, *LOAC Manual* (1999), p. 5-5, § 44.

²⁵⁹ Canada, *LOAC Manual* (1999), p. 5-5, § 50.

²⁶⁰ France, *LOAC Teaching Note* (2000), p. 7.

²⁶¹ France, *LOAC Manual* (2001), pp. 55 and 82.

²⁶² Germany, *Military Manual* (1992), §§ 409-411.

protect civilians from their effects, for example, the posting of warning signs, the posting of sentries, the provision of fences or the issue of warnings.²⁶³

With respect to the use of remotely delivered mines, the manual provides that this kind of weapon is prohibited unless such mines are only used within an area which is itself a military objective or which contains military objectives . . . If a mine does no longer serve its military purpose, a self-actuating mechanism shall ensure its destruction or neutralization within a reasonable lapse of time.

The manual also states that “effective advance warning shall be given of any delivery or dropping of remotely delivered mines which may affect the civilian population, unless circumstances do not permit”.²⁶⁴

230. Israel’s Manual on the Laws of War states that:

The mining of areas for protection against invasion of a country’s territory is permitted. The problem arises when mines are used as aggressive weapons and concealed within enemy territory (where the concealing party has no control over the movement of people). Such mines are liable to lie in the path of innocent civilians and injure them rather than combatants. In other words, the prohibition is not on the weapon itself but on the manner of its employment. Likewise, it is forbidden to use mines flung from a plane or fired in shells.²⁶⁵

231. Kenya’s LOAC Manual states that mines, other than remotely delivered, may be used in populated areas “when they are placed on or in the close vicinity of a military objective belonging to or under the control of the enemy; or when measures are taken to protect civilian persons (e.g. warning signs, sentries, issue of warnings, provision of fences)”. According to the manual, remotely delivered mines

may be used

- a) only within an area being itself a military objective, or containing military objectives, and
- b) when their location can be accurately recorded, or an effective neutralising mechanism is issued on each mine;
- c) subject to effective advanced warning to the civilian population when the tactical situation permits.²⁶⁶

232. The Military Manual of the Netherlands reproduces Articles 4 and 5 of the 1980 Protocol II to the CCW.²⁶⁷

233. New Zealand’s Military Manual states that “Protocol II to the CCW . . . restricts the use of mines . . . It also contains specific provisions on the use of

²⁶³ Germany, *Military Manual* (1992), p. 38.

²⁶⁴ Germany, *Military Manual* (1992), §§ 413–414.

²⁶⁵ Israel, *Manual on the Laws of War* (1998), p. 14.

²⁶⁶ Kenya, *LOAC Manual* (1997), Précis No. 3, pp. 3–4.

²⁶⁷ Netherlands, *Military Manual* (1993), pp. IV-6/IV-10.

remotely delivered mines". The manual reproduces Articles 3–8 of the 1980 Protocol II to the CCW.²⁶⁸

234. Spain's LOAC Manual provides the same restrictions and prohibitions on the use of mines and remotely delivered mines as are contained in Articles 3, 4, and 5 of the 1980 Protocol II to the CCW.²⁶⁹ It also states that:

Independent of the type of target, its location, the kind of military operation, the given mission or any other circumstances, it is prohibited to use this type of weapon [i.e., *inter alia*, mines] . . . wherever its location is indiscriminate . . . wherever it cannot be guided towards a specific military target and wherever there is reason to believe that it will cause disproportionate collateral damage.²⁷⁰

235. Sweden's IHL Manual, with reference to the 1980 Protocol II to the CCW, states that landmines cannot be "used against civilian populations or individual civilians, which is in full agreement with AP I (Art. 51)". It adds that "it is particularly stated that the indiscriminate use of mines . . . is prohibited". It further stresses that "the new method of remote delivery, *i.e.* planting mines from aircraft or dispersing them over large areas by firing them with missiles or artillery, may be used only against an area which is itself a military objective or which contains military objectives".²⁷¹

236. The US Air Force Pamphlet states that:

Aerial dropped mines . . . are not prohibited under international law, provided that they do not in their design or inherent characteristics cause unnecessary suffering. The manner of use of such weapons, however, is regulated by the rules of armed conflict . . . Necessary precautions must be taken in the use of all weapons, including delayed action weapons, to avoid or minimize incidental civilian casualties. Also mines must not be used for the purpose of preventing rescue of or protection to wounded or sick persons or to deny other humanitarian protections.²⁷²

237. The US Air Force Commander's Handbook states that:

The main legal problem raised by mine warfare is to make sure that civilian persons and property are not unnecessarily endangered, both during and after the conflict, and the parties to the conflict should take reasonable measures to this end. Depending on the circumstances, these measures might include warning civilians, using mines that self-destruct after a period of time and clearing minefields after the end of hostilities.²⁷³

238. The US Naval Handbook states that:

As with all weapons, to be lawful, land mines must be directed at military objectives. The controlled nature of command detonated land mines provides effective

²⁶⁸ New Zealand, *Military Manual* (1992), § 514.

²⁶⁹ Spain, *LOAC Manual* (1996), § 2.4.c.(2).

²⁷⁰ Spain, *LOAC Manual* (1996), § 3.2.a.(3).

²⁷¹ Sweden, *IHL Manual* (1991), Section 3.3.2, pp. 80–81.

²⁷² US, *Air Force Pamphlet* (1976), § 6-6(d).

²⁷³ US, *Air Force Commander's Handbook* (1980), § 6-5.

target discrimination. In the case of non-command detonated land mines, however, there exists potential for indiscriminate injury to noncombatants. Accordingly special care must be taken when employing land mines to ensure non-combatants are not indiscriminately injured.²⁷⁴

National Legislation

239. South Korea's Conventional Weapons Act provides that "the commander of the military unit that emplaces mines . . . must take all necessary measures including advance warning so as to prevent damage to the life, body, and property of the civilians residing in the vicinity".²⁷⁵ It adds that:

1. The Commander of the military unit that has emplaced mines or controls over the mine-emplaced area that can potentially harm civilians (herein after referred to as "minefield") must place warning signs that fulfil the conditions specified in the attached material in or around the minefield.
2. The Commander of the military unit that holds jurisdiction over the minefield with non remotely-delivered anti-personnel mines which do not fulfil the conditions of Article 3, paragraph 3, must take the necessary precautions and measures to deny access of civilians in addition to the warning sign as stipulated in Article 1. However, an exceptional case would be: if the angle of flight taken by the fragment is less than 90 degrees from the horizontal level, the use of the anti-personnel mine occurs within 72 hours since it has been placed and the military unit that emplaced the anti-personnel mine is adjacent.
3. No one is allowed to remove, damage, destroy, hide or otherwise undermine the proper utility of the warning signs placed as per the Article 1.²⁷⁶

240. Under the US War Crimes Act as amended, wilfully killing or causing serious injury to civilians in relation to an armed conflict and in violation of the provisions of the 1996 Amended Protocol II to the CCW is a war crime.²⁷⁷

National Case-law

241. No practice was found.

Other National Practice

242. In 1994, during a debate in the First Committee of the UN General Assembly, Australia stated that the 1980 Protocol II to the CCW "should apply to non-international as well as to international conflicts", that "mines should not be exported to States that are not party to Protocol II" and that "anti-personnel mines should be detectable and incorporate a self-destruct mechanism".²⁷⁸

243. In 1995, in response to a report of the Australian Joint Standing Committee on Foreign Affairs, Defence and Trade that recommended that "international

²⁷⁴ US, *Naval Handbook* (1995), § 9.3.

²⁷⁵ South Korea, *Conventional Weapons Act* (2001), Article 6.

²⁷⁶ South Korea, *Conventional Weapons Act* (2001), Article 7.

²⁷⁷ US, *War Crimes Act as amended* (1996), Section 2441(c)(4).

²⁷⁸ Australia, Statement before the First Committee of the UN General Assembly, UN Doc. A/C.1/49/PV.3, 17 October 1994, p. 15.

conventions relating to land mines could be couched in terms of rights and obligations, thereby making international criminal law applicable and making breaches subject to international criminal tribunals or war crimes tribunals", the Australian government stated that:

One of our proposals for the Review Conference [of the CCW] was to have the States parties acknowledge in their conference declaration that a deliberate or indiscriminate use of land mines against civilians ought to attract the same criminal responsibility as it does under other humanitarian instruments.²⁷⁹

244. At the First Annual Conference of High Contracting Parties to Amended Protocol II to the CCW in 1999, Canada stated that it:

continues to have serious concerns about reports concerning the indiscriminate use of anti-personnel mines by the Russian military in the context of the ongoing conflict in Chechnya... Many of these mines were remotely delivered against no apparent military target... Moreover, Russian forces appear to have undertaken few if any steps to protect civilians in that conflict from the effects of mines, for example through the posting of signs, sentries or fences around known mined areas.

It also voiced its concerns "about recent public reports that representatives of the state-owned Pakistan Ordnance Factories are alleged to have offered anti-personnel mines for sale to a private UK citizen in direct violation of their obligations under the Amended Protocol II to the CCW".²⁸⁰

245. At the Second Meeting of States Parties to the Ottawa Convention in 2000, Canada stated that:

It is important to highlight the indiscriminate use of landmines by both Russian and Chechen forces in Chechnya – surely one of the most serious setbacks for the already minimal norms regarding mine use contained within the Landmines Protocol of the Convention on Certain Conventional Weapons.²⁸¹

246. In 1993, during a debate in the First Committee of the UN General Assembly, China stated that it "understood the desire to avoid the killing of civilians by land mines, but oversimplified measures limited to halting the export of those weapons could not solve the problem".²⁸²

247. At the Second Session of the First Review Conference of States Parties to the CCW in 1996, China expressed its concern about the suffering of and casualties among civilians caused by the "irresponsible use of landmines, especially anti-personnel landmines". It added that "China has made enormous

²⁷⁹ Australia, Senate, *Debates*, 29 November 1995, Vol. 176, pp. 4246–4281, reprinted in *Australian Yearbook of International Law*, 1995, pp. 737 and 741–742.

²⁸⁰ Canada, Statement at the First Annual Conference of High Contracting Parties to Amended Protocol II to the CCW, Geneva, 15 December 1999.

²⁸¹ Canada, Statement at the Second Meeting of States Parties to the Ottawa Convention, Geneva, 11–15 September 2000.

²⁸² China, Statement before the First Committee of the UN General Assembly, UN Doc. A/C.1/48/SR.28, 18 November 1993, p. 7.

efforts on a series of important issues such as the scope of application, technical specifications on the detectability, self-destruction and self-deactivation of landmines and transfer of landmines". It announced that "pending the entry-into-force of the Amended Protocol, it will implement a moratorium on its export of anti-personnel landmines which do not meet the technical specifications on detectability, self-destruction and self-deactivation as provided for by the Protocol".²⁸³

248. At the Second Review Conference of States Parties to the CCW in 2001, the representative of China declared that "his country, a party to the Convention and all its protocols, faithfully discharged its obligations under them. His Government had launched a number of education campaigns concerning the Convention... Furthermore, the Government had amended domestic law in order to guarantee the enforcement of the Convention."²⁸⁴

249. In 1994, during a debate in the First Committee of the UN General Assembly, the Czech Republic stated that it supported proposals concerning "the detectability of landmines and the limitation of their functioning after the end of conflicts", as well as "a moratorium on the export of such land-mines".²⁸⁵

250. In 1993, during a debate in the First Committee of the UN General Assembly, Egypt stated that it supported the comments made by several other delegations which had expressed the view that export restrictions alone "would not achieve the desired results" and that "a resolution dealing with the production and use of anti-personnel mines would have been preferable".²⁸⁶

251. In 1974, during discussions in the Ad Hoc Committee on Conventional Weapons established by the CDDH, Finland stated that:

In the case of weapons, the draft Additional Protocols did little more than reaffirm existing law and should be supplemented with prohibitions and restrictions of the use of specific categories of conventional weapons. The Ad Hoc Committee should endeavour to define such weapons and prepare a list mentioning, at least, ... delayed action weapons including mines.²⁸⁷

252. In 1994, during a debate in the First Committee of the UN General Assembly, Finland stated that it wished to prevent "future indiscriminate and irresponsible use of anti-personnel land-mines".²⁸⁸

²⁸³ China, Statement at the First Review Conference of States Parties to the CCW (Second Session), Geneva, 22 April–3 May 1996, UN Doc. CCW/CONF.I/SR.11, 29 January 1996, § 20.

²⁸⁴ China, Statement at the Second Review Conference of States Parties to the CCW, Geneva, 11–21 December 2001, UN Doc. CCW/CONF.II/SR.2, 16 January 2002, § 44.

²⁸⁵ Czech Republic, Statement before the First Committee of the UN General Assembly, UN Doc. A/C.1/49/PV.6, 19 October 1994, p. 15.

²⁸⁶ Egypt, Statement before the First Committee of the UN General Assembly, UN Doc. A/C.1/48/SR.28, 18 November 1993, p. 9.

²⁸⁷ Finland, Statement at the CDDH, *Official Records*, Vol. XVI, CDDH/IV/SR.1, 13 March 1974, p. 9, § 9.

²⁸⁸ Finland, Statement before the First Committee of the UN General Assembly, UN Doc. A/C.1/49/PV.4, 18 October 1994, p. 17.

253. In 1993, during a debate in the First Committee of the UN General Assembly, France stated that while it

strongly supported international action on the indiscriminate laying of non-self-destructing mines... Protocol II to the inhuman weapons convention permitted self-destructing or self-neutralizing anti-personnel mines as legitimate forms of self-defence if directed at military targets.²⁸⁹

254. In 1993, during a debate in the First Committee of the UN General Assembly, Ghana stated that "it would have been preferable for the resolution to cover the production, use and stockpiling of anti-personnel mines, as well as their export".²⁹⁰

255. In 1976, during discussions in the Ad Hoc Committee on Conventional Weapons established by the CDDH, Italy stated that "the obligation to record the location of minefields and to fit a neutralising mechanism on remotely delivered mines provided a satisfactory guarantee for the civilian population".²⁹¹

256. In 1994, during a debate in the First Committee of the UN General Assembly, Japan stated that it would "participate actively in the work of reviewing the [1980 CCW] in order to tighten the controls on the use and availability of land-mines".²⁹²

257. In 2000, during a debate in the First Committee of the UN General Assembly, South Korea stated that it was intending to accede to the 1980 CCW and the 1996 Amended Protocol II to the CCW.²⁹³

258. In 1974, during discussions in the Ad Hoc Committee on Conventional Weapons established by the CDDH, the representative of Kuwait stated that:

17. ... As a defensive measure, the practice of laying mine-fields – provided that they were properly marked for the benefit of the local population and friendly forces – could not be prohibited. It supported restrictions on the use of mines as a defensive weapon and that their use as offensive weapons should be prohibited... He himself considered that the use of anti-personnel landmines for the purpose of paralysing the enemy's movements was acceptable.
18. On the other hand, he stressed the danger to civilians as well as to members of the armed forces of air-delivered mines, which were likely to strike indiscriminately, especially if they were scattered over a wide area. He therefore considered that, in the case of delayed-action and treacherous weapons, it was better to make every effort to provide a rule for limiting their use rather than

²⁸⁹ France, Statement before the First Committee of the UN General Assembly, UN Doc. A/C.1/48/SR.28, 18 November 1993, p. 7.

²⁹⁰ Ghana, Statement before the First Committee of the UN General Assembly, UN Doc. A/C.1/48/SR.28, 18 November 1993, p. 9.

²⁹¹ Italy, Statement at the CDDH, *Official Records*, Vol. XVI, CDDH/IV/SR.29, 25 May 1976, p. 297.

²⁹² Japan, Statement before the First Committee of the UN General Assembly, UN Doc. A/C.1/49/PV.4, 18 October 1994, p. 21.

²⁹³ South Korea, Statement before the First Committee of the UN General Assembly, 6 October 2000, UN Doc. A/C.1/55/PV.7, 6 October 2000, p. 14.

to try to lay stress on their inhuman aspects or the medical results they produced, and that the best course would be to regard them as defensive weapons and to prohibit their use as offensive weapons.²⁹⁴

259. At the CCW Preparatory Conference, Mexico stated that it had already submitted proposals concerning the “limitation of the use of anti-personnel and anti-tank mines and booby traps to military targets and their immediate surroundings, with effective precautions to protect civilians”.²⁹⁵

260. In 1994, during a debate in the First Committee of the UN General Assembly, New Zealand advocated a “tougher regime of controls on the use . . . of mines”.²⁹⁶

261. In 1994, during a debate in the First Committee of the UN General Assembly, Norway called for restrictions “on the production and use of such land-mines” and the development of “an efficient verification regime” for the enforcement of the 1980 CCW and its Protocols.²⁹⁷

262. In 2000, during a debate in the First Committee of the UN General Assembly, Pakistan stated that “although our security environment does not permit us to accept a comprehensive ban on APLs, Pakistan will strictly abide by its commitments and obligations under the amended Protocol II on landmines”.²⁹⁸

263. At the Second Review Conference of States Parties to the CCW in 2001, Pakistan declared its full commitment to the 1980 CCW and proposed that during the Review Conference a method would be examined to accelerate the process of achieving universal adherence to the CCW and its Protocols.²⁹⁹

264. In government communiqués in 1995, Peru stated that it considered Ecuador’s “indiscriminate use” of anti-personnel landmines in the border dispute between them as a violation of Articles 35(2) and 51(4) AP I and as a violation of the 1980 CCW.³⁰⁰

265. In 1995, during a debate in the First Committee of the UN General Assembly, Peru stated that it deemed it “essential to . . . set up standards to determine the responsibilities of States and the application of sanctions for damage caused to non-combatant victims and the environment”.³⁰¹

²⁹⁴ Kuwait, Statement at the CDDH, *Official Records*, Vol. XVI, CDDH/IV/SR.13, 28 February 1975, p. 127, §§ 17–18.

²⁹⁵ Mexico, Statement at the CCW Preparatory Conference, Doc. A/CONF.95/PREP.CONF.I/SR.3, 30 August 1978, pp. 3–4.

²⁹⁶ New Zealand, Statement before the First Committee of the UN General Assembly, UN Doc. A/C.1/49/PV.4, 18 October 1994, p. 14.

²⁹⁷ Norway, Statement before the First Committee of the UN General Assembly, UN Doc. A/C.1/49/PV.6, 19 October 1994, p. 7.

²⁹⁸ Pakistan, Statement before the First Committee of the UN General Assembly, 13 October 2000, UN Doc. A/C.1/55/PV.13, 13 October 2000, p. 12.

²⁹⁹ Pakistan, Statement of 11 December 2001 at the Second Review Conference of States Parties to the CCW, Geneva, 11–21 December 2001, UN Doc. CCW/CONF.II/SR.2, 16 January 2002, §§ 26–28.

³⁰⁰ Peru, Government Communiqué, Geneva, 6 March 1995; Official Communiqué No. 011 of the Joint Command of the Armed Forces, 24 February 1995.

³⁰¹ Peru, Statement before the First Committee of the UN General Assembly, UN Doc. A/C.1/50/PV.9, 25 October 1995, p. 11.

266. In 1995, during a debate in the First Committee of the UN General Assembly, Poland stated that it had “declared a moratorium on the export of anti-personnel land-mines that do not have self-destruct or self-neutralizing devices”.³⁰²

267. In 1993, during a debate in the First Committee of the UN General Assembly, Sri Lanka stated that it felt that the proposed moratorium on the export of anti-personnel mines was inadequate as it did not deal with production or use, and in particular the use of anti-personnel landmines by non-State entities.³⁰³

268. At the CCW Preparatory Conference, Switzerland stated that it supported “the prohibition or extensive restriction of the use of mines and booby-traps, backed by the necessary guarantees”.³⁰⁴

269. In 1994, during a debate in the First Committee of the UN General Assembly, Ukraine advocated “strong action to reduce the threat posed to civilian populations by the indiscriminate use of landmines”.³⁰⁵

270. In 1976, during a meeting of the Ad Hoc Committee on Conventional Weapons established by the CDDH, the UK, introducing a working paper on the regulation of the use of landmines and other devices on behalf of France, Netherlands and UK, stated that:

Article 2 of the present working paper . . . required the location of minefields to be recorded. It should, however, be noted that the amount of detail in which the recording was made would depend on the type of minefield in question. Where mines were laid by engineers, it might be possible to record the location of each one; in minefields laid by artillery, however, it would only be possible to record the area covered.³⁰⁶

271. In 1993, during a debate in the First Committee of the UN General Assembly, the UK stated that while it “strongly supported international action on the indiscriminate laying of non-self-destructing mines . . . Protocol II to the inhumane weapons convention permitted self-destructing or self-neutralizing anti-personnel mines as legitimate forms of self-defence if directed at military targets”.³⁰⁷

272. In 1995, during a debate in the House of Commons, the UK Minister of State for Defence Procurement stated that “the parties in the conflict in the former Yugoslavia have indiscriminately sown anti-personnel land mines. That

³⁰² Poland, Statement before the First Committee of the UN General Assembly, UN Doc. A/C.1/50/PV.9, 25 October 1995, p. 7.

³⁰³ Sri Lanka, Statement before the First Committee of the UN General Assembly, UN Doc. A/C.1/48/SR.28, 18 November 1993, pp. 8–9.

³⁰⁴ Switzerland, Statement at the CCW Conference, Doc. A/CONF.95/PREP.CONF./II/SR.28, 18 April 1978, p. 3.

³⁰⁵ Ukraine, Statement before the First Committee of the UN General Assembly, UN Doc. A/C.1/49/PV.7, 20 October 1994, p. 17.

³⁰⁶ UK, Statement at the CDDH, *Official Records*, Vol. XVI, CDDH/IV/SR.28, 25 May 1976, p. 289, § 24.

³⁰⁷ UK, Statement before the First Committee of the UN General Assembly, UN Doc. A/C.1/48/SR.28, 18 November 1993, § 31.

may be in direct contravention of the United Nations weaponry convention [1980 CCW].³⁰⁸

273. In 1976, during discussions in the Ad Hoc Committee on Conventional Weapons established by the CDDH, the representative of the US stated that:

35. It was clearly desirable to place certain restrictions on the use of land mines and other devices... Her delegation supported reasonable and feasible requirements for recording the location of minefields. In that respect she agreed with the statement of the United Kingdom representative at [another meeting of the Committee on Conventional Weapons] that the nature and extent of the recording would depend on the type of minefield in question and the circumstances and method of its emplacement.

36. She also supported a prohibition on the use of remotely delivered mines unless such mines were fitted with a neutralizing mechanism or the area in which they were delivered was clearly marked. Furthermore, her delegation welcomed and shared the concern evidenced in the various proposals for the protection of the civilian population against the effects of mines and similar devices.³⁰⁹

274. Following a decision by the US President in 1996, the US unilaterally undertook:

not to use, and to place in inactive stockpile status with intent to demilitarize by the end of 1999, all non-self-destructing APL not needed for (a) training personnel engaged in demining and countermining operations, and (b) to defend the United States and its allies from armed aggression across the Korean demilitarized zone.³¹⁰

275. In 1991, a State denounced the use of drop-mines on civilian objects in the non-international conflict to which it was a party.³¹¹

III. Practice of International Organisations and Conferences

United Nations

276. In two resolutions adopted in 1994, the UN Security Council condemned all acts by parties to the conflict in Angola "including the laying of landmines, that imperil or inhibit humanitarian relief efforts".³¹²

277. In a resolution adopted in 1994 concerning the situation in Angola, the UN Security Council noted that "the widespread dispersal of landmines is causing hardship to the civilian population and is hampering the return of refugees and displaced persons and other humanitarian relief efforts".³¹³

³⁰⁸ UK, House of Commons, Statement by the Minister of State for Defence Procurement, *Hansard*, 31 January 1995, Vol. 253, cols. 842-3.

³⁰⁹ US, Statement at the CDDH, *Official Records*, Vol. XVI, CDDH/IV/SR.29, 25 May 1976, p. 300, §§ 35-36.

³¹⁰ US, Secretary of Defense, Memorandum for Secretaries of the Military Departments, Implementation of the President's Decision on Anti-Personnel Landmines, 17 June 1996.

³¹¹ ICRC archive document.

³¹² UN Security Council, Res. 945, 29 September 1994, § 10; Res. 952, 27 October 1994, § 7.

³¹³ UN Security Council, Res. 965, 30 November 1994, preamble.

278. In a resolution adopted in 1995, the UN Security Council noted “with concern that unexploded landmines constitute a substantial hazard to the population of Rwanda” and underlined “the importance the Council attaches to efforts to eliminate the threat posed by unexploded landmines in a number of States”.³¹⁴

279. In a resolution adopted in 1996, the UN Security Council expressed “its regret at the civilian casualties inflicted by landmines” and called upon all parties in Afghanistan “to desist from the indiscriminate use of landmines”.³¹⁵

280. In a resolution adopted in 1996, the UN Security Council expressed its “serious concern at the indiscriminate use of landmines in Tajikistan and the threat which this poses to the population and UNMOT personnel”.³¹⁶

281. In a resolution adopted in 1997 on the situation in Georgia, the UN Security Council stated that it was “deeply concerned at the continued deterioration of the security conditions in the Gali region, with an increase of acts of violence by armed groups, and indiscriminate laying of mines”. It also condemned “the continued laying of mines, including new types of mines, in the Gali region, which has already caused several deaths and injuries among the civilian population and the peacekeepers and the observers of the international community”.³¹⁷

282. In numerous resolutions adopted between 1986 and 1999, the UN General Assembly expressed its wish for all States to accede to the 1980 CCW and its Protocols.³¹⁸

283. In two resolutions adopted in 1994 and 1995 respectively, the UN General Assembly stated that it was “gravely concerned with the suffering and casualties caused to non-combatants as a result of the proliferation, as well as the indiscriminate and irresponsible use of anti-personnel land-mines”. It emphasised the importance of the 1980 CCW and its Protocols as the “authoritative international instrument governing the responsible use of anti-personnel land-mines and related devices”.³¹⁹

284. In three resolutions adopted between 1994 and 1996, the UN General Assembly expressed grave concern at the indiscriminate use of anti-personnel landmines in Cambodia.³²⁰

³¹⁴ UN Security Council, Res. 1005, 17 July 1995, preamble.

³¹⁵ UN Security Council, Res. 1076, 22 October 1996, §§ 6 and 9.

³¹⁶ UN Security Council, Res. 1089, 13 December 1996, § 11.

³¹⁷ UN Security Council, Res. 1096, 30 January 1997, preamble and § 14.

³¹⁸ UN General Assembly, Res. 35/153, 12 December 1980; Res. 36/93, 9 December 1981; Res. 37/79, 9 December 1982; Res. 38/66, 15 December 1983; Res. 39/56, 12 December 1984; Res. 40/84, 12 December 1985; Res. 41/50, 3 December 1986; Res. 42/30, 30 November 1987; Res. 43/67, 7 December 1988; Res. 45/64, 4 December 1990; Res. 46/40, 6 December 1991; Res. 47/56, 9 December 1992; Res. 48/79, 16 December 1993; Res. 49/75 D, 15 December 1994, § 5; Res. 49/79, 15 December 1994; Res. 50/70 O, 12 December 1995, § 5; Res. 50/74, 12 December 1995; Res. 51/45 S, 10 December 1996; Res. 51/49, 10 December 1996; Res. 52/42, 9 December 1997; Res. 53/81, 10 December 1998; Res. 54/58, 1 December 1999.

³¹⁹ UN General Assembly, Res. 49/75 D, 15 December 1994; Res. 50/70 O, 12 December 1995.

³²⁰ UN General Assembly, Res. 49/199, 23 December 1994; Res. 50/178, 22 December 1995; Res. 51/98, 12 December 1996.

285. In three resolutions adopted between 1994 and 1996, the UN General Assembly deplored the use of landmines against civilians in Sudan.³²¹

286. In a resolution adopted in 1996, the UN General Assembly welcomed the adoption of Amended Protocol II to the CCW, as well as the “national measures adopted by an increasing number of Member States relating to bans, moratoriums or restrictions on the transfer, use or production of anti-personnel landmines or to the reduction of existing stockpiles of such mines”. It urged “more international co-operation in the area of prohibitions or restrictions on the use of certain conventional weapons”.³²²

287. In a resolution adopted in 1998, the UN General Assembly welcomed “as interim measures, the various bans, moratoriums and other restrictions already declared by States on anti-personnel landmines” and called upon “States that have not yet done so to declare and implement such bans, moratoriums and other restrictions as soon as possible”.³²³

288. In three resolutions adopted between 1997 and 1999, the UN General Assembly welcomed the adoption of the 1996 Amended Protocol II to the CCW and urged all States which had not yet done so to agree to be bound by it.³²⁴

³²¹ UN General Assembly, Res. 49/198, 23 December 1994 (the resolution was adopted by 101 votes in favour, 13 against and 49 abstentions. Against: Afghanistan, China, Cuba, India, Indonesia, Iran, Iraq, Libya, Myanmar, Pakistan, Sudan, Syria and Vietnam. Abstaining: Bahrain, Bangladesh, Benin, Bhutan, Brunei Darussalam, Burkina Faso, Burundi, Cameroon, Colombia, Congo, Côte d’Ivoire, Cyprus, North Korea, Egypt, Ethiopia, Gabon, Ghana, Guatemala, Guinea, Jordan, Kenya, Kuwait, Kyrgyzstan, Laos, Lebanon, Lesotho, Malaysia, Maldives, Mali, Marshall Islands, Mauritania, Morocco, Mozambique, Niger, Nigeria, Oman, Papua New Guinea, Philippines, Qatar, South Korea, Saudi Arabia, Sierra Leone, Sri Lanka, Swaziland, Thailand, Togo, Tunisia, Turkmenistan and United Arab Emirates); Res. 50/197, 22 December 1995 (the resolution was adopted by 94 votes in favour, 15 against and 54 abstentions. Against: Afghanistan, China, Cuba, India, Indonesia, Iran, Libya, Myanmar, Nigeria, Pakistan, Qatar, Saudi Arabia, Sudan, Syria and Vietnam. Abstaining: Algeria, Angola, Bahrain, Bangladesh, Benin, Bhutan, Brunei Darussalam, Burkina Faso, Burundi, Cambodia, Cameroon, Cape Verde, Chad, Colombia, Congo, Côte d’Ivoire, North Korea, Equatorial Guinea, Fiji, Gabon, Gambia, Ghana, Grenada, Guatemala, Guinea, Guinea-Bissau, Jordan, Kenya, Kuwait, Kyrgyzstan, Laos, Lebanon, Lesotho, Malaysia, Maldives, Mali, Mauritania, Morocco, Nepal, Niger, Oman, Papua New Guinea, Philippines, South Korea, Rwanda, Saint Kitts and Nevis, Sierra Leone, Sri Lanka, Swaziland, Thailand, Togo, Tunisia, United Arab Emirates and Vanuatu); Res. 51/112, 12 December 1996 (the resolution was adopted by 100 votes in favour, 16 against and 50 abstentions. Against: Afghanistan, China, Cuba, India, Indonesia, Iran, Jordan, Libya, Myanmar, Nigeria, Pakistan, Qatar, Saudi Arabia, Sudan, Syria and Vietnam. Abstaining: Algeria, Bahrain, Bangladesh, Benin, Bhutan, Brunei Darussalam, Burkina Faso, Burundi, Cambodia, Cameroon, Cape Verde, Chad, Colombia, Congo, Côte d’Ivoire, Egypt, Equatorial Guinea, Fiji, Gabon, Ghana, Guinea, Guinea-Bissau, Kenya, Kuwait, Kyrgyzstan, Laos, Lebanon, Liberia, Malaysia, Maldives, Mali, Mauritania, Morocco, Mozambique, Nepal, Niger, Oman, Panama, Papua New Guinea, Philippines, South Korea, Senegal, Sierra Leone, Sri Lanka, Swaziland, Thailand, Togo, Tunisia, United Arab Emirates and Zaire).

³²² UN General Assembly, Res. 51/49, 8 January 1997.

³²³ UN General Assembly, Res. 52/38 H, 8 January 1998, § 2. (The resolution was adopted by 147 votes in favour, none against and 15 abstentions. Abstaining: Benin, Botswana, Cuba, Eritrea, Indonesia, Kenya, Malawi, Mexico, Mozambique, Namibia, Philippines, South Africa, Togo, Zambia and Zimbabwe.)

³²⁴ UN General Assembly, Res. 52/42, 9 December 1997; Res. 53/81, 4 December 1998; Res. 54/58, 1 December 1999.

- 289.** In a resolution adopted in 2000, the UN General Assembly expressed its deep concern about the continuing serious violations of human rights and IHL in Sudan. It focused especially on “the use of weapons, including indiscriminate artillery shelling and landmines against the civilian population”.³²⁵
- 290.** In five resolutions adopted between 1993 and 1998 concerning the situation of human rights in Sudan, the UN Commission on Human Rights called upon parties to the hostilities “to halt the use of weapons, including landmines, against the civilian population”.³²⁶
- 291.** In six resolutions between 1994 and 1996, the UN Commission on Human Rights requested States to give full support to the prevention of the indiscriminate use of anti-personnel mines and the use of landmines against civilian populations.³²⁷
- 292.** In two resolutions adopted in 1995 and 1996 respectively, the UN Sub-Commission on Human Rights urged States that had not yet done so to sign and ratify the 1980 CCW and its Protocols.³²⁸
- 293.** In 1994, in an article concerning landmines published in the journal *Foreign Affairs*, the UN Secretary-General recommended that the restrictions in the 1980 CCW and its Protocol II be strengthened.³²⁹
- 294.** In 1998, in a report on mine clearance, the UN Secretary-General emphasised the importance of the 1997 Ottawa Convention and the 1996 Amended Protocol II to the CCW, as well as the desirability of achieving the adherence of all States to both of these instruments.³³⁰
- 295.** In 1995, in a report concerning the conflict in Guatemala, the Director of MINUGUA stated that:

The Mission recommends that URNG issue precise instructions to its combatants to refrain from causing unnecessary harm to individuals and property, to take due

³²⁵ UN General Assembly, Res. 55/116, 4 December 2000, § 2(a)(v). (The resolution was adopted by 85 votes in favour, 32 against and 49 abstentions. Against: Algeria, Bahrain, Chad, China, Comoros, Cuba, North Korea, DRC, Djibouti, Egypt, Gambia, India, Indonesia, Iran, Jordan, Kuwait, Laos, Lebanon, Libya, Mauritania, Morocco, Myanmar, Oman, Pakistan, Qatar, Saudi Arabia, Sudan, Syria, Togo, Tunisia, United Arab Emirates and Vietnam. Abstaining: Azerbaijan, Bangladesh, Belarus, Benin, Bhutan, Botswana, Brunei Darussalam, Burkina Faso, Burundi, Cambodia, Cameroon, Cape Verde, Congo, Côte d'Ivoire, Ethiopia, Fiji, Georgia, Ghana, Guinea, Honduras, Jamaica, Kenya, Lesotho, Madagascar, Malawi, Malaysia, Maldives, Mali, Marshall Islands, Micronesia, Mozambique, Nepal, Nigeria, Palau, Philippines, Russia, Rwanda, Saint Lucia, Senegal, Sierra Leone, Singapore, Sri Lanka, Suriname, Swaziland, Thailand, Uganda, Ukraine, Tanzania and US.)

³²⁶ UN Commission on Human Rights, Res. 1993/60, 10 March 1993, § 9; Res. 1994/79, 9 March 1994, § 10; Res. 1995/77, 8 March 1995, § 15; Res. 1996/73, 23 April 1996, § 15; Res. 1998/67, 21 April 1998, § 6.

³²⁷ UN Commission on Human Rights, Res. 1994/94, 9 March 1994, Res. 1995/77, 8 March 1995, § 15; Res. 1996/54, 19 April 1996, § 15; Res. 1996/73, 23 April 1996, § 22; Res. 1996/75, 23 April 1996, § 4; Res. 1996/85, 24 April 1996, § 18.

³²⁸ UN Sub-Commission on Human Rights, Res. 1995/24, 24 August 1995, § 2; Res. 1996/15, 23 August 1996, § 2.

³²⁹ Boutros Boutros-Ghali, “The Land Mine Crisis”, *Foreign Affairs*, Vol. 73(5), September/October 1994, pp. 8–13.

³³⁰ UN General Assembly, UN Doc. A/53/496, Report of the Secretary-General on Assistance in Mine-Clearance, 14 October 1998, §§ 16–21.

care not to create additional risks to life in attacking military targets and, in particular, to end the practice of laying mines or explosives in areas where civilians work, live or circulate.³³¹

Other International Organisations

296. In a resolution on landmines in Angola adopted at its Dakar Session in February 1995, the ACP-EU Joint Assembly appealed to the Angolan government "to finally sign and ratify the 1980 CCW including the 1980 Protocol II to the CCW, and abide by its provisions".³³²

297. In a resolution on landmines adopted at its Brussels Session in September 1995, the ACP-EU Joint Assembly called upon African and Asian countries which had not yet done so to ratify the 1980 CCW.³³³

298. In a joint statement in 1993, the Social, Health and Family Affairs Committee of the Parliamentary Assembly of the Council of Europe and UNICEF condemned "the widespread use of antipersonnel mines, particularly those which look like toys, of which the main victims are children".³³⁴

299. In a resolution on Rwanda and the prevention of humanitarian crises adopted in 1994, the Parliamentary Assembly of the Council of Europe invited all member States to ratify the 1980 CCW and support a revision of Protocol II, particularly with a view to making self-destruct mechanisms compulsory on landmines.³³⁵

300. In 1995, in a written declaration on landmines and blinding laser weapons, 25 European parliamentarians declared their support for a strengthened 1980 Protocol II to the CCW applicable in non-international armed conflict.³³⁶

301. In a resolution adopted in 1996, the Parliamentary Assembly of the Council of Europe invited:

in particular, the governments of the member states of the Council of Europe, of the states whose parliaments enjoy or have applied for special guest status with the Assembly, of the states whose parliaments enjoy observer status, namely Israel, and of all other states to:

- ...
- b. ratify, if they have not done so, ... the [1980 CCW] and its protocols ...
- ...
- j. promote extension of the aforesaid United Nations Convention of 1980 to non-international armed conflicts, and inclusion in its provisions of effective procedures for verification and regular inspection.³³⁷

³³¹ MINUGUA, Director, Second Report, UN Doc. A/49/929, 29 June 1995, Annex, § 197.

³³² ACP-EU Joint Assembly, Resolution on land mines in Angola, Doc. 95/C 245/04, Dakar, 2 February 1995, § 6.

³³³ ACP-EU Joint Assembly, Resolution on land mines, Doc. 95/C 61/04, Brussels, 28 September 1995, § 6.

³³⁴ Council of Europe, Parliamentary Assembly, Report on the situation of women and children in the former Yugoslavia, Doc. No. 6903, 22 September 1993, p. 11.

³³⁵ Council of Europe, Parliamentary Assembly, Res. 1050, 10 November 1994.

³³⁶ Council of Europe, Parliamentary Assembly, Written declaration No. 242 on landmines and blinding laser weapons, Doc. 7343, 29 June 1995.

³³⁷ Council of Europe, Parliamentary Assembly, Res. 1085, 24 April 1996, § 8b and j.

302. In 1995, the EU Council of Ministers adopted a decision concerning a joint action on anti-personnel landmines, the aim of which was “to help combat the indiscriminate use and spread throughout the world of anti-personnel landmines which are very dangerous for civilian populations”. It stated that the member States “shall work to strengthen [the 1980 Protocol II to the CCW], in particular by . . . extending its scope to non-international armed conflicts [and] substantially strengthening restrictions or bans on anti-personnel mines”.³³⁸

303. In 1995, in answer to a question from the European Parliament, the European Commission stated that it was conscious of the suffering inflicted by landmines and that it supported “further measures for the curtailment of the availability and use of antipersonnel-landmines, through multilateral action, with an effective regime of control and verification and with the ultimate goal of eliminating such weapons”.³³⁹

304. In 1996, the EU Council adopted a decision concerning a joint action on anti-personnel landmines stating that “the European Union has resolved to combat and end the indiscriminate use and spread throughout the world of anti-personnel landmines as well as to contribute to solving problems already caused by these weapons”.³⁴⁰

305. At the First Annual Conference of High Contracting Parties to Amended Protocol II to the CCW in 1999, the EU stated that “wide adherence to Amended Protocol II to the CCW is . . . important . . . The EU is committed to the goal of total elimination of anti-personnel mines world-wide as well as to contributing to solving problems caused by these weapons.”³⁴¹

306. In a resolution adopted in 1994 on respect for international humanitarian law and support for humanitarian action in armed conflicts, the OAU Council of Ministers invited its members to “consider, or reconsider, without delay the possibility” of adhering to the 1980 CCW.³⁴²

307. In a resolution adopted in 1995 on the 1980 CCW and problems posed by the proliferation of anti-personnel mines in Africa, the OAU Council of Ministers stated that it was “deeply concerned over the tragic consequences resulting from the generalised and indiscriminate use of anti-personnel mines and the fact that of all the regions of the world, Africa is the continent with the largest number of these weapons”. It further condemned “cases of flagrant violation of the IHL by the indiscriminate use of anti-personnel mines” and urged member

³³⁸ EU, Council Decision 95/170/CFSP concerning the joint action adopted by the Council on the basis of Article J.3 of the Treaty of the European Union on anti-personnel mines, 12 May 1995, *Official Journal of the European Communities*, No. L 115, 22 May 1995, Articles 1 and 3(2). (The decision is no longer in force)

³³⁹ European Commission, Answer to Written Question E-1384/95 from the European Parliament, Doc. 95/C 257/59, 30 June 1995.

³⁴⁰ EU, Council Decision 96/588/CFSP concerning the joint action adopted by the Council on the basis of Article J.3 of the Treaty of the European Union on anti-personnel landmines, 1 October 1996, *Official Journal of the European Communities*, No. L 260, 12 October 1996, Article 1.

³⁴¹ EU, Statement at the First Annual Conference of High Contracting Parties to Amended Protocol II to the CCW, Geneva, 15 December 1999.

³⁴² OAU, Council of Ministers, Res. 1526 (LX), 6–11 June 1994, § 6(b).

States to support an African common position advocating “the extension of the field of application of the 1980 Convention to non-international armed conflicts”.³⁴³

308. In a resolution adopted in 1996 on the revision of the 1980 CCW and problems posed by the proliferation of anti-personnel mines in Africa, the OAU Council of Ministers noted that the African continent had the largest presence of landmines of all continents. It condemned the indiscriminate use of landmines and urged all member States which had not yet acceded to the CCW “to consider doing so as early as possible, particularly to its Protocol II”.³⁴⁴

309. In the recommendations of the second OAU/ICRC seminar on IHL for diplomats accredited to the OAU in 1995, the participants expressed “their deep concern about the scourge of mines and their generalised and indiscriminate use and the attendant harmful consequences”. They recommended the “establishment and adoption... of an African common position on the following issues:... The extension of the scope of implementation of the 1980 Convention to non-international armed conflicts [and] inclusion, in the Convention, of a mechanism to guarantee an effective implementation of the Convention.”³⁴⁵

310. In a resolution adopted in 1994 on respect for international humanitarian law, the OAS General Assembly stated that it was “deeply disturbed by the testing, production, sale, transfer, and use of certain conventional weapons which may be deemed to be excessively injurious or to have indiscriminate effects”. It urged all member States to accede to the 1980 CCW.³⁴⁶

311. In a resolution adopted in 1995 on respect for international humanitarian law, the OAS General Assembly stated that it was “alarmed by the terrible and lasting consequences for the civilian population of the use of anti-personnel mines”. It urged member States “to consider the possibility of becoming parties to the 1980 CCW and... to take part in the Review Conference on that Convention”.³⁴⁷

312. In a resolution adopted in 1996 on respect for international humanitarian law, the OAS General Assembly stated that it was “particularly alarmed at the indiscriminate effects of land mines on the civilian population and on humanitarian action” and urged those countries that deemed it desirable to consider the possibility of taking steps internally to prohibit the manufacture, sale and exportation of anti-personal mines”. It urged non-parties to the 1980 CCW to accede to it.³⁴⁸

³⁴³ OAU, Council of Ministers, Res. 1593 (LXII), 21–23 June 1995, preamble and §§ 2, 3 and 4(ii).

³⁴⁴ OAU, Council of Ministers, Res. 1628 (LXIII), 26–28 February 1996, preamble and §§ 2 and 3.

³⁴⁵ OAU/ICRC, Second seminar on IHL for diplomats accredited to the OAU, Addis Ababa, 12 April 1995, Recommendations, p. 3, § 3(c).

³⁴⁶ OAS, General Assembly, Res. 1270 (XXIV-O/94), 10 June 1994, preamble and § 1.

³⁴⁷ OAS, General Assembly, Res. 1335 (XXV-O/95), 9 June 1995, preamble and § 1.

³⁴⁸ OAS, General Assembly, Res. 1408 (XXVI-O/96), 7 June 1996, preamble and § 1.

International Conferences

313. Mexico and Switzerland proposed a draft article to the Ad Hoc Committee on Conventional Weapons established by the CDDH entitled "Anti-tank and anti-personnel mines" which read:

1. It is prohibited to lay mines in an area which contains a concentration of civilians and in which combat between ground forces is neither taking place nor imminent, unless:
 - (a) they are placed on or in the immediate vicinity of a military objective; and
 - (b) effective precautions have been taken to protect civilians from their effects.
2. The location of methodically laid minefields shall be recorded on sketches or plans, or shown on topographic maps. Such documents shall, so far as possible, be prepared in respect of mines laid during combat. These documents shall be preserved in order to make possible the subsequent removal of the mines without danger.
3. It is prohibited to lay remotely-delivered mines or similar explosive devices which are dropped, fired or teleguided, unless:
 - (a) they are equipped with a self-destruct or neutralization mechanism which becomes operative on the expiry of . . . hours at most, and
 - (b) the area in which they are employed is inside the combat zone of the ground forces.³⁴⁹

314. In the Ad Hoc Committee on Conventional Weapons established by the CDDH, a proposal entitled "Anti-personnel land-mines" was supported by Afghanistan, Algeria, Austria, Colombia, Egypt, Kuwait, Lebanon, Mali, Mauritania, Mexico, Norway, Sudan, Sweden, Switzerland, Venezuela and SFRY which stated that "anti-personnel land-mines must not be laid by aircraft".³⁵⁰ According to an explanatory memorandum:

The use of anti-personnel mines is a generally accepted means of hampering enemy advance and of putting combatants out of action.

However, certain ways of employing anti-personnel landmines may easily lead to injuries indiscriminately being inflicted upon combatants and civilians. The risks for such results are especially high if such mines are laid, perhaps in very large numbers, by aircraft. The limits of the mines will often be very uncertain with this method. The results are apt to be particularly cruel if the mines are not equipped with self-destruction devices which will function reliably after a relatively short time. The risk of indiscriminate effects may be reduced also through marking of minefields – this is not possible, however, when the mines are scattered over a vast area.³⁵¹

³⁴⁹ Mexico and Switzerland, Draft article entitled "Anti-tank and anti-personnel mines" submitted to the Ad Hoc Committee on Conventional Weapons established by the CDDH, *Official Records*, Vol. XVI, CDDH/IV/211 within CDDH/IV/226, p. 585.

³⁵⁰ Afghanistan, Algeria, Austria, Colombia, Egypt, Kuwait, Lebanon, Mali, Mauritania, Mexico, Norway, Sudan, Sweden, Switzerland, Venezuela and SFRY, Proposal entitled "Anti-personnel land-mines" submitted to the Ad Hoc Committee on Conventional Weapons established by the CDDH, *Official Records*, Vol. XVI, CDDH/IV/201 (V) within CDDH/IV/226, p. 581.

³⁵¹ Afghanistan, Algeria, Austria, Colombia, Egypt, Kuwait, Lebanon, Mali, Mauritania, Mexico, Norway, Sudan, Sweden, Switzerland, Venezuela and SFRY, Explanatory Memorandum on "Anti-personnel land-mines" submitted to the Ad Hoc Committee on Conventional Weapons

315. A draft text entitled “The Regulation of the Use of Land-Mines and Other Devices” proposed to the Ad Hoc Committee on Conventional Weapons established by the CDDH by Denmark, France, Netherlands and UK elaborated upon an earlier proposal made at the Conference of Government Experts on the Use of Certain Conventional Weapons in Lugano in 1976. This draft text suggested a number of measures including: the compulsory recording of pre-planned minefields (Article 2); a prohibition on the use of remotely delivered mines unless these mines were self-neutralising or the target area was marked (Article 3); and the prohibition of manually emplaced mines in towns or civilian areas unless “they are placed on or in the close vicinity of a military objective” or “due precautions are taken to protect civilians from their effects” (Article 4).³⁵² The proposal was generally favourably received and was explicitly supported by the FRG and Libya.³⁵³

316. A draft article was introduced in the Ad Hoc Committee on Conventional Weapons established by the CDDH by Austria, Mexico, Sweden, Switzerland, Uruguay and SFRY which read, *inter alia*, as follows:

1. It is forbidden to use mines and devices to which this article applies in an area containing a concentration of civilians and in which combat between ground forces is not taking place or is not imminent unless effective precautions are taken to protect civilians from their effects.
2. The location of pre-planned minefields shall always be recorded. Minefields laid during combat and the location of certain explosive and non-explosive devices shall be recorded as far as possible. These records shall be preserved in order to make possible the subsequent removal of the mines and devices and to make the records public when it is necessary.
3. The use of remotely-delivered mines is prohibited unless
 - (a) each such mine is fitted with a neutralizing mechanism which renders the mine harmless within a period of . . . , and
 - (b) they are used within the combat zone.³⁵⁴

317. A proposal submitted by Austria, Denmark, France, Mexico, the Netherlands, Spain, Sweden, Switzerland and the UK to the Ad Hoc Committee on Conventional Weapons established by the CDDH provided that:

1. Scope of application

The proposals relate to the use in armed conflict on land of the mines and other devices defined therein . . .

established by the CDDH, *Official Records*, Vol. XVI, CDDH/IV/201 within CDDH/IV/226, pp. 581–582.

³⁵² Denmark, France, Netherlands and UK, Proposal entitled “The Regulation of the Use of Land-Mines and Other Devices” submitted to the Ad Hoc Committee on Conventional Weapons established by the CDDH, *Official Records*, Vol. XVI, CDDH/IV/213 within CDDH/IV/226, pp. 588–591.

³⁵³ CDDH, *Official Records*, Vol. XVI, CDDH/IV/SR.30, 26 May 1976, p. 308 (FRG); *Official Records*, Vol. XVI, CDDH/IV/SR.40, 19 May 1977, p. 411 (Libya).

³⁵⁴ Austria, Mexico, Sweden, Switzerland, Uruguay and SFRY, “Draft article on the Use of Land Mines and the Use of Certain Explosive and Non-Explosive Devices” submitted to the Ad Hoc Committee on Conventional Weapons established by the CDDH, *Official Records*, Vol. XVI, CDDH/IV/222 within CDDH/IV/226, p. 593.

3. Recording of the location of minefields and other devices

- (1) The Parties to a conflict shall record the location of:
 - (a) all pre-planned minefields laid by them; and
 - (b) all areas in which they have made large-scale and pre-planned use of explosive or non-explosive devices.
- (2) The Parties shall endeavour to ensure the recording of the location of all other minefields, mines and explosive and non-explosive devices which they have laid or placed in position.
- (3) All such records shall be retained by the Parties and the location of all recorded minefields, mines and explosive or non-explosive devices remaining in territory controlled by an adverse Party shall be made public after the cessation of hostilities.

4. Restrictions on the use of remotely delivered mines

The use of remotely delivered mines is prohibited unless:

- (a) each such mine is fitted with an effective neutralizing mechanism, that is to say a self-actuating or remotely controlled mechanism which is designed to render a mine harmless or cause it to destroy itself when it is anticipated that the mine will no longer serve the military purpose for which it was placed in position;
or
 - (b) the area in which they are delivered is marked in some definite manner in order to warn the civilian population,
and, in either case, they are only used within an area containing military objectives.
5. Restrictions on the use of mines and other devices in populated areas
- (1) This proposal applies to mines (other than remotely delivered [anti-tank] mines), explosive and non-explosive devices, and other manually-emplaced munitions and devices designed to kill, injure or damage and which are actuated by remote control or automatically after a lapse of time.
 - (2) It is prohibited to use any object to which this proposal applies in any city, town, village or other area containing a similar concentration of civilians in which combat between ground forces is not taking place or does not appear to be imminent, unless either:
 - (a) they are placed on or in the close vicinity of a military objective belonging to or under the control of an adverse Party; or
 - (b) effective precautions are taken to protect civilians from their effects.³⁵⁵

318. The Final Report of the CCW Conference submitted to the UN General Assembly stated in connection with Article 3 of the 1980 Protocol II to the CCW that "the parties must take whatever measures are open to them to protect civilians wherever they are. They may use records for this purpose by, for example, marking minefields or otherwise warning the civilian population of the dangers of mines and booby traps."³⁵⁶

³⁵⁵ Austria, Denmark, France, Mexico, Netherlands, Spain, Sweden, Switzerland and UK, Proposal submitted to the Ad Hoc Committee on Conventional Weapons established by the CDDH, Working Group Document CDDH/IV/GT/4*, *Official Records*, Vol. XVI, CDDH/408/Rev. 1, pp. 544–546.

³⁵⁶ UN Conference on Prohibitions or Restrictions of Use of Certain Conventional Weapons Which May be Deemed to Be Excessively Injurious or to Have Indiscriminate Effects, Second Session, Geneva, 15 September–10 October 1980, Final Report to the UN General Assembly, UN Doc. A/CONF.95/15, 27 October 1980, p. 9.

319. The 25th International Conference of the Red Cross in 1986 adopted a resolution on work on international humanitarian law in armed conflicts at sea and on land in which it urged all States to become parties to the 1980 CCW and its Protocols "as early as possible so as ultimately to obtain universality of adherence". It also noted "the dangers to civilians caused by mines... employed during an armed conflict and the need for international co-operation in this field consistent with Article 9 of Protocol II attached to the 1980 Convention".³⁵⁷

320. In a resolution adopted in 1995 on challenges posed by calamities arising from armed conflict, the 93rd Inter-Parliamentary Conference called on States "to lay down a ban on anti-personnel mines" during the review of the 1980 CCW, and, pending their total prohibition:

- (a) to stipulate that all anti-personnel mines must be equipped with effective self-destruction devices;
- (b) to ban all mines which cannot be easily localized and to recommend specifications to this end;
- (c) to broaden the Convention to cover all internal conflicts.³⁵⁸

321. The 26th International Conference of the Red Cross and Red Crescent in 1995 adopted a resolution on the protection of the civilian population in period of armed conflict in which it urged "all States which have not yet done so to become party to the [1980 CCW] and in particular to its Protocol II on landmines, with a view to achieving universal adherence thereto" and further underlined "the importance of respect for its provisions by all parties to armed conflict".³⁵⁹

322. In the Final Declaration of the ICRC Regional Seminar for Asian Military and Strategic Studies Experts in 1997, the participants called upon States of the Asian region but also the international community to consider the following urgent measures especially

for those States which are not yet Parties, adherence to the 1980 United Nations Convention on Certain Conventional Weapons, including its Protocol II on landmines (as amended on 3 May 1996), and for current States party to this Convention that have not yet done so adherence to its amended Protocol II at the earliest possible date to ensure its early entry into force.³⁶⁰

³⁵⁷ 25th International Conference of the Red Cross, Geneva, 23–31 October 1986, Res. VII, § B(2) and (5).

³⁵⁸ 93rd Inter-Parliamentary Conference, Madrid, 27 March–1 April 1999, Resolution on the International Community in the Face of the Challenges posed by Calamities Arising from Armed Conflicts and by Natural or Man-made Disasters: The Need for a Coherent and Effective Response through Political and Humanitarian Assistance Means and Mechanisms Adapted to the Situation, § 16.

³⁵⁹ 26th International Conference of the Red Cross and Red Crescent, Geneva, 3–7 December 1995, Res. II, § G(g).

³⁶⁰ ICRC Regional Seminar for Asian Military and Strategic Studies Experts, Manila, 20–23 July 1997, Final Declaration, Anti-personnel Mines: What Future for Asia?, p. 3–4.

IV. Practice of International Judicial and Quasi-judicial Bodies

323. In a resolution on anti-personnel mines adopted in 1995, the ACiHPR urged African States to “participate in large numbers in the 1996 CCW Review Conference to press for the introduction of a clause on the prohibition or restriction of the use of mines in that Convention”.³⁶¹

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

324. To fulfil its task of disseminating IHL, the ICRC has delegates around the world teaching armed and security forces that:

Mines other than remotely delivered, booby-traps and other devices may be use in populated areas:

- a) when they are placed on or in the close vicinity of a military objective belonging to or under the control of the enemy; or
- b) when measures are taken to protect civilians persons (e.g. warning signs, sentries, issue of warnings, provision of fences).

The location shall be recorded of:

- a) pre-planned minefields;
- b) areas where large-scale and pre-planned use is made of booby-traps;
- c) other minefields, mines and booby-traps, when the tactical situation permits.

Remotely delivered mines may be used:

- a) only within an area
 - being itself a military objective, or
 - containing military objectives; and
- b) when their location can be accurately recorded, or an effective neutralizing mechanism is used on each mine;
- c) subject to effective advance warning to the civilian population, when the tactical situation permits.³⁶²

325. In May 1993, in a publication entitled “Mines: A Perverse Use of Technology”, the ICRC condemned the indiscriminate use of anti-personnel mines.³⁶³

326. At its Birmingham Session in 1993, the Council of Delegates adopted a resolution on mines, in which it urged States

which have not yet done so to ratify the 1980 United Nations Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons Which May be

³⁶¹ ACiHPR, Res. 4 (XVII), 13–22 March 1995, §§ 1 and 2.

³⁶² Frédéric de Mulinen, *Handbook on the Law of War for Armed Forces*, ICRC, Geneva, 1987, §§ 924–930.

³⁶³ ICRC, *Mines: A Perverse Use of Technology*, May 1993, extracts reprinted in Louis Maresca and Stuart Maslen (eds.), *The Banning of Anti-Personnel Landmines*, Cambridge University Press, Cambridge, 2000, pp. 257–263.

Deemed to be Excessively Injurious or to Have Indiscriminate Effects and to seek, during the forthcoming Review Conference, effective means to deal with the problem caused by mines by reinforcing the normative provisions of the Convention and by introducing implementation mechanisms.³⁶⁴

327. At the Second Session of the Meeting of Governmental Experts to prepare the CCW Review Conference in May 1994, the ICRC made several different proposals on prohibitions and restrictions on anti-personnel mines. While the ICRC's preferred option was a blanket prohibition on the use, manufacture, stockpiling and transfer of anti-personnel mines, it also proposed an alternative prohibiting the use, manufacture, stockpiling or transfer of certain types of mines including: mines that are not easily detectable; mines with anti-handling devices; mines without an effective self-destruction mechanism; and "anti-vehicle mines that are not equipped with an effective integrated self-neutralizing mechanism together with an effective locating mechanism".³⁶⁵

328. In 1994, in a statement before the First Committee of the UN General Assembly, the ICRC, after expressing its support for a total ban on anti-personnel mines, added that "as a minimum all anti-personnel mines should automatically and reliably render themselves harmless within a specified period of time".³⁶⁶

329. In 1995, in a position paper on landmines, the ICRC stated that "if States are unable, in the short term, to agree to a total prohibition on the use of anti-personnel mines, the ICRC proposes, as a minimum, the banning of all anti-personnel landmines lacking effective self-destruct mechanisms". The paper also outlined other "essential minimum steps" that must be taken in order to protect civilians and to facilitate mine clearance including: the prohibition of mines that are not easily detectable; an extension of the 1980 CCW to cover all internal conflicts; reinforcing implementation mechanisms for the 1980 CCW; and encouraging universal adherence to the 1980 CCW.³⁶⁷

330. At its Geneva Session in 1995, the Council of Delegates adopted a resolution on anti-personnel landmines in which it expressed its "great concern about the indiscriminate effects of anti-personnel landmines and the consequences for civilian populations and humanitarian action".³⁶⁸

³⁶⁴ International Red Cross and Red Crescent Movement, Council of Delegates, Birmingham Session, 29–30 October 1993, Res. 3, § 1.

³⁶⁵ ICRC, Proposal at the Meeting of Governmental Experts to Prepare the CCW Review Conference (Second Session), UN Doc. CCW/CONF.I/GE/CRP.24, 27 May 1994, reprinted in Louis Maresca and Stuart Maslen (eds.), *The Banning of Anti-Personnel Landmines*, Cambridge University Press, Cambridge, 2000, pp. 322–324.

³⁶⁶ ICRC, Statement before the First Committee of the UN General Assembly, UN Doc. A/C.1/49/PV.10, 24 October 1994, p. 11.

³⁶⁷ ICRC, Position Paper No. 1 Landmines and Blinding Weapons: From Expert Group to the Review Conference, February 1995, reprinted in Louis Maresca and Stuart Maslen (eds.), *The Banning of Anti-Personnel Landmines*, Cambridge University Press, Cambridge, 2000, pp. 328–331.

³⁶⁸ International Red Cross and Red Crescent Movement, Council of Delegates, Geneva Session, 1–2 December 1995, Res. 10, § 1.

331. In 1996, in a statement before the First Committee of the UN General Assembly, the ICRC welcomed the improvements that had been made in the 1996 Amended Protocol II to the CCW. These improvements included: the extension of the Protocol to non-international conflicts; protections for humanitarian workers; annual meetings of States parties; and a requirement that States punish serious violations of the Amended Protocol. The ICRC went on to make the case for a total ban on the basis that “the new limitations on the use of anti-personnel mines are both weak and complex” and “the implementation of new provisions on detectability and self-destruction can be delayed for up to nine years after entry into force of the revised Protocol”.³⁶⁹

332. At its Geneva Session in 1999, the Council of Delegates adopted a resolution on the Movement strategy on landmines in which it approved the Movement Strategy on Landmines, one of the core elements of which was to “achieve universal adherence to and effective implementation of the norms established by the Ottawa Convention and amended Protocol II to the 1980 Convention on Certain Conventional Weapons”.³⁷⁰

VI. Other Practice

333. In 1986, in a report on landmines in El Salvador and Nicaragua, Americas Watch listed the following uses of landmines, booby-traps and related devices among those that “should be prohibited in the conduct of hostilities in both countries”:

1. Their direct use against individual or groups of unarmed civilians where no legitimate military objective, such as enemy combatants or war material, is present. Such uses of these weapons are indiscriminate.
2. The direct use against civilian objects, i.e., towns, villages, dwellings or buildings dedicated to civilian purposes where no military objective is present. Such weapons’ use is also indiscriminate.
3. The use of any remotely delivered mines which are not effectively marked and have *no* self-actuating or remotely controlled mechanism to cause its destruction or neutralization once its military purpose has been served. Such mines are “blind weapons” and their use is indiscriminate as to time.
4. The use of hand delivered mines, such as Claymore varieties, and booby-traps in or near a civilian locale containing military objectives which are deployed *without* any precaution, markings or other warnings, or which do *not* self-destruct or are *not* removed once their military purpose has been served. Such uses are similarly indiscriminate.³⁷¹ [emphasis in original]

³⁶⁹ ICRC, Statement before the First Committee of the UN General Assembly, UN Doc. A/C.1/51/PV.8, 18 October 1996, p. 9.

³⁷⁰ International Red Cross and Red Crescent Movement, Council of Delegates, Geneva Session, 29–30 October 1999, Res. 10, § 1.

³⁷¹ Americas Watch, *Land Mines in El Salvador and Nicaragua: The Civilian Victims*, New York, December 1986, pp. 100–101.

334. According to the Report on the Practice of El Salvador, the FMLN acknowledged in 1987 that landmines are important for its strategy, but has stated that they were directed exclusively against the army.³⁷² The report alleges that the FMLN did not comply with the requirement of sign-posting minefields.³⁷³

335. Rule B4 of the Rules of International Law Governing the Conduct of Hostilities in Non-international Armed Conflicts, adopted in 1990 by the Council of the IIHL, states that:

In application of the general rules listed in section A above, especially those on the distinction between combatants and civilians and on the immunity of the civilian population, mine, booby-traps and other devices within the meaning of Protocol II to the [1980 CCW] may not be directed against the civilian population as such or against individual civilians, nor used indiscriminately.

...

To ensure the protection of the civilian population referred to in the previous paragraphs, precautions must be taken to protect them from attacks in the form of mines, booby-traps and other devices.³⁷⁴

336. In 1993, an armed opposition group declared that it neither placed landmines in places which might be frequented by civilians, nor used them during raids.³⁷⁵

337. In 1994, an armed opposition group stated that it only used anti-tank mines which were detonated remotely. It also systematically informed the ICRC of mined locations.³⁷⁶

338. An editorial in *Economic and Political Weekly* in 1997 stated that India was in favour of a "'phased approach' [to restrictions on the use of anti-personnel mines] which will for the present allow the use of land-mines in the defence of countries' borders".³⁷⁷

339. In 1998, in report on violations of the laws of war by both sides in Angola, Africa Watch stated that "it is prohibited to use landmines near a civilian object, even if it contains military objectives, without any precautions, markings or other warnings or if such devices do not self-destruct or are not removed after their military purpose has been served".³⁷⁸

³⁷² Report on the Practice of El Salvador, 1997, Chapter 3.3, referring to "La guerra en el mes de julio y el informe castrense", *Estudios Centroamericanos*, Universidad Centroamericana José Simeón Cañas, Vol. XLII, No. 465, July 1987, p. 65.

³⁷³ Report on the Practice of El Salvador, 1997, Chapter 3.3, referring to IDHUCA, Instituto de Derechos Humanos, Universidad Centroamericana José Simeón Cañas, *Los Derechos Humanos en El Salvador en 1989*, San Salvador, 1991.

³⁷⁴ IIHL, Rules of International Humanitarian Law Governing the Conduct of Hostilities in Non-international Armed Conflicts, Rule B4, *IRRC*, No. 278, 1990, p. 399.

³⁷⁵ ICRC archive document. ³⁷⁶ ICRC archive document.

³⁷⁷ India, Editorial entitled "Welcome Movement", *Economic and Political Weekly*, 27 September 1997, p. 2433.

³⁷⁸ Africa Watch, *Angola: Violations of the Laws of War by Both Sides*, New York, April 1998, p. 58.

C. Measures to Reduce the Danger Caused by Landmines

I. Treaties and Other Instruments

Treaties

340. Article 5(1) of the 1980 Protocol II to the CCW provides that:

The use of remotely delivered mines is prohibited unless such mines are only used within an area which is itself a military objective or which contains military objectives, and unless:

- (a) their location can be accurately recorded in accordance with Article 7(1)(a); or
- (b) an effective neutralizing mechanism is used on each such mine, that is to say, a self-actuating mechanism which is designed to render a mine harmless or cause it to destroy itself when it is anticipated that the mine will no longer serve the military purpose for which it was placed in position, or a remotely-controlled mechanism which is designed to render harmless or destroy a mine when the mine no longer serves the military purpose for which it was placed in position.

341. Article 7 of the 1980 Protocol II to the CCW provides that:

1. The parties to the conflict shall record the location of:
 - (a) all pre-planned minefields laid by them; . . .
 - . . .
2. The parties shall endeavour to ensure the recording of the location of all other minefields, mines . . . which they have laid or placed in position.
3. All such records shall be retained by the parties who shall:
 - (a) immediately after the cessation of active hostilities:
 - (i) take all necessary and appropriate measures, including the use of such records, to protect civilians from the effects of minefields, mines . . . and either
 - (ii) in cases where the forces of neither party are in the territory of the adverse party, make available to each other and to the Secretary-General of the United Nations all information in their possession concerning the location of minefields, mines . . . in the territory of the adverse party; or
 - (iii) once complete withdrawal of the forces of the parties from the territory of the adverse party has taken place, make available to the adverse party and to the Secretary-General of the United Nations all information in their possession concerning the location of minefields, mines . . . in the territory of the adverse party;
 - (b) when a United Nations force or mission performs functions in any area, make available to the authority mentioned in Article 8 such information as is required by that Article;
 - (c) whenever possible, by mutual agreement, provide for the release of information concerning the location of minefields, mines . . . particularly in agreements governing the cessation of hostilities.

342. Article 8 of the 1980 Protocol II to the CCW stipulates that:

1. When a United Nations force or mission performs functions of peacekeeping, observation or similar functions in any area, each party to the conflict shall, if requested by the head of the United Nations force or mission in that area, as far as it is able:
 - (a) remove or render harmless all mines or booby-traps in that area;
 - (b) take such measures as may be necessary to protect the force or mission from the effects of minefields, mines and booby-traps while carrying out its duties; and
 - (c) make available to the head of the United Nations force or mission in that area, all information in the party's possession concerning the location of minefields, mines and booby traps in that area.
2. When a United Nations fact-finding mission performs functions in any area, any party to the conflict concerned shall provide protection to that mission except where, because of the size of such mission, it cannot adequately provide such protection. In that case it shall make available to the head of the mission the information in its possession concerning the location of minefields, mines and booby-traps in that area.

343. Upon ratification of the 1980 CCW, Canada stated that:

With respect to Protocol II [to the 1980 CCW], it is the understanding of the Government of Canada that:

- (a) Any obligation to record the location of remotely delivered mines pursuant to sub-paragraph 1(a) of article 5 refers to the location of mine fields and not to the location of individual remotely delivered mines.
- (b) The term "pre-planned", as used in sub-paragraph 1(a) of article 7, means that the position of the minefield in question should have been determined in advance so that an accurate record of the location of the minefield, when laid, can be made.
- (c) The phrase 'similar functions' used in article 8, includes the concepts of 'peace-making', 'preventive peace-keeping' and 'peace-enforcement' as defined in an agenda for peace (United Nations document A/47/277 of 17 June 1992).³⁷⁹

344. Upon ratification of the 1980 CCW, the Netherlands stated that "with regard to article 8, paragraph 1, of Protocol II: It is the understanding of the Government of the Kingdom of the Netherlands that the words 'as far as it is able' mean 'as far as it is technically able'."³⁸⁰

345. Upon accession to the 1980 CCW, Israel stated that:

With respect to Protocol II [to the 1980 CCW], it is the understanding of the Government of Israel that:

- (i) Any obligation to record the location of remotely delivered mines pursuant to sub-paragraph 1(a) of article 5 refers to the location of mine fields and not to the location of individual remotely delivered mines;

³⁷⁹ Canada, Declaration made upon ratification of the CCW, 24 June 1994, § 3.

³⁸⁰ Netherlands, Declaration made upon ratification of the CCW, 18 June 1987, § 3.

- (ii) the term pre-planned, as used in sub-paragraph 1(a) of article 7, means that the position of the minefield in question should have been determined in advance so that an accurate record of the location of the minefield, when laid, can be made.³⁸¹

346. Article 9 of the 1980 Protocol II to the CCW provides that:

After the cessation of active hostilities, the parties shall endeavour to reach agreement, both among themselves and, where appropriate, with other States and with international organizations, on the provision of information and technical and material assistance – including, in appropriate circumstances, joint operations – necessary to remove or otherwise render ineffective minefields, mines . . . placed in position during the conflict.

347. Article 1(2) of the 1996 Amended Protocol II to the CCW provides that:

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

348. Article 3(2) of the 1996 Amended Protocol II to the CCW provides that:

Each High Contracting Party or party to a conflict is, in accordance with the provisions of this Protocol, responsible for all mines, booby-traps, and other devices employed by it and undertakes to clear, remove, destroy or maintain them as specified in Article 10 of this Protocol.

349. Article 6(1) of the 1996 Amended Protocol II to the CCW states that “it is prohibited to use remotely-delivered mines unless they are recorded in accordance with sub-paragraph I (b) of the Technical Annex”.

350. Article 9 of the 1996 Amended Protocol II to the CCW provides that:

1. All information concerning minefields, mined areas, mines, booby-traps and other devices shall be recorded in accordance with the provisions of the Technical Annex.
2. All such records shall be retained by the parties to a conflict, who shall, without delay after the cessation of active hostilities, take all necessary and appropriate measures, including the use of such information, to protect civilians from the effects of minefields, mined areas, mines, booby-traps and other devices in areas under their control.

At the same time, they shall also make available to the other party or parties to the conflict and to the Secretary-General of the United Nations all such information in their possession concerning minefields, mined areas, mines, booby-traps and other devices laid by them in areas no longer under their control; provided, however, subject to reciprocity, where the forces of a party to a conflict are in the territory of an adverse party, either party may withhold such information from the Secretary-General and the other party, to the extent

³⁸¹ Israel, Declarations and statements of understanding made upon accession to the CCW, 22 March 1995, § c.

that security interests require such withholding, until neither party is in the territory of the other. In the latter case, the information withheld shall be disclosed as soon as those security interests permit. Wherever possible, the parties to the conflict shall seek, by mutual agreement, to provide for the release of such information at the earliest possible time in a manner consistent with the security interests of each party.

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

351. Article 10 of the 1996 Amended Protocol II to the CCW provides that:

1. Without delay after the cessation of active hostilities, all minefields, mined areas, mines . . . shall be cleared, removed, destroyed or maintained in accordance with Article 3 and paragraph 2 of Article 5 of this Protocol.
2. High Contracting Parties and parties to a conflict bear such responsibility with respect to minefields, mined areas, mines . . . in areas under their control.
3. With respect to minefields, mined areas, mines . . . laid by a party in areas over which it no longer exercises control, such party shall provide to the party in control of the area pursuant to paragraph 2 of this Article, to the extent permitted by such party, technical and material assistance necessary to fulfil such responsibility.
4. At all times necessary, the parties shall endeavour to reach agreement, both among themselves and, where appropriate, with other States and with international organizations, on the provision of technical and material assistance, including, in appropriate circumstances, the undertaking of joint operations necessary to fulfil such responsibilities.

352. Article 12 of the 1996 Amended Protocol II to the CCW provides that:

1. Application
 - (a) With the exception of the forces and missions referred to in sub-paragraph 2(a) (i) of this Article, this Article applies only to missions which are performing functions in an area with the consent of the High Contracting Party on whose territory the functions are performed.
 - (b) The application of the provisions of this Article to parties to a conflict which are not High Contracting Parties shall not change their legal status or the legal status of a disputed territory, either explicitly or implicitly.
 - (c) The provisions of this Article are without prejudice to existing international humanitarian law, or other international instruments as applicable, or decisions by the UN Security Council of the United Nations, which provide for a higher level of protection to personnel functioning in accordance with this Article.
2. Peace-keeping and certain other forces and missions
 - (a) This paragraph applies to:
 - (i) any United Nations force or mission performing peace-keeping, observation or similar functions in any area in accordance with the Charter of the United Nations;
 - (ii) any mission established pursuant to Chapter VIII of the Charter of the United Nations and performing its functions in the area of a conflict.
 - (b) Each High Contracting Party or party to a conflict, if so requested by the head of a force or mission to which this paragraph applies, shall:

- (i) so far as it is able, take such measures as are necessary to protect the force or mission from the effects of mines, booby-traps and other devices in any area under its control;
 - (ii) if necessary in order effectively to protect such personnel, remove or render harmless, so far as it is able, all mines, booby-traps and other devices in that area; and
 - (iii) inform the head of the force or mission of the location of all known minefields, mined areas, mines, booby-traps and other devices in the area in which the force or mission is performing its functions and, so far as is feasible, make available to the head of the force or mission all information in its possession concerning such minefields, mined areas, mines, booby-traps and other devices.
3. Humanitarian and fact-finding missions of the United Nations System
- (a) This paragraph applies to any humanitarian or fact-finding mission of the United Nations System.
 - (b) Each High Contracting Party or party to a conflict, if so requested by the head of a mission to which this paragraph applies, shall:
 - (i) provide the personnel of the mission with the protections set out in sub-paragraph 2(b) (i) of this Article; and
 - (ii) if access to or through any place under its control is necessary for the performance of the mission's functions and in order to provide the personnel of the mission with safe passage to or through that place:
 - (aa) unless on-going hostilities prevent, inform the head of the mission of a safe route to that place if such information is available; or
 - (bb) if information identifying a safe route is not provided in accordance with sub-paragraph (aa), so far as is necessary and feasible, clear a lane through minefields.
4. Missions of the International Committee of the Red Cross
- (a) This paragraph applies to any mission of the International Committee of the Red Cross performing functions with the consent of the host State or States as provided for by the Geneva Conventions of 12 August 1949 and, where applicable, their Additional Protocols.
 - (b) Each High Contracting Party or party to a conflict, if so requested by the head of a mission to which this paragraph applies, shall:
 - (i) provide the personnel of the mission with the protections set out in sub-paragraph 2(b) (i) of this Article; and
 - (ii) take the measures set out in sub-paragraph 3(b) (ii) of this Article.
5. Other humanitarian missions and missions of enquiry
- (a) Insofar as paragraphs 2, 3 and 4 above do not apply to them, this paragraph applies to the following missions when they are performing functions in the area of a conflict or to assist the victims of a conflict:
 - (i) any humanitarian mission of a national Red Cross or Red Crescent Society or of their International Federation;
 - (ii) any mission of an impartial humanitarian organization, including any impartial humanitarian demining mission; and
 - (iii) any mission of enquiry established pursuant to the provisions of the Geneva Conventions of 12 August 1949 and, where applicable, their Additional Protocols.
 - (b) Each High Contracting Party or party to a conflict, if so requested by the head of a mission to which this paragraph applies, shall, so far as is feasible:

- (i) provide the personnel of the mission with the protections set out in sub-paragraph 2(b) (i) of this Article, and
 - (ii) take the measures set out in sub-paragraph 3(b) (ii) of this Article.
6. Confidentiality
All information provided in confidence pursuant to this Article shall be treated by the recipient in strict confidence and shall not be released outside the force or mission concerned without the express authorization of the provider of the information.
7. Respect for laws and regulations
Without prejudice to such privileges and immunities as they may enjoy or to the requirements of their duties, personnel participating in the forces and missions referred to in this Article shall:
- (a) respect the laws and regulations of the host State; and
 - (b) refrain from any action or activity incompatible with the impartial and international nature of their duties.

353. Upon ratification of the 1996 Amended Protocol II to the CCW, Canada stated that "it is understood that the maintenance of a minefield referred to in Article 10, in accordance with the standards on marking, monitoring and protection by fencing or other means set out in Amended Protocol II, would not be considered as a use of the mines contained therein".³⁸²

354. Upon acceptance of the 1996 Amended Protocol II to the CCW, France stated that:

France takes it that article 4 and the Technical Annex to amended Protocol II do not require the removal or replacement of mines that have already been laid . . .

The provisions of amended Protocol II such as those concerning the marking, monitoring and protection of zones which contain anti-personnel mines and are under the control of a party, are applicable to all zones containing mines, irrespective of the date on which those mines were laid.³⁸³

355. Article 5 of the 1997 Ottawa Convention provides that:

1. Each State Party undertakes to destroy or ensure the destruction of all anti-personnel mines in mined areas under its jurisdiction or control, as soon as possible but not later than ten years after the entry into force of this Convention for that State Party.
2. Each State Party shall make every effort to identify all areas under its jurisdiction or control in which anti-personnel mines are known or suspected to be placed and shall ensure as soon as possible that all anti-personnel mines in mined areas under its jurisdiction or control are perimeter-marked, monitored and protected by fencing or other means, to ensure the effective exclusion of civilians, until all anti-personnel mines contained therein have been destroyed. The marking shall at least be to the standards set out in the Protocol on Prohibitions or Restrictions on the Use of Mines, Booby-Traps and Other Devices, as amended on 3 May 1996, annexed to the Convention

³⁸² Canada, Reservations and statements of understanding made upon ratification of Amended Protocol II to the CCW, 5 January 1998, § 3.

³⁸³ France, Declarations made upon acceptance of Amended Protocol II to the CCW, 23 July 1998.

on Prohibitions or Restrictions on the Use of Certain Conventional Weapons Which May Be Deemed to Be Excessively Injurious or to Have Indiscriminate Effects.

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

356. In 2001, States parties to the 1980 CCW decided to amend Article 1 of the Convention, governing its scope. This amendment states that:

1. This Convention and its annexed Protocols shall apply in the situations referred to in Article 2 common to the Geneva Conventions of 12 August 1949 for the Protection of War Victims, including any situation described in paragraph 4 of Article 1 of Additional Protocol I to these Conventions.
2. This Convention and its annexed Protocols shall also apply, in addition to situations referred to in paragraph 1 of this Article, to situations referred to in Article 3 common to the Geneva Conventions of 12 August 1949. This Convention and its annexed Protocols shall not apply to situations of internal disturbances and tensions, such as riots, isolated and sporadic acts of violence, and other acts of a similar nature, as not being armed conflicts.

Other Instruments

357. Article 15 of the 1956 New Delhi Draft Rules provides that “if the Parties to the conflict make use of mines, they are bound . . . to chart the minefields. The charts shall be handed over, at the close of active hostilities, to the adverse Party, and also to other authorities responsible for the safety of the population.”

358. Article II(8) of the 1992 N’Sele Ceasefire Agreement provides that “ceasefire” shall imply “a ban on . . . the hindering of operations to remove mines”.

359. Paragraphs 79 and 80 of the 2000 Cairo Declaration adopted at the Africa-Europe Summit states that there is a need to intensify efforts “in the fields of mine clearance, assistance thereto, as well as with respect to mine victims and mine awareness”. The States present at the Summit declared that they would “continue to co-operate towards a comprehensive resolution of the landmine problem in Africa, in particular by addressing the issue of the removal of existing landmines”.

II. National Practice

Military Manuals

360. Argentina’s Law of War Manual reproduces the content of Article 7 of the 1980 Protocol II to the CCW.³⁸⁴

³⁸⁴ Argentina, *Law of War Manual* (1989), § 4.24(2).

361. Australia's *Commanders' Guide* states that "the location of minefields... is to be recorded".³⁸⁵ As regards remotely delivered mines, it states that "either the location of minefields containing remotely delivered mines must be accurately recorded or the mines themselves must be equipped with an effective neutralising mechanism which destroy or renders them harmless after a period of time".³⁸⁶

362. Australia's *Defence Force Manual* states that:

The location of all pre-planned minefields and areas in which there has been large scale and pre-planned use of booby-traps must be recorded. A record should also be kept of all other minefields, mines and booby traps so that they may be disarmed when they are no longer required.³⁸⁷

The manual further states that:

Remotely delivered mines can only be used within the area of a military objective if their location can be accurately recorded and they can be neutralised when they no longer serve the military purpose for which they were placed in position. Either each mine must have an effective self neutralising or destroying mechanism or a remotely controlled mechanism designed to render the mine harmless or destroy it.³⁸⁸

363. Belgium's *Law of War Manual* states, with reference to the 1980 CCW, that remotely delivered minefields are only permitted if the location of the mines is mapped.³⁸⁹

364. Cameroon's *Instructors' Manual* states that the restrictions contained in the 1980 Protocol II to the CCW must be scrupulously applied in order to avoid civilian casualties. The manual provides, therefore, that the use of mines, booby-traps and other devices must follow the rules on recording and publication of the location of mines and minefields as defined in Article 7 of the Protocol.³⁹⁰

365. Canada's *LOAC Manual* states that "the location of all pre-planned minefields... must be recorded. A record should also be kept of all other minefields [and] mines... so that they may be disarmed when they are no longer required".³⁹¹ It stresses that "Canada's obligation to clear minefields after the cessation of hostilities will vary depending upon circumstances such as the degree of jurisdiction or control exercised over the territory, the terms of any peace accord and any other bilateral or multilateral arrangement".³⁹²

³⁸⁵ Australia, *Commanders' Guide* (1994), § 942.

³⁸⁶ Australia, *Commanders' Guide* (1994), § 940.

³⁸⁷ Australia, *Defence Force Manual* (1994), § 423.

³⁸⁸ Australia, *Defence Force Manual* (1994), § 425.

³⁸⁹ Belgium, *Law of War Manual* (1983), p. 38.

³⁹⁰ Cameroon, *Instructors' Manual* (1992), p. 123.

³⁹¹ Canada, *LOAC Manual* (1999), p. 5-5, § 46.

³⁹² Canada, *LOAC Manual* (1999), p. 5-2, § 19.

366. According to France's LOAC Teaching Note, employing landmines (except anti-personnel mines) is allowed on the condition that their exact location is recorded. It further provides that "at the end of hostilities the mine fields have to be indicated and as far as possible neutralised".³⁹³

367. France's LOAC Manual states that employing landmines (except anti-personnel mines) is allowed on the condition that their exact location is recorded. It further states that "at the end of hostilities the mine fields have to be indicated and as far as possible neutralised".³⁹⁴

368. Germany's Military Manual states that:

The location of minefields [and] mines... shall be recorded: the parties to the conflict shall retain these records and, whenever possible, by mutual agreement, provide for their publication (Weapons Conv., Prot. 2, Art. 7). In the Federal Armed Force the territorial command authorities are responsible for the mining documentation.

It adds that:

After the cessation of an international armed conflict, the parties to the conflict shall, both among themselves and, where appropriate, with other states or international organizations, exchange information and technical assistance necessary to remove or otherwise render ineffective minefields [and] mines.³⁹⁵

With respect to remotely delivered mines, the manual, quoting Article 5(1) of the 1980 Protocol II to the CCW, provides that "after emplacement their location shall be accurately recorded".³⁹⁶

369. Israel's Manual on the Laws of War states that "it is incumbent on every army to keep a record of a minefield laid during combat. Any mine manufactured after the Convention came into force must contain a metal piece of at least 8 grams to enable its detection by a mine detector."³⁹⁷

370. Kenya's LOAC Manual states that "the location shall be recorded of: pre-planned minefields... other minefields, mines... when the tactical situation permits". With respect to remotely delivered mines, the manual states that their use is allowed when "their location can be accurately recorded or an effective neutralizing mechanism is used on each mine".³⁹⁸

371. The Military Manual of the Netherlands reproduces the content of Article 7 of the 1980 Protocol II to the CCW.³⁹⁹

³⁹³ France, *LOAC Teaching Note* (2000), p. 7.

³⁹⁴ France, *LOAC Manual* (2001), p. 55, see also p. 82.

³⁹⁵ Germany, *Military Manual* (1992), §§ 417 and 419.

³⁹⁶ Germany, *Military Manual* (1992), § 413.

³⁹⁷ Israel, *Manual on the Laws of War* (1998), p. 14.

³⁹⁸ Kenya, *LOAC Manual* (1997), Précis No. 3, pp. 3-4.

³⁹⁹ Netherlands, *Military Manual* (1993), pp. IV-6/IV-10.

372. New Zealand's Military Manual cites Article 7 of the 1980 Protocol II to the CCW and states that "all feasible efforts will be made to record the location of all minefields".⁴⁰⁰

373. Spain's LOAC Manual contains the same provisions as Article 7 of the 1980 Protocol II to the CCW.⁴⁰¹

374. Sweden's IHL Manual states that:

According to Protocol II [to the 1980 CCW], the parties to a conflict shall record the locations of all pre-planned minefields . . . The parties shall retain all mine records and, after cessation of hostilities, shall make them available to the adversary – this provision, however, is not obligatory in a case where the latter party still has combat forces on the wrong side of the frontier.⁴⁰²

With respect to remotely delivered mines, the manual states that "the protocol [II to the 1980 CCW] states the special precautionary measures to be observed in the form of recording the locations of the mine fields, or the use of self-destruction mechanisms".⁴⁰³

375. Switzerland's Basic Military Manual states that large-scale minefields must be mapped, and after the cessation of hostilities, in order to protect the civilian population, these maps shall be handed over to the adverse party and to the UN. In this context, the manual refers to Articles 6 to 9 of the 1980 Protocol II to the CCW.⁴⁰⁴

376. The UK LOAC Manual, under the heading "Future Developments", considers the possibility of a treaty imposing "an obligation to record minefields and to fit remotely delivered mines with self-neutralising mechanisms or to record their location".⁴⁰⁵

377. The US Air Force Commander's Handbook states that "the party establishing a minefield should always keep a record of its location."⁴⁰⁶

378. The US Naval Handbook states that international law "requires that, to the extent possible, belligerents record the location of all minefields in order to facilitate their removal upon the cessation of hostilities. It is the practice of the United States to record the location of minefields in all circumstances."⁴⁰⁷

National Legislation

379. Albania's Anti-personnel Mines Decision provides that "all the areas of the Republic of Albania infested with mines must be determined and cleared by 2009".⁴⁰⁸

⁴⁰⁰ New Zealand, *Military Manual* (1992), § 514. ⁴⁰¹ Spain, *LOAC Manual* (1996), § 3.2.a.(4).

⁴⁰² Sweden, *IHL Manual* (1991), Section 3.3.2, pp. 80–81.

⁴⁰³ Sweden, *IHL Manual* (1991), Section 3.3.2, pp. 80–81.

⁴⁰⁴ Switzerland, *Basic Military Manual* (1987), Article 23.

⁴⁰⁵ UK, *LOAC Manual* (1981), Section 11, p. 40, § 4(b).

⁴⁰⁶ US, *Air Force Commander's Handbook* (1980), § 6-5.

⁴⁰⁷ US, *Naval Handbook* (1995), p. 448, § 9.3.

⁴⁰⁸ Albania, *Anti-personnel Mines Decision* (2000), § 7.

380. South Korea's Conventional Weapons Act provides that:

1. The Commander of the military unit that emplaced mines . . . must record and maintain the following information on the emplaced field:
 - a. Precise location and boundary of the emplaced area;
 - b. Type, number, emplacing method, type of fuse and life time of the emplaced mine . . . and
 - c. Location of every emplaced mine (except for remotely-delivered anti-personnel mines) . . .
2. The Commander of the military unit that emplaced mines must manage the information, which was recorded and maintained as prescribed by paragraph 1 in accordance with the Military Secrets Protection Act.⁴⁰⁹

381. Malaysia's Anti-personnel Mines Act provides that:

Where an area is identified as a mined area or is suspected to be a mined area, the Minister shall, wherever possible, ensure that such area is perimeter-marked and protected by fencing or otherwise employ such means as necessary so as to notify civilians of the presence of anti-personnel mines.⁴¹⁰

National Case-law

382. No practice was found.

Other National Practice

383. In 1994, during the debate in the UN General Assembly that preceded the adoption of Resolution 49/215, Afghanistan stated that it and "many others expect the Secretary-General to enhance the role of the existing Mine Clearance and Policy Unit . . . in order, *inter alia*, to study on a continuous basis the problem of land-mines and mine-clearance in war-stricken countries". It further stated that "all States that have spread land-mines in other countries must provide maps of the minefields".⁴¹¹

384. In 1975, during discussions in the Ad Hoc Committee on Conventional Weapons established by the CDDH, Canada advocated the "automatic and compulsory marking" of remotely delivered minefields.⁴¹²

385. In 1995, during a debate in the First Committee of the UN General Assembly, Côte d'Ivoire stated that it welcomed the establishment of the UN fund for assistance in demining.⁴¹³

⁴⁰⁹ South Korea, *Conventional Weapons Act* (2001), Article 8.

⁴¹⁰ Malaysia, *Anti-personnel Mines Act* (2002), Section 6.

⁴¹¹ Afghanistan, Statement before the UN General Assembly, UN Doc. A/49/PV.95, 23 December 1994, p. 4.

⁴¹² Canada, Statement at the CDDH, *Official Records*, Vol. XVI, CDDH/IV/SR.14, 5 March 1975, p. 131.

⁴¹³ Côte d'Ivoire, Statement before the First Committee of the UN General Assembly, UN Doc. A/C.1/50/PV.6, 18 October 1995, p. 2.

386. In 1995, during a debate in the First Committee of the UN General Assembly, Ethiopia stated that it “welcomed the outcome of the July 1995 international meeting on mine clearance and the pledges made there”.⁴¹⁴

387. In 1994, during the debate in the UN General Assembly that preceded the adoption of Resolution 49/215, Honduras stated that it was “grateful for the work the Secretary-General has done in connection with the establishment of a fund for assistance in mine clearance” and that it supported the mine-clearance work of the OAS in the Central America region.⁴¹⁵

388. In 1976, during discussions in the Ad Hoc Committee on Conventional Weapons established by the CDDH, Italy stated that “the obligation to record the location of minefields and to fit a neutralizing mechanism on remotely delivered mines provided a satisfactory guarantee for the civilian population”.⁴¹⁶

389. In 1995, during a debate in the First Committee of the UN General Assembly, Libya raised the issue of the clearance of mines on its territory dating from the Second World War and stated that it had “asked the countries concerned, bilaterally or through the United Nations, to provide us with maps of the minefields, to help us in the necessary demining operations and to pay compensation for the damage these mines have caused”.⁴¹⁷

390. In 1993, during a debate in the First Committee of the UN General Assembly, Pakistan stated that it would have preferred “a more comprehensive approach to the issue of uncleared anti-personnel mines” and that “issues relating to self-neutralizing mines should also be considered”.⁴¹⁸

391. In 1995, during a debate in the First Committee of the UN General Assembly, Pakistan stated that “millions of indiscriminately used mines threaten civilian populations in over 60 countries. There must be a global commitment to remove these mines, especially those in developing countries.”⁴¹⁹

392. At the First Annual Conference of High Contracting Parties to Amended Protocol II to the CCW in 1999, Pakistan stated that it would convert its entire stock of anti-personnel mines to detectable mines.⁴²⁰

393. In 1995, during a debate in the First Committee of the UN General Assembly, Peru stated that it supported the “establishment of a voluntary fund to

⁴¹⁴ Ethiopia, Statement before the First Committee of the UN General Assembly, UN Doc. A/C.1/50/PV.9, 25 October 1995, p. 16.

⁴¹⁵ Honduras, Statement before the UN General Assembly, UN Doc. A/49/PV.95, 23 December 1994, p. 3.

⁴¹⁶ Italy, Statement at the CDDH, *Official Records*, Vol. XVI, CDDH/IV/SR.29, 25 May 1976, p. 297, § 20.

⁴¹⁷ Libya, Statement before the First Committee of the UN General Assembly, UN Doc. A/C.1/50/PV.8, 20 October 1995, p. 18.

⁴¹⁸ Pakistan, Statement before the First Committee of the UN General Assembly, UN Doc. A/C.1/48/SR.28, 18 November 1993, p. 8.

⁴¹⁹ Pakistan, Statement before the First Committee of the UN General Assembly, UN Doc. A/C.1/50/PV.8, 26 October 1995, p. 19.

⁴²⁰ Pakistan, Statement at the First Annual Conference of High Contracting Parties to Amended Protocol II to the CCW, Geneva, 17 December 1999.

finance information and training programmes on de-mining” and stated that it would definitely contribute to the fund.⁴²¹

394. In 1995, during a debate in the First Committee of the UN General Assembly, Poland stated that it had “pledged to make an important contribution to the United Nations Voluntary Trust Fund for Assistance in Mine Clearance”.⁴²²

395. At the CCW Preparatory Conference in 1978, Sweden stated that certain limitations on the use of conventional weapons should be agreed upon by the participants including “that minefields on land must be charted when they were laid, so that they could be cleared at the end of hostilities and not remain as permanent hazards to life”.⁴²³

396. In 1995, during a debate in the First Committee of the UN General Assembly, Thailand stated that it appreciated “the efforts of the United Nations in drawing up a comprehensive mine clearance programme, in launching mine awareness activities, and, more importantly, in establishing the United Nations Voluntary Trust Fund for land mine-affected countries”.⁴²⁴

397. In 1976, during discussions in the Ad Hoc Committee on Conventional Weapons established by the CDDH, the US supported “reasonable and feasible requirements for recording the location of minefields”.⁴²⁵

398. In 1994, a State declared that its armed forces laid mines according to plans or pre-planned maps as required by international law.⁴²⁶

III. Practice of International Organisations and Conferences

United Nations

399. In a resolution adopted in 1995, the UN Security Council noted “the desire of the Government of Rwanda to address the problem of unexploded landmines, and the interest on the part of other States to assist with the detection and destruction of these mines”. It underlined “the importance the Council attaches to efforts to eliminate the threat posed by unexploded landmines in a number of States, and the humanitarian nature of demining programmes”.⁴²⁷

400. In a resolution adopted in 1996 on the situation in Cyprus, the UN Security Council called upon the military authorities on both sides “to clear

⁴²¹ Peru, Statement before the First Committee of the UN General Assembly, UN Doc. A/C.1/50/PV.9, 25 October 1995, p. 11.

⁴²² Poland, Statement before the First Committee of the UN General Assembly, UN Doc. A/C.1/50/PV.9, 25 October 1995, p. 7.

⁴²³ Sweden, Statement at the United Nations Preparatory Conference for the CCW Conference, Doc. A/CONF.95/PREP.CONF.I/SR.4, 31 August 1978, p. 2.

⁴²⁴ Thailand, Statement before the First Committee of the UN General Assembly, UN Doc. A/C.1/50/PV.5, 17 October 1995, p. 16.

⁴²⁵ US, Statement at the CDDH, *Official Records*, Vol. XVI, CDDH/IV/SR.29, 25 May 1976, p. 300, § 35.

⁴²⁶ ICRC archive document.

⁴²⁷ UN Security Council, Res. 1005, 17 July 1995, preamble.

all minefields . . . inside the buffer zone without further delay, as requested by UNFICYP".⁴²⁸

401. In a resolution adopted in 1996 on the situation in Angola, the UN Security Council emphasised "the need for the political will to speed up demining efforts to enable the free circulation of people and goods and to restore public confidence".⁴²⁹ In another resolution adopted the same year, the Council noted the progress being made in the area of demining in Angola and encouraged "both parties to intensify their demining efforts".⁴³⁰ In October 1996, the UN Security Council adopted a further resolution on Angola in which it expressed "serious concern about interference by UNITA with mine-clearing activities" and called upon "both parties to intensify their demining efforts".⁴³¹ In another resolution adopted in 1996, the UN Security Council expressed its support "for various United Nations demining activities in Angola, including plans aimed at enhancing national demining capacity".⁴³²

402. In two resolutions adopted in 1997 concerning Croatia, the UN Security Council called upon the parties to "cooperate fully with the United Nations military observers and to ensure their safety and freedom of movement, including through the removal of landmines".⁴³³

403. In a resolution adopted in 1993, the UN General Assembly expressed its concern about the damaging effects of uncleared landmines.⁴³⁴

404. In a resolution adopted in 1994, the UN General Assembly expressed its will to reinforce "international co-operation in the area of . . . the removal of minefields, mines and booby-traps".⁴³⁵

405. In two resolutions adopted in 1994 and 1995, the UN General Assembly recognised "the importance of recording, where appropriate, the location of mines". It further called upon:

Member States, especially those that have a capacity to do so, to provide the necessary information and technical and material assistance, as appropriate, and to locate, remove, destroy or otherwise render ineffective minefields, mines booby-traps and other devices, in accordance with international law.⁴³⁶

Both resolutions were adopted by consensus.

406. In three resolutions adopted in 1994 and 1996, the UN General Assembly expressed:

⁴²⁸ UN Security Council, Res. 1062, 28 June 1996, § 6(c).

⁴²⁹ UN Security Council, Res. 1055, 8 May 1996, § 11.

⁴³⁰ UN Security Council, Res. 1064, 11 July 1996, § 15.

⁴³¹ UN Security Council, Res. 1075, 11 October 1996, § 20.

⁴³² UN Security Council, Res. 1087, 11 December 1996, § 17.

⁴³³ UN Security Council, Res. 1093, 14 January 1997, § 4; Res. 1119, 14 July 1997, § 2.

⁴³⁴ UN General Assembly, Res. 48/75K, 13 December 1993.

⁴³⁵ UN General Assembly, Res. 49/79, 15 December 1994, preamble.

⁴³⁶ UN General Assembly, Res. 49/215, 23 December 1994, preamble and § 9; Res. 50/82, 14 December 1995, preamble and § 10.

grave concern at the indiscriminate use of anti-personnel landmines in Cambodia and the devastating consequences and destabilising effects of such mines have on Cambodian society, and encourages the Government of Cambodia to continue its support for the removal of these mines.⁴³⁷ [emphasis in original]

The resolutions were adopted without a vote.

407. In a resolution adopted in 1996, the UN General Assembly welcomed the adoption of the 1996 Amended Protocol II to the CCW and expressed its will to reinforce “international cooperation in the area of . . . the removal of minefields [and] mines”.⁴³⁸

408. In a resolution adopted in 1998, the UN General Assembly reaffirmed “its deep concern at the problem caused by the presence of mines and other unexploded devices”. It emphasised “the importance of recording the location of mines, of retaining all such records and making them available to concerned parties upon cessation of hostilities”. The General Assembly recognised “the important role that the international community, particularly States involved in the deployment of mines, can play in assisting mine clearance in affected countries” and urged:

Member States, regional, governmental and non-governmental organizations and foundations to continue to extend full assistance and cooperation to the Secretary-General and, in particular, to provide him with information and data as well as other appropriate resources that could be useful in strengthening the coordination role of the United Nations in mine action.⁴³⁹

409. In a resolution adopted in 1999 on the situation of human rights in Kosovo, the UN General Assembly called upon “all parties, in particular those of the Federal Republic of Yugoslavia (Serbia and Montenegro), to clear the area forthwith of all landmines and booby-traps and to work with the relevant international bodies to this end”.⁴⁴⁰

410. In a resolution adopted in 1996, the UN Commission on Human Rights, concerned by the impact of anti-personnel landmines, encouraged Cambodia to “continue its efforts to remove these mines”.⁴⁴¹

411. In 1997, in a report on assistance in mine clearance, the UN Secretary-General noted that the UN had developed quite an extensive mine-clearance

⁴³⁷ UN General Assembly, Res. 49/199, 23 December 1994, § 13; Res. 50/178, 22 December 1995, § 13; Res. 51/98, 12 December 1996, § 25.

⁴³⁸ UN General Assembly, Res. 51/49, 10 December 1996, preamble.

⁴³⁹ UN General Assembly, Res. 53/26, 31 December 1998, preamble and § 10.

⁴⁴⁰ UN General Assembly, Res. 53/164, 25 February 1999, § 12. (The resolution was adopted by 122 votes in favour, 3 against and 34 abstentions. Against: Belarus, India and Russia. Abstaining: Angola, Antigua and Barbuda, Belize, Bhutan, Botswana, Cameroon, Central African Republic, China, Colombia, DRC, Côte d’Ivoire, Cuba, Eritrea, Ethiopia, Gabon, Ghana, Guinea, Guinea-Bissau, Jamaica, Laos, Mozambique, Myanmar, Namibia, Nepal, Peru, Philippines, Singapore, Sri Lanka, FYROM, Trinidad and Tobago, Ukraine, Tanzania, Venezuela and Zimbabwe.)

⁴⁴¹ UN Commission on Human Rights, Res. 1996/54, 3 March 1995, § 22.

programme, but that a more precise global assessment of the mine problem was needed in order to tackle the issue properly.⁴⁴²

Other International Organisations

412. No practice was found.

International Conferences

413. A draft text submitted by Denmark, France, the Netherlands and the UK to the Ad Hoc Committee on Conventional Weapons established by the CDDH, which elaborated upon an earlier proposal made at the Lugano Conference, dealt with the problems created by landmines and "other devices". A number of measures were suggested, including the compulsory recording of pre-planned minefields.⁴⁴³ The proposal was positively received by the States present and was explicitly supported by the FRG and Libya.⁴⁴⁴

414. A proposal was introduced by Austria, Mexico, Sweden, Switzerland, Uruguay and SFRY to the Ad Hoc Committee on Conventional Weapons established by the CDDH, which provided that the use of remotely delivered mines was prohibited unless "each such mine is fitted with a neutralizing mechanism" and "they are used within the combat zone".⁴⁴⁵

415. Austria, Denmark, France, Mexico, Netherlands, Spain, Sweden, Switzerland and UK submitted a proposal to the Ad Hoc Committee on Conventional Weapons established by the CDDH which provided that parties to a conflict "shall record the location of (a) all pre-planned minefields laid by them; and (b) all areas in which they have made large-scale and pre-planned use of explosive or non-explosive devices". The final part of the section on recording required parties to retain these records and "the location of all recorded minefields, mines and explosive or non-explosive devices remaining in territory controlled by an adverse Party shall be made public after the cessation of active hostilities".⁴⁴⁶

⁴⁴² UN Secretary-General, Report on Assistance in Mine Clearance, UN Doc. A/52/679, 11 December 1997, §§ 107-111.

⁴⁴³ Denmark, France, Netherlands and UK, Proposal entitled "The Regulation of the Use of Land-Mines and Other Devices" submitted to the Ad Hoc Committee on Conventional Weapons established by the CDDH, *Official Records*, Vol. XVI, CDDH/IV/213 within CDDH/IV/226, pp. 588-591.

⁴⁴⁴ CDDH, *Official Records*, Vol. XVI, CDDH/IV/SR.30, 26 May 1976, p. 308 (FRG); *Official Records*, Vol. XVI, CDDH/IV/SR.40, 19 May 1977, p. 411 (Libya).

⁴⁴⁵ Austria, Mexico, Sweden, Switzerland, Uruguay and SFRY, "Draft article on the Use of Land Mines and the Use of Certain Explosive and Non-Explosive Devices" submitted to the Ad Hoc Committee on Conventional Weapons established by the CDDH, *Official Records*, Vol. XVI, CDDH/IV/222 within CDDH/IV/226, p. 593.

⁴⁴⁶ Austria, Denmark, France, Mexico, the Netherlands, Spain, Sweden, Switzerland and UK, Proposal submitted to the Ad Hoc Committee on Conventional Weapons established by the CDDH, Working Group Document CDDH/IV/GT/4*, *Official Records*, Vol. XVI, CDDH/408/Rev. 1, pp. 544-546.

416. In 1980, the Secretariat of the 1979–1980 CCW Conference issued a note concerning the recording and publication of minefields, mines and booby-traps commenting on the draft Protocol II to the CCW and stating that:

The accurate recording of the location of minefields and related weapons is only one aspect of the obligation which should be imposed on the parties in order to ensure the protection of a United Nations force or mission . . . The recording should not only cover the boundaries of the fields but also the number, type and pattern of distribution of the mines, as well as details of any anti-lifting devices attached to them.⁴⁴⁷

417. The Final Report of the CCW submitted to the UN General Assembly stated in connection with Article 3 of the 1980 Protocol II to the CCW that:

The parties must take whatever measures are open to them to protect civilians wherever they are . . . The parties may, if they wish, assist in this process by providing, either unilaterally or by mutual agreement, or through the Secretary-General of the United Nations, information about the location of minefields, mines and booby traps.⁴⁴⁸

418. The 25th International Conference of the Red Cross in 1986 adopted a resolution on work on international humanitarian law in armed conflicts at sea and on land in which it urged all States to become parties to the 1980 CCW and its Protocols “as early as possible so as ultimately to obtain universality of adherence”. It noted “the dangers to civilians caused by mines, booby-traps and other devices employed during an armed conflict and the need for international co-operation in this field consistent with Article 9 of Protocol II attached to the 1980 Convention”.⁴⁴⁹

419. The 26th International Conference of the Red Cross and Red Crescent in 1995 adopted a resolution on the protection of civilians in armed conflict in which it urged:

all States and competent organizations to take concrete action to increase their support for mine-clearance efforts in affected States, which will need to continue for many decades, to strengthen international co-operation and assistance in this field and, in this regard, to provide the necessary maps and information and appropriate technical and material assistance to remove or otherwise render

⁴⁴⁷ UN Conference on Prohibitions or Restrictions of Use of Certain Conventional Weapons Which May be Deemed to Be Excessively Injurious or to Have Indiscriminate Effects, Second Session, Geneva, 15 September–10 October 1980, Note by the Secretariat on the Draft Protocol on Prohibitions or Restrictions on the Use of Mines, Booby-Traps and Other Devices, UN Doc. A/CONF.95/CW/4, 15 September 1980.

⁴⁴⁸ UN Conference on Prohibitions or Restrictions of Use of Certain Conventional Weapons Which May be Deemed to Be Excessively Injurious or to Have Indiscriminate Effects, Second Session, Geneva, 15 September–10 October 1980, Final Report of the Conference to the UN General Assembly, Doc. A/CONF.95/15, 27 October 1980, p. 9.

⁴⁴⁹ 25th International Conference of the Red Cross, Geneva, 23–31 October 1986, Res. VII, § B(2) and (5).

ineffective minefields, mines and booby traps, in accordance with international law.⁴⁵⁰

420. In a resolution adopted on the occasion of the 50th anniversary of the Geneva Conventions in 1999 on the contribution of parliaments to ensuring respect for and promoting International humanitarian law, the 102nd Inter-Parliamentary Conference urged “States that produce or use this pernicious weapon [antipersonnel landmines], . . . to provide financial and technical assistance for (i) de-mining efforts, especially in heavily mined areas, (ii) victim assistance programmes, including rehabilitation and retraining activities, and (iii) mine awareness activities to reduce the risk of accidents”.⁴⁵¹

IV. Practice of International Judicial and Quasi-judicial Bodies

421. No practice was found.

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

422. In 1995, in a position paper on landmines, the ICRC stated that “certain essential minimum steps must be taken to protect civilians and facilitate mine clearance” including the prohibition of “all mines which are not easily detectable”.⁴⁵²

423. At its Geneva Session in 1995, the Council of Delegates adopted a resolution on anti-personnel landmines in which it encouraged “all measures to alleviate the suffering of victims and to remove mines already in place”.⁴⁵³

424. In 1996, in a statement before the First Committee of the UN General Assembly, the ICRC welcomed the improvements that had been made in the 1996 Amended Protocol II to the CCW, including: the extension of the Protocol to non-international conflicts; clear assignment of responsibility for mine clearance; and requirements that the location of all mines be recorded.⁴⁵⁴

425. At its Geneva Session in 1999, the Council of Delegates adopted a resolution on the Movement strategy on landmines in which it approved the Movement Strategy on Landmines. One of the core elements of the strategy was to:

⁴⁵⁰ 26th International Conference of the Red Cross and Red Crescent, Geneva, 3–7 December 1995, Res. II, § G(h).

⁴⁵¹ 102nd Inter-Parliamentary Conference, Berlin, 10–15 October 1999, Resolution on the contribution of parliaments to ensuring respect for and promoting international humanitarian law on the occasion of the 50th anniversary of the Geneva Conventions, § 15.

⁴⁵² ICRC, Position Paper No. 1 Landmines and Blinding Weapons: From Expert Group to the Review Conference, February 1995, reprinted in Louis Maresca and Stuart Maslen (eds.), *The Banning of Anti-Personnel Landmines*, Cambridge University Press, Cambridge, 2000, p. 330.

⁴⁵³ International Red Cross and Red Crescent Movement, Council of Delegates, Geneva Session, 1–2 December 1995, Res. 10, § 2.

⁴⁵⁴ ICRC, Statement before the First Committee of the UN General Assembly, UN Doc. A/C.1/51/PV.8, 18 October 1996, p. 9.

cooperate with mine-clearance organizations according to humanitarian priorities, by developing mine-awareness activities and providing medical assistance to clearance teams, in accordance with the *Guidelines on Red Cross/Red Crescent involvement in mine-clearance activities*, adopted at the 1997 session of the Council of Delegates.⁴⁵⁵

VI. Other Practice

426. In 1994, an armed opposition group stated that it systematically informed the ICRC of mined locations.⁴⁵⁶

427. In 1998, in a report on violations of the laws of war by both sides in Angola, Africa Watch stated that "it is prohibited to use landmines near a civilian object, even if it contains military objectives, without any precautions, markings or other warnings or if such devices do not self-destruct or are not removed after their military purpose has been served".⁴⁵⁷

⁴⁵⁵ International Red Cross and Red Crescent Movement, Council of Delegates, Geneva Session, 29–30 October 1999, Res. 10, § 1.

⁴⁵⁶ ICRC archive document.

⁴⁵⁷ Africa Watch, *Angola: Violations of the Laws of War by Both Sides*, New York, April 1998, p. 58.

INCENDIARY WEAPONS

A. Use of Incendiary Weapons against Civilians and Civilian Objects (practice relating to Rule 84)	§§ 1–183
Use of incendiary weapons in general	§§ 1–107
Use of incendiary weapons against civilians and civilian objects in particular	§§ 108–183
B. Use of Incendiary Weapons against Combatants (practice relating to Rule 85)	§§ 184–215
Use of incendiary weapons in general	§ 184
Use of incendiary weapons against combatants in particular	§§ 185–215

A. Use of Incendiary Weapons against Civilians and Civilian Objects

Use of incendiary weapons in general

I. Treaties and Other Instruments

Treaties

1. No practice was found.

Other Instruments

2. Section 6.2 of the 1999 UN Secretary-General's Bulletin states that "the use of certain conventional weapons, such as...incendiary weapons is prohibited".

II. National Practice

Military Manuals

3. Canada's Code of Conduct provides that the use of "tracer rounds for other than marking" is forbidden.¹

4. Colombia's Basic Military Manual prohibits the use of weapons which "cause unnecessary and indiscriminate, widespread, long-term and severe damage to people and the environment. This includes, *inter alia*:...incendiary

¹ Canada, *Code of Conduct* (2001), Rule 3, § 10(c).

weapons, whose production, importation, possession and use is also prohibited by Article 81 of the National Constitution."²

National Legislation

5. Andorra's Decree on Arms prohibits the use of incendiary weapons.³

6. Hungary's Criminal Code as amended prohibits incendiary weapons. It provides that:

- (1) Any person who uses or orders the use of a weapon or instrument of war prohibited by international treaty in a theatre of military operation or in an occupied territory against the enemy, civilians or prisoners of war commits a felony offence and shall be punishable by imprisonment of between 10 to 15 years or life imprisonment.
- (2) Any person who makes preparations for the use of a weapon prohibited by international treaty commits a felony offence and shall be punishable by imprisonment of up to five years.
- (3) For the purpose of Subsections (1)-(2) the following shall be construed as weapons prohibited by international treaty:

- ...
- b) the following weapons listed in the Protocols to the Convention signed at Geneva on 15 October 1980 on Prohibitions or Restrictions on the Use of Certain Conventional Weapons which May Be Deemed to Be Excessively Injurious or to Have Indiscriminate Effects, as promulgated by Law-Decree 2 of 1984...

- ...
3. incendiary weapons specified in Point 1 of Article 1 of Protocol III.⁴

7. Under the Penal Code as amended of the SFRY (FRY), the use of, or the order to use, "means or methods of combat prohibited under the rules of international law, during a war or an armed conflict" is a war crime.⁵ The commentary on the Penal Code as amended states that "the following weapons and means of combat are considered to be prohibited: ... napalm bombs and other incendiary weapons".⁶

National Case-law

8. No practice was found.

Other National Practice

9. A draft provision prohibiting the use of incendiary weapons was proposed to the Ad Hoc Committee on Conventional Weapons established by the CDDH by Afghanistan, Algeria, Austria, Colombia, Egypt, Kuwait, Lebanon, Mali,

² Colombia, *Basic Military Manual* (1995), pp. 49-50.

³ Andorra, *Decree on Arms* (1989), Chapter 1, Section 3, Article 2.

⁴ Hungary, *Criminal Code as amended* (1978), Article 160/A, §§ 1, 2 and 3(b)(3).

⁵ SFRY (FRY), *Penal Code as amended* (1976), Article 148(1).

⁶ SFRY (FRY), *Penal Code as amended* (1976), commentary on Article 148(1).

Mauritania, Mexico, Norway, Sudan, Sweden, Switzerland, Venezuela and SFRY. It stated that:

Incendiary weapons shall be prohibited for use.

- A. This prohibition shall apply to:
the use of any munition which is primarily designed to set fire to objects or to cause burn injury to persons through the action of flame and/or heat produced by a chemical reaction of a substance delivered on the target. Such munitions include flame-throwers, incendiary shells, rockets, grenades, mines and bombs.
- B. This prohibition shall not apply to:
 1. Munitions which may have secondary or incidental incendiary effects, such as illuminants, tracers, smoke, or signalling systems;
 2. Incendiary munitions which are designed and used specifically for defence against aircraft or armoured vehicles.⁷

A slightly revised proposal was later presented to the Committee by Afghanistan, Algeria, Austria, Côte d'Ivoire, Egypt, Iran, Kuwait, Lebanon, Lesotho, Mali, Mauritania, Mexico, Norway, Romania, Sudan, Sweden, Switzerland, Tunisia, Tanzania, Venezuela, SFRY and Zaire. This proposal changed the second exception (B2) to "munitions which combine incendiary effects with penetration or fragmentation effects and which are specifically designed for use against aircraft, armoured vehicles and similar targets".⁸

10. In 1973, with respect to Resolution 2932 A (XXVII) in which the UN General Assembly asked States to comment on the report of the UN Secretary-General on napalm and other incendiary weapons and all aspects of their possible use, Australia stated that it "reaffirms the principles [in international agreements prohibiting the employment in war of weapons calculated to cause unnecessary suffering] and their application to the use of all classes of weapons, particular napalm". It further stated that it "does not possess aerial or mechanized napalm-type weapons and does not intend to acquire them".⁹

11. In 1977, during a debate in the First Committee of the UN General Assembly, Austria stated that development, production and use of incendiary weapons should be banned.¹⁰

⁷ Afghanistan, Algeria, Austria, Colombia, Egypt, Kuwait, Lebanon, Mali, Mauritania, Mexico, Norway, Sudan, Sweden, Switzerland, Venezuela and SFRY, Proposal submitted to the Ad Hoc Committee on Conventional Weapons established by the CDDH, *Official Records*, Vol. XVI, CDDH/IV/20 at CDDH/IV/226, p. 556.

⁸ Afghanistan, Algeria, Austria, Côte d'Ivoire, Egypt, Iran, Kuwait, Lebanon, Lesotho, Mali, Mauritania, Mexico, Norway, Romania, Sudan, Sweden, Switzerland, Tunisia, Tanzania, Venezuela, SFRY and Zaire, Proposal submitted to the Ad Hoc Committee on Conventional Weapons established by the CDDH, *Official Records*, Vol. XVI, CDDH/IV/Inf.220 at CDDH/IV/226, pp. 560-561.

⁹ Australia, Reply of 21 September 1973 sent to the UN Secretary-General, reprinted in Report of the Secretary-General on napalm and other incendiary weapons and all aspects of their possible use, UN Doc. A/9207, 11 October 1973, p. 4.

¹⁰ Austria, Statement before the First Committee of the UN General Assembly, UN Doc. A/C.1/32/PV.13, 27 October 1977, p. 28.

12. In 1973, with respect to Resolution 2932 A (XXVII) in which the UN General Assembly asked States to comment on the report of the UN Secretary-General on napalm and other incendiary weapons and all aspects of their possible use, Barbados stated that it “supports the conclusions contained in chapter V of the report”, namely “the necessity of working out measures for the prohibition of the use, production, development and stockpiling of napalm and other incendiary weapons” (see *infra*).¹¹

13. In 1972, during a debate preceding the adoption of Resolution 3032 (XXVII) in which the UN General Assembly called upon “all parties to armed conflicts to observe the international humanitarian rules which are applicable, in particular the Hague Conventions of 1899 and 1907”, Belgium stated that this paragraph contained a very clear reference to napalm.¹²

14. In 1973, in response to Resolution 2932 A (XXVII) in which the UN General Assembly asked States to comment on the report of the UN Secretary-General on napalm and other incendiary weapons and all aspects of their possible use, Canada stated that “both considerations of limitations on the use of specific weapons, such as napalm and other incendiary weapons, and efforts to promote the further development of the international humanitarian law of armed conflict, should be undertaken quickly and effectively”.¹³

15. In 1972, during a debate on Resolution 2932 A (XXVII) in the First Committee of the UN General Assembly, Chile stated that it preferred a firmer resolution, but that it accepted that the process banning incendiary weapons had not been developed to that point and acquiesced with the draft proposal. Regarding napalm, it stated that “international law is extremely out of date and deficient” and added that “it is urgent that the United Nations adopt all necessary measures and arrive at a legal instrument prohibiting its production, stockpiling and use”.¹⁴

16. In 1973, during a debate in the First Committee of the UN General Assembly, China stated that it was against the use of incendiary weapons and condemned Israel’s use of them in the Yom Kippur War in 1973.¹⁵

17. At the 18th International Conference of the Red Cross, China condemned the use of napalm by US forces in the Korean War, stating that “foreign invaders

¹¹ Barbados, Reply of 22 February 1973 sent to the UN Secretary-General, reprinted in Report of the Secretary-General on napalm and other incendiary weapons and all aspects of their possible use, UN Doc. A/9207, 11 October 1973, p. 4.

¹² Belgium, Statement before the Sixth Committee of the UN General Assembly, UN Doc. A/C.6/SR.1388, 9 December 1972, p. 468.

¹³ Canada, Reply sent to the UN Secretary-General, reprinted in Report of the Secretary-General on napalm and other incendiary weapons and all aspects of their possible use, UN Doc. A/9207/Add.1, 11 October 1973, p. 3.

¹⁴ Chile, Statement before the First Committee of the UN General Assembly, UN Doc. A/C.1/PV.1888, 9 November 1972, p. 18–19.

¹⁵ China, Statement before the First Committee of the UN General Assembly, UN Doc. A/C.1/PV.1968, 23 November 1973, p. 569.

also wantonly bombarded the undefended cities and villages located far from the front line, for many times used the most inhumane napalm bombs".¹⁶

18. In 1977, during a debate in the First Committee of the UN General Assembly, Colombia supported the elimination of incendiary weapons.¹⁷

19. In 1973, with respect to Resolution 2932 A (XXVII) in which the UN General Assembly asked States to comment on the report of the UN Secretary-General on napalm and other incendiary weapons and all aspects of their possible use, Cyprus concurred with the conclusions of the report and recommended that "both the General Assembly and the ICRC be involved in the measures for the prohibition of the use, production, development and stockpiling of napalm and other incendiary weapons".¹⁸

20. In 1973, with respect to Resolution 2932 A (XXVII) in which the UN General Assembly asked States to comment on the report of the UN Secretary-General on napalm and other incendiary weapons and all aspects of their possible use, Czechoslovakia assured the UN Secretary-General that the competent Czechoslovak authorities were prepared to "exert every effort to achieve a solution leading to the final prohibition of the use of napalm and other incendiary weapons".¹⁹

21. In 1972, during a debate on Resolution 2932 A (XXVII) in the First Committee of the UN General Assembly, Ecuador stated that no pretext could justify the use of incendiary weapons and that the effects were especially grave in colonial conflicts in less-developed nations.²⁰

22. In 1973, in its reply on the report of the UN Secretary-General on napalm and other incendiary weapons and all aspects of their possible use, Finland deemed it important "to continue discussions and studies in order to find various ways and means to restrict the use of inhuman weapons and methods of warfare". It recommended that the issue of incendiary weapons be discussed at the upcoming CDDH.²¹

23. In 1974, during discussions in the Ad Hoc Committee on Conventional Weapons established by the CDDH, Finland stated that:

¹⁶ China, Statement of 30 July 1952 at the 18th International Conference of the Red Cross, Toronto, 26 July–7 August 1952, reprinted in *Documents on Foreign Affairs of the People's Republic of China*, World Knowledge Press, Beijing, Vol. 2, pp. 82–83.

¹⁷ Colombia, Statement before the First Committee of the UN General Assembly, UN Doc. A/C.1/32/PV.21, 2 November 1977, p. 11.

¹⁸ Cyprus, Reply of 5 April 1973 sent to the UN Secretary-General, reprinted in Report of the Secretary-General on napalm and other incendiary weapons and all aspects of their possible use, UN Doc. A/9207, 11 October 1973, p. 5.

¹⁹ Czechoslovakia, Reply of 31 August 1973 sent to the UN Secretary-General, reprinted in Report of the Secretary-General on napalm and other incendiary weapons and all aspects of their possible use, UN Doc. A/9207, 11 October 1973, p. 6.

²⁰ Ecuador, Statement before the First Committee of the UN General Assembly, UN Doc. A/C.1/PV.1883, 3 November 1972, p. 6.

²¹ Finland, Reply of 21 September 1973 sent to the UN Secretary-General, reprinted in Report of the Secretary-General on napalm and other incendiary weapons and all aspects of their possible use, UN Doc. A/9207, 11 October 1973, p. 7.

9. In view of the development of modern weaponry and warfare and their consequences on the civilian population, it was of prime importance to reach early agreement on general principles prohibiting or restricting the use of specific weapons. . . . Reports . . . showed clearly that the deployment of extremely cruel weapons, such as napalm and other incendiary weapons, seemed to be most frequent in cases where their strict military value was least, namely, when directed against civilian targets. The suffering they caused was disproportionate to any military advantage gained.
10. . . . The Ad Hoc Committee should endeavour to define [specific categories of conventional weapons] and prepare a list mentioning, at least, napalm and other incendiary weapons.²²

24. In 1976, during discussions in the Ad Hoc Committee on Conventional Weapons established by the CDDH, the representative of the FRG stated that "he did not think . . . that the time had come to renounce flame weapons. Security considerations prevented not only his country, but many others, from doing so." He added that:

Although his country had to look for solutions which were sound from a security point of view, it did not wish to minimize the seriousness of wounds caused by napalm and other flame weapons. Although he agreed with the United Kingdom representative, who had pointed out that with the elimination of napalm a number of burn casualties would be reduced by only a fairly small percentage, he favoured the widespread endeavours to prohibit the sources of those grave injuries.²³

25. At the CCW Preparatory Conference in 1979, the FRG stated that proposals made by delegations "for a total ban" on incendiary weapons or for "a ban with explicit exceptions" were:

not only inconsistent with the mandate [set out in UN General Assembly Resolution 32/152] but were based on an unproven hypothesis, namely that incendiary weapons were excessively injurious in all circumstances. The exceptions, for their part, would give rise to a definite paradox since, if there was not excessive injury under all circumstances, it was illogical to start from the idea of a total ban.²⁴

26. In 1973, in response to Resolution 2932 A (XXVII) in which the UN General Assembly asked States to comment on the report of the UN Secretary-General on napalm and other incendiary weapons and all aspects of their possible use, Guatemala stated that "it is necessary to make renewed efforts for the legal prohibition of the use of weapons that cause unnecessary suffering in all armed conflicts, especially the mass use of incendiary weapons".²⁵

²² Finland, Statement at the CDDH, *Official Records*, Vol. XVI, CDDH/IV/SR.1, 13 March 1974, p. 9, §§ 9–10.

²³ FRG, Statement at the CDDH, *Official Records*, Vol. XVI, CDDH/IV/SR.32, 1 June 1976, p. 336, §§ 30 and 32.

²⁴ FRG, Statement at the CCW Preparatory Conference, UN Doc. A/CONF.95/PREP.CONF./II/SR.24, 9 April 1979, p. 6, § 23.

²⁵ Guatemala, Reply of 10 August 1973 sent to the UN Secretary-General, reprinted in Report of the Secretary-General on napalm and other incendiary weapons and all aspects of their possible use, UN Doc. A/9207, 11 October 1973, p. 8.

27. In 1976, during discussions in the Ad Hoc Committee on Conventional Weapons established by the CDDH, the representative of India stated that:

His delegation, for its part, was of the opinion that a country should not be placed at a disadvantage when the defence of its territory was at stake. It should accordingly be entitled to use incendiary weapons against the enemy on its own soil. Once the enemy had been driven back beyond the international borders, however, the use of incendiary weapons against him would be illegal. His delegation therefore proposed a complete prohibition of the use of incendiary weapons by the armed forces of a country outside that country's own borders or the borders of its allies. It thought that that proposal would provide a fair solution to a very complicated problem.²⁶

28. In 1973, in response to Resolution 2932 A (XXVII) in which the UN General Assembly asked States to comment on the report of the UN Secretary-General on napalm and other incendiary weapons and all aspects of their possible use, Iran stated that "given a general consensus within the international community to take action on these weapons, the Government of Iran would think that the most practical approach would be to consider a prohibition on the use of all incendiary weapons".²⁷

29. According to the Report on the Practice of Iran, in February 1981, an Iranian colonel announced that Iraq had used incendiary bombs against the Iranian city of Marivan. He called this act a "crime" and stated that these weapons were banned.²⁸

30. In 1976, during discussions in the Ad Hoc Committee on Conventional Weapons established by the CDDH, the representative of Iraq stated that:

27. ... His Government considered incendiary weapons to be completely inhumane. The sufferings caused by their use could not be minimized, especially as such weapons did not discriminate between civilian and military objectives. There was a tendency for military forces to be more cautious in employing them in attacks, out of regard for the protection of their own forces, but in cities incendiary weapons could present a serious danger to the civilian population.

28. Some delegations seemed to favour criteria which would not prohibit the use of incendiary weapons altogether. In his opinion it was impossible to establish such criteria because of the inherently lethal nature of those weapons. That point had already been brought up by the Secretary-General of the United Nations in his 1972 report entitled "Napalm and other incendiary weapons and all aspects of their possible use" ... His delegation was in full agreement with the conclusions in that report to the effect that all efforts should be made to prohibit the use of incendiary weapons in warfare.²⁹

²⁶ India, Statement at the CDDH, *Official Records*, Vol. XVI, CDDH/IV/SR.28, 20 May 1976, p. 284, § 5.

²⁷ Iran, Reply of 31 July 1973 sent to the UN Secretary-General, reprinted in Report of the Secretary-General on napalm and other incendiary weapons and all aspects of their possible use, UN Doc. A/9207, 11 October 1973, p. 10, § 5.

²⁸ Report on the Practice of Iran, 1997, Chapter 3.4.

²⁹ Iraq, Statement at the CDDH, *Official Records*, Vol. XVI, CDDH/IV/SR.27, 19 May 1976, p. 279, §§ 27-28.

31. At the CCW Preparatory Conference in 1978, Iraq stated that it “desired the prohibition of certain incendiary weapons”.³⁰
32. According to the Report on the Practice of Iraq, Iraq has “restrictions and limitations” on the use of incendiary weapons.³¹
33. At the CCW Preparatory Conference in 1978, Japan declared that while it “was not sure it would be practicable to ban completely” all incendiary weapons, the use of incendiary weapons containing yellow phosphorus should be prohibited.³²
34. According to the Report on the Practice of Jordan, the “Jordanian army was constantly bombarded with napalm bombs throughout the 1967 War. Jordan condemned officially the use by Israel of these horrible weapons.”³³
35. In 1973, in response to Resolution 2932 A (XXVII) in which the UN General Assembly asked States to comment on the report of the UN Secretary-General on napalm and other incendiary weapons and all aspects of their possible use, Kuwait stated that it “will whole-heartedly support any action that may be taken by the United Nations to prevent the use of napalm in armed conflicts and especially against the civilian population”.³⁴
36. In 1975, during discussions in the Ad Hoc Committee on Conventional Weapons established by the CDDH, Kuwait stated that:

16. There were several types of weapon which could be included in the category of incendiary weapons, and military authorities would claim that their use was necessary without concerning themselves with the humanitarian side of the question.
17. Several types of incendiary weapons such as napalm, flame-throwers and incendiary munitions, should be prohibited forthwith, regardless of military considerations. The other incendiary weapons should be classified as defensive or offensive, and as anti-personnel or anti-matériel. Incendiary weapons would thus be divided into two categories from the operational point of view.
18. His delegation suggested that incendiary weapons used indiscriminately against members of the armed forces and the civilian population should be prohibited. It also suggested that incendiary weapons used against civilian objects should be prohibited. It considered, moreover, that incendiary weapons other than napalm and flame-throwers should be used only for defence or for attacking military matériel. It would support any measure designed to prohibit or restrict the use of destructive weapons.³⁵

³⁰ Iraq, Statement at the CCW Preparatory Conference, UN Doc. A/CONF.95/PREP.CONF./I/SR.8, 6 September 1978, p. 7.

³¹ Report on the Practice of Iraq, 1998, Chapter 3.5.

³² Japan, Statement at the CCW Preparatory Conference, UN Doc. A/CONF.95/PREP.CONF./I/SR.12, 12 September 1978, p. 2, § 3.

³³ Report on the Practice of Jordan, 1997, Chapter 3.5, referring to Press Conference by his Majesty the King of Jordan, 19 June 1967.

³⁴ Kuwait, Reply of 20 February 1973 sent to the UN Secretary-General, reprinted in Report of the UN Secretary-General on napalm and other incendiary weapons and all aspects of their possible use, UN Doc. A/9207, 11 October 1973, p. 11.

³⁵ Kuwait, Statement at the CDDH, *Official Records*, Vol. XVI, CDDH/IV/SR.10, 19 February 1975, pp. 94–95, §§ 16–18.

37. In 1975, during discussions in the Ad Hoc Committee on Conventional Weapons established by the CDDH, Madagascar welcomed the establishment of the Committee and stated that this "would enable the [CDDH] to . . . draw up rules prohibiting the use of napalm and other incendiary weapons" and that "the Government of Madagascar condemned the use of incendiary weapons and all methods of destruction employing napalm or phosphorus, which caused terrible injuries. In such cases no argument or subterfuge could prevail over humanitarian law."³⁶

38. In 1973, in response to Resolution 2932 A (XXVII) in which the UN General Assembly asked States to comment on the report of the UN Secretary-General on napalm and other incendiary weapons and all aspects of their possible use, Mexico stated that it was in favour of the total prohibition of the use of incendiary weapons, including napalm, to be achieved by an international agreement.³⁷

39. In 1975, during discussions in the Ad Hoc Committee on Conventional Weapons established by the CDDH, the representative of Mexico stated that:

33. . . . The ban on incendiary weapons should, in fact, be a total one.

34. He expressed satisfaction that the United Nations General Assembly had reflected the wishes of international opinion regarding the prohibition of incendiary weapons.³⁸

40. In 1976, during discussions in the Ad Hoc Committee on Conventional Weapons established by the CDDH, Mexico, with respect to the draft protocol relative to the prohibition of the use of incendiary weapons submitted by Norway (see *infra*), stated that:

The actual content of the Norwegian proposal . . . was discouraging in so far as it appeared to constitute a further attempt to restrict the use of incendiary weapons on the basis of the targets attacked, whereas negotiations thus far had been directed towards the total prohibition of incendiary weapons, or at least of some of them. The extensive information considered at previous meetings of the Committee and at the two sessions of the Conference of Government Experts showed that incendiary weapons were particularly cruel and caused wounds which were difficult to treat. The same sources also showed that the military effectiveness of such weapons was limited, that their tactical value lay mainly in the terror which fire inspired in everyone except trained troops, and that substitutes could be used in practically all the circumstances for which incendiary weapons were employed. Moreover, such weapons were *par excellence* weapons which caused superfluous injury. [The prohibition to employ weapons, projectiles and material and methods of warfare of a nature to cause superfluous injury or unnecessary suffering] was absolute. To accept restrictions on the use of incendiary weapons on the basis

³⁶ Madagascar, Statement at the CDDH, *Official Records*, Vol. XVI, CDDH/IV/SR.10, 19 February 1975, p. 103, § 55.

³⁷ Mexico, Reply of 29 August 1973 sent to the UN Secretary-General, reprinted in Report of the Secretary-General on napalm and other incendiary weapons and all aspects of their possible use, UN Doc. A/9207, 11 October 1973, p. 11.

³⁸ Mexico, Statement at the CDDH, *Official Records*, Vol. XVI, CDDH/IV/SR.10, 19 February 1975, p. 98, §§ 33–34.

of the targets attacked would entail the acceptance of one of two assumptions: either incendiary weapons did not cause superfluous injury and therefore did not fall within the meaning of the absolute prohibition laid down in article 33, paragraph 2; or else the Ad Hoc Committee was going to limit the scope of what had already been approved in Committee III. His delegation could accept neither of those assumptions.³⁹

41. At the CCW Preparatory Conference in 1978, Mexico stated that its earlier proposal on the prohibition of incendiary weapons ought to be a base for the future treaty.⁴⁰ It proposed the following:

Art. 1. It is prohibited to use incendiary weapons . . .

Art. 2. The prohibition referred to in the foregoing article shall apply to the use of any munition which is primarily designed to set fire to objects or to cause burn injury to persons through the action of flame and/or heat produced by chemical reaction of the substance delivered on the target. Such munitions include flame-throwers, incendiary shells, rockets, grenades, mines and bombs.

Art. 3. The prohibition referred to in article 1 above shall not apply to munitions which may have secondary or incidental incendiary effects, such as illuminants, tracers, smoke or signalling systems.⁴¹

42. In 1973, in response to Resolution 2932 A (XXVII) in which the UN General Assembly asked States to comment on the report of the UN Secretary-General on napalm and other incendiary weapons and all aspects of their possible use, Mongolia stated that it "fully associates itself with the views of the consultant expert as to the necessity of working out measures for the prohibition of the use, production, development and stockpiling of napalm and incendiary weapons".⁴²

43. At the CDDH, Mozambique stated that "while this Conference is meeting here, the people of Mozambique are being bombed by the illegal and racist régime of Ian Smith, which is using napalm and other materials causing superfluous injury".⁴³

44. In 1992, during a debate in the First Committee of the UN General Assembly, the Netherlands implied that universal adherence to the 1980 CCW would give it effect in internal conflicts.⁴⁴

³⁹ Mexico, Statement at the CDDH, *Official Records*, Vol. XVI, CDDH/IV/SR.25, 13 May 1976, p. 259, § 33.

⁴⁰ Mexico, Statement at the CCW Preparatory Conference, UN Doc. A/CONF.95/PREP.CONF./I/SR.3, 31 August 1978, p. 3.

⁴¹ Mexico, Draft clauses relating to the prohibition of the use of incendiary weapons submitted to the CCW Preparatory Conference, UN Doc. A/CONF.95/PREP.CONF./L.4, 11 September 1978.

⁴² Mongolia, Reply of 21 July 1973 sent to the UN Secretary-General, reprinted in Report of the Secretary-General on napalm and other incendiary weapons and all aspects of their possible use, UN Doc. A/9207, 11 October 1973, p. 12, § 5.

⁴³ Mozambique, Statement at the CDDH, *Official Records*, Vol. VI, CDDH/SR.44, 30 May 1977, p. 303.

⁴⁴ Netherlands, Statement before the First Committee of the UN General Assembly, UN Doc. A/C.1/47/PV.26, 5 November 1992, p. 21.

45. In 1973, during a debate in the Sixth Committee of the UN General Assembly, New Zealand stated that it “believed that there was a strong case for a total prohibition of the use of napalm and other incendiary weapons”.⁴⁵

46. In 1975, during discussions in the Ad Hoc Committee on Conventional Weapons established by the CDDH, the representative of New Zealand stated that:

38. ...As the New Zealand delegation had already said in the United Nations General Assembly and as was also stated in [a] working paper, a rule prohibiting the use of napalm and other incendiary weapons in all circumstances was much more likely to be complied with than a restriction on particular uses...

39. So far as concerned the principle of prohibiting or restricting the use of napalm and other incendiary weapons, he recalled that on a number of occasions since 1973 his Government had stated its position, which was that, while the paramount requirement was to protect civilians, such protection should not be restricted to civilians. If the use of incendiaries was prohibited only in particular circumstances or against particular targets, there would be substantial difficulties of implementation. There was a strong case for a total prohibition of such weapons.⁴⁶

47. At the CCW Preparatory Conference in 1979, Nigeria expressed “great concern over the fact that the negotiations on incendiary weapons had not yielded positive results”. It hoped, on behalf of the African bloc, that the Conference would result in “a treaty or convention restricting or prohibiting certain conventional weapons deemed to be excessively injurious or to have indiscriminate effects”.⁴⁷

48. In 1973, in response to Resolution 2932 A (XXVII) in which the UN General Assembly asked States to comment on the report of the UN Secretary-General on napalm and other incendiary weapons and all aspects of their possible use, Norway stated that a prohibition on production, development and stockpiling of incendiary weapons would be extremely complicated to implement, since production of incendiary weapons was easy. Consequently, it preferred a total prohibition of the use of some or all incendiary weapons.⁴⁸

49. Norway submitted a “Draft Protocol Relative to the Prohibition of the Use of Incendiary Weapons” to the Ad Hoc Committee on Conventional Weapons established by the CDDH which read, *inter alia*, as follows:

⁴⁵ New Zealand, Statement before the First Committee of the UN General Assembly, UN Doc. A/C.6/SR.1453, 4 December 1973, p. 308.

⁴⁶ New Zealand, Statement at the CDDH, *Official Records*, Vol. XVI, CDDH/IV/SR.10, 19 February 1975, pp. 99–100, §§ 38–39.

⁴⁷ Nigeria, Statement at the CCW Preparatory Conference, UN Doc. A/CONF.95/PREP.CONF/II/SR.24, 9 April 1979, p. 5, § 17.

⁴⁸ Norway, Reply of 11 September 1973 sent to the UN Secretary-General, reprinted in Report of the Secretary-General on napalm and other incendiary weapons and all aspects of their possible use, UN Doc. A/9207, 11 October 1973, p. 16.

Article 1 – Field of application

The present Protocol shall apply in the situations referred to in articles 2 and 3 common to the Geneva Conventions of August 12, 1949 for the Protection of War Victims.

...

Article 3 – General prohibition

With the further limitations spelled out in the present Protocol and subject to the provisions of [AP I], incendiary weapons may only be used against objects that are military objectives in the sense of article 47, paragraph 2 of the said Protocol, including in close support of friendly forces.

The use of incendiary weapons against personnel is prohibited.

Nevertheless, the presence of combatants or civilians within or in the immediate vicinity of legitimate targets as described in this article does not render such targets immune from attacks with incendiary weapons.

...

Article 5 – Precaution in attack

Any use of incendiary weapons is subject to article 50 of [AP I].

In addition, it is prohibited to launch an attack with incendiary weapons except when:

- (a) the location of the target is known and properly recognized, and
- (b) all feasible precaution is taken to limit the incendiary effects to the specific military objectives and to avoid incidental injury or incidental loss of lives.

Article 6 – Protection against environmental effects

Before deciding upon the launching of attack with incendiary weapons, special care must be taken to ensure that environmental effects as described in article 48 *bis* of [AP I] will be avoided.⁴⁹

50. In 1977, during a debate in the First Committee of the UN General Assembly, Peru stated that incendiary weapons should be prohibited.⁵⁰

51. In 1995, in an official communiqué released by the Joint Command of the Peruvian armed forces, Peru denied having used flame-throwers in its conflict with Ecuador.⁵¹

52. A 1998, in statement issued in reply to a question from the ICRC on the customary norms of IHL of the Philippines, the Philippine Department of Foreign Affairs declared that the Philippines had renounced the use of napalm.⁵²

53. In 1973, in response to Resolution 2932 A (XXVII) in which the UN General Assembly asked States to comment on the report of the UN Secretary-General

⁴⁹ Norway, Draft protocol relative to the prohibition of the use of incendiary weapons submitted to the Ad Hoc Committee on Conventional Weapons established by the CDDH, *Official Records*, Vol. XVI, CDDH/IV/207 within CDDH/IV/226, pp. 567–569.

⁵⁰ Peru, Statement before the First Committee of the UN General Assembly, UN Doc. A/C.1/32/PV.16, 28 October 1977, p. 22.

⁵¹ Peru, Joint Command of the Armed Forces, Official Communiqué No. 011 CCFFAA, Lima, 24 February 1995.

⁵² Philippines, Statement by the Department of Foreign Affairs, Office of United Nations and International Organizations (UNIO), Manila, 6 March 1998, Report on the Practice of the Philippines, 1997, Additional material on Chapter 3.

on napalm and other incendiary weapons and all aspects of their possible use, Poland stated that it considered that the report could “serve as a suitable basis for further considerations of the direction and manner of negotiating with a view to reaching an agreement on the prohibition of the use of incendiary weapons and, subsequently, their total elimination from military arsenals”.⁵³

54. In 1974, during discussions in the Ad Hoc Committee on Conventional Weapons established by the CDDH, Poland stated that “napalm and other incendiary weapons . . . should be banned”.⁵⁴

55. At the CCW Preparatory Conference in 1979, Poland stated that “it was disappointing” that the Conference had not reached an agreement on the prohibition or restriction of incendiary weapons. It hoped that “the extensive debate on the total prohibition of the use of such weapons in inhabited areas would eventually lead to the elimination of at least the most drastic and indiscriminate weapons in that category”.⁵⁵

56. At the International Conference on the Protection of War Victims in 1993, Russia declared that “in order to protect the civilian population against indiscriminate weapons . . . incendiary weapons . . . should be completely banned in internal conflicts”.⁵⁶

57. In 1974, during discussions in the Ad Hoc Committee on Conventional Weapons established by the CDDH, the representative of Sudan stated that “recent experience had shown the untold sufferings produced by the use of . . . incendiary weapons. His country was ready to co-operate with the ICRC in its endeavours to ensure respect for all the rules laid down concerning their prohibition.”⁵⁷

58. In 1973, in response to Resolution 2932 A (XXVII) in which the UN General Assembly asked States to comment on the report of the UN Secretary-General on napalm and other incendiary weapons and all aspects of their possible use, Sweden stated that “if total prohibition of use were attained as regards some or all incendiary weapons the question of a ban on production, development and stockpiling, etc. could subsequently be taken up”.⁵⁸

59. In 1977, during a debate in the First Committee of the UN General Assembly, Sweden stated that it, “together with many others”, was convinced that

⁵³ Poland, Reply of 25 September sent to the UN Secretary-General, reprinted in Report of the Secretary-General on napalm and other incendiary weapons and all aspects of their possible use, UN Doc. A/9207, 11 October 1973, p. 17.

⁵⁴ Poland, Statement at the CDDH, *Official Records*, Vol. XVI, CDDH/IV/SR.1, 13 March 1974, p. 13, § 28.

⁵⁵ Poland, Statement at the CCW Preparatory Conference, UN Doc. A/CONF.95/PREP.CONF/II/SR.28, 18 April 1979, p. 2, § 2.

⁵⁶ Russia, Statement at the International Conference for the Protection of War Victims, Geneva, 30 August–1 September 1993.

⁵⁷ Sudan, Statement at the CDDH, *Official Records*, Vol. XVI, CDDH/IV/SR.3, 15 March 1974, p. 27, § 11.

⁵⁸ Sweden, Reply of 5 June 1973 sent to the UN Secretary-General, reprinted in Report of the Secretary-General on napalm and other incendiary weapons and all aspects of their possible use, UN Doc. A/9207, 11 October 1973, p. 23.

incendiary weapons could be restricted and partially banned without “upsetting any military balance”.⁵⁹

60. At the CCW Preparatory Conference in 1979, Sweden stated that “no category of conventional weapons had evoked greater public revulsion than incendiary weapons, including napalm” and that, given the difficulty of applying partial bans on incendiary weapons, it was of the view that a “complete prohibition was the preferable course”.⁶⁰

61. In 1987, during a debate in the First Committee of the UN General Assembly, Sweden stated that further restrictions on incendiary weapons should be enacted.⁶¹ It reiterated this view in 1992.⁶²

62. At the CCW Preparatory Conference in 1978, Switzerland stated that “although civilians and combatants could be distinguished in theory, it was impossible to do so in practice” and therefore it “advocated the total prohibition of the main types of incendiary weapons”.⁶³

63. In 1973, in response to Resolution 2932 A (XXVII) in which the UN General Assembly asked States to comment on the report of the UN Secretary-General on napalm and other incendiary weapons and all aspects of their possible use, Syria endorsed “all the provisions contained in the report, and in particular, those concerning the ban on [napalm and other incendiary weapons]”.⁶⁴

64. In 1974, during discussions in the Ad Hoc Committee on Conventional Weapons established by the CDDH, Togo stated that the CDDH “should prohibit the use of weapons such as napalm, incendiary and area weapons”.⁶⁵

65. In 1977, during a debate in the First Committee of the UN General Assembly, Turkey stated that it supported the prohibition or restrictions on incendiary weapons, but held that it would only be effective if it reflected a consensus in the world community.⁶⁶

66. In 1969, in the context of the adoption of UN General Assembly Resolution 2444 (XXIII), the USSR stated that:

⁵⁹ Sweden, Statement before the First Committee of the UN General Assembly, UN Doc. A/C.1/32/PV.32, 15 November 1977, p. 26.

⁶⁰ Sweden, Statement at the CCW Preparatory Conference, UN Doc. A/CONF.95/PREP.CONF./II/SR.28, 18 April 1979, p. 3, § 7.

⁶¹ Sweden, Statement before the First Committee of the UN General Assembly, UN Doc. A/C.1/42/PV.32, 12 October 1987, p. 6.

⁶² Sweden, Statement before the First Committee of the UN General Assembly, UN Doc. A/C.1/47/PV.26, 5 November 1992, p. 18.

⁶³ Switzerland, Statement at the CCW Preparatory Conference, UN Doc. A/CONF.95/PREP.CONF./I/SR.12, 12 September 1978, p. 2, § 3.

⁶⁴ Syria, Reply of 31 July 1973 sent to the UN Secretary-General, reprinted in Report of the Secretary-General on napalm and other incendiary weapons and all aspects of their possible use, UN Doc. A/9207, 11 October 1973, p. 23.

⁶⁵ Togo, Statement at the CDDH, *Official Records*, Vol. XVI, CDDH/IV/SR.1, 13 March 1974, p. 16, § 45.

⁶⁶ Turkey, Statement before the First Committee of the UN General Assembly, UN Doc. A/C.1/32/PV.44, 25 November 1977, p. 23.

For the purpose of crushing the resistance of the Arabs [in the territories occupied by Israel], the aggressors from Israel are continuing to use napalm, which is forbidden by international law.

The criminal, inhuman acts of the imperialist States are a shameful violation of international law, and also of the resolutions of the International Conferences of the Red Cross.⁶⁷

67. In 1972, during a debate in the Sixth Committee of the UN General Assembly, the USSR stated that it "was in favour of the prohibition of means of warfare which were particularly cruel, because their use was incompatible with the norms of international law. One such means was napalm."⁶⁸

68. In 1975, during discussions in the Ad Hoc Committee on Conventional Weapons established by the CDDH, the representative of the UAE stated that "he himself would be grateful if the Diplomatic Conference succeeded in prohibiting certain deadly weapons which were already condemned by world public opinion, such as napalm and other incendiary weapons".⁶⁹

69. In 1976, during discussions in the Ad Hoc Committee on Conventional Weapons established by the CDDH, the representative of the UK stated that:

18. His country had at present no requirement for napalm, but that it possessed other weapons capable of causing death by burning... His delegation could not subscribe to [a] prohibition [of these weapons].

19. The United Kingdom, which was seriously concerned about the suffering caused by flame weapons, was participating actively in negotiations designed to ascertain ways in which the international community might reduce such suffering.

...

21. ... Incendiary weapons could be both effective and discriminating...

22. The issue at stake was the right of States to use incendiary weapons when they felt their security threatened. It was not easy to deny them that right; but at the same time there was good reason to believe that the great majority of delegations at the current Conference would be happy to see some limitation on the use of such weapons... The Netherlands proposal [submitted as an annex to a working paper on incendiary weapons, see *supra*] provided an excellent basis for negotiation, and it was greatly to be hoped that the Committee would reach agreement along these lines.⁷⁰

70. At the CCW Preparatory Conference in 1978, the US felt that an "early agreement" on the use of incendiary weapons was unlikely and that "continued

⁶⁷ USSR, Reply dated 30 December 1969 to the UN Secretary-General regarding the preparation of the study requested in paragraph 2 of General Assembly Resolution 2444 (XXIII), annexed to Report of the Secretary-General on respect for human rights in armed conflicts, UN Doc. A/8052, 18 September 1970, Annex III, p. 120.

⁶⁸ USSR, Statement before the Sixth Committee of the UN General Assembly, UN Doc. A/C.6/SR.1388, 9 December 1972, p. 469.

⁶⁹ UAE, Statement at the CDDH, *Official Records*, Vol. XVI, CDDH/IV/SR.16, 12 March 1975, p. 158, § 20.

⁷⁰ UK, Statement at the CDDH, *Official Records*, Vol. XVI, CDDH/IV/SR.28, 20 May 1976, p. 287, §§ 18-22.

insistence on the total prohibition of such weapons, or prohibition of their use against people, would preclude the possibility of agreement" as "a compromise could be reached only if consideration was given both to humanitarian concerns and to military requirements and if the effects of alternative weapons were taken into account".⁷¹

71. In 1977, during a debate in the First Committee of the UN General Assembly, Zaire stated that development, production and use of incendiary weapons should be banned.⁷²

72. According to the Report on the Practice of Zimbabwe, it is not the military practice of Zimbabwe to use incendiary weapons.⁷³

73. In 1978, during an armed conflict between two States, one of the States denounced the use of napalm and phosphorous bombs based on international law and conventions.⁷⁴

III. Practice of International Organisations and Conferences

United Nations

74. UN General Assembly Resolution 2932 A (XXVII), adopted in 1972, was the first to deal with incendiary weapons. The resolution referred to the "proposals for both the elimination and non-use of incendiary weapons" that were advanced at disarmament negotiations in 1933 and noted that "similar proposals had been repeatedly made in recent years". The resolution deplored "the use of napalm and other incendiary weapons in all armed conflicts".⁷⁵ The resolution's provision deploring the use of incendiary weapons in "all armed conflicts" was part of an amendment sponsored by Jordan, Kenya, Syria and Uganda.⁷⁶

75. In a resolution adopted following the CE (1972), the UN General Assembly expressed its concern that no agreement had been reached concerning, *inter alia*, weapons that cause unnecessary suffering. It reiterated its call upon "all parties to armed conflicts to observe the international humanitarian rules which are applicable, in particular the Hague Conventions of 1899 and 1907".⁷⁷

76. In a resolution adopted in 1972, the UN General Assembly deplored "the use of napalm and other incendiary weapons in all armed conflicts".⁷⁸

⁷¹ US, Statement at the CCW Preparatory Conference, Doc. A/CONF.95/PREP.CONF.1/SR.5, 1 September 1978, p. 3, § 7.

⁷² Zaire, Statement before the First Committee of the UN General Assembly, UN Doc. A/C.1/32/PV.28, 9 November 1977, p. 4.

⁷³ Report on the Practice of Zimbabwe, 1998, Chapter 3.5.

⁷⁴ ICRC archive document.

⁷⁵ UN General Assembly, Res. 2932 A (XXVII), 29 November 1972, preamble and § 3.

⁷⁶ Jordan, Kenya, Syria and Uganda, Proposal submitted to the First Committee of the UN General Assembly, UN Doc. A/C.1/PV.1894, 16 November 1972, p. 5.

⁷⁷ UN General Assembly, Res. 3032 (XXVII), 14 December 1972, § 2.

⁷⁸ UN General Assembly, Res. 2932 A (XXVII), 29 November 1972, § 3.

77. In several resolutions between 1973 and 1977, the UN General Assembly invited the upcoming CDDH to “seek agreement” on rules prohibiting or restricting the use of incendiary weapons.⁷⁹

78. In a resolution adopted in 1973, the UN General Assembly stated that:

The efficacy of these general principles [of international law prohibiting the use of weapons which are likely to cause unnecessary suffering and means and methods of warfare which have indiscriminate effects] could be further enhanced if rules were elaborated and generally accepted prohibiting or restricting the use of napalm and other incendiary weapons.⁸⁰

79. In a resolution adopted in 1974, the UN General Assembly condemned “the use of napalm and other incendiary weapons in armed conflicts in circumstances where it may affect human beings or may cause damage to the environment and/or natural resources”. It also urged “all States to refrain from the production, stockpiling, proliferation, and use of such weapons pending the conclusion of agreements on the prohibition of these weapons”.⁸¹

80. In a resolution adopted in 1980, the UN General Assembly welcomed the successful conclusion of the 1980 CCW and its Protocols and commended the Convention and the three annexed Protocols to all States “with a view to achieving the widest possible adherence to these instruments”.⁸²

81. In numerous resolutions adopted between 1981 and 1998, the UN General Assembly urged all States that had not done so to accede to the 1980 CCW and its Protocols.⁸³

82. In a resolution adopted in 1996, the UN Sub-Commission on Human Rights listed napalm as “a weapon of mass destruction or with indiscriminate effects”. It also stated that “the use of napalm is incompatible with human rights and humanitarian law”.⁸⁴

83. In 1969, in his report on respect for human rights in armed conflict, the UN Secretary-General stated that there was no consensus on the legal status of incendiary weapons. Some experts stated that napalm could be used discriminately and that this use must be controlled.⁸⁵

⁷⁹ UN General Assembly, Res. 3076 (XXVIII), 6 December 1973, § 1; Res. 3255 A (XXIX), 9 December 1974, § 3; Res. 31/64, 10 December 1976, § 2; Res. 32/152, 19 December 1977, § 2.

⁸⁰ UN General Assembly, Res. 3076 (XXVIII), 6 December 1973, preamble.

⁸¹ UN General Assembly, Res. 3255 B (XXIX), 9 December 1974, §§ 1 and 2.

⁸² UN General Assembly, Res. 35/153, 12 December 1980, § 4.

⁸³ UN General Assembly, Res. 36/93, 9 December 1981, § 1; Res. 37/79, 9 December 1982, § 1; Res. 38/66, 15 December 1983, § 3; Res. 39/56, 12 December 1984, § 3; Res. 40/84, 12 December 1985, § 3; Res. 41/50, 3 December 1986, § 3; Res. 42/30, 30 November 1987, § 3; Res. 43/67, 7 December 1988, § 3; Res. 45/64, 4 December 1990, § 3; Res. 46/40, 6 December 1991, § 3; Res. 47/56, 9 December 1992, § 3; Res. 48/79, 16 December 1993, § 3; Res. 49/79, 15 December 1994, § 3; Res. 50/74, 12 December 1995, § 3; Res. 51/49, 10 December 1996, § 3; Res. 52/42, 9 December 1997, § 3; Res. 53/81, 4 December 1998, § 5.

⁸⁴ UN Sub-Commission on Human Rights, Res. 1996/16, 29 August 1996, § 1 and preamble.

⁸⁵ UN Secretary-General, Report on respect for human rights in armed conflicts, UN Doc. A/7720, 20 November 1969, p. 62.

84. In 1973, in his report on napalm and other incendiary weapons and all aspects of their possible use, the UN Secretary-General noted that Article 22 of 1907 Hague Convention (IV), “the right of belligerents to adopt means of injuring the enemy is not unlimited”, and Article 23(e) prohibiting means of warfare which caused unnecessary suffering were applicable to incendiary weapons. These principles were deemed to be of a customary nature. The report concluded by bringing “to the attention of the General Assembly the necessity of working out measures for the prohibition of the use, production, development and stockpiling of napalm and other incendiary weapons”.⁸⁶

85. The UN Secretariat’s survey on respect for human rights in armed conflicts in 1973 analysed practice and doctrine on incendiary weapons. A majority of the sources supported the view that there were restrictions on the use of incendiary weapons.⁸⁷

Other International Organisations

86. In 1985, in a report on the deteriorating situation in Afghanistan, the Rapporteur of the Parliamentary Assembly of the Council of Europe stated that “according to several concordant accounts, . . . chemical substances and incendiary bombs producing gases of various colours have been discharged”. In this respect, he added that the report of the Special Rapporteur of the UN Commission on Human Rights deserved mention.⁸⁸ In that report, the UN Special Rapporteur had recommended that “the parties to the conflict, namely government and opposition forces, should be reminded that it is their duty to apply fully the rules of international humanitarian law without discrimination”.⁸⁹

87. In a resolution adopted in 1996, the Parliamentary Assembly of the Council of Europe invited:

in particular, the governments of the member states of the Council of Europe, of the states whose parliaments enjoy or have applied for special guest status with the Assembly, of the states whose parliaments enjoy observer status, namely Israel, and of all other states to:

...

- b. ratify, if they have not done so, . . . the United Nations Convention of 1980 on the prohibitions or restrictions on the use of certain conventional weapons and its protocols . . .

⁸⁶ UN Secretary-General, Report on napalm and other incendiary weapons and all aspects of their possible use, UN Doc. A/8803/Rev.1, April 1973, p. 56.

⁸⁷ UN Secretariat, Respect for human rights in armed conflicts, Existing rules of international law concerning the prohibition or restriction of use of specific weapons, UN Doc. A/9215, 7 November 1973, p. 120.

⁸⁸ Council of Europe, Parliamentary Assembly, Rapporteur, Report on the deteriorating situation in Afghanistan, Doc. 5495, 15 November 1985, pp. 7–8, § 16(e).

⁸⁹ UN Commission on Human Rights, Special Rapporteur on the Situation of Human Rights in Afghanistan, Report, Recommendations, reprinted in Council of Europe, Parliamentary Assembly, Doc. 5495, Appendix 1, 15 November 1985, p. 11, § 190.

- j. promote extension of the aforesaid United Nations Convention of 1980 to non-international armed conflicts, and inclusion in its provisions of effective procedures for verification and regular inspection.⁹⁰

88. In a resolution adopted in 1994 on respect for IHL and support for humanitarian action in armed conflicts, the OAU Council of Ministers invited "all States that have not yet become party to the...[1980] CCW, to consider, or reconsider, without delay the possibility of doing so in the near future".⁹¹

89. In two resolutions adopted in 1994 and 1996 on respect for IHL, the OAS General Assembly urged member States to accede to the 1980 CCW.⁹²

90. In 1994, the OIC denounced the use of napalm by Serb forces during the conflict in Bosnia and Herzegovina.⁹³

International Conferences

91. No practice was found.

IV. Practice of International Judicial and Quasi-judicial Bodies

92. No practice was found.

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

93. No practice was found.

VI. Other Practice

94. In 1979, in a letter to the ICRC, an armed group confirmed its commitment to IHL and denounced the use of "all kinds of prohibited weapons such napalm bombs".⁹⁴

95. *Jane's Infantry Weapons* reported that the DNG incendiary smoke hand grenade, which contains "a charge of stabilised red phosphorus composition which gives both incendiary and smoke-producing effects", is being produced in Austria.⁹⁵ *Jane's Ammunition Handbook* also reported that the 81 mm

⁹⁰ Council of Europe, Parliamentary Assembly, Res. 1085, 24 April 1996, § 8(b) and (j).

⁹¹ OAU, Council of Ministers, Res. 1526 (LX), 6–11 June 1994, § 6.

⁹² OAS, General Assembly, Res. 1270 (XXIV-O/94), 10 June 1994, § 1; Res. 1408 (XXVI-O/96), 7 June 1996, § 1.

⁹³ OIC, Declaration of the Enlarged Meeting of the Foreign Ministers of the Contact Group of the OIC and OIC States Contributing Troops to UNPROFOR in Bosnia and Herzegovina, Geneva, 6 December 1994, § 6.

⁹⁴ ICRC archive document.

⁹⁵ Terry J. Gander (ed.), *Jane's Infantry Weapons*, Jane's Information Group, Coulsdon, Twenty-fourth edition, 1998–1999, pp. 506.

smoke/incendiary bomb RPI Mk 3, which is filled in order to “provide a greater fire raising capability while still producing a useful amount of screening smoke”, is being manufactured in Austria.⁹⁶

96. *Jane's Infantry Weapons* reported that Brazil's arsenal contains the Hydroar LC T1 M1 flame-thrower.⁹⁷ Furthermore, according to the *Jane's Air-Launched Weapons*, AV-BI bombs are being manufactured in Brazil and included in its arsenal.⁹⁸

97. According to *Jane's Air-Launched Weapons*, Chile produces and possesses napalm bombs.⁹⁹

98. According to *Jane's Infantry Weapons*, China's PLA stockpiles the NORINCO portable flame-thrower, which is also offered for export sale.¹⁰⁰ *Jane's Ammunition Handbook* also reports that the PLA stockpiles the 82 mm incendiary bomb Type 53 for 82 mm mortars which “is filled with an unidentified incendiary agent (probably red phosphorus) in the form of pellets”.¹⁰¹

99. According to *Jane's Infantry Weapons*, “various European countries” stockpile the Haley and Weller E108 incendiary grenade. The grenade “was developed for use as a sabotage and a destruction weapon . . . It burns at a temperature in excess of 2,700° C and will melt through 2mm of steel.”¹⁰²

100. According to *Jane's Infantry Weapons*, “the former Warsaw-pact nations and others” use the RPO-A Schmel Rocket Infantry flame-thrower and the LPO-50 flame-thrower.¹⁰³

101. *Jane's Infantry Weapons* reported that the DM 24 incendiary smoke hand grenade is being produced in Germany. The grenade is an “incendiary mass”, which “burns for about five minutes at a temperature of approximately 1,200°C. This heat ignites any combustible material the burning mass touches.”¹⁰⁴

⁹⁶ Terry J. Gander and Charles Q. Cutshaw (eds.), *Jane's Ammunition Handbook*, Jane's Information Group, Coulsdon, Seventh edition, 1998–1999, p. 414.

⁹⁷ Terry J. Gander (ed.), *Jane's Infantry Weapons*, Jane's Information Group, Coulsdon, Twenty-fourth edition, 1998–1999, p. 231.

⁹⁸ Duncan Lennox (ed.), *Jane's Air-Launched Weapons*, Jane's Information Group, Coulsdon, Issue 33, August 1999.

⁹⁹ Duncan Lennox (ed.), *Jane's Air-Launched Weapons*, Jane's Information Group, Coulsdon, Issue 27, June 1997.

¹⁰⁰ Terry J. Gander (ed.), *Jane's Infantry Weapons*, Jane's Information Group, Coulsdon, Twenty-fourth edition, 1998–1999, p. 232.

¹⁰¹ Terry J. Gander and Charles Q. Cutshaw (eds.), *Jane's Ammunition Handbook*, Jane's Information Group, Coulsdon, Seventh edition, 1998–1999, p. 440.

¹⁰² Terry J. Gander (ed.), *Jane's Infantry Weapons*, Jane's Information Group, Coulsdon, Twenty-fourth edition, 1998–1999, p. 539.

¹⁰³ Terry J. Gander (ed.), *Jane's Infantry Weapons*, Jane's Information Group, Coulsdon, Twenty-fourth edition, 1998–1999, p. 247.

¹⁰⁴ Terry J. Gander (ed.), *Jane's Infantry Weapons*, Jane's Information Group, Coulsdon, Twenty-fourth edition, 1998–1999, p. 520.

102. According to *Jane's Air-Launched Weapons*, Russia produces and possesses ZB-500GD and ZB-500ShM, which are "napalm type fire bombs".¹⁰⁵

103. *Jane's Infantry Weapons* reported that the arsenal of South Africa's National Defence Force contains a red phosphorus hand grenade and the M1A1 60 mm red phosphorus bomb. The effect of the grenade is to:

spread the burning red phosphorous granules over the immediate area. The grenade can be used in a defensive role where screening smoke is required and as an offensive weapon when the acrid smoke and incendiary effect can be used for bunker or room clearance. The burning granules will also ignite various materials.¹⁰⁶

104. *Jane's Infantry Weapons* reported that the EXPAL incendiary hand grenade is being produced in Spain. There are three versions of this grenade: the GWP, which "is filled with white phosphorous and therefore has applications as a smoke-producer, an antipersonnel weapon or as an incendiary grenade"; the GRP, which "has a primary role as a smoke-producer but will also act as an incendiary device with easily ignited substances"; and the CTE grenade, which "is filled with thermite and is therefore purely an incendiary device which will ignite anything capable of being burned".¹⁰⁷ Furthermore, according to *Jane's Air-Launched Weapons*, Spain produces and possesses BIN incendiary bombs.¹⁰⁸

105. *Jane's Infantry Weapons* reported that the arsenal of the Taiwan Army and Marine Corps contains the Type 67 flame-thrower.¹⁰⁹

106. *Jane's Infantry Weapons* reported that the arsenal of the US army contains the AN-M14 TH3 incendiary hand grenade. The grenade is used "primarily to provide a source of intense heat to destroy equipment. It generates heat to 2,200°C. The grenade filler will burn from 30 to 45 seconds... The grenade is normally hand thrown, although it may be rifle-launched using a special M2 series projection adapter."¹¹⁰ Furthermore, according to *Jane's Air-Launched Weapons*, the US produces and possesses M 116 napalm bombs.¹¹¹

107. According to *Jeune Afrique Economie* in 1996, Portugal allegedly used napalm in the conflict in Angola.¹¹²

¹⁰⁵ Duncan Lennox (ed.), *Jane's Air-Launched Weapons*, Jane's Information Group, Coulsdon, Issue 33, August 1999.

¹⁰⁶ Terry J. Gander (ed.), *Jane's Infantry Weapons*, Jane's Information Group, Coulsdon, Twenty-fourth edition, 1998–1999, pp. 534 and 619.

¹⁰⁷ Terry J. Gander (ed.), *Jane's Infantry Weapons*, Jane's Information Group, Coulsdon, Twenty-fourth edition, 1998–1999, p. 535.

¹⁰⁸ Duncan Lennox (ed.), *Jane's Air-Launched Weapons*, Jane's Information Group, Coulsdon, Issue 28, November 1997.

¹⁰⁹ Terry J. Gander (ed.), *Jane's Infantry Weapons*, Jane's Information Group, Coulsdon, Twenty-fourth edition, 1998–1999, p. 254.

¹¹⁰ Terry J. Gander (ed.), *Jane's Infantry Weapons*, Jane's Information Group, Coulsdon, Twenty-fourth edition, 1998–1999, p. 543.

¹¹¹ Duncan Lennox (ed.), *Jane's Air-Launched Weapons*, Jane's Information Group, Coulsdon, Issue 31, November 1998.

¹¹² "Savimbi, l'Unita et l'Angola", *Jeune Afrique Economie*, hors série, April 1996, collection Marchés Nouveaux, p. 117.

Use of incendiary weapons against civilians and civilian objects in particular

I. Treaties and Other Instruments

Treaties

108. Article 1(1) of the 1980 Protocol III to the CCW defines “incendiary weapon” as:

Any weapon or munition which is primarily designed to set fire to objects or to cause burn injury to persons through the action of flame, heat, or a combination thereof, produced by a chemical reaction of a substance delivered on the target.

- (a) Incendiary weapons can take the form of, for example, flame throwers, fougasses, shells, rockets, grenades, mines, bombs and other containers of incendiary substances.
- (b) Incendiary weapons do not include:
 - i. Munitions which may have incidental incendiary effects, such as illuminants, tracers, smoke or signalling systems;
 - ii. Munitions designed to combine penetration, blast or fragmentation effects with an additional incendiary effect, such as armour-piercing projectiles, fragmentation shells, explosive bombs and similar combined-effects munitions in which the incendiary effect is not specifically designed to cause burn injury to persons, but to be used against military objectives, such as armoured vehicles, aircraft and installations or facilities.

109. Article 1(5) of the 1980 Protocol III to the CCW provides that “‘feasible precautions’ are those precautions which are practicable or practically possible taking into account all circumstances ruling at the time, including humanitarian and military considerations”.

110. Article 2 of the 1980 Protocol III to the CCW restricts the use of incendiary weapons in order to protect civilians and civilian objects. It provides that:

1. It is prohibited in all circumstances to make the civilian population as such, individual civilians or civilian objects the object of attack by incendiary weapons.
2. It is prohibited in all circumstances to make any military objective located within a concentration of civilians the object of attack by air-delivered incendiary weapons.
3. It is further prohibited to make any military objective located within a concentration of civilians the object of attack by means of incendiary weapons other than air-delivered incendiary weapons, except when such military objective is clearly separated from the concentration of civilians and all feasible precautions are taken with a view to limiting the incendiary effects to the military objective and to avoiding, and in any event to minimizing, incidental loss of civilian life, injury to civilians and damage to civilian objects.
4. It is prohibited to make forests or other kinds of plant cover the object of attack by incendiary weapons except when such natural elements are used to cover, conceal or camouflage combatants or other military objectives, or are themselves military objectives.

111. Upon ratification of the 1980 CCW, Canada stated that:

With respect to Protocol III, it is the understanding of the Government of Canada that the expression “clearly separated” in paragraph 3 of Article 2 includes both spatial separation or separation by means of an effective physical barrier between the military objective and the concentration of civilians.¹¹³

112. Upon ratification of the 1980 CCW, France declared that:

With reference to the scope of application defined in article 1 of the Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons, . . . it will apply the provisions of the Convention and its three Protocols [I, II and III] to all armed conflicts referred to in articles 2 and 3 common to the Geneva Conventions of 12 August 1949 [international and non-international armed conflicts].¹¹⁴

113. Upon accession to the 1980 CCW, Israel stated that:

With reference to the scope of application defined in article 1 of the Convention, the Government of the State of Israel will apply the provisions of the Convention and those annexed Protocols to which Israel has agreed [I, II and III] to become bound to all armed conflicts involving regular forces of States referred to in article 2 common to the Geneva Conventions of 12 August 1949, as well as to all armed conflicts referred to in article 3 common to the Geneva Conventions of 12 August 1949.¹¹⁵

114. Upon ratification of the 1980 CCW, the UK stated that:

The United Kingdom accepts the provisions of article 2(2) and (3) on the understanding that the terms of those paragraphs of that article do not imply that the air-delivery of incendiary weapons, or of any other weapons, projectiles or munitions, is less accurate or less capable of being carried out discriminately than all or any other means of delivery.¹¹⁶

115. In 2001, States parties to the 1980 CCW decided to amend Article 1 of the Convention, governing its scope. This amendment states that:

1. This Convention and its annexed Protocols shall apply in the situations referred to in Article 2 common to the Geneva Conventions of 12 August 1949 for the Protection of War Victims, including any situation described in paragraph 4 of Article I of Additional Protocol I to these Conventions.
2. This Convention and its annexed Protocols shall also apply, in addition to situations referred to in paragraph 1 of this Article, to situations referred to in Article 3 common to the Geneva Conventions of 12 August 1949. This Convention and its annexed Protocols shall not apply to situations of internal disturbances and tensions, such as riots, isolated and sporadic acts of violence, and other acts of a similar nature, as not being armed conflicts.

¹¹³ Canada, Declaration made upon ratification of the CCW, 24 June 1994, § 4.

¹¹⁴ France, Reservations made upon ratification of the CCW, 4 March 1988.

¹¹⁵ Israel, Declarations and statements of understanding made upon accession to the CCW, 22 March 1995, § a.

¹¹⁶ UK, Declarations made upon ratification of the CCW, 13 February 1995, § d.

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

Other Instruments

116. No practice was found.

II. National Practice

Military Manuals

117. Argentina's Law of War Manual reproduces the content of Article 1(1), (2) and (3) and Article 2 of the 1980 Protocol III to the CCW.¹¹⁷

118. Australia's Commanders' Guide states that "incendiary weapons should only be used against military targets. Incendiaries include weapons such as "napalm, flame-throwers, tracer rounds and white phosphorous".¹¹⁸

119. Australia's Defence Force Manual states that:

416. Incendiary weapons include any weapon or munition which is designed to set fire to objects or to cause burn injury to humans through the action of flame, heat or a combination of the two causes by a chemical reaction of a substance delivered on a target. They include flame throwers, shell, rockets, grenades, mines, bombs and other containers of incendiary materials.

417. Incendiary weapons do not include munitions which have incidental incendiary effects such as illuminants, tracers, smoke or signalling devices; nor do they include munitions designed to combine penetration, blast or fragmentation effects with an additional incendiary effect, such as armour piercing projectiles, fragmentation shells, explosive bombs and similar combined effects ammunition in which the incendiary effect is not specifically designed to cause burn injury to humans, but to be used against military objectives such as armoured vehicles, aircraft and installations and facilities.

418. Specific rules prohibit the use of incendiary weapons:

- (a) in all circumstances to attack the civilian population, individual citizens or civilian objects with air delivered incendiary weapons;
- (b) in all circumstances to make any military objective located within a concentration of civilians the object of attack by air delivered incendiary weapons;
- (c) to make any military objective located within a concentration of civilians the object of an attack by other than air delivered incendiary weapons, except where the military objective is clearly separated from the civilians and all feasible precautions are taken to minimise incidental loss of civilian life and damage to civilian objects (separation in this context can mean a barrier (such as an air raid shelter or a hill) or distance; and
- (d) on forests or plant cover except when the forests or plant cover are either being used to cover, conceal or camouflage military objectives or are themselves military objectives (if it is necessary to use incendiaries on a forest to clear a

¹¹⁷ Argentina, *Law of War Manual* (1989), §§ 4.25 and 4.26.

¹¹⁸ Australia, *Commanders' Guide* (1994), § 314, see also §§ 933–934.

field of fire or facilitate an advance or attack against an enemy, the forest has become a military objective and may legitimately be attacked).¹¹⁹

120. Belgium's Law of War Manual defines incendiary weapons in accordance with Article 1 of the 1980 Protocol III to the CCW and states that:

The use of such [incendiary] weapons against persons is prohibited because they cause unnecessary suffering, but their use against military objectives, such as bunkers, tanks, depots, etc. is permitted. However, if these military objectives are located inside a civilian concentration, their use is prohibited, except when the object is clearly separate from the concentration of civilians and all precautions are taken to avoid any loss of life among the civilian population and any damage to civilian objects. Their use against forests is also prohibited, except when they constitute a military objective or are used to conceal combatants or other military objectives.¹²⁰

121. Cameroon's Instructors' Manual restates the definition of incendiary weapons found in Article 1 of the 1980 Protocol III to the CCW and, with reference to Article 2 of the Protocol, states that "the only restrictions applicable to such arms concern their use against non-military objectives, against the environment and against military objectives located in areas of civilian concentration".¹²¹

122. Canada's LOAC Manual restates the definition of incendiary weapons and the restrictions concerning their application contained in Articles 1 and 2 respectively of the 1980 Protocol III to the CCW.¹²²

123. Ecuador's Naval Manual states that:

Incendiary weapons such as tracing ammunition, heat-producing bombs, flame throwers, napalm and any other incendiary weapons or agents, are considered lawful. Persons selecting these weapons for use should employ them in such a way as to minimize uncontrolled and indiscriminate effects on the civilian population, in a manner compatible with the fulfilment of the mission and the security of the forces.¹²³

124. France's LOAC Teaching Note states that "the use of incendiary weapons is strictly limited to military objectives" and that "it is forbidden to launch an attack with incendiary weapons against military objectives located near or within a concentration of civilians".¹²⁴

125. France's LOAC Manual states that "the use of incendiary weapons is strictly limited to military objectives" and that "it is forbidden to launch an attack with incendiary weapons against military objectives located near or within a concentration of civilians".¹²⁵ It also states that "it is possible to

¹¹⁹ Australia, *Defence Force Manual* (1994), §§ 416–418.

¹²⁰ Belgium, *Law of War Manual* (1983), p. 38.

¹²¹ Cameroon, *Instructors' Manual* (1992), pp. 123–124, § 441.

¹²² Canada, *LOAC Manual* (1999), p. 5-4, §§ 33, 34 and 36.

¹²³ Ecuador, *Naval Manual* (1989), § 9-6.

¹²⁴ France, *LOAC Teaching Note* (2000), p. 6.

¹²⁵ France, *LOAC Manual* (2001), p. 54.

use incendiary weapons when the military target is clearly separated from the civilian concentration and all feasible precautions are taken with a view to limiting the incendiary effects to the military objective, when the tactical situation allows it".¹²⁶ As regards napalm and flame-throwers, the manual repeats the same provision and quotes Article 1 of the 1980 Protocol III to the CCW.¹²⁷

126. Germany's Military Manual states, with reference to the 1980 Protocol III to the CCW, defines incendiary weapons in accordance with the Protocol and further states that:

422. When incendiary weapons are used, precautions shall be taken which are practicable or practically possible taking into account all circumstances ruling at the time, including humanitarian and military considerations.

423. The civilian population as such, individual civilians and civilian objects shall be granted special protection. They shall never be made the object of attack by incendiary weapons.

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

425. It is further prohibited to use incendiary weapons against forests or other kinds of plant cover except when such natural elements are used to cover, conceal or camouflage a military objective, or are themselves military objectives.¹²⁸

127. Israel's Manual on the Laws of War states that:

Incendiary arms are not banned. Nevertheless, because of their wide range of cover, this protocol of the CCW Convention is meant to protect civilians and forbids making a population centre a target for an incendiary weapons attack. Furthermore, it is forbidden to attack a military objective situated within a population centre employing incendiary weapons. The protocol does not ban the use of these arms during combat (for instance, in flushing out bunkers).¹²⁹

128. Kenya's LOAC Manual defines incendiary weapons in accordance with Article 1 of the 1980 Protocol III to the CCW and states that the "conditions for permitted use" are:

Incendiary weapons which are not air-delivered may be used:

- (a) when the military objective is clearly separated from a concentration of civilian persons; and
- (b) subject to precautions to limit incendiary effects to the military objective, when the tactical situation permits.

Air-delivered incendiary weapons may be so used only in attack against a military objective located outside concentrations of civilian persons.¹³⁰

¹²⁶ France, *LOAC Manual* (2001), p. 24. ¹²⁷ France, *LOAC Manual* (2001), pp. 86 and 79.

¹²⁸ Germany, *Military Manual* (1992), §§ 420–425.

¹²⁹ Israel, *Manual on the Laws of War* (1998), p. 16.

¹³⁰ Kenya, *LOAC Manual* (1997), Précis No. 3, p. 5.

129. The Military Manual of the Netherlands defines incendiary weapons in accordance with Article 1 of the 1980 Protocol III to the CCW. It further specifies that:

The general rules with regard to the protection of the civilian population apply, namely, in the first place, that the civilian population, individual civilians and civilian objects may not be attacked. Furthermore, it is forbidden to attack military objectives located inside a concentration of civilians by air-delivered incendiary weapons. Attacks by incendiary weapons which are not air-delivered are permitted provided two conditions are fulfilled:

- The military objective has to be clearly separated from the concentration of civilians.
- Precautionary measures have to be taken to limit the incendiary effect to the military objective and to avoid collateral damage to civilians and civilian objects.¹³¹

130. New Zealand's Military Manual restates Article 2 of the 1980 Protocol III to the CCW.¹³²

131. Russia's Military Manual prohibits "any weapons which strike indiscriminately or whose use causes superfluous injury and destruction" and specifically refers to the 1980 Protocol III to the CCW.¹³³

132. Spain's LOAC Manual defines incendiary weapons in accordance with Article 1 of the 1980 Protocol III and restates the restrictions of the use of incendiary weapons contained in Article 2 of the Protocol.¹³⁴

133. Sweden's IHL Manual states that:

[The 1980] Protocol III [to the CCW] contains restrictions applying where incendiary weapons are used. This protocol does not constitute a total prohibition of the use of incendiary weapons – which Sweden and other states had proposed. However, the protocol lays down such heavy restrictions on their use that there is reason to characterize it as a *partial prohibition of incendiary weapons*.

A great bone of contention has been how incendiary weapons are to be defined. Agreement has now been reached on a definition by which "incendiary weapon" covers any weapon or ammunition primarily designed to set fire to objects or to cause burn injuries to persons through the action of flames, heat or a combination of these. Incendiary weapons do not include those with incidental incendiary effects, such as illuminants or tracers. Nor shall armour-piercing projectiles and explosive shells that act through penetrating, blast or fragmentation effects in combination with the incendiary effect be considered as incendiary weapons.

...

This new rule [in Article 2 of Protocol III] affords civilians considerably better protection than hitherto against incendiary weapons.

...

¹³¹ Netherlands, *Military Manual* (1993), pp. V-13/14, § 11.

¹³² New Zealand, *Military Manual* (1992), §§ 513 and 620.

¹³³ Russia, *Military Manual* (1990), § 6(h). ¹³⁴ Spain, *LOAC Manual* (1996), § 3.2.a.(3).

There is a need to supplement the present Protocol III so that the agreement constitutes a *complete prohibition of incendiary weapons*. In this way, protection of civilians could be further enhanced.¹³⁵ [emphasis in original]

134. Switzerland's Basic Military Manual, with reference to the 1980 Protocol III to the CCW, states that "it is forbidden to use incendiary weapons against civilian objects or against a military objective that is not clearly separated from a concentration of civilians".¹³⁶

135. The US Rules of Engagement for Vietnam stated that "the use of incendiary type munitions in inhabited or urban areas will be avoided unless friendly survival is at stake or it is necessary for the accomplishment of the commander's mission".¹³⁷

136. The US Air Force Pamphlet states that:

The potential of fire to spread beyond the immediate target area has also raised concerns about uncontrollable or indiscriminate effects affecting the civilian population or civilian objects. Accordingly, any applicable rules of engagement relating to incendiary weapons must be followed closely to avoid controversy. The manner in which incendiary weapons are employed is also regulated by the other principles and rules regulating armed force... In particular, the potential capacity of fire to spread must be considered in relation to the rules protecting civilians and civilian objects... For example, incendiary weapons should be avoided in urban areas, to the extent that other weapons are available and as effective.¹³⁸

137. The US Naval Handbook states that:

Incendiary devices such as tracer ammunition, thermite bombs, flame throwers, napalm, and other incendiary weapons and agents, are lawful weapons. Where incendiary devices are the weapons of choice, they should be employed in a manner that does not cause incidental injury or collateral damage that is excessive in light of the military advantage anticipated by the attack.¹³⁹

National Legislation

138. Under Estonia's Penal Code, "large scale use of incendiary weapons under conditions where the military objective cannot be clearly separated from civilian population, civilian objects or the surrounding environment" is a war crime.¹⁴⁰

139. Under Hungary's Criminal Code as amended, employing "incendiary weapons" as defined in the 1980 Protocol III to the CCW is a war crime.¹⁴¹

National Case-law

140. No practice was found.

¹³⁵ Sweden, *IHL Manual* (1991), Section 3.3.2, pp. 81–83.

¹³⁶ Switzerland, *Basic Military Manual* (1987), Article 23(d).

¹³⁷ US, *Rules of Engagement for Vietnam* (1971), § 6(d)(1).

¹³⁸ US, *Air Force Pamphlet* (1976), § 6-6(c). ¹³⁹ US, *Naval Handbook* (1995), § 9.7.

¹⁴⁰ Estonia, *Penal Code* (2001), § 103.

¹⁴¹ Hungary, *Criminal Code as amended* (1978), Section 160/A(3)(b)(3).

Other National Practice

141. In 1971, in an Australian report on the protection of the civil population against the effects of certain weapons, it was stated that:

In respect of napalm and other weapons of an incendiary nature the Army recognises certain complexities of classification. It contemplates no less than three types of weapon:

- a. "flame weapons" such as napalm bombs and flame throwers which employ or involve the projection of a flaming (petroleum or other) substance;
- b. pure heat weapons; and,
- c. electronic/nuclear (sub-atomic) weapons of the nature of laser rays or any development of that general conception.

This is not an exhaustive classification and ignores the atom weapon, whether as a bomb or otherwise.

Presently only napalm bombs and flamethrowers are available or in use. They present problems of economic use. Currently they are not used against any human target but only against structures although their use against structures is possibly less useful if a structure is unmanned by enemy personnel.

Even if not used against human targets flame weapons do present an advantage as a means of generating fear and despondency, even if not of terror and even if no enemy is actually harmed by them or is within range.

Their weight and lack of economy in use is a problem which may cause flame throwers to be discarded in favour of more sophisticated and longer ranging means of dispersing their (napalm) content.

These weapons as presently existing are not held to contravene international law if used in accepted fashion and not indiscriminately against humans or against inanimate targets so as to involve innocent civilians as little as possible. However, it is conceivable that new or "unconventional" uses of these weapons may be alleged to be contrary to law, depending upon interpretation of the Hague Rules and any extension of them.¹⁴²

142. In an annex to a working paper on incendiary weapons submitted by Australia, Denmark and Netherlands to the Ad Hoc Committee on Conventional Weapons established by the CDDH, the Netherlands proposed the following rules:

2. Rules

- (a) As a consequence of the rules of international law applicable with respect to the protection of the civilian population against the effects of hostilities, it is prohibited to make any city, town, village or other area containing a concentration of civilians the object of attack by means of any incendiary munition.
- (b) Specific military objectives that are within such an area may be made the object of attack by means of incendiary munitions, provided that the attack is otherwise lawful and that all feasible precautions are taken to limit the

¹⁴² Australia, Report on the protection of the civil population against the effects of certain weapons, May 1971, pp. 2-3, Report on the Practice of Australia, 1998, Chapter 3.5.

incendiary effects to the specific military objectives and to avoid incidental loss of civilian life or injury to civilians.

- (c) In order to reduce to a minimum the risks posed to civilians by the use of flame weapons, it is prohibited to make any specific military objective that is within such an area the object of aerial attack by means of napalm or other flame munition unless that objective is located within an area in which combat between ground forces is taking place or is imminent.¹⁴³

This proposal was later subject to slight revision.¹⁴⁴

143. At the CCW Preparatory Conference in 1978, Australia and the Netherlands sponsored a draft proposal which divided incendiary weapons into "incendiary" and "flame" munitions and stated that "it is prohibited to make any concentration of civilians the object of attack by means of any incendiary munition". The proposal further stated that "specific military objectives that are situated within a concentration of civilians" may be attacked with incendiary weapons if "all feasible precautions are taken to limit the incendiary effects to all specific military objectives and to avoid incidental loss of civilian life or injury to civilians". The final part of the proposal provided that, in order to:

reduce to a minimum the risks posed to civilians by the use of flame weapons, it is prohibited to make any specific military objective that is situated within a concentration of civilians the object of aerial attack by means of napalm or other flame munitions unless that objective is located within an area in which combat between ground forces is taking place or appears to be imminent.¹⁴⁵

144. In 1979, towards the end of CCW Preparatory Conference, Australia and the Netherlands submitted a further draft proposal on incendiary weapons. The proposal provided that "as a consequence of the rules of international law applicable with respect to the protection of civilians against the effects of hostilities, it is prohibited to make the civilian population as such as well as individual civilians the object of attack by means of incendiary munitions". It also prohibited aerial attacks with napalm or other flame munitions against military targets situated within concentrations of civilians. Attacks with incendiary munitions against military objectives in civilian concentrations were not prohibited, "provided the attack is otherwise lawful and that all feasible precautions are taken to limit the incendiary effects to the

¹⁴³ Netherlands, Proposal annexed to a working paper on incendiary weapons submitted by Australia, Denmark and Netherlands to the Ad Hoc Committee on Conventional Weapons established by the CDDH, *Official Records*, Vol. XVI, CDDH/IV/206 within CDDH/IV/226, pp. 562–563.

¹⁴⁴ Netherlands, Revised proposal annexed to a working paper on incendiary weapons submitted by Australia, Denmark and Netherlands to the Ad Hoc Committee on Conventional Weapons established by the CDDH, *Official Records*, Vol. XVI, CDDH/IV/206 (Rev. 1) within CDDH/IV/226, pp. 564–565.

¹⁴⁵ Australia and Netherlands, Draft proposal on incendiary weapons submitted to the CCW Preparatory Conference, UN Doc. A/CONF.95/PREP.CONF./L.11, 13 September 1978.

military objective and to avoid incidental loss of civilian life and injury to civilians".¹⁴⁶

145. At the First Review Conference of States Parties to the CCW in 1995, Australia stated that "the restrictions laid down in the Convention regarding the use of incendiary devices . . . were strong and clear".¹⁴⁷

146. Towards the end of the CCW Preparatory Conference in 1979, Austria, Egypt, Ghana, Jamaica, Mexico, Romania, Sweden, Venezuela, SFRY and Zaire, which had earlier sponsored a proposal which called for a total ban, submitted a proposal which restricted the ban on the use of incendiary weapons to use against civilians, military objectives located within a concentration of civilians and unprotected combatants.¹⁴⁸

147. In 1974, during discussions in the Ad Hoc Committee on Conventional Weapons established by the CDDH, Brazil stated that "there were good humanitarian reasons for the international community to agree at least on restricting the use of incendiary weapons against targets which were not exclusively military".¹⁴⁹

148. In 1973, in its reply on the report of the UN Secretary-General on napalm and other incendiary weapons and all aspects of their possible use, Denmark stated that it wanted to work out an agreement restricting or prohibiting the use of napalm and other incendiary weapons. It added that "the aim of such agreements should be to restrict or prohibit the use of napalm and other incendiary weapons, especially in circumstances where these weapons have an indiscriminate effect against the civilian population".¹⁵⁰

149. At the CCW Preparatory Conference in 1978, Denmark and Norway presented a proposal which stated that "it is prohibited to make the civilian population or individual civilians the object of attack by incendiary weapons" and that "it is prohibited to make any military objective located within a concentration of civilians the object of attack by incendiary weapons delivered by aircraft, except when that military objective is clearly separated and distinct from the civilian population". The final rule contained in the proposal provided that:

Whenever an attack is made by incendiary weapons in accordance with the above provisions and other applicable rules of international law, all feasible precautions

¹⁴⁶ Australia and Netherlands, Draft proposal on incendiary weapons submitted to the CCW Preparatory Conference, UN Doc. A/CONF.95/PREP.CONF/L.15, 5 April 1979.

¹⁴⁷ Australia, Statement at the First Review Conference of States Parties to the CCW, Vienna, 25 September–13 October 1995, UN Doc. CCW/CONF.I/SR.3, 2 October 1995, § 25.

¹⁴⁸ Austria, Egypt, Ghana, Jamaica, Mexico, Romania, Sweden, Venezuela, SFRY and Zaire, Draft protocol on Prohibition or Restrictions on the Use of incendiary Weapons submitted to the CCW Conference, UN Doc. A/CONF.95/CW/L.1, 27 September 1979, pp. 1–2.

¹⁴⁹ Brazil, Statement at the CDDH, *Official Records*, Vol. XVI, CDDH/IV/SR.2, 14 March 1974, p. 18, § 7; see also *Official Records*, Vol. XVI, CDDH/IV/SR.6, 22 March 1974, p. 50, § 18 and Vol. XVI, CDDH/IV/SR.10, 19 February 1975, p. 92, § 5.

¹⁵⁰ Denmark, Reply of 28 August 1973 sent to the UN Secretary-General, reprinted in Report of the Secretary-General on napalm and other incendiary weapons and all aspects of their possible use, UN Doc. A/9207, 11 October 1973, p. 6.

shall be taken to limit the effects of such attack to the military objective itself with a view to avoiding, and in any event to minimizing, incidental loss of civilian life, injury to civilians and damage to civilian objects.¹⁵¹

150. In 1977, during a debate in the First Committee of the UN General Assembly, Egypt advocated the prohibition or restriction of incendiary weapons.¹⁵²

151. In 1987, the French Ministry of Foreign Affairs explained that the reasons for which France refused to ratify the 1980 Protocol III to the CCW was the provision relating to the use of incendiary weapons against military objectives located within a concentration of civilians. It considered the provision to be “too imprecise, thus unrealistic”.¹⁵³

152. In 1973, in its reply on the report of the UN Secretary-General on napalm and other incendiary weapons and all aspects of their possible use, India stated that possible agreement could only be found on restrictions of use against civilian objects. It stated that it would “take an active interest in, and promote” a prohibition of all inhumane weapons, including incendiary weapons, against civilian targets, with due regard for the principles of reciprocity and right of retaliation.¹⁵⁴

153. At the Third Preparatory Committee for the Second Review Conference of States Parties to the CCW in 2001, India stated that it “fully supported the idea of expanding the scope of the CCW to cover armed internal conflicts”.¹⁵⁵

154. At the CCW Preparatory Conference in 1978, Indonesia submitted a draft proposal, which developed the proposal it had submitted during the CDDH.¹⁵⁶ The proposal prohibited the use of incendiaries, except against:

military objects other than personnel, provided that these objects are not within civilian population centres and against combatants holding positions in field fortifications such as bunkers and pillboxes where the use of alternate weapons will inevitably render more casualties.¹⁵⁷

155. In 1976, during discussions in the Ad Hoc Committee on Conventional Weapons established by the CDDH, Japan stated that:

¹⁵¹ Denmark and Norway, Draft proposal on incendiary weapons submitted to the CCW Preparatory Conference, UN Doc. A/CONF.95/PREP.CONF./L.12, 13 September 1978.

¹⁵² Egypt, Statement before the First Committee of the UN General Assembly, UN Doc. A/C.1/32/PV.26, 4 November 1977, p. 17.

¹⁵³ France, Ministry of Foreign Affairs, Statement of 2 December 1987 by the Secretary of State before the National Assembly, excerpt reprinted in *Annuaire Français de Droit International*, Vol. 34, 1988, p. 900.

¹⁵⁴ India, Reply of 16 October 1973 sent to the UN Secretary-General, reprinted in Report of the Secretary-General on napalm and other incendiary weapons and all aspects of their possible use, UN Doc. A/9207, 11 October 1973, p. 9.

¹⁵⁵ India, Statement of 24 September 2001 at the Third Preparatory Committee for the Second Review Conference of States Parties to the CCW, Geneva, 24–28 September 2001.

¹⁵⁶ Indonesia, Proposal concerning incendiary weapons submitted to the Ad Hoc Committee established by the CDDH, Vol. XVI, *Official Records*, CDDH/IV/223 within CDDH/IV 226, p. 578.

¹⁵⁷ Indonesia, Draft proposal on incendiary weapons submitted to the CCW Preparatory Conference, UN Doc. A/CONF.95/PREP.CONF./L.13, 22 March 1979.

21. A consensus had been reached at the first session of the Conference of Government Experts that attacks in which incendiary weapons were used against cities with a concentration of civilians were indiscriminate and should be prohibited.
22. The working paper on incendiary weapons . . . submitted by eleven countries, including Japan, had been intended to start the prohibition or restriction of the use of such weapons from the point at which a minimum consensus had been reached, and had therefore been completely realistic.¹⁵⁸

156. At the CCW Preparatory Conference in 1978, Japan declared that while it "was not sure it would be practicable to ban completely weapons of that kind [incendiaries] other than those which employed yellow phosphorus, it would be useful to prohibit their use in indiscriminate attacks on cities or populated areas".¹⁵⁹

157. In 1992, prior to the adoption of UN General Assembly Resolution 47/37 on the protection of the environment in times of armed conflict, Jordan and the US submitted a memorandum entitled "International Law Providing Protection to the Environment in Times of Armed Conflict", which stated that:

For States parties the following principles of international law, as applicable, provide additional protection for the environment in times of armed conflict:

Article 2(4) of [the 1980 Protocol III to the CCW] prohibits States parties from making forests or other kinds of plant cover the object of attack by incendiary weapons except when such natural elements cover, conceal or camouflage combatants or other military objectives, or are themselves military objectives.¹⁶⁰

158. In 1973, in its reply on the report of the UN Secretary-General on napalm and other incendiary weapons and all aspects of their possible use, the Netherlands supported restrictions on the use of incendiary weapons, especially to protect civilians.¹⁶¹

159. At the CCW Preparatory Conference in 1979, New Zealand stated that "it shared the view expressed by the overwhelming majority of delegations concerning the need for stronger provisions for the protection of civilians and civilian centres against all incendiary weapons".¹⁶²

¹⁵⁸ Japan, Statement at the CDDH, *Official Records*, Vol. XVI, CDDH/IV/SR.27, 19 May 1976, p. 278, §§ 21–22.

¹⁵⁹ Japan, Statement at the CCW Preparatory Conference, UN Doc. A/CONF.95/PREP.CONF.I/SR.12, 12 September 1978, p. 2, § 3.

¹⁶⁰ Jordan and US, International Law Providing Protection to the Environment in Times of Armed Conflict, annexed to Letter dated 28 September 1992 to the Chairman of the Sixth Committee of the UN General Assembly, UN Doc. A/C.6/47/3, 28 September 1992, § 2(d).

¹⁶¹ Netherlands, Reply of 30 August 1973 sent to the UN Secretary-General, reprinted in Report of the Secretary-General on napalm and other incendiary weapons and all aspects of their possible use, UN Doc. A/9207, 11 October 1973, p. 13.

¹⁶² New Zealand, Statement at the CCW Preparatory Conference, UN Doc. A/CONF.95/PREP.CONF/II/SR.27, 18 April 1979, p. 8, § 72.

160. Norway submitted a “Draft Protocol Relative to the Prohibition of the Use of Incendiary Weapons” to the Ad Hoc Committee on Conventional Weapons established by the CDDH which read, *inter alia*, as follows:

Article 1 – Field of application

The present Protocol shall apply in the situations referred to in articles 2 and 3 common to the Geneva Conventions of August 12, 1949 for the Protection of War Victims.

...

Article 4 – Protection of the civilian population

Any use of incendiary weapons is subject to article 46 of [AP I].

In any city, town, village or other area containing a concentration of civilians, incendiary weapons may be used only provided that combat between ground forces is taking place in that area, or the military objective is clearly separated from the civilian population.¹⁶³

161. At the International Conference on the Protection of War Victims in 1993, Russia declared that “in order to protect the civilian population against indiscriminate weapons... incendiary weapons... should be completely banned in internal conflicts”.¹⁶⁴

162. At the CCW Preparatory Conference in 1979, during the debate on the second proposal made by Australia and the Netherlands, Syria criticised the proposal, stating that “in its present form, the proposal left serious doubts regarding the precautions taken to limit the incendiary effects and to avoid loss of human lives” and that “it had not been proved that napalm was more dangerous than other incendiary weapons”.¹⁶⁵

163. At the CCW Preparatory Conference in 1979, the USSR stated that it was “regrettable” that no agreement on restricting the use of incendiary weapons had been reached. It felt that the:

draft revised at the second session extended the scope of the prohibition of the use of incendiary weapons, particularly against military objectives situated within a concentration of civilians, and might constitute a good point of departure for the future work of the Conference.¹⁶⁶

164. At the CCW Preparatory Conference in 1979, the UK stated that:

The exchange of views in the past week had proved disappointing because some delegations had adopted extreme positions. These positions were doubtless dictated by humanitarian considerations which could in no sense be criticised. However, if

¹⁶³ Norway, Draft protocol relative to the prohibition of the use of incendiary weapons submitted to the Ad Hoc Committee on Conventional Weapons established by the CDDH, *Official Records*, Vol. XVI, CDDH/IV/207 within CDDH/IV/226, pp. 567–569.

¹⁶⁴ Russia, Statement at the International Conference for the Protection of War Victims, Geneva, 30 August–1 September 1993.

¹⁶⁵ Syria, Statement at the CCW Preparatory Conference, UN Doc. A/CONF.95/PREP.CONF/II/SR.23, 6 April 1979, p. 3, §§ 6–7.

¹⁶⁶ USSR, Statement at the CCW Preparatory Conference, UN Doc. A/CONF.95/PREP.CONF/II/SR.24, 9 April 1979, p. 5, § 16.

agreement was to be reached on anything specific that would be an advance over the present state of the law, the objective would plainly have to be a more limited one. The text of the proposal submitted by Australia and the Netherlands met precisely that need.¹⁶⁷

165. In 1976, during discussions in the Ad Hoc Committee on Conventional Weapons established by the CDDH, the representative of the US stated that:

36. ... The United States delegation could not accept any proposal which would have the effect of precluding the use of napalm or similar weapons in close-combat situations. It could therefore not accept total prohibition of the use of such weapons or prohibition of their anti-personnel use.
37. Her delegation recognized, however, that special limitations were appropriate in areas populated by civilians. It had carefully studied the proposal in the working paper submitted to the Lugano Conference [of Government Experts on the Use of Certain Conventional Weapons] by the Netherlands experts and introduced again in the Ad Hoc Committee [as an annex to a working paper, see *supra*] that the use of air delivered flame weapons should be prohibited in populated areas, except for the zone in which combat between ground forces was taking place or was imminent. Such a prohibition would preclude the use of air-delivered napalm against military targets in cities, towns or villages, such as ammunition and supply dumps, vehicle parks, convoys and barracks. Acceptance of that proposal would involve the abandonment of lawful uses of napalm against legitimate military targets. In view, however, of the concern that the use of air-delivered napalm in populated areas might prove dangerous to civilians, the United States delegation was prepared to accept the Netherlands proposal as a basis for serious negotiation, and was also prepared to consider any other proposals for protecting the civilian population from the effects of incendiary weapons.¹⁶⁸

166. At the CCW Preparatory Conference in 1979, the US explained that it:

could not accept a total ban on the use of incendiary weapons, because the weapons substituted for them would, in certain situations, be more destructive and consequently more injurious, and would thus be contrary to the spirit of article 57 of the Protocol on International Armed Conflict.

It went on to say that, while it could not accept a restriction on the use of incendiaries against combatants, "an agreement on limiting the use of incendiaries in areas containing civilian concentrations was appropriate and possible . . . The [Australia/Netherlands] proposal was the maximum that some of the principal interested parties at the Conference would be prepared to accept".¹⁶⁹

¹⁶⁷ UK, Statement at the CCW Preparatory Conference, UN Doc. A/CONF.95/PREP.CONF/II/SR.23, 6 April 1979, p. 2.

¹⁶⁸ US, Statement at the CDDH, *Official Records*, Vol. XVI, CDDH/IV/SR.27, 19 May 1976, p. 281, §§ 36–37.

¹⁶⁹ US, Statement at the CCW Preparatory Conference, UN Doc. A/CONF.95/PREP.CONF/II/SR.28, 18 April 1979, pp. 2–3, §§ 5–6.

167. With respect to the decision by the US whether or not to use incendiary weapons during a strategic bombing campaign against North Korean industrial areas during the Korean War, it is reported that:

At the Target Selection Committee meeting General Weyland pointed out that someone would have to decide whether or not the B-29's could use incendiary munitions, and within a few days FEAF [Far Eastern Air Force] got the answer to this question – in the negative. Washington was very hesitant about any air action which might be exploited by Communist propaganda and desired no unnecessary civilian casualties which might result from fire raids. General Stratemeyer consequently directed General O'Donnell not to employ incendiaries without specific approval.¹⁷⁰

168. In transmitting the Protocols to the 1980 CCW to the US Senate, the US President stated that “the United States must retain its ability to employ incendiaries to hold high priority military targets such as those at risk in a manner consistent with the principle of proportionality which governs the use of all weapons under existing law”.¹⁷¹

III. Practice of International Organisations and Conferences

United Nations

169. In several resolutions between 1973 and 1977, the UN General Assembly invited the upcoming CDDH to “seek agreement” on rules prohibiting or restricting the use of incendiary weapons.¹⁷²

170. In a resolution adopted in 1973, the UN General Assembly called on the CDDH to “seek agreement on rules prohibiting or restricting the use of [incendiary] weapons.” The preamble to the resolution states that “the efficacy of the general principles of [IHL] could be further enhanced if rules were elaborated and generally accepted prohibiting or restricting the use of napalm and other incendiary weapons”.¹⁷³

171. Two UN General Assembly resolutions adopted on the same occasion in 1974 dealt with two different aspects of incendiary weapons. Resolution 3255 A contained an invitation to the CDDH to consider a prohibition or restriction on these weapons.¹⁷⁴ Resolution 3255 B condemned “the use of napalm and other incendiary weapons in armed conflicts in circumstances where it may

¹⁷⁰ Robert F. Futrell, *The US Air Force in Korea 1950–1953*, Office of Air Force History, US Air Force, Washington, D.C., Revised edition, 1983, p. 187.

¹⁷¹ US, Message from the US President transmitting Protocols II, III and IV to the CCW to the Senate, Treaty Doc. 105-1, Washington, 7 January 1997, pp. 37–40.

¹⁷² UN General Assembly, Res. 3076 (XXVIII), 6 December 1973, § 1; Res. 3255 A (XXIX), 9 December 1974, § 3; Res. 31/64, 10 December 1976, § 2; Res. 32/152, 19 December 1977, § 2.

¹⁷³ UN General Assembly, Res. 3076 (XXVIII), 6 December 1973, § 1 and preamble.

¹⁷⁴ UN General Assembly, Res. 3255 A (XXIX), 9 December 1974, § 3.

affect human beings or may cause damage to the environment and/or natural resources".¹⁷⁵

172. In a resolution adopted in 1980, the UN General Assembly welcomed the successful agreement on the 1980 CCW and its Protocols. It urged States to agree to be bound by the Convention and Protocols "with a view to achieving the widest possible adherence to these instruments".¹⁷⁶

173. In numerous resolutions, the UN General Assembly urged all States that had not yet done so to accede to the 1980 CCW and its Protocols.¹⁷⁷

174. In resolution adopted in 1994 on the situation of human rights in the former Yugoslavia, the UN General Assembly condemned "the use of... napalm bombs on civilian targets by Croatian Serb and Bosnian Serb forces".¹⁷⁸

175. In a resolution adopted in 1995, the UN Commission on Human Rights condemned "the use of... napalm bombs against civilian targets by Bosnian and Croatian Serb forces".¹⁷⁹

176. In a resolution adopted in 1997, the UN Sub-Commission on Human Rights declared that "the use on civilian population of napalm and fuel-air bombs violates Protocol III... of the 1980 Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons".¹⁸⁰

Other International Organisations

177. In a resolution adopted in 1996, the Parliamentary Assembly of the Council of Europe invited:

in particular, the governments of the member states of the Council of Europe, of the states whose parliaments enjoy or have applied for special guest status with the Assembly, of the states whose parliaments enjoy observer status, namely Israel, and of all other states to:

- ...
- b. ratify, if they have not done so, ... the United Nations Convention of 1980 on the prohibitions or restrictions on the use of certain conventional weapons [1980 CCW] and its protocols ...
- j. promote extension of the aforesaid United Nations Convention of 1980 to non-international armed conflicts, and inclusion in its provisions of effective procedures for verification and regular inspection.¹⁸¹

¹⁷⁵ UN General Assembly, Res. 3255 B (XXIX), 9 December 1974, § 1.

¹⁷⁶ UN General Assembly, Res. 35/153, 12 December 1980, §§ 2 and 4.

¹⁷⁷ UN General Assembly, Res. 36/93, 9 December 1981, § 1; Res. 37/79, 9 December 1982, § 1; Res. 38/66, 15 December 1983, § 3; Res. 39/56, 12 December 1984, § 3; Res. 40/84, 12 December 1985, § 3; Res. 41/50, 3 December 1986, § 3; Res. 42/30, 30 November 1987, § 3; Res. 43/67, 7 December 1988, § 3; Res. 45/64, 4 December 1990, § 3; Res. 46/40, 6 December 1991, § 3; Res. 47/56, 9 December 1992, § 3; Res. 48/79, 16 December 1993, § 3; Res. 49/79, 15 December 1994, § 3; Res. 50/74, 12 December 1995, § 3; Res. 51/49, 10 December 1996, § 3; Res. 52/42, 9 December 1997, § 2; Res. 53/81, 4 December 1998, § 5; Res. 54/58, 1 December 1999, § III(3).

¹⁷⁸ UN General Assembly, Res. 49/196, 23 December 1994, § 7.

¹⁷⁹ UN Commission on Human Rights, Res. 1995/89, 8 March 1995, § 5.

¹⁸⁰ UN Sub-Commission on Human Rights, Res. 1997/36, 28 August 1997, preamble.

¹⁸¹ Council of Europe, Parliamentary Assembly, Res. 1085, 24 April 1996, § 8b and j.

178. In 1982, at the 7th Extraordinary Session of the UN General Assembly, Denmark expressed its concern on behalf of the EC over civilian casualties caused by Israel's use of phosphorous shrapnel during the invasion of Lebanon.¹⁸²

International Conferences

179. No practice was found

IV. Practice of International Judicial and Quasi-judicial Bodies

180. In the case concerning the events at La Tablada in Argentina before the IACiHR in 1997, the petitioners held that the military attack to retake the barracks was a "legal violation of all current legislation on this subject" and especially mentioned that the military had used white phosphorus or incendiary bombs.¹⁸³ The IACiHR stated that:

The Commission must note that even if it were proved that the Argentine military had used such weapons, it cannot be said that their use in January 1989 violated an explicit prohibition applicable to the conduct of internal armed conflicts at that time. In this connection, protocol III to the CCW cited by petitioners, was not ratified by Argentina until 1995. Moreover and most pertinently, Article 1 of the CCW states that the Incendiary Weapons Protocol applies only to interstate armed conflicts and to a limited class of national liberation wars. As such, this instrument did not directly apply to the internal hostilities at the Tablada. In addition, the Protocol does not make the use of such weapons per se unlawful. Although it prohibits their direct use against peaceable civilians, it does not ban their deployment against lawful military targets, which include civilians who directly participate in combat.¹⁸⁴

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

181. To fulfil its task of disseminating IHL, the ICRC has delegates around the world teaching armed and security forces the definition of incendiary weapons in accordance with Article 1 of the 1980 Protocol III to the CCW and that:

934. Incendiary weapons which are not air-delivered may be used:

- a) when the military object is clearly separated from a concentration of civilian persons; and
- b) subject to precautions to limit incendiary effects to the military objective, when the tactical situation permits.

935. Air-delivered incendiary weapons may be so used only in attack against a military objective located outside concentrations of civilian persons.¹⁸⁵

¹⁸² EC, Statement by Denmark on behalf of the EC at the 7th Extraordinary Session of the UN General Assembly, UN Doc. A/ES-7/PV. 26, 17 August 1982, pp. 14–17.

¹⁸³ IACiHR, *Case 11.137 (Argentina)*, Report, 18 November 1997, §§ 9–10.

¹⁸⁴ IACiHR, *Case 11.137 (Argentina)*, Report, 18 November 1997, § 187.

¹⁸⁵ Frédéric de Mulinen, *Handbook on the Law of War for Armed Forces*, ICRC, Geneva, 1987, §§ 931–935.

VI. *Other Practice*

182. Rule B5 of the Rules of International Humanitarian Law Governing the Conduct of Hostilities in Non-international Armed Conflicts, adopted in 1990 by the Council of the IHL, states that:

In application of the general rules listed in Section A above, especially those on the distinction between combatants and civilians and on the immunity of the civilian population, incendiary weapons may not be directed against the civilian population as such, against individual civilians or civilian objects, nor used indiscriminately.¹⁸⁶

183. A journalist reported that in Grozny in 2000:

Incendiary bombs, incendiary cluster bombs and containers were extensively used to torch enemy-occupied objects and to destroy enemy manpower concentrations. At the time of these air raids there were several thousand Chechen fighters in Grozny and up to 100,000 civilians . . . Concrete evidence has been gathered by journalists and human rights groups on the use of different air-delivered incendiary weapons, including “vacuum” or “fuel” bombs against Grozny and other Chechen towns and villages. There is also concrete evidence that hundreds of civilians, including women and children, have been killed by such weapons.

The journalist went on to say that:

The use of prohibited incendiary weapons in violation of international agreements is a much more serious war crime than the abuse of civilians by troops and bombardments by “ordinary” bombs or shells. The Russian military knows that the use of incendiary weapons is severely limited by international agreements. Such weapons are not part of the normal inventory of Russian units. Military sources say the orders to forgo internationally outlawed air-delivered incendiary weapons and attack towns and villages “came from the highest authorities”. It is a legal fact that by using incendiary weapons Russia as a state committed a war crime.

Lastly, the journalist stated that “[General] Zolotov agreed with me that attacking Grozny with incendiary weapons was a terrible war crime”.¹⁸⁷

B. Use of Incendiary Weapons against Combatants

Use of incendiary weapons in general

184. The practice concerning the use of incendiary weapons in general in section A is relevant, *mutatis mutandis*, for this section but is not repeated here.

¹⁸⁶ IHL, Rules of International Humanitarian Law Governing the Conduct of Hostilities in Non-international Armed Conflicts, Rule B5, *IRRC*, No. 278, 1990, p. 402.

¹⁸⁷ Pavel Felgenhauer, “Endorsing War Crimes”, *Moscow Times*, 12 July 2001, p. 6 (citing an article by Russian General Leonid Zolotov).

Use of incendiary weapons against combatants in particular

I. Treaties and Other Instruments

Treaties

185. Upon signature of the 1980 CCW, China stated that “the Protocol [to the CCW] on Prohibitions or Restrictions on the Use of Incendiary Weapons does not stipulate restrictions on the use of such weapons against combat personnel”.¹⁸⁸

Other Instruments

186. Articles 6 and 8 of the 1938 ILA Draft Convention for the Protection of Civilian Populations against New Engines of War provide that:

Art. 6. The use of ... incendiary ... weapons as against any State, whether or not a party to the present convention, and in any war, whatever its character, is prohibited.

The application of this rule shall be regulated by the following ... articles.

...

Art. 8. The prohibition of the use of incendiary weapons shall apply to all projectiles specifically intended to cause fires except when used for defence against aircraft. The prohibition shall not apply:

- I. to projectiles specially constructed to give light or to be luminous;
- II. to pyrotechnics not normally likely to cause fires;
- III. to projectiles of all kinds which, though capable of producing incendiary effects accidentally, are not normally likely to produce such effects;
- IV. to incendiary projectiles designed specifically for defence against aircraft when used exclusively for that purpose;
- V. to appliances, such as flame-projectors, used to attack individual combatants by fire.

II. National Practice

Military Manuals

187. Australia’s Commanders’ Guide states that “there are no prohibitions on the use of incendiary weapons against combatants”.¹⁸⁹

188. Belgium’s Law of War Manual states that “the use of [incendiary] weapons against persons is prohibited because they cause unnecessary suffering, but their use against military objectives, such as bunkers, tanks, depots, etc. is permitted”.¹⁹⁰

¹⁸⁸ China, Declaration made upon signature of the CCW, 14 September 1981, § 3.

¹⁸⁹ Australia, *Commanders’ Guide* (1994), § 935.

¹⁹⁰ Belgium, *Law of War Manual* (1983), p. 38.

189. Canada's LOAC Manual stipulates that "the use of incendiary weapons against combatants is not prohibited unless such use results in superfluous injury or unnecessary suffering".¹⁹¹

190. Colombia's Basic Military Manual prohibits the use of weapons which "cause unnecessary and indiscriminate, widespread, long-term and severe damage to people and the environment. This includes, *inter alia*:... incendiary weapons, whose production, importation, possession and use is also prohibited by Article 81 of the National Constitution."¹⁹²

191. New Zealand's Military Manual states that "there are no provisions on the use of incendiaries against combatants in [the 1980 Protocol III to the CCW]. The use of incendiary weapons to cause unnecessary suffering is prohibited. A value judgement must be made in particular circumstances to determine whether or not the suffering caused is unnecessary."¹⁹³ The manual also recalls that "the UN Conference which negotiated the [1980 Protocol III to the CCW] was unable to agree on any requirement to protect combatants from the effects of incendiary weapons".¹⁹⁴

192. Sweden's IHL Manual states that:

[The 1980] Protocol III [to the CCW] contains restrictions applying where incendiary weapons are used.

...

At the same time it must be noted that it has not been possible to reach agreement on a rule that would also afford combatants protection against these weapons.

...

There is a need to supplement the present Protocol III so that the agreement constitutes a *complete prohibition of incendiary weapons*. In this way, protection of civilians could be further enhanced, and this should be extended to cover combatants. For, in fact, the latter also experience injury from incendiary weapons as unnecessary suffering.¹⁹⁵ [emphasis in original]

193. The UK Military Manual states that "the use of flame throwers when directed against military targets is lawful. However, their use against personnel is contrary to the law of war in so far as it is calculated to cause unnecessary suffering."¹⁹⁶

194. The US Field Manual states that "the use of weapons which employ fire, such as tracer flame-throwers, napalm and other incendiary agents, against targets requiring their use is not a violation of international law. They should not, however, be employed in such a way as to cause unnecessary suffering to individuals."¹⁹⁷

¹⁹¹ Canada, *LOAC Manual* (1999), p. 5-4, § 35.

¹⁹² Colombia, *Basic Military Manual* (1995), pp. 49-50.

¹⁹³ New Zealand, *Military Manual* (1992), §§ 513(7) and 620(7).

¹⁹⁴ New Zealand, *Military Manual* (1992), § 510(f), footnote 49 and § 617(f), footnote 37.

¹⁹⁵ Sweden, *IHL Manual* (1991), Section 3.3.2, pp. 81-83.

¹⁹⁶ UK, *Military Manual* (1958), § 110, footnote 1. ¹⁹⁷ US, *Field Manual* (1956), § 36.

195. The US Air Force Pamphlet states that:

Incendiary weapons, such as incendiary ammunition, flame throwers, napalm and other incendiary agents have widespread uses in armed conflict. Although evoking intense international concern, combined with attempts to ban their use, state practice indicates clearly they are regarded as lawful in situations requiring their use. Conventional incendiary weapons are normally employed against materiel targets and combatants in the vicinity of such targets, such as pill boxes, tanks, vehicles, fortifications, etc. Use in ground support of friendly troops in close contact with enemy troops is an important use. Such uses are justified by the military effectiveness of incendiary weapons demonstrated during World War I, World War II, Korea, Vietnam and other conflicts. Controversy over incendiary weapons has evolved over the years partly as the result of concern about the medical difficulties in treating burn injuries, as well as arbitrary attempts to analogise incendiary weapons to prohibited means of chemical warfare... Additionally, incendiary weapons must not be used so as to cause unnecessary suffering.¹⁹⁸

National Legislation

196. No practice was found.

National Case-law

197. No practice was found.

Other National Practice

198. Towards the end of the CCW Conference in 1979, Austria, Egypt, Ghana, Jamaica, Mexico, Romania, Sweden, Venezuela, SFRY and Zaire, which had earlier sponsored a proposal which called for a total ban, submitted a proposal which restricted the ban on the use of incendiary weapons to use against civilians and against "combatants except when they are in, or in the vicinity of, armoured vehicles, field fortifications or other similar objectives".¹⁹⁹

199. At the CCW Preparatory Conference in 1978, Denmark and Norway presented a proposal prohibiting, *inter alia*, making military personnel as such the object of attack by incendiary weapons except when "the personnel is engaged or about to engage in combat or being deployed for combat engagement" or "the personnel is under armoured protection, in field fortifications or under similar protection".²⁰⁰

200. At the CCW Preparatory Conference, Indonesia submitted a draft proposal, which developed the proposal submitted during the CDDH.²⁰¹ It

¹⁹⁸ US, *Air Force Pamphlet* (1976), § 6-6(c).

¹⁹⁹ Austria, Egypt, Ghana, Jamaica, Mexico, Romania, Sweden, Venezuela, SFRY and Zaire, Draft protocol on incendiary weapons submitted to the CCW Conference, UN Doc. A/CONF.95/CW/L.1, 26 September 1979, pp. 1-2.

²⁰⁰ Denmark and Norway, Draft proposal on incendiary weapons submitted to the CCW Preparatory Conference, UN Doc. A/CONF.95/PREP.CONF./L.12, 13 September 1978.

²⁰¹ See Indonesia, Proposal concerning incendiary weapons submitted to the Ad Hoc Committee on Conventional Weapons established by the CDDH, *Official Records*, Vol. XVI, CDDH/IV/223 within CDDH/IV 226, p. 578.

proposed a prohibition of the use of incendiaries, except against “military objects other than personnel” and “against combatants holding positions in field fortifications such as bunkers and pillboxes where the use of alternate weapons will inevitably render more casualties”.²⁰²

201. With reference to a press conference by the King of Jordan in 1967, the Report on the Practice of Jordan states that “the Jordanian army was constantly bombarded with napalm bombs throughout the 1967 War. Jordan condemned officially the use by Israel of this horrible weapon.”²⁰³

202. Norway submitted a “Draft Protocol Relative to the Prohibition of the Use of Incendiary Weapons” to the Ad Hoc Committee on Conventional Weapons established by the CDDH which read, *inter alia*, as follows:

Article 1 – Field of application

The present Protocol shall apply in the situations referred to in articles 2 and 3 common to the Geneva Conventions of August 12, 1949 for the Protection of War Victims.

...

Article 3 – General prohibition

With the further limitations spelled out in the present Protocol and subject to the provisions of [AP I], incendiary weapons may only be used against objects that are military objectives in the sense of article 47, paragraph 2 of the said Protocol, including in close support of friendly forces.

The use of incendiary weapons against personnel is prohibited.

Nevertheless, the presence of combatants or civilians within or in the immediate vicinity of legitimate targets as described in this article does not render such targets immune from attacks with incendiary weapons.

...

Article 5 – Precaution in attack

Any use of incendiary weapons is subject to article 50 of [AP I].

In addition, it is prohibited to launch an attack with incendiary weapons except when:

- (a) the location of the target is known and properly recognized, and
- (b) all feasible precaution is taken to limit the incendiary effects to the specific military objectives and to avoid incidental injury or incidental loss of lives.²⁰⁴

203. At the CCW Preparatory Conference in 1979, during the general debate on the second proposal made by Australia and the Netherlands, Poland stated that it hoped that:

²⁰² Indonesia, Draft proposal on incendiary weapons submitted to the CCW Preparatory Conference, UN Doc. A/CONF.95/PREP.CONF./L.13, 22 March 1979.

²⁰³ Report on the Practice of Jordan, 1997, Chapter 3.5, referring to press conference by his Majesty the King of Jordan, 19 June 1967.

²⁰⁴ Norway, Draft protocol relative to the prohibition of the use of incendiary weapons submitted to the Ad Hoc Committee on Conventional Weapons established by the CDDH, *Official Records*, Vol. XVI, CDDH/IV/207 within CDDH/IV/226, pp. 567–569.

the extensive debate on the total prohibition of the use of such weapons in inhabited areas would eventually lead to the elimination of at least the most drastic and indiscriminate weapons in that category, and might help to restrict the use of incendiaries against military personnel when they inflicted unnecessary suffering.²⁰⁵

204. In 1969, in the context of the adoption of UN General Assembly Resolution 2444 (XXIII), the USSR stated that:

For the purpose of crushing the resistance of the Arabs [in the territories occupied by Israel], the aggressors from Israel are continuing to use napalm, which is forbidden by international law.

The criminal, inhuman acts of the imperialist States are a shameful violation of international law, and also of the resolutions of the International Conferences of the Red Cross.²⁰⁶

205. In 1973, in response to Resolution 2932 A (XXVII) in which the UN General Assembly asked States to comment on the report of the UN Secretary-General on napalm and other incendiary weapons and all aspects of their possible use, the UK emphasised that incendiary weapons must not be used to create unnecessary suffering and recommended further study of this issue.²⁰⁷

206. At the CCW Preparatory Conference in 1979, the US explained that it could not accept a restriction on the use of incendiaries against combatants for two reasons. First, "troops in or near the targets attacked with incendiaries would inevitably be killed, and commanding officers would risk being charged with violating the antipersonnel restriction". Second, "the establishment of any rule embodying a comprehensive set of exceptions would not change present practices and its effect would be purely cosmetic".²⁰⁸

207. Course material from the US Army War College, which is also used by the US Marine Corps, states that "a) Incendiaries are lawful when utilized for the purpose(s) for which they were designed. b) There is NO prohibition on the use of napalm or flame-throwers against enemy personnel."²⁰⁹

²⁰⁵ Poland, Statement at the CCW Preparatory Conference, UN Doc. A/CONF.95/PREP.CONF/II/SR.28, 18 April 1979, p. 2, § 2.

²⁰⁶ USSR, Reply dated 30 December 1969 to the UN Secretary-General regarding the preparation of the study requested in paragraph 2 of General Assembly Resolution 2444 (XXIII), annexed to Report of the Secretary-General on respect for human rights in armed conflicts, UN Doc. A/8052, 18 September 1970, Annex III, p. 120.

²⁰⁷ UK, Reply sent to the UN Secretary-General, reprinted in Report of the Secretary-General on napalm and other incendiary weapons and all aspects of their possible use, UN Doc. A/9207, rev.1 add.1, 11 October 1973.

²⁰⁸ US, Statement at the CCW Preparatory Conference, UN Doc. A/CONF.95/PREP.CONF/II/SR.28, 18 April 1979, pp. 2-3, §§ 5-6.

²⁰⁹ US, Marine Corps, Reference Material for Marine Corps Law of Warfare Course, *Army War College Selected Readings*, Advanced Course Law for the Joint Warfighter, Vol. II, Second edition, 1989, pp. 256.

*III. Practice of International Organisations and Conferences**United Nations*

208. In a resolution adopted in 1974, the UN General Assembly condemned "the use of napalm and other incendiary weapons in armed conflicts in circumstances where it may affect human beings".²¹⁰

209. In a resolution adopted in 1976, the UN General Assembly invited the CDDH "to accelerate its consideration of the use of specific conventional weapons, including any which may be deemed to be excessively injurious . . . and to do its utmost to agree for humanitarian reasons on possible rules prohibiting or restricting the use of such weapons".²¹¹

Other International Organisations

210. No practice was found.

International Conferences

211. No practice was found.

IV. Practice of International Judicial and Quasi-judicial Bodies

212. No practice was found.

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

213. No practice was found.

VI. Other Practice

214. In 1994, in a report on arms trade and violation of the IHL in Angola, Human Rights Watch stated that UN officials had accused the Angolan government of systematically bombing UNITA-controlled areas with incendiary bombs in 1992.²¹²

215. It has been reported that in the context of the conflict in Ethiopia, "the Ethiopian armed forces had used napalm and cluster bombs against separatists in Eritrea and Tigray".²¹³

²¹⁰ UN General Assembly, Res. 3255 (XXIX), 9 December 1974, § 1.

²¹¹ UN General Assembly, Res. 31/64, 10 November 1976, § 2.

²¹² Human Rights Watch, *Angola: Arms Trade and Violations of the Laws of War Since the 1992 Elections*, New York, November 1994, p. 77.

²¹³ Thomas P. Ofcansky and LaVerle Berry (eds.), *Ethiopia: A Country Study*, Government Printing Office, Washington D.C., Fourth edition, 1993, p. 328.

BLINDING LASER WEAPONS

Blinding Laser Weapons (practice relating to Rule 86)	§§ 1–106
Laser weapons specifically designed to cause permanent blindness	§§ 1–90
Laser systems incidentally causing blindness	§§ 91–106

Blinding Laser Weapons**Laser weapons specifically designed to cause permanent blindness***I. Treaties and Other Instruments**Treaties*

1. Article 1 of the 1995 Protocol IV to the CCW provides that:

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

2. Article 4 of the 1995 Protocol IV to the CCW specifies that “for the purpose of this protocol ‘permanent blindness’ means irreversible and uncorrectable loss of vision which is seriously disabling with no prospect of recovery. Serious disability is equivalent to visual acuity of less than 20/200 Snellen measured using both eyes.”

3. The 1995 Protocol IV to the CCW was adopted by consensus, although a number of States would have preferred a stronger text that included a prohibition of blinding as a method of warfare and indicated this orally during negotiations and at the final plenary session.¹ Discussions on Article 1, which refers to “laser weapons specifically designed as their sole combat function or as one of their combat functions”, turned on whether it was enough to indicate “specifically designed”, and one State, the UK, would have preferred “primarily designed”. The issue was that the systems concerned could easily be designed

¹ Austria, Australia, Belgium, Denmark, Ecuador, Finland, France, Germany, Iran, Mexico, Netherlands, Norway, Poland, Romania, Russia and Sweden.

to aim at both electro-optical systems and human eyes, and therefore alternative formulations were abandoned in favour of this explicit description that would cover dual use systems.

4. Upon acceptance of the 1995 Protocol IV to the CCW, Austria, Belgium, Canada, Greece, Ireland, Italy, Liechtenstein and South Africa stated that "the provisions of . . . Protocol [IV] which by their contents or nature may also be applied in peacetime, shall be observed at all times".²

5. Upon acceptance of the 1995 Protocol IV to the CCW, Australia stated that "the provisions of Protocol IV shall apply in all circumstances".³

6. Upon acceptance of the 1995 Protocol IV to the CCW, Germany declared that "it will apply the provisions of Protocol IV under all circumstances and at all times".⁴

7. Upon acceptance of the 1995 Protocol IV to the CCW, Israel declared that:

With reference to the scope of application defined in Article 1 of the Convention, the Government of the State of Israel will apply the provisions of the Protocol on Blinding Laser Weapons as well as the Convention and those annexed Protocols to which Israel has agreed to become bound, to all armed conflicts involving regular armed forces of States referred to in article 2 common to the Geneva Convention of 12 August 1949, as well as to all armed conflicts referred to in Article 3 common to the Geneva Convention of 12 August 1949.⁵

8. Upon acceptance of the 1995 Protocol IV to the CCW, the Netherlands declared that "the provisions of Protocol IV which, given their content or nature, can also be applied in peacetime must be observed in all circumstances".⁶

9. Upon acceptance of the 1995 Protocol IV to the CCW, Sweden stated that:

Sweden intends to apply the Protocol to all types of armed conflict . . .

Sweden has since long strived for explicit prohibition of the use of blinding lasers which would risk causing permanent blindness to soldiers. Such an effect, in Sweden's view is contrary to the principle of international law prohibiting means and methods of warfare which cause unnecessary suffering.⁷

10. Upon acceptance of the 1995 Protocol IV to the CCW, Switzerland stated that "the provisions of Protocol IV shall apply in all circumstances".⁸

² Austria, Declaration made upon acceptance of Protocol IV to the CCW, 27 July 1998; Belgium, Declaration made upon acceptance of Protocol IV to the CCW, 10 March 1999; Canada, Declaration made upon acceptance of Protocol IV to the CCW, 25 June 1998; Greece, Declaration made upon acceptance of Protocol IV to the CCW, 5 August 1997; Ireland, Declaration made upon acceptance of Protocol IV to the CCW, 27 March 1997; Italy, Declaration made upon acceptance of Protocol IV to the CCW, 13 January 1999; Liechtenstein, Declaration made upon acceptance of Protocol IV to the CCW, 19 November 1997; South Africa, Declaration made upon acceptance of Protocol IV to the CCW, 26 June 1998.

³ Australia, Declaration made upon acceptance of Protocol IV to the CCW, 22 August 1997.

⁴ Germany, Declaration made upon acceptance of Protocol IV to the CCW, 27 June 1997.

⁵ Israel, Declaration upon acceptance of Protocol IV to the CCW, 30 October 2000.

⁶ Netherlands, Declaration made upon acceptance of Protocol IV to the CCW, 25 March 1999.

⁷ Sweden, Declaration made upon acceptance of Protocol IV to the CCW, 15 January 1997.

⁸ Switzerland, Declaration made upon acceptance of Protocol IV to the CCW, 24 March 1998.

11. Upon acceptance of the 1995 Protocol IV to the CCW, the UK stated that “the application of its provisions will not be limited to the situations set out in Article 1 of the [1980 CCW]”.⁹

12. In 2001, States parties to the 1980 CCW decided to amend Article 1 of the Convention, governing its scope. This amendment states that:

1. This Convention and its annexed Protocols shall apply in the situations referred to in Article 2 common to the Geneva Conventions of 12 August 1949 for the Protection of War Victims, including any situation described in paragraph 4 of Article I of Additional Protocol I to these Conventions.
2. This Convention and its annexed Protocols shall also apply, in addition to situations referred to in paragraph 1 of this Article, to situations referred to in Article 3 common to the Geneva Conventions of 12 August 1949. This Convention and its annexed Protocols shall not apply to situations of internal disturbances and tensions, such as riots, isolated and sporadic acts of violence, and other acts of a similar nature, as not being armed conflicts.
3. In case of armed conflicts not of an international character occurring in the territory of one of the High Contracting Parties, each party to the conflict shall be bound to apply the prohibitions and restrictions of this Convention and its annexed Protocols.

Other Instruments

13. No practice was found.

II. National Practice

Military Manuals

14. Bosnia and Herzegovina’s Military Instructions states that “it is prohibited to use . . . ‘blinding’ weapons”.¹⁰

15. Canada’s LOAC Manual provides that “laser weapons specifically designed, as their sole combat function or one of their combat functions, to cause permanent blindness to unenhanced vision (i.e., the naked eye or to the eye with corrective eyesight devices) are prohibited”.¹¹

16. France’s LOAC Teaching Note includes blinding laser weapons in the list of weapons that “are totally prohibited by the law of armed conflict” because of their inhuman and indiscriminate character.¹²

17. France’s LOAC Manual incorporates the content of Article 1 of the 1995 Protocol IV to the CCW.¹³ It further includes blinding laser weapons in the list of weapons that “are totally prohibited by the law of armed conflict” because of their inhuman and indiscriminate character.¹⁴

18. Germany’s IHL Manual states that “new weapon developments may also violate a specific prohibition or general principles of international

⁹ UK, Declaration made upon acceptance of Protocol IV to the CCW, 11 February 1999.

¹⁰ Bosnia and Herzegovina, *Military Instructions* (1992), Item 11, § 1.

¹¹ Canada, *LOAC Manual* (1999), p. 5-3, § 28. ¹² France, *LOAC Teaching Note* (2000), p. 6.

¹³ France, *LOAC Manual* (2001), p. 80. ¹⁴ France, *LOAC Manual* (2001), p. 54.

humanitarian law, e.g. the use of laser weapons which are specifically intended to cause permanent blindness to the adversary".¹⁵

19. According to Israel's Manual on the Laws of War, the 1995 Protocol IV to the CCW "states that it is forbidden to employ weapons that use laser beams for the operational objective of causing blindness to an unprotected eye".¹⁶

20. The US Naval Handbook states that:

Directed energy devices, which include laser... are not proscribed by the law of armed conflict. Lasers may be employed as a range finder or for target acquisition with the possibility of ancillary injury to enemy personnel, or directly against combatants as an anti-personnel weapon. Their use does not violate the prohibition against the infliction of unnecessary suffering.¹⁷

21. The Annotated Supplement to the US Naval Handbook states that the position defined in the Naval Handbook

is no longer completely accurate with respect to antipersonnel weapons. There have been various efforts over the years to prohibit the use of lasers as antipersonnel weapons... [The 1995] Protocol IV [to the CCW] prohibits the use or transfer of laser weapons specifically designed to cause blindness to unenhanced vision.¹⁸

National Legislation

22. Austria's Law on the Prohibition of Blinding Laser Weapons states that "the acquisition, possession, development, transportation, production, trade and arrangement of acquisition and sale of blinding laser weapons and specific parts of them are prohibited". It punishes "whoever, and even if only by negligence, contravenes the prohibition of § 2 of this Federal Law".¹⁹

23. Under Hungary's Criminal Code as amended, employing "blinding laser weapons" as defined in the 1995 Protocol IV to the CCW is a war crime.²⁰

24. Luxembourg's Blinding Laser Weapons Act prohibits the use and the transfer of blinding laser weapons to another State or an entity other than a State.²¹

National Case-law

25. No practice was found.

Other National Practice

26. In 1997, in its response to the Joint Standing Committee On Treaties, the Australian government stated that:

¹⁵ Germany, *IHL Manual* (1996), § 302. ¹⁶ Israel, *Manual on the Laws of War* (1998), pp. 16–17.

¹⁷ US, *Naval Handbook* (1995), pp. 452–454, § 9.8.

¹⁸ US, *Annotated Supplement to the Naval Handbook* (1997), § 9.8, footnote 45.

¹⁹ Austria, *Law on the Prohibition of Blinding Laser Weapons* (1998), §§ 2(1) and 3.

²⁰ Hungary, *Criminal Code as amended* (1978), Section 160/A(3)(b)(4).

²¹ Luxembourg, *Blinding Laser Weapons Act* (1999), Article 3.

There is no evidence of any actual use of blinding laser weapons. Against this background, constructing and implementing arduous verification mechanisms was not regarded as a vital element of Protocol IV to the CCW. Should future developments indicate a need for verification and compliance measures, the Australian government would consider the options accordingly. . . In the face of the global community's overwhelming support for the achievements of Protocol IV and the absence of any consensus on a need to tighten its provisions, the Australian Government considers the text to be essentially adequate in dealing with the limited problem at hand. However, should persuasive evidence of any substantive weaknesses emerge, the Government will, through official review processes including the Review Conference in 2001, explore options for ensuring that effect is given to the intent behind Protocol IV.²²

27. In 1995, during a debate in the First Committee of the UN General Assembly, Burkina Faso called for "the halting of the use of laser weapons, particularly those which lead to irreversible blindness".²³

28. In 1995, during a debate in the First Committee of the UN General Assembly, Chile called the 1995 Protocol IV to the CCW imperfect.²⁴

29. At the First Review Conference of States Parties to the CCW (Second Session) in 1996, China made the following statement:

The Chinese delegation positively appraises the important results achieved by this conference. We adopted a new Protocol banning the use and transfer of blinding laser weapons which are specially designed to cause permanent blindness to naked eyes. This is the first time in human history that a kind of inhumane weapon is declared illegal and prohibited before it is actually used. This is significant.²⁵

30. In 1995, in reply to questions in parliament, the French President stated that "it should be stressed that France also subscribes to the objective of a prohibition on the deliberate blinding of persons as a method of warfare".²⁶

31. In 1995, the German government expressed its support for a prohibition on the use and production of blinding laser weapons.²⁷ In August 1995, in answer to questions in parliament, a Minister of State noted that the government knew of no German companies that were involved in the development or testing of blinding laser weapons. He added that blinding laser weapons were not part of NATO planning, that the German Department of Defence had never placed an

²² Australia, Joint Standing Committee On Treaties, Restrictions on the Use of Blinding Laser Weapons and Landmines, Government Response, Canberra, August 1997.

²³ Burkina Faso, Statement before the First Committee of the UN General Assembly, UN Doc. A/C.1/50/PV.8, 20 October 1995, p. 10.

²⁴ Chile, Statement before the First Committee of the UN General Assembly, UN Doc. A/C.1/50/PV.10, 26 October 1995, p. 22.

²⁵ China, Statement at the First Review Conference of States Parties to the CCW (Second Session), Geneva, 3 May 1996, p. 1.

²⁶ France, Reply to written questions from Members of Parliament, *SIRPA Actualité*, No. 30, 9 September 1995, quoted in Louise Doswald-Beck, "New Protocol on Blinding Laser Weapons", *IRRC*, No. 312, 1996, p. 291, footnote 80.

²⁷ Germany, Lower House of Parliament, Reply by the government to a question, Konferenz zur Überprüfung des VN-Waffenübereinkommens in Wien (25 September bis 13 Oktober 1995), *BT-Drucksache* 13/2998, 14 November 1995, p. 2.

order for the development or purchasing of such weapons and that it did not intend to do so in the future.²⁸

32. At the First Review Conference of States Parties to the CCW (First Session) in 1995, Germany stated that “while the review of Protocol II was the top priority of the Conference, other conventional weapons which were excessively injurious or might have indiscriminate effects should not be ignored”. Therefore Germany was strongly in favour of prohibiting blinding laser weapons.²⁹

33. At the Third Preparatory Committee for the Second Review Conference of States Parties to the CCW in 2001, India stated that it “fully supported the idea of expanding the scope of the CCW to cover armed internal conflicts”.³⁰

34. The Report on the Practice of Indonesia states that Indonesia has prohibited the use of blinding laser weapons.³¹

35. In 1991, during a debate in the First Committee of the UN General Assembly, Ireland stated that it might support the proposal to ban blinding laser weapons.³²

36. According to the Report on the Practice of Jordan, Jordan does not use, manufacture or stockpile anti-personnel lasers and it does not plan to do so in the future.³³

37. In 1992, during a debate in the First Committee of the UN General Assembly, the Netherlands implied that universal adherence to the 1980 CCW would give it effect in internal conflicts.³⁴

38. A working paper submitted by the Netherlands to the First Review Conference of States Parties to the CCW (First Session) in 1995 evaluated existing customary law relating to the use of blinding lasers prior to the negotiation and adoption of Protocol IV. It stated that the “use of antipersonnel lasers whose sole purpose is to cause permanent blindness in military personnel is . . . illegal under the current laws of armed conflicts”. It noted, however, one possible exception to this under the then existing law, namely:

One exception might be cases in which blinding an opponent with a highly discriminate weapon such as a laser would be more humane than using a different method or means. This instance could occur if, for example, a sniper were to hide himself in a civilian environment. In this case other, more conventional methods of disabling

²⁸ Germany, Lower House of Parliament, Reply by a Minister of State to a written question, *BT-Drucksache* 13/2140, 11 August 1995, pp. 3–4.

²⁹ Germany, Statement at the First Review Conference of States Parties to the CCW (First Session), UN Doc. CCW/Conf.I/SR.2, 29 September 1995, p. 10, § 50.

³⁰ India, Statement of 24 September 2001 at the Third Preparatory Committee for the Second Review Conference of States Parties to the CCW, Geneva, 24–28 September 2001.

³¹ Report on the Practice of Indonesia, 1997, Chapter 3.4.

³² Ireland, Statement before the First Committee of the UN General Assembly, UN Doc. A/C.1/46/PV.31, 7 November 1991, p. 37.

³³ Report on the Practice of Jordan, 1997, Chapter 3.4.

³⁴ Netherlands, Statement before the First Committee of the UN General Assembly, UN Doc. A/C.1/47/PV.26, 5 November 1992, p. 21.

the sniper can be expected to cause a large number of civilian casualties that could be prevented through the use of a laser.³⁵

39. In the Ad Hoc Committee on Conventional Weapons of the CDDH, Sweden stated that:

It might be thought that the mere suspicion that a new or improved type of weapon might cause greater suffering or have more indiscriminate effects than its predecessor would constitute a basis for serious negotiations on the prohibition of such weapons on humanitarian grounds. It might be argued, for instance, that because laser weapons, if used against personnel, were likely to cause permanent damage to, or a complete loss of eyesight, they should be considered unnecessarily cruel. His delegation was inclined to that opinion and accordingly urged the great Powers to desist from further work in that direction and to agree on rules prohibiting the use of such weapons. If that were not possible, because some countries might consider that laser weapons would prove to be of considerable military value, for instance, in combating attacking missiles, it might still prove possible to negotiate an agreement prohibiting their use against any target other than a military target. It was possible that laser weapons would never be used against personnel because of their relative complexity and high cost, but there could be no certainty of that. It would therefore be worth while prohibiting such use.³⁶

40. At the 25th International Conference of the Red Cross in 1986, Sweden and Switzerland submitted a draft resolution which stated that:

The development of laser technology for military use includes a risk that laser equipment of armed forces can be specifically used for antipersonnel purposes on the battlefield, such as causing permanent blindness of human beings, and that such use may be considered already prohibited under existing international law.³⁷

This wording was not retained, and the resolution adopted instead stated that the Conference noted "that some governments have voiced their concern about the development of new weapons technologies the use of which, in certain circumstances, could be prohibited under existing international law".³⁸

41. In 1987, during debates in the First Committee of the UN General Assembly, Sweden stated that "the use of blinding laser weapons designed to cause permanent blindness would be in clear contravention of fundamental principles of the law of warfare" and that "the International Community should consider a ban on the use of laser weapons for such purposes".³⁹

³⁵ Netherlands, Working paper submitted to the First Review Conference of States Parties to the CCW (First Session), UN Doc. CCW/CONF.I/MCIII/WP.1, 26 September 1995, p. 9.

³⁶ Sweden, Statement at the CDDH, *Official Records*, Vol. XVI, CDDH/IV/SR.33, 2 June 1976, p. 339, § 6.

³⁷ 25th International Conference of the Red Cross, Geneva, 23–31 October 1986, Commission I, CI/2.6/PR3, Item 2.6, quoted in Louise Doswald-Beck, "New Protocol on Blinding Laser Weapons", *IRRC*, No. 312, 1996, p. 273.

³⁸ 25th International Conference of the Red Cross, Geneva, 23–31 October 1986, Res. VII, § B(6).

³⁹ Sweden, Statement before the First Committee of the UN General Assembly, UN Doc. A/C.1/42/PV.3, 12 October 1987, p. 55; Statement before the First Committee of the UN General Assembly, UN Doc. A/C.1/42/PV.34, 12 October 1987, p. 6.

42. In 1991, during a debate in the First Committee of the UN General Assembly, Sweden stated that it would seek consensus on a resolution on the prohibition of blinding laser weapons at the International Conference of the Red Cross and Red Crescent to be held in 1991 in Budapest (but eventually cancelled).⁴⁰

43. In 1992, during a debate in the First Committee of the UN General Assembly, Sweden advocated prohibitions or restrictions on blinding laser weapons.⁴¹

44. In 1994, in a working paper submitted to the Group of Governmental Experts to prepare the First Review Conference of States Parties to the CCW, Sweden proposed the following provision: "It is prohibited to use laser beams as an anti-personnel method of warfare, with the intention or expected result of seriously damaging the eyesight of persons."⁴²

45. In 1995, during a debate in the First Committee of the UN General Assembly, Sweden stated that for ten years it had been calling for a ban on blinding laser weapons.⁴³

46. In 1987, during a debate in the First Committee of the UN General Assembly, the USSR stated that it had no objection to a ban on anti-personnel laser weapons.⁴⁴

47. In 1998, in a letter to the ICRC President, the UK Secretary of Defence stressed that "the UK's Armed Forces have never planned to use weapons intended to cause permanent blindness. The capabilities of weapons systems under development which employ lasers, and the concepts of operation for their use, are already consistent with the [1995 Protocol IV to the CCW]."⁴⁵

48. Prior to the adoption of the 1995 Protocol IV to the CCW, the US was developing a number of laser systems intended to blind either personnel and/or optical systems. An evaluation in 1988 by the Office of the Judge Advocate General concluded that such weapons would not cause unnecessary suffering and therefore would not be illegal.⁴⁶ During the meetings of governmental experts preparatory to the Review Conference, the US opposed the adoption of a Protocol on the subject. The system that was closest to deployment was the "Laser Countermeasure System" (LCMS also referred to as the PLQ-5),

⁴⁰ Sweden, Statement before the First Committee of the UN General Assembly, UN Doc. A/C.1/46/PV.8, 18 October 1991, p. 28.

⁴¹ Sweden, Statement before the First Committee of the UN General Assembly, UN Doc. A/C.1/47/PV.26, 9 November 1992, p. 19.

⁴² Sweden, Working paper submitted to the Group of Governmental Experts to prepare the First Review Conference of States Parties to the CCW, UN Doc. CCW/CONF.I/GE/CRP.3, 16 May 1994.

⁴³ Sweden, Statement before the First Committee of the UN General Assembly, UN Doc. A/C.1/50/PV.17, 9 October 1995, p. 2.

⁴⁴ USSR, Statement before the UN General Assembly, UN Doc. A/C.1/42/PV.5, 14 October 1987, p. 34-35.

⁴⁵ UK, Letter from the Secretary of Defence to the ICRC President, 23 March 1998.

⁴⁶ US, Department of the Army, Office of the Judge Advocate General, Memorandum on Use of Lasers as Antipersonnel Weapons, Doc. DA PAM 27-50-191, 29 September 1988, reprinted in *The Army Lawyer*, November 1988, p. 3.

mounted on an M16 rifle, for which the army hoped to have government approval for manufacture in June 1995. This system was described as having “the primary objective to detect, jam and suppress threat fire control, optical and electro-optical systems”.⁴⁷ It certainly had the capacity to blind at considerable distances and its use for this purpose was not excluded.⁴⁸ Congress decided to delay its decision on whether to give approval for manufacture.⁴⁹ As a result of pressure from a number of Congressmen,⁵⁰ the Department of Defense reconsidered its policy. In September 1995, the Secretary of Defense announced that “the Department of Defense prohibits the use of lasers specifically designed to cause permanent blindness of unenhanced vision and supports negotiations prohibiting the use of such weapons”.⁵¹ A Department of Defense News Briefing in October 1995 indicated that “with lasers, we have an opportunity to stop a proliferation of a new and dangerous weapon, we hope. We are now engaged in discussions at the Conference on Conventional Weapons in Vienna to do just that. Secretary Perry felt strongly that we should take a lead role in that by swearing off the development and use of lasers intentionally designed to blind people.”⁵²

49. A controversial analysis of the 1995 Protocol IV to the CCW by the Judge Advocate General of the US Department of the Army in 1995 stated that the Protocol was only applicable in international armed conflict, and not in operations such as “non-combatant evacuation, peacekeeping or counter terrorism missions, or in internal conflicts”. It also stated that the “State Parties that negotiated and adopted (by consensus) the laser Protocol did not conclude that use of a laser to blind an enemy combatant causes unnecessary suffering, or that use of a laser to blind an individual enemy combatant was illegal”.⁵³ Further to concern expressed at this interpretation by a US Senator,⁵⁴ the Secretary of Defense replied as follows:

Regretting any confusion created by the internal November 1995 memo, I would like to take this opportunity to reaffirm the Department’s policy. As you know, it is US policy to prohibit the use of weapons specifically designed to permanently blind... It was not the intent of the States Parties to Protocol IV to prohibit only

⁴⁷ Lockheed-Sanders Fact Sheet, Laser Countermeasure System (LCMS), Doc. AN/PLQ-5, 1994.

⁴⁸ US, Department of the Army, Office of the Judge Advocate General, Memorandum on the subject AN/PLQ-5 Laser Countermeasure System, *Law of War Review*, 16 September 1994.

⁴⁹ Human Rights Watch Arms Project, *US Blinding Laser Weapons*, 21 May 1995, New York/Washington D.C., Vol. 7, No. 5, pp. 2 and 9; *Inside the Pentagon*, 13 July 1995, p. 9.

⁵⁰ US, Letter to the Secretary of Defense from 48 US Senators and Congressmen, 31 July 1995.

⁵¹ US, DefenseLink News Release No. 482-95, 1 September 1995. (The US Secretary of Defense repeated the same statement on 17 January 1997, SECDEF Memo U00888/97, DoD Policy on Blinding Lasers.)

⁵² US, DefenseLink Transcript, DoD News Briefing, Mr. Kenneth H. Bacon, ASTD (PA), 12 October 1995.

⁵³ US, Department of the Army, Office of the Judge Advocate General, Memorandum on Effect of Laser Protocol on U.S. Army Programs, 1 November 1995, *US Airforce Operations Law Deskbook*, Vol. II, 1996, p. IX-14, §§ 4(d) and 5.

⁵⁴ US, Letter from Senator Patrick Leahy to the Secretary of Defense, 18 April 1996.

mass blinding . . . As you note, there is no prohibition in CCW on research, development or production. Nevertheless, the Department has no intent to spend money developing weapons we are prohibited from using. We certainly would not want to encourage other countries to loosely interpret the treaty's prohibitions, by implying that we want to develop or produce weapons we are prohibited from using. . . On the question of individual blinding, your interpretation is correct. Under both CCW and DoD policy, laser weapons designed specifically to cause permanent blindness may not be used against an individual enemy combatant.⁵⁵

50. On 5 October 1995, namely after the adoption of new policy and during the final negotiations of Protocol IV to the CCW, the US army cancelled the LCMS programme.⁵⁶

51. During the final plenary session of the First Review Conference of States Parties to the CCW (Second Session) in 1996, the US stated that it "supported expansion of the scope of Protocol IV and it is the policy of the US to refrain from the use of laser weapons prohibited by Protocol IV at all times".⁵⁷

52. The guidelines on blinding laser weapons issued in 1997 by the US Secretary of Defense state that:

The Department of Defense prohibits the use of lasers specifically designed to cause permanent blindness and supports negotiations to prohibit the use of such weapons. However, laser systems are absolutely vital to our modern military. Among other things, they are currently used for detection, targeting, range-finding, communications and target destruction. They provide a critical technological edge to US forces and allow our forces to fight, win and survive on an increasingly lethal battlefield. In addition, lasers provide significant humanitarian benefits. They allow weapon systems to be increasingly discriminate, thereby reducing collateral damage to civilian lives and property. The Department of Defense recognizes that accidental or incidental eye injuries may occur on the battlefield as the result of the use of lasers not specifically designed to cause permanent blindness. Therefore, we continue to strive, through training and doctrine, to minimize these injuries.⁵⁸

53. In 1997, in his message to the US Senate transmitting the 1995 Protocol IV to the CCW for consent to ratification, the US President stated that "these blinding lasers are not needed by our military forces. They are potential weapons of the future, and the US is committed to preventing their emergence and use." Regarding the scope of the Protocol, whilst recognising that it was officially that of international armed conflicts, the same message indicated that

⁵⁵ US, Letter from the Secretary of Defence to Senator Patrick Leahy, 8 May 1996.

⁵⁶ Bradley Graham, "Army Laser Weapon Becomes First Casualty of New Policy", *Washington Post*, 13 October 1995; "Army finalizing LCMS termination plan", *Inside the Pentagon*, 19 October 1995.

⁵⁷ US, Statement at the First Review Conference of States Parties to the CCW (Second Session), 3 May 1996, reprinted in W. Hays Parks, "Memorandum of Law: Travaux préparatoires and legal analysis of blinding laser weapons protocol", *The Army Lawyer*, June 1997, p. 41.

⁵⁸ US, Secretary of Defence, DOD Policy on Blinding Lasers, SECDEF Memo U00888/97, 17 January 1997, reprinted in *Annotated Supplement to the Naval Handbook* (1997), § 9.8, footnote 45.

“it is US policy to apply the Protocol to all such conflicts, however they may be characterized, and in peacetime”.⁵⁹

54. According to the Report on the Practice of Zimbabwe, Zimbabwe is opposed to the use of laser weapons.⁶⁰

III. Practice of International Organisations and Conferences

United Nations

55. In several resolutions adopted between 1995 and 1999, the UN General Assembly urged all States that had not yet done so to become parties to the 1980 CCW and its Protocols. The General Assembly expressed its satisfaction that the 1995 Protocol IV to the CCW had entered into force on July 1998 and recommended that States express their consent to be bound by the Protocol, with a view to widest possible adherence to this instrument at an early date.⁶¹

56. During the negotiation of Protocol IV to the CCW in Vienna in 1995, the UNDP representative stated that he was speaking “on behalf of the International Initiative Against Avoidable Disability promoted by UNDP, WHO and UNICEF”. He held that “the laser weapons had now been designed specially to blind personnel” and believed that “the use of such a weapon is abhorrent to the conscience of humanity”.⁶²

Other International Organisations

57. In a resolution on anti-personnel mines adopted in 1996, the ACP-EU Joint Assembly called upon the European Council to adopt a new joint action before the final session of the CCW Review Conference, stipulating that all EU members should ratify the 1995 Protocol IV to the CCW, ban the development and production of blinding laser weapons and proceed to the destruction of the existing stocks of blinding laser weapons.⁶³

58. In a resolution adopted in 1996, the Parliamentary Assembly of the Council of Europe emphasised that it appreciated the ICRC’s “diplomatic efforts to secure the banning of certain particularly cruel weapons, such as . . . laser weapons that blind victims. In this connection, it welcomes the recent adoption of the [1995 Protocol IV to the CCW].”⁶⁴ The Parliamentary Assembly also invited:

⁵⁹ US, Message from the US President transmitting the Protocols to the CCW to the Senate for consent to ratification, Treaty Doc. 105-1, Washington D.C., 1997.

⁶⁰ Report on the Practice of Zimbabwe, 1998, Chapter 3.1.

⁶¹ UN General Assembly, Res. 50/74, 12 December 1995, preamble and §§ 3 and 6; Res. 51/49, 10 December 1996, preamble and §§ 3 and 7; Res. 52/42, 9 December 1997, preamble and §§ 2 and 4; Res. 53/81, 4 December 1998, preamble and §§ 1 and 5; Res. 54/58, 1 December 1999, preamble and §§ I(1), II(1) and III(3).

⁶² UNDP, Statement at the First Review Conference of States Parties to the CCW (First Session), UN Doc. CCW/CONF.I/SR5, 27 September 1995, pp. 10–11, §§ 49 and 50.

⁶³ ACP-EU, Joint Assembly, Resolution on anti-personnel mines, 22 March 1996, *Official Journal of the European Community*, No. C 254, 1996, Item 4, § 2(c), (e) and (f).

⁶⁴ Council of Europe, Parliamentary Assembly, Res. 1085, 24 April 1996, § 6.

in particular, the governments of the member states of the Council of Europe, of the states whose parliaments enjoy or have applied for special guest status with the Assembly, of the states whose parliaments enjoy observer status, namely Israel, and of all other states to:

- ...
- b. ratify, if they have not done so, ... the United Nations Convention of 1980 on the prohibitions or restrictions on the use of certain conventional weapons [1980 CCW] and its protocols ...
 - j. promote extension of the aforesaid United Nations Convention of 1980 to non-international armed conflicts, and inclusion in its provisions of effective procedures for verification and regular inspection.⁶⁵

59. In a resolution adopted in 1995, the European Parliament:

G. welcomed the agreement on a Protocol to the Convention on Certain Conventional Weapons to restrict the use and transfer of blinding laser weapons, but regretted that the Protocol fails to ban the production of blinding laser weapons and provides loopholes for the production, use and transfer of some blinding laser weapons, including those that target optical systems;

H. believed that deliberate blinding as a method of warfare is abhorrent and in contravention of established custom, the principles of humanity and the dictates of the public conscience;

I. believing that deliberate blinding as a method of warfare is abhorrent and in contravention of established custom, the principles of humanity and the dictates of the public conscience ...

- 2. Urged Member States to ratify the laser weapon Protocol without delays or reservations;
- 3. Welcomed the decision to convene a follow-up conference ... and calls on all Member States to use this opportunity to promote a comprehensive ban on ... all blinding laser weapons.⁶⁶

60. In 1995, the EU Council of Ministers adopted a common position stating that the member States shall "actively promote" the adoption of a Protocol on blinding laser weapons.⁶⁷

61. In 1995, in answer to a question from the European Parliament, the European Commission stated that it was "fully associated with the common position of the Member States".⁶⁸

62. In 1995, in answer to a question from the European Parliament, the Council of Ministers explained the EU common position and stated that

⁶⁵ Council of Europe, Parliamentary Assembly, Res. 1085, 24 April 1996, § 8(b) and (j).

⁶⁶ European Parliament, Resolution on the failure of the international conference on anti-personnel mines and laser weapons, 29 June 1995.

⁶⁷ EU, Council of Ministers, Common Position concerning blinding laser weapons defined by the Council on the basis of Article J.2 of the Treaty on European Union, concerning blinding laser weapons, 18 September 1995, Doc. 95/379/CFSP, *Official Journal of the European Community*, No. L 227, 1995, p. 3.

⁶⁸ European Commission, Answer to Written Question E-2490/95 from the European Parliament, *Official Journal of the European Community*, No. C 340, 1995, Item 82, 9 October 1995.

“certain of the Union’s partners have adopted similar positions to that of the Union”.⁶⁹

63. In a resolution adopted in 1995, the OAU Council of Ministers urged all member States to accede to the 1980 CCW and expressed its support for the adoption of “a Protocol banning laser blinding weapons”.⁷⁰

64. In a resolution adopted in 1996, the OAU Council of Ministers expressed “satisfaction with the adoption of a Protocol banning blinding laser weapons by the Review Conference” and called upon “all Member States to consider adhering to it”.⁷¹

65. In a resolution adopted in 1996 on respect for IHL, the OAS General Assembly urged member States to accede to the 1980 CCW.⁷²

International Conferences

66. The expert report prepared for the Conference of Government Experts on Weapons which may Cause Unnecessary Suffering or have Indiscriminate Effects held in Lucerne in 1974 noted that “use of lasers as anti-personnel devices is unlikely due to low cost-effectiveness for this purpose. Laser could, of course, have antipersonnel effects in addition to primary antimatériel purposes”.⁷³

67. A report on the discussion concerning laser weapons which took place at the Conference of Government Experts on Weapons which may Cause Unnecessary Suffering or have Indiscriminate Effects held in Lucerne in 1974 states that:

261. Experts noted that lasers had already found military application in certain range-finding, guidance and communication systems. The opinion was expressed by one expert that certain laser weapons were feasible and might appear rather soon. Other experts, however, stated their doubts about the military practicability of such weapons, citing the high level of complexity and running costs likely to be involved if anything but the most specialized applications were envisaged. With regard to such specialized applications, there was some discussion of the potential of laser radiation weapons in an anti-aircraft or anti-missile role; the view was expressed that, having regard to energy requirements and to the transmissivity of the atmosphere at different altitudes to possible wavelengths of laser radiation, laser weapons of this type, if they were feasible at all, would probably only be usable from large aircraft.

262. With regard to the effects on the human body of laser radiation, two types of likely injury were cited. The first was burn injury. The second was ocular injury, already a well recognized hazard to users of existing laser devices, and one which stems from the natural capacity of the ocular lens to focus incident light, thereby

⁶⁹ EU, Council of Ministers, Answer to Written Question E2489/95 from the European Parliament, *Official Journal of the European Community*, No. C 56, 1996, Item 38, 21 December 1995.

⁷⁰ OAU, Council of Ministers, Res. 1593 (LXII), 21–23 June 1995, §§ 3 and 7.

⁷¹ OAU, Council of Ministers, Res. 1628 (LXIII), 26–28 February 1996, § 9.

⁷² OAS, General Assembly, Res. 1408 (XXVI-O/96), 7 June 1996, § 1.

⁷³ Weapons that may Cause Unnecessary Suffering or have Indiscriminate Effects, Report on the Work of Experts, ICRC, Geneva, 1973, p. 69, § 240.

concentrating its power, and hence its effect, on the retina. The resultant damage may lead to partial or total blindness. One expert observed that the degree of laser damage to human tissue depended on the wavelength of the incident radiation, and he stated that the most powerful forms of laser currently available did not in fact operate at the most damaging wavelengths.

...

Evaluation

277. Some experts were of the opinion that, because the effects of potential future weapons could have important humanitarian implications, it was necessary to keep a close watch in order to develop any prohibitions or limitations that might seem necessary before the weapon in question had become widely accepted.⁷⁴

68. At the Conference of Government Experts on the Use of Certain Conventional Weapons held in Lugano in 1976, one expert stated that "laser weapons would appear at the beginning of the eighties, and this expectation would necessitate a watch to be kept on the military use of the laser beam, especially in an anti-personnel capacity, so as to prevent its causing a greater incidence of casualties among combatants".⁷⁵

69. At the Conference of Government Experts on the Use of Certain Conventional Weapons held in Lugano in 1976, one expert read out paragraph 277 of the report of the Conference of Government Experts on Weapons which may Cause Unnecessary Suffering or have Indiscriminate Effects held in Lucerne in 1974 (see *supra*) and pointed out that it was a text with which most experts could agree. He further stated that:

In view of the fact that the laser beam could cause blindness, its use as an anti-personnel weapon would have very grave consequences even if the combatants aimed at had protective equipment. To completely forbid its use against people was therefore desirable and also possible, but its unqualified prohibition was impossible, as it might be extremely useful against strategically important targets.⁷⁶

70. In a resolution adopted in 1995 on the challenges posed by calamities arising from armed conflict, the 93rd Inter-Parliamentary Conference called on States "to ban blinding laser weapons in an additional Protocol".⁷⁷

71. At the First Review Conference of States Parties to the CCW in 1995, a consensus emerged during the negotiations that blinding laser weapons must not be used in any armed conflict.⁷⁸ A number of States supported the Austrian

⁷⁴ Conference of Government Experts on the Use of Certain Conventional Weapons, Lucerne, 24 September–18 October 1974, Report, ICRC, Geneva, 1975, §§ 261–262 and 277.

⁷⁵ Conference of Government Experts on the Use of Certain Conventional Weapons, Second Session, Lugano, 28 January–26 February 1976, Report, ICRC, Geneva, 1976, p. 19, § 54.

⁷⁶ Conference of Government Experts on the Use of Certain Conventional Weapons, Second Session, Lugano, 28 January–26 February 1976, Report, ICRC, Geneva, 1976, pp. 80–81, § 5.

⁷⁷ 93rd Inter-Parliamentary Conference, Madrid, 27 March–1 April 1995, Resolution on the international community in the face of the challenges posed by calamities arising from armed conflicts and by natural or man-made disasters: the need for a coherent and effective response through political and humanitarian assistance means and mechanisms adapted to the situation, § 16(e).

⁷⁸ ICRC, Working paper on war crimes submitted to the Preparatory Committee for the Establishment of an International Criminal Court, New York, 14 February 1997, p. 29.

proposal that would have applied the Protocol "in all circumstances including armed conflict and times of peace".⁷⁹ The proposal retained was that the scope of the Protocol should be the same as that agreed on for the new 1980 Protocol II to the CCW also in the process of being negotiated in another Committee.⁸⁰ The lack of agreement on the 1996 Amended Protocol II to the CCW (for reasons other than its scope) meant that that Protocol could not be adopted at the Vienna session of the Conference. States decided to go ahead and adopt the Protocol IV nonetheless, even though the extension of the scope of application to internal armed conflict could not be included. At the final session of the First Review Conference, in May 1996, the suggestion was made to return to Protocol IV and add the same scope of application clause that was finally agreed on for Protocol II. All States were in favour, with the sole exception of one State, which declared that it opposed this alteration purely because of its principled opposition to extending IHL instruments to non-international armed conflict. At the same time, however, that State declared that it was opposed to the production and use of blinding laser weapons and that it had no intention of using these weapons in any type of conflict.⁸¹

72. The 26th International Conference of the Red Cross and Red Crescent in 1996 welcomed the adoption of the 1995 Protocol IV to the CCW "as an important step in the development of international humanitarian law" and emphasised "the prohibition on the use or transfer of laser weapons specifically designed to cause permanent blindness". The Conference further welcomed "the general agreement achieved at the Review Conference that the scope of application of this Protocol should apply not only to international armed conflicts".⁸²

73. The Final Declaration of the First Review Conference of States Parties to the CCW (Second Session) in 1996 contained the following statement in relation to blinding laser weapons:

Welcoming the adoption of Protocol IV on Blinding Laser Weapons as a codification and progressive development of the rules of international law,
Noting that a number of issues could be considered in the future, for example at a review conference, taking into account scientific and technological developments, including the questions of proliferation on the production, stockpiling and transfer of blinding laser weapons and the question of compliance with regard to such weapons, as well as other pertinent issues, such as the definition of "permanent blindness", including the concept of field of vision.

⁷⁹ First Review Conference of States Parties to the CCW (First Session), UN Doc. CCW/CONF.I/MCIII/WP.2, 26 September 1995, Article 1(2).

⁸⁰ First Review Conference of States Parties to the CCW (First Session), UN Doc. CCW/CONF.I/4, 12 October 1995, § 5. (The report of the Main Committee (III) stated that "during the course of negotiations on the draft text, the Committee decided to leave the question of scope, as referred to in Article 1, to the decision of the Drafting Committee of the Review Conference, pending the agreed text on scope negotiated in Main Committee II".)

⁸¹ ICRC archive document.

⁸² 26th International Conference of the Red Cross and Red Crescent, Geneva, 3–7 December 1995, Res. II, § H(c), (d) and (f).

The High Contracting Parties solemnly declare:

Their satisfaction at the adoption of the Protocol on Blinding Laser Weapons (Protocol IV) to the Convention,

Their conviction of the importance of the earliest possible entry into force of Protocol IV,

Their desire that all States, pending the entry into force, respect and ensure respect of the substantive provisions of Protocol IV to the fullest extent possible,

Their recognition of the need for achieving the total prohibition of blinding laser weapons, the use and transfer of which are prohibited in Protocol IV,

Their wish to keep the issue of the blinding effects related to the use of laser systems under consideration.⁸³

74. In the Final Declaration of the Second Review Conference of the CCW in 2001, States Parties expressed their determination “to encourage all States to become Parties to the Protocol [on blinding laser weapons] as soon as possible”. States Parties also reaffirmed “the recognition by the First Review Conference of the need for the total prohibition of blinding laser weapons, the use and transfer of which are prohibited in Protocol IV”.⁸⁴

IV. Practice of International Judicial and Quasi-judicial Bodies

75. No practice was found.

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

76. Research, analysis and discussion on blinding laser weapons that helped lead to the adoption of the 1995 Protocol IV to the CCW took place largely in the context of a series of expert meetings on this subject convened by the ICRC.⁸⁵

77. At the Group of Governmental Experts to prepare the First Review Conference of States Parties to the CCW in 1994, the ICRC made a proposal to the effect that:

1. Blinding as a method of warfare is prohibited.
2. Laser weapons may not be used against the eyesight of persons.⁸⁶

78. In 1994, in the First Committee of the UN General Assembly, the ICRC addressed the issue of blinding laser weapons in the following terms:

⁸³ First Review Conference of States Parties to the CCW (Second Session), UN Doc. CCW/CONF.I/16, Final Declaration, 22 April to 3 May 1996, §§ 14–20.

⁸⁴ Second Review Conference of States Parties to the CCW, Geneva, 11–21 December 2001, UN Doc. CCW/CONF.II/2, Final Declaration, 25 January 2002, p. 11.

⁸⁵ Louise Doswald-Beck (ed.), *Blinding Weapons: Reports of the meetings of experts convened by the International Committee of the Red Cross on Battlefield Laser Weapons 1989–1991*, ICRC, Geneva, 1993, 371 pp.

⁸⁶ ICRC, Working paper submitted to the Group of Governmental Experts to prepare the First Review Conference of States Parties to the CCW, UN Doc. CCW/CONF.I/GE/CRP.28, 12 August 1994.

The ICRC is very pleased that a large number of States have either formally or informally indicated their support for a Protocol on the subject of blinding weapons . . . This preventive step will save the world from the horrifying prospect of large numbers of persons being suddenly blinded for life by certain laser weapons that could soon be both inexpensive and easily available.⁸⁷

79. In 1996, at the close of the session of the First Review Conference of States Parties to the CCW that adopted Protocol IV, the head of the ICRC delegation made the following formal statement:

The adoption of the Protocol on blinding laser weapons represents a victory for civilization over barbarity. Above and beyond the text of the Protocol, what we will remember about the decision taken today, and what the people of the world will understand, is that States do not accept the idea that men might deliberately blind other men, in any circumstances whatsoever.⁸⁸

80. In 1995, in the First Committee of the UN General Assembly, the ICRC made the following statement:

The adoption, on 13 October 1995, of Protocol IV, on blinding laser weapons, is a major achievement. To our knowledge, this is the first time since 1868 that a weapon has been prohibited before it could be used on the battlefield. Thus, humanity has been spared the horror that such blinding weapons would have created. Quite apart from the actual wording of the instrument, the effect of its adoption is a strong message that States will not tolerate the deliberate blinding of people in any circumstances. Thus, it is a triumph of civilization over barbarity. It is also a major achievement that this Protocol includes a prohibition on the transfer of blinding laser weapons. The ICRC sincerely hopes that States will adhere to it as quickly as possible and will take all appropriate measures to ensure respect for its provisions.⁸⁹

VI. Other Practice

81. *Jane's Defence Weekly* and other journalists alleged that the UK had deployed prototypes of blinding laser weapons in the war in the South Atlantic.⁹⁰

82. According to the Human Rights Watch Arms Project, "two Stingray prototypes were deployed [by the US], but not used, in the Gulf War".⁹¹

⁸⁷ ICRC, Statement before the First Committee of the UN General Assembly, UN Doc. A/C.1/49/PV.10, 24 October 1994, p. 11.

⁸⁸ Louise Doswald-Beck, "New Protocol on Blinding Laser Weapons", *IRRC*, No. 312, 1996, p. 297.

⁸⁹ ICRC, Statement before the First Committee of the UN General Assembly, UN Doc. A/C.1/50/PV.11, 26 October 1995, pp. 25–26.

⁹⁰ Simon O'Dwyer-Russell, "Navy's top secret laser was tried out in Falklands", *Sunday Telegraph*, 7 January 1990; Fermin Gallego and Mark Daly, "Laser Weapons in Royal Navy Service", *Jane's Defence Weekly*, 13 January 1990, pp. 48–49.

⁹¹ Human Rights Watch Arms Project, *US Blinding Laser Weapons*, Washington D.C., May 1995, p. 1.

83. Prior to the adoption of Protocol IV, there were a number of programmes developing blinding laser weapons. The extent of these is not known, not all of them having been confirmed. Some research on the extent of such developments was undertaken by the Human Rights Watch Arms Project, which published a report in 1995 in which it indicated that such weapons were being researched or developed in China, France, Germany, Israel, Russia, UK, Ukraine and US.⁹²

84. There were reports that a Chinese company NORINCO had developed a portable blinding laser weapon that was displayed in March 1995 at defence exhibitions in Manila and Abu Dhabi. According to *Jane's Intelligence Review*, the Chinese ZM-87 was the first openly offensive laser to be marketed.⁹³ In October 1995, China ratified the 1995 Protocol IV to the CCW.

85. In a public statement in April 1995, the WMA stated that "the development of antipersonnel lasers as blinding weapons represent[s] one of the biggest public health issues facing the world today. The World Medical Association fully supports the ICRC in its efforts to combat this growing menace."⁹⁴

86. In two press releases in 1995, Human Rights Watch condemned the use of blinding laser weapons. In the first, it stated that "blinding laser weapons are cruel and inhumane weapons that would cause unnecessary suffering to countless soldiers and possibly civilians".⁹⁵ In the second, it emphasised its belief that "blinding laser weapons are an excessively cruel weapon, and that the use of blinding laser weapons is repugnant to the public conscience and should therefore be banned".⁹⁶ These statements were based on a Human Rights Watch report, "Blinding Laser Weapons, the Need to Ban a Cruel and Inhuman Weapon", in which it stated that:

Given the long-term effects on a country of permanently blinding large numbers of soldiers, the intentional blinding by lasers or any other weapon cannot justify whatever minimal military utility might be gained in the short run. Tactical lasers, including weapons that are often referred to as anti-material or anti-sensor such as LCMS, have the capacity for directly causing blindness and in some cases are intended to cause blindness. This characteristic renders them essentially antipersonnel and requires that they be banned.⁹⁷

⁹² Human Rights Watch Arms Project, *Blinding Laser Weapons: The Need to Ban a Cruel and Inhumane Weapon*, Washington, D.C., September 1995; Nick Cook, "Chinese laser 'blinder' weapon for export", *Jane's Defence Weekly*, 27 May 1995.

⁹³ Sebastian Gorka and Richard Sullivan, "Assuming the offensive: The laser threat on the 21st century battlefield", *Jane's Intelligence Review*, February 1998, pp. 45-46; see also *Jane's Defence Weekly*, 27 May 1995, p. 3 and *International Defense Review*, May 1995, pp. 19-21.

⁹⁴ WMA, Public statement, 24 April 1995.

⁹⁵ Human Rights Watch Arms Project, Press Release, 24 September 1995.

⁹⁶ Human Rights Watch Arms Project, Press Release, 21 May 1995.

⁹⁷ Human Rights Watch Arms Project, *Blinding Laser Weapons: the Need to Ban a Cruel and Inhumane Weapon*, Vol. 7, No. 1, Washington, D.C., September 1995.

87. At the First Review Conference of States Parties to the CCW in 1995, the World Blind Union supported a ban on blinding laser weapons.⁹⁸

88. At the First Review Conference of States Parties to the CCW in 1995, the World Veterans Association supported a ban on blinding laser weapons.⁹⁹

89. At the First Review Conference of States Parties to the CCW in 1995, the Cristoffel-Blindenmission of Germany stated that it considered laser weapons to be an "inhumane weapon system". It therefore made an urgent appeal:

to ban any use of laser beams against other people within international conflicts and civil wars; to forbid the development, production, storage, trading and use of such weapons; and to provide for implementation and verification of the Protocol, including sanctions if necessary.¹⁰⁰

90. In a resolution adopted in 1995, the Blinded Veterans Association of the US stated that:

Laser weapons with the potential to blind are cruel and inhumane weapons, and we as a society must not accept blinding as a method of warfare... The Blinded Veterans Association actively supports efforts to seek an international prohibition on the use of lasers for the purpose of blinding as a method of warfare.¹⁰¹

Laser systems incidentally causing blindness

I. Treaties and Other Instruments

Treaties

91. Articles 2 and 3 of the 1995 Protocol IV to the CCW provide that:

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

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

Other Instruments

92. No practice was found.

⁹⁸ World Blind Union, Statement at the First Review Conference of States Parties to the CCW (First Session), Vienna, 28 September 1995, UN Doc. CCW/CONF.I/SR.6, 5 October 1995, p. 12, § 56; see also Louise Doswald-Beck, "New Protocol on Blinding Laser Weapons", *IRRC*, No. 312, 1996, p. 276.

⁹⁹ World Veterans Federation, Statement at the First Review Conference of States Parties to the CCW (First Session), Vienna, 28 September 1995, UN Doc. CCW/CONF.I/SR.6, 5 October 1995, p. 17, § 82; see also Louise Doswald-Beck, "New Protocol on Blinding Laser Weapons", *IRRC*, No. 312, 1996, p. 276.

¹⁰⁰ Cristoffel-Blindenmission, Statement at the First Review Conference of States Parties to the CCW (First Session), Vienna, 28 September 1995, UN Doc. CCW/CONF.I/SR.6, 5 October 1995, p. 11, § 50.

¹⁰¹ Blinded Veterans Association, National Convention, Resolution 26-95, 26 August 1995.

II. National Practice

Military Manuals

93. Canada's LOAC Manual states that:

Blinding as an incidental or collateral effect of the legitimate military employment of laser systems is not covered by the prohibition. For example, the legitimate use of a laser targeting system in a tank is lawful even if one of its collateral effects may be to cause blindness. However, such a laser targeting system could not be deliberately used to blind enemy combatants.¹⁰²

94. Israel's Manual on the Laws of War states that "in the employment of arms applying laser technology for purposes other than causing blindness (i.e. for ranging purposes), it is incumbent on the states to take all precautionary measures to prevent unintentional blinding".¹⁰³

95. The Annotated Supplement to the US Naval Handbook states that "while blinding as an incidental effect of 'legitimate military employment' of range finding or target acquisition lasers is not prohibited by [the 1995 Protocol IV to the CCW], parties thereto are obligated 'to take all feasible precautions' to avoid such injuries".¹⁰⁴

National Legislation

96. No practice was found.

National Case-law

97. No practice was found.

Other National Practice

98. In 1997, in its response to the Joint Standing Committee On Treaties, the Australian government stated that:

Efforts are under way to increase the safety of these [laser] systems. For example, the Defence Department's Defence Science and Technology Organization has a program aimed at making laser range-finders safer through the development and use of lasers which can be operated in the eye-safe region of the electromagnetic spectrum.¹⁰⁵

99. In 1998, in a letter to the ICRC President, the UK Secretary of Defence stressed that "the capabilities of weapons systems under development which employ lasers, and the concepts of operation for their use, are already consistent with the [1995 Protocol IV to the CCW]".¹⁰⁶

¹⁰² Canada, *LOAC Manual* (1999), p. 5-3, § 30.

¹⁰³ Israel, *Manual on the Laws of War* (1998), p. 17.

¹⁰⁴ US, *Annotated Supplement to the Naval Handbook* (1997), § 9.8, footnote 45.

¹⁰⁵ Australia, Joint Standing Committee On Treaties, *Restrictions on the Use of Blinding Laser Weapons and Landmines*, Government Response, Canberra, August 1997.

¹⁰⁶ UK, Letter from the Secretary of Defence to the ICRC President, 23 March 1998.

100. In 1995, in a US Department of Defense policy statement on blinding lasers, the need for some restrictions, aside from the prohibition of deliberate blinding, was explained in the following fashion:

Laser systems are absolutely vital to our modern military. Among other things, they are currently used for detection, targeting, range-finding, communications and target destruction. They provide a critical technological edge to US forces and allow our forces to fight, win and survive on an increasingly lethal battlefield. In addition, lasers provide significant humanitarian benefits. They allow weapons systems to be increasingly discriminate, thereby reducing collateral damage to civilian lives and property. The Department of Defense recognizes that accidental or incidental eye injuries may occur on the battlefield as the result of the use of legitimate laser systems. Therefore we continue to strive, through training and doctrine, to minimize these injuries.¹⁰⁷

III. Practice of International Organisations and Conferences

United Nations

101. No practice was found.

Other International Organisations

102. No practice was found.

International Conferences

103. The Final Declaration of the First Review Conference of States Parties to the CCW in 1996 stated that:

Welcoming the adoption of Protocol IV on Blinding Laser Weapons as a codification and progressive development of the rules of international law . . .

The High Contracting Parties solemnly declare:

Their conviction of the importance of the earliest possible entry into force of Protocol IV,

Their desire that all States, pending the entry into force, respect and ensure respect of the substantive provisions of Protocol IV to the fullest extent possible,

Their wish to keep the issue of the blinding effects related to the use of laser systems under consideration.¹⁰⁸

IV. Practice of International Judicial and Quasi-judicial Bodies

104. No practice was found.

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

105. No practice was found.

¹⁰⁷ US, DefenseLink News Release, Reference Number: 482-95, 1 September 1995.

¹⁰⁸ First Review Conference of States Parties to the CCW (Second Session), Final Declaration, UN Doc. CCW/CONF.I/16, 22 April–3 May 1996, § 14 and §§ 17–19.

VI. Other Practice

106. In 1995, in its report on blinding laser weapons, Human Rights Watch stated that:

Laser target designators and range finders are of great military utility and may reduce the number of casualties or ensure more precise attacks on military targets. Still, experts believe that because they can cause significant injury and permanent blindness, combatants remain under a legal obligation to weigh the human consequences of even these instruments. Perhaps the most important consideration is to ensure that laser range finders and target designators are not abused and used intentionally against the eyesight of individuals and outside their missions. Government officials have expressed the fear that personnel using such lasers might be charged with war crimes if an individual is blinded. However, soldiers and their commanders always are required to know the legitimate and illegitimate, unacceptable uses of weapons.¹⁰⁹

¹⁰⁹ Human Rights Watch, *Blinding Laser Weapons: the Need to Ban a Cruel and Inhumane Weapon*, September 1995, Vol. 7, No. 1, p. 37.