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The International Review of the Red Cross
wishes its readers
all the best for 1996

INTERNATIONAL REVIEW
OF THE RED CROSS

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JANUARY-FEBRUARY 1996 ISSUE

We should like to inform our faithful readers that the January-February 1996 issue of the *Review* will be devoted to the **26th International Conference of the Red Cross and Red Crescent**, which was held in Geneva from 3 to 7 December 1995. The resolutions adopted by the Conference and by the Council of Delegates will be published as offprints.

San Remo Manual on International Law Applicable to Armed Conflict at Sea

by Louise Doswald-Beck

1. Background

The law regulating the use of force at sea has long been due for a reevaluation in the light of developments in methods and means of warfare at sea and the fact that major changes have taken place in other branches of international law of direct relevance to this issue. This need was reflected in Resolution VII of the 25th International Conference of the Red Cross, which noted that “some areas of international humanitarian law relating to sea warfare are in need of reaffirmation and clarification on the basis of existing fundamental principles of international humanitarian law” and therefore appealed to “governments to co-ordinate their efforts in appropriate fora in order to review the necessity and the possibility of updating the relevant texts of international humanitarian law relating to sea warfare”.

Although the law relating to land warfare has been reaffirmed in recent treaties, in particular the two Protocols of 1977 additional to the Geneva Conventions of 1949, this has not been the case as regards the law of armed conflict at sea. The Second Geneva Convention of 1949 deals only with the protection of the wounded, sick and shipwrecked at sea, with some adjustments in Additional Protocol I of 1977, in particular the extension to shipwrecked civilians of the protection laid down in the Second Geneva Convention. However, these treaties do not address the law regulating the conduct of hostilities at sea. Almost all of the treaties on this subject date from 1907, when the Second International Peace Conference at The Hague adopted eight Conventions on the law of naval warfare. One of these has since been overtaken by the Second Geneva Convention and another, on the creation of an international prize

court, never entered into force. A third, which regulated bombardment of land targets by naval forces, has in practice been overridden by the rules regulating attacks in Protocol I of 1977. However, these rules in Protocol I apply only to naval attacks that directly affect civilians on land, and therefore do not cover attacks by naval forces on objects, in particular vessels and aircraft, at sea. The 1907 treaties themselves did not represent a complete codification of the law of war at sea, but dealt with certain subjects, namely, the status of enemy merchant ships and their conversion into warships, the laying of automatic contact mines and the immunity of certain vessels from capture. An attempt to draft a more complete treaty took place in London in 1909, but the final Declaration did not enter into force. A non-binding code was drafted by the *Institut de droit international* and adopted in Oxford in 1913. Together, the 1909 London Declaration and the 1913 Oxford Manual give a good idea of pre-First World War customary law.

Events in the First World War showed that the Hague treaties and traditional customary law had begun to be overtaken by developments in methods and means of warfare. The use of submarines, in particular, which were unable to follow procedures required of surface ships, resulted in the torpedoing of merchant vessels in ways which were in violation of the accepted law of the time. Efforts were made, in particular by Great Britain in the 1920s, to outlaw submarines altogether but as this proposal was not accepted a treaty was adopted in 1936 specifying that submarines must abide by the same rules as warships. However, this attempt at regulating new methods of warfare did not solve the problem, which was exacerbated by the subsequent widespread use of aircraft, seamines and long-range missiles. This led to many arbitrary sinkings in the Second World War, including many hospital ships and Red Cross vessels carrying relief supplies.

The customary law that developed prior to the First World War had made an appropriate balance between military and humanitarian needs that suited naval practices and the sailing ships of the nineteenth century. As it is not possible to return to those times, the law needs to be adjusted so that the same balance can be respected with rules that are appropriate for modern conditions. Another major factor is that there have been important developments in other areas of international law such as the United Nations Charter, the law of the sea, air law and environmental law since the Second World War which must be taken into account in any restatement of the law applicable to armed conflicts at sea. The development of the law of armed conflict on land is also of importance, in that all armed conflicts involve operations in which the land, air and sea forces

work in close cooperation and it would therefore not be appropriate to have totally different standards. Furthermore, all aspects of armed conflict should be in conformity with the basic principles of international humanitarian law, wherever the theatre of operations might be. However, at the same time it is recognized that there are certain specificities of naval operations that need to be taken into account, in particular the fact that neutral interests are involved at sea to an infinitely greater extent than is the case with land operations.

All these factors have led to a troubling degree of uncertainty as to the content of contemporary international law applicable to armed conflicts at sea. Although operations at sea are not at all as frequent as those on land, several recent conflicts have shown the need for greater certainty in the law applicable to naval warfare. The Falklands/Malvinas conflict brought the first major naval operation since the Second World War, and although it fortunately did not result in any serious problems as regards the safety of civilian or neutral shipping, it did raise significant questions with regard to the use of exclusion zones. Another problem which came to light was the negative effect on the efficiency of hospital ships of the rule in the Second Geneva Convention which prohibits hospital ships from using a secret code. The war between Iran and Iraq, on the other hand, saw extensive attacks on neutral civilian shipping as well as the use of exclusion zones by the belligerents. The downing of the Iranian *Vincennes* forcefully brought to light the practical difficulties involved in the correct identification of civilian objects by belligerent naval forces and the unclear relationship between the work of civilian air traffic authorities and the perceived needs of belligerent forces in the area. The second Gulf war involved extensive naval activity when the Coalition forces established a blockade, without formally designating it as such.¹ Of particular interest were the methods used to enforce the blockade and the exceptions to it that were allowed for humanitarian reasons. The extent to which the United Nations Security Council was bound by the rules of international humanitarian law was also an important issue. Finally, it should be mentioned that the laying of seamines has created some difficulty. Such mines were laid in the Iran/Iraq war and some were removed by neutral States. In June 1995, a vessel chartered by the International Committee of the Red Cross to provide relief supplies to civilians in Sri Lanka was severely damaged and sank when it hit a seamine. The government of Sweden has on several occasions proposed a new treaty

¹ The term "interdiction" was used by the US forces.

to the international community on the use of naval mines, first of all in 1989 at the United Nations Disarmament Commission, then in 1991 before the First Committee of the UN General Assembly and now as an additional Protocol to the 1980 Convention on Certain Conventional Weapons.² Unfortunately, there is some doubt as to whether this latest initiative will be successful as the Review Conference of the 1980 Convention, which will meet in September-October 1995, will concentrate on landmines and, to a lesser degree, laser weapons.

In recent years some States have prepared naval manuals or further developed and updated military manuals which include sections on the law of naval warfare. The most notable recent naval manual is the United States Commander's Handbook on the Law of Naval Operations (NWP 9A) and its annotated supplement.³ The new German manual, Humanitarian Law in Armed Conflicts ZDv 15/2, published in 1992, has an important section on armed conflict at sea and a new manual, a large section of which will cover naval operations, is currently being prepared by the United Kingdom.

Although recent conflicts have not involved the very extensive sinking of civilian and other non-combatant shipping that occurred in the Second World War, it still needs to be clearly established that indiscriminate naval operations are unlawful and for this purpose detailed international regulations are necessary.

2. Development of the San Remo Manual and its intended purpose

The San Remo Manual was drafted over a period of six years and adopted in June 1994. It is accompanied by a full commentary, entitled the "Explanation".⁴ The participants in the groups of experts that prepared the Manual were a mixture of governmental personnel and academics attending in their personal capacity from twenty-four countries.

² The full title of this Convention is: "Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons Which May be Deemed to be Excessively Injurious or to Have Indiscriminate Effects".

³ NWP 9(Rev.A)/FMFM 1-10. A new revised version is due to appear shortly.

⁴ Both the Manual and the Explanation are published by Cambridge University Press, "San Remo Manual on International Law Applicable to Armed Conflicts at Sea: Prepared by a Group of International Lawyers and Naval Experts convened by the International Institute of Humanitarian Law" (ed. Louise Doswald-Beck) 1995.

A series of annual meetings, beginning in San Remo in 1987, were convened by the San Remo International Institute of International Law in cooperation with a number of other institutions, including the International Committee of the Red Cross and several National Societies. The second meeting, which was held in Madrid in 1988 in cooperation with the Spanish Red Cross, established a Plan of Action to draw up a statement of contemporary international law applicable to armed conflicts at sea. Subsequent meetings were held in Bochum, Toulon, Bergen, Ottawa, Geneva and, finally, Livorno. The first four of these meetings were organized in cooperation with the National Societies of Germany, France, Norway and Canada respectively. The ICRC played a major role throughout. Apart from coorganizing the meeting held in Geneva, it offered its advice to the Institute throughout the process, coordinated the drafting work and helped contribute to the administrative and secretarial work. The ICRC also convened three meetings of the rapporteurs, whose reports were the basis of discussion in the annual meetings, in order to organize the drafting of the "Explanation".

The Manual is not a binding document. In view of the extent of uncertainty in the law, the experts decided that it was premature to embark on diplomatic negotiations to draft a treaty on the subject. The work therefore concentrated on finding areas of agreement as to the present content of customary law, which were far more numerous than initially appeared possible. As a second step the experts discussed controversial issues with a view to reaching an agreed compromise on innovative proposals by way of progressive development. However, although the Manual was to contain provisions of this latter type, most of them were always meant to be an expression of what the participants believed to be present law. Thus in many respects the San Remo Manual was intentionally designed to be a modern equivalent of the Oxford Manual of 1913. The experts believed that the drafting of such a document would help clarify the law, thus removing the impression that there was such a degree of disagreement as to render its uniform development in customary law or eventual codification impossible.⁵ The experts particularly noted, when embarking on this project, that the result would be very helpful for dissemination purposes and would encourage the drafting of more national manuals.

⁵ There had been a few seminars on the subject of the law of naval warfare, for example, in Brest 1987, ASIL panel 1988, Newport 1990, which highlighted the disagreements.

In 1990, the experts decided that it was important to publish, at the same time as the Manual, a commentary which would indicate the sources of the rules found in the Manual, relate the discussion concerning the more controversial provisions and explain why certain decisions were made. The commentary would also be an indication of which provisions were generally accepted as being declaratory of customary law and which were in the nature of proposals for the progressive development of the law. The intention was that the Manual be read together with this commentary (later named the "Explanation").

3. Content of the San Remo Manual

The experts' intentions were achieved as regards the content of the Manual and Explanation, and indeed the success of the meetings was such that more issues were dealt with, for example the environment, than was initially planned.

The Manual consists of 183 paragraphs arranged in six parts.⁶

Part I, entitled "General Provisions", covers the scope of application of the rules, the effect of the United Nations Charter, the areas of sea in which military operations may take place and definitions of terms used.

Part II, "Regions of Operations", specifies the rules applicable to belligerents and neutrals in different areas of the sea: namely, internal waters, the territorial sea and archipelagic waters; international straits and archipelagic sea lanes; the exclusive economic zone and continental shelf; and, finally, the high seas and seabed beyond national jurisdiction.

Part III, "Basic Rules and Target Discrimination", is by far the longest part and begins by specifying the fundamental tenets of international humanitarian law, which are normally associated with the law applicable to land warfare, but which participants believed are also applicable to warfare at sea. After enunciating the rule that the right of the parties to choose methods or means of warfare is not unlimited, this section repeats the basic rules of the principle of distinction, including the prohibition of indiscriminate attacks, the rule prohibiting the use of weapons that cause unnecessary suffering or superfluous injury, the prohibition of the denial

⁶ See hereinafter, pp. 595-637.

of quarter, and the need to pay due regard to the natural environment. The rest of Part III contains sections on precautions in attack, enemy vessels and aircraft exempt from attack, enemy or neutral vessels or aircraft that may be subject to attack, and special precautions regarding civil aircraft.

Part IV is entitled “Methods and Means of Warfare at Sea” and contains rules on the use of certain weapons (missiles and other projectiles, torpedoes and mines), the rules applicable to blockades and “zones”, and a section on deception, ruses of war and perfidy.

Part V, “Measures Short of Attack - Interception, Visit, Search, Diversion and Capture”, contains seven sections covering the following subjects: determination of the enemy character of vessels and aircraft; visit, search and diversion of merchant vessels; interception, visit, search and diversion of civil aircraft; and capture of enemy or neutral vessels, civil aircraft and goods.

Part VI, “Protected Persons, Medical Transports and Medical Aircraft”, does not attempt to repeat the detailed provisions in the Second Geneva Convention and Additional Protocol I on these categories, but instead specifies that these detailed rules remain applicable and goes on to indicate certain additional rules largely based on recent developments.

Although certain sections of the Manual are not of direct relevance to the rules of international humanitarian law as such, in particular those sections dealing with the effect of the United Nations Charter and regions of naval operations, they were nevertheless felt by the participants to be a necessary component of this Manual, as they help to provide a framework of legal certainty which in turn helps to secure the correct implementation of the rules of international humanitarian law. In particular, the Manual specifies that the rules apply to all parties, irrespective of which party was responsible for the outbreak of the conflict, and that they also apply to operations authorized or undertaken by the United Nations.

However, the most important contribution of the Manual is the reaffirmation and updating of international humanitarian law, taking into account the four Geneva Conventions of 1949 and Additional Protocol I of 1977.

The most important innovation compared with the traditional pre-1914 law was the introduction of a clear formulation of the principle of distinction as formulated in Protocol I. Although in traditional law the only ships that could be attacked on sight were belligerent warships and auxiliaries, various military measures could be taken against both belligerent and neutral shipping that assisted the enemy’s war effort, for ex-

ample by carrying military materials or helping the enemy's intelligence. Such measures were usually limited to the capture of the merchant vessels concerned, and destruction of the vessels was allowed only in certain specific instances and subject to certain conditions, in particular that provision be made for the safety of the passengers and crew. As mentioned above, the introduction this century of new means of warfare, in particular submarines and aircraft, has led to difficulty in the implementation of the traditional law and to attacks on merchant shipping in both World Wars. In order to cope with this, and on the basis of recent State practice and Additional Protocol I, the experts decided to introduce the concept of the "military objective". The purpose was to limit attacks to warships (a category which includes submarines), auxiliaries and merchant vessels that directly help the military action of the enemy, while retaining the option of using traditional measures short of attack to other defined vessels. The Manual repeats the definition of "military objective" found in Article 52 of Additional Protocol I, and it was felt that this would accommodate military needs and at the same time benefit from the gains made by international humanitarian law since the Second World War. However, in addition to this general definition, and unlike Additional Protocol I, the Manual contains examples of activities that would normally cause vessels engaged in them to become military objectives, and this list is meant to provide some concrete guidance. The relevant paragraph⁷ reads as follows:

The following activities may render merchant vessels military objectives:

- (a) engaging in belligerent acts on behalf of the enemy, e.g., laying mines, minesweeping, cutting undersea cables and pipelines, engaging in visit and search of neutral merchant vessels or attacking other merchant vessels;*
- (b) acting as an auxiliary to an enemy's armed forces, e.g., carrying troops or replenishing warships;*
- (c) being incorporated into or assisting the enemy's intelligence gathering system, e.g., engaging in reconnaissance, early warning, surveillance, or command, control and communications missions;*
- (d) sailing under convoy of enemy warships or military aircraft;*

⁷ Paragraph 60.

- (e) *refusing an order to stop or actively resisting visit, search or capture;*
- (f) *being armed to an extent that they could inflict damage to a warship; this excludes light individual weapons for the defence of personnel, e.g., against pirates, and purely deflective systems such as "chaff";*
or
- (g) *otherwise making an effective contribution to military action, e.g., carrying military materials.*

There is also a paragraph relating to the possible attack of neutral vessels, but which, not surprisingly, is narrower and stricter.

In addition, the Manual lists⁸ vessels that are specifically exempt from capture, on the basis of either treaty law or customary law:

The following classes of enemy vessels are exempt from attack:

- (a) *hospital ships;*
- (b) *small craft used for coastal rescue operations and other medical transports;*
- (c) *vessels granted safe conduct by agreement between the belligerent parties including:*
 - (i) *cartel vessels, e.g., vessels designated for and engaged in the transport of prisoners of war;*
 - (ii) *vessels engaged in humanitarian missions, including vessels carrying supplies indispensable to the survival of the civilian population, and vessels engaged in relief actions and rescue operations;*
- (d) *vessels engaged in transporting cultural property under special protection;*
- (e) *passenger vessels when engaged only in carrying civilian passengers;*
- (f) *vessels charged with religious, non-military scientific or philanthropic missions; vessels collecting scientific data of likely military applications are not protected;*
- (g) *small coastal fishing vessels and small boats engaged in local coastal trade, but they are subject to the regulations of a belligerent naval commander operating in the area and to inspection;*

⁸ Paragraph 47.

- (h) *vessels designated or adapted exclusively for responding to pollution incidents in the marine environment;*
- (i) *vessels which have surrendered;*
- (j) *life rafts and lifeboats.*

The Manual contains a section on precautions to be taken before launching an attack, similar to those found in Article 57 of Protocol I, which is intended to help avoid unlawful attacks.

However, the Manual does not deal only with vessels. The experts recognized that aircraft play an important part in naval operations and that any realistic manual would have to take this fully into account. Therefore there are similar provisions, *mutatis mutandis*, on aircraft that may be attacked and those which are exempt from attack. There is also a section on special precautions in relation to civil aviation in order to try to avoid making attacks on innocent civilian aircraft. For this purpose, the experts made reference to international civil aviation rules promulgated by the ICAO. In general these provisions in the San Remo Manual are a pragmatic attempt to marry military necessities, international humanitarian law and civil aviation rules.

The use of different sea areas, although not strictly within the scope of international humanitarian law, was also an important innovation which needed to take into account the contemporary law of the sea, in particular as contained in the 1982 Law of the Sea Convention. Here again, it was not always so easy to combine military necessities whilst respecting as far as possible the provisions of that Convention. Controversial areas were rules relating to the protection of the environment, freedom of navigation and the special rights of exploration and exploitation in the exclusive economic zones of neutral States, and particularly the lawfulness or otherwise of the creation of "zones" (normally referred to as exclusion zones) which adversely affect the right of navigation of neutral shipping. Despite this, it may be seen as an important achievement that the Manual specifies that if such zones are created international humanitarian law must be nevertheless respected in its entirety.

Of great importance is the fact that the Manual includes rules relating to the protection of protected persons similar to those in both the Geneva Conventions of 1949 and Additional Protocol I of 1977. Since the last comprehensive international instrument on the law of naval warfare dates back to 1913, this inclusion was necessary.

The Manual does not repeat the entire content of the Second Geneva Convention and Protocol I, which would be unnecessary, but makes a specific reference to the fact that provisions on the protection of protected persons are to be found in those instruments. It does, however, contain a section on the status and treatment of all persons recovered at sea. In particular it specifies that civilians captured at sea are protected by the Fourth Geneva Convention; this is an improvement on the traditional law, which indicates only that they are "subject to the discipline of the captor".⁹ Apart from specific provisions on the treatment of the wounded, sick and shipwrecked found in the Second Geneva Convention and Additional Protocol I, much of the law in existing treaties and other authorities on the status and treatment of persons captured at sea is fragmentary and incomplete. Therefore in addition to clarifying accepted rules of customary law, some of the rules in the Manual are in the nature of progressive development. The same section of the Manual contains some specific rules relating to the protection of medical ships and aircraft found in Protocol I and encourages the use of the means of identification introduced by Annex I of that Protocol.

Finally, specific mention must be made of the fact that the Manual lays down that starvation blockades are unlawful and requires the blockading power to allow relief shipments if a secondary effect of the blockade is that civilians are short of food or other essential supplies. This is a definite departure from traditional law and reflects the new rules prohibiting the starvation of the civilian population and stipulating the provision of relief supplies which were introduced in Protocol I in 1977 and are now generally seen as having become an established part of international customary law.

4. Conclusion

As the San Remo Manual is the only comprehensive international instrument that has been drafted on the law of naval warfare since 1913, it is likely to have an important impact. It has already influenced the provisions relating to naval warfare in the German manual and it is quite likely that future manuals will also be so influenced. In this way the San

⁹ See, for example, the United States Manual, *supra* note 2 at pp. 8-9.

Remo Manual should help consolidate contemporary international customary law, promote its coherent development and thereby provide a much firmer foundation for possible future treaty developments than could otherwise have been the case. The Manual and accompanying Explanation will also be very useful for dissemination purposes, which should in turn promote a better respect for the law.

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SAN REMO MANUAL
ON
INTERNATIONAL LAW APPLICABLE
TO ARMED CONFLICTS AT SEA

PREPARED BY
INTERNATIONAL LAWYERS AND
NAVAL EXPERTS

CONVENED BY THE
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The present text, as well as a commentary, entitled the “Explanation”, was published in the *San Remo Manual on International Law Applicable to Armed Conflicts at Sea* (edited by Louise Doswald-Beck), International Institute of Humanitarian Law, Grotius Publications, Cambridge University Press, Cambridge, 1995 (ISBN 0521 55188 9 hardback and ISBN 0521 55864 6 paperback).

INTRODUCTORY NOTE

The *San Remo Manual* was prepared during the period 1988-1994 by a group of legal and naval experts participating in their personal capacity in a series of Round Tables convened by the International Institute of Humanitarian Law. The purpose of the *Manual* is to provide a contemporary restatement of international law applicable to armed conflicts at sea. The *Manual* includes a few provisions which might be considered progressive developments in the law but most of its provisions are considered to state the law which is currently applicable. The *Manual* is viewed by the participants of the Round Tables as being in many respects a modern equivalent to the *Oxford Manual on the Laws of Naval War Governing the Relations Between Belligerents* adopted by the Institute of International Law in 1913. A contemporary manual was considered necessary because of developments in the law since 1913 which for the most part have not been incorporated into recent treaty law, the Second Geneva Convention of 1949 being essentially limited to the protection of the wounded, sick and shipwrecked at sea. In particular, there has not been a development for the law of armed conflict at sea similar to that for the law of armed conflict on land with the conclusion of Protocol I of 1977 additional to the Geneva Conventions of 1949. Although some of the provisions of Additional Protocol I affect naval operations, in particular those supplementing the protection given to medical vessels and aircraft in the Second Geneva Convention of 1949, Part IV of the Protocol, which protects civilians against the effects of hostilities, is applicable only to naval operations which affect civilians and civilian objects on land.

A preliminary Round Table on International Humanitarian Law Applicable to Armed Conflicts at Sea, held in San Remo in 1987 and convened by the International Institute of Humanitarian Law, in cooperation with the Institute of International Law of the University of Pisa (Italy) and the University of Syracuse (USA), undertook an initial review of the law. The Madrid Round Table, convened by the International Institute of Humanitarian Law in 1988, developed a plan of action to draft a contemporary restatement of the law of armed conflict at sea. In conformity with its mandate to prepare developments in international humanitarian law, the International Committee of the Red Cross supported this project throughout. In order to implement the Madrid Plan of Action, the Institute held annual Round Tables which met in Bochum in 1989, in Toulon in 1990, in Bergen in 1991, in Ottawa in 1992, in Geneva in 1993 and finally in Livorno in 1994. Basing themselves on thorough reports

made by rapporteurs between the meetings, comments thereto by participants and careful discussion during the meetings, these groups drafted the *Manual* which was adopted in Livorno in June 1994.

The related *Explanation* was prepared by a core group of experts who had also been the rapporteurs for the Round Tables. The *Manual* should be read together with this *Explanation* for a full understanding of the *Manual's* provisions.

The authentic text of the *Manual* is English.

PART I

GENERAL PROVISIONS

SECTION I

SCOPE OF APPLICATION OF THE LAW

- 1 The parties to an armed conflict at sea are bound by the principles and rules of international humanitarian law from the moment armed force is used.
- 2 In cases not covered by this document or by international agreements, civilians and combatants remain under the protection and authority of the principles of international law derived from established custom, from the principles of humanity and from the dictates of the public conscience.

SECTION II

ARMED CONFLICTS AND THE LAW OF SELF-DEFENCE

- 3 The exercise of the right of individual or collective self-defence recognized in Article 51 of the Charter of the United Nations is subject to the conditions and limitations laid down in the Charter, and arising from general international law, including in particular the principles of necessity and proportionality.

- 4 The principles of necessity and proportionality apply equally to armed conflict at sea and require that the conduct of hostilities by a State should not exceed the degree and kind of force, not otherwise prohibited by the law of armed conflict, required to repel an armed attack against it and to restore its security.
- 5 How far a State is justified in its military actions against the enemy will depend upon the intensity and scale of the armed attack for which the enemy is responsible and the gravity of the threat posed.
- 6 The rules set out in this document and any other rules of international humanitarian law shall apply equally to all parties to the conflict. The equal application of these rules to all parties to the conflict shall not be affected by the international responsibility that may have been incurred by any of them for the outbreak of the conflict.

SECTION III

ARMED CONFLICTS IN WHICH THE SECURITY COUNCIL HAS TAKEN ACTION

- 7 Notwithstanding any rule in this document or elsewhere on the law of neutrality, where the Security Council, acting in accordance with its powers under Chapter VII of the Charter of the United Nations, has identified one or more of the parties to an armed conflict as responsible for resorting to force in violation of international law, neutral States:
 - (a) are bound not to lend assistance other than humanitarian assistance to that State; *and*
 - (b) may lend assistance to any State which has been the victim of a breach of the peace or an act of aggression by that State.
- 8 Where, in the course of an international armed conflict, the Security Council has taken preventive or enforcement action involving the application of economic measures under Chapter VII of the Charter, Member States of the United Nations may not rely upon the law of neutrality to justify conduct which would be incompatible with their obligations under the Charter or under decisions of the Security Council.
- 9 Subject to paragraph 7, where the Security Council has taken a decision to use force, or to authorize the use of force by a particular State

or States, the rules set out in this document and any other rules of international humanitarian law applicable to armed conflicts at sea shall apply to all parties to any such conflict which may ensue.

SECTION IV
AREAS OF NAVAL WARFARE

- 10 Subject to other applicable rules of the law of armed conflict at sea contained in this document or elsewhere, hostile actions by naval forces may be conducted in, on or over:
- (a) the territorial sea and internal waters, the land territories, the exclusive economic zone and continental shelf and, where applicable, the archipelagic waters, of belligerent States;
 - (b) the high seas; *and*
 - (c) subject to paragraphs 34 and 35, the exclusive economic zone and the continental shelf of neutral States.
- 11 The parties to the conflict are encouraged to agree that no hostile actions will be conducted in marine areas containing:
- (a) rare or fragile ecosystems; *or*
 - (b) the habitat of depleted, threatened or endangered species or other forms of marine life.
- 12 In carrying out operations in areas where neutral States enjoy sovereign rights, jurisdiction, or other rights under general international law, belligerents shall have due regard for the legitimate rights and duties of those neutral States.

SECTION V
DEFINITIONS

- 13 For the purposes of this document:
- (a) 'international humanitarian law' means international rules, established by treaties or custom, which limit the right of parties to a

- conflict to use the methods or means of warfare of their choice, or which protect States not party to the conflict or persons and objects that are, or may be, affected by the conflict;
- (b) 'attack' means an act of violence, whether in offence or in defence;
 - (c) 'collateral casualties' or 'collateral damage' means the loss of life of, or injury to, civilians or other protected persons, and damage to or the destruction of the natural environment or objects that are not in themselves military objectives;
 - (d) 'neutral' means any State not party to the conflict;
 - (e) 'hospital ships, coastal rescue craft and other medical transports' means vessels that are protected under the Second Geneva Convention of 1949 and Additional Protocol I of 1977;
 - (f) 'medical aircraft' means an aircraft that is protected under the Geneva Conventions of 1949 and Additional Protocol I of 1977;
 - (g) 'warship' means a ship belonging to the armed forces of a State bearing the external marks distinguishing the character and nationality of such a ship, under the command of an officer duly commissioned by the government of that State and whose name appears in the appropriate service list or its equivalent, and manned by a crew which is under regular armed forces discipline;
 - (h) 'auxiliary vessel' means a vessel, other than a warship, that is owned by or under the exclusive control of the armed forces of a State and used for the time being on government non-commercial service;
 - (i) 'merchant vessel' means a vessel, other than a warship, an auxiliary vessel, or a State vessel such as a customs or police vessel, that is engaged in commercial or private service;
 - (j) 'military aircraft' means an aircraft operated by commissioned units of the armed forces of a State having the military marks of that State, commanded by a member of the armed forces and manned by a crew subject to regular armed forces discipline;
 - (k) 'auxiliary aircraft' means an aircraft, other than a military aircraft, that is owned by or under the exclusive control of the armed forces of a State and used for the time being on government non-commercial service;

- (l) 'civil aircraft' means an aircraft other than a military, auxiliary, or State aircraft such as a customs or police aircraft, that is engaged in commercial or private service;
- (m) 'civil airliner' means a civil aircraft that is clearly marked and engaged in carrying civilian passengers in scheduled or non-scheduled services along Air Traffic Service routes.

PART II

REGIONS OF OPERATIONS

SECTION I

INTERNAL WATERS, TERRITORIAL SEA AND ARCHIPELAGIC WATERS

- 14 Neutral waters consist of the internal waters, territorial sea, and, where applicable, the archipelagic waters, of neutral States. Neutral airspace consists of the airspace over neutral waters and the land territory of neutral States.
- 15 Within and over neutral waters, including neutral waters comprising an international strait and waters in which the right of archipelagic sea lanes passage may be exercised, hostile actions by belligerent forces are forbidden. A neutral State must take such measures as are consistent with Section II of this Part, including the exercise of surveillance, as the means at its disposal allow, to prevent the violation of its neutrality by belligerent forces.
- 16 Hostile actions within the meaning of paragraph 15 include, *inter alia*:
 - (a) attack on or capture of persons or objects located in, on or over neutral waters or territory;
 - (b) use as a base of operations, including attack on or capture of persons or objects located outside neutral waters, if the attack or seizure is conducted by belligerent forces located in, on or over neutral waters;
 - (c) laying of mines; *or*
 - (d) visit, search, diversion or capture.

- 17 Belligerent forces may not use neutral waters as a sanctuary.
- 18 Belligerent military and auxiliary aircraft may not enter neutral airspace. Should they do so, the neutral State shall use the means at its disposal to require the aircraft to land within its territory and shall intern the aircraft and its crew for the duration of the armed conflict. Should the aircraft fail to follow the instructions to land, it may be attacked, subject to the special rules relating to medical aircraft as specified in paragraphs 181-183.
- 19 Subject to paragraphs 29 and 33, a neutral State may, on a non-discriminatory basis, condition, restrict or prohibit the entrance to or passage through its neutral waters by belligerent warships and auxiliary vessels.
- 20 Subject to the duty of impartiality, and to paragraphs 21 and 23-33, and under such regulations as it may establish, a neutral State may, without jeopardizing its neutrality, permit the following acts within its neutral waters:
 - (a) passage through its territorial sea, and where applicable its archipelagic waters, by warships, auxiliary vessels and prizes of belligerent States; warships, auxiliary vessels and prizes may employ pilots of the neutral State during passage;
 - (b) replenishment by a belligerent warship or auxiliary vessel of its food, water and fuel sufficient to reach a port in its own territory;
and
 - (c) repairs of belligerent warships or auxiliary vessels found necessary by the neutral State to make them seaworthy; such repairs may not restore or increase their fighting strength.
- 21 A belligerent warship or auxiliary vessel may not extend the duration of its passage through neutral waters, or its presence in those waters for replenishment or repair, for longer than 24 hours unless unavoidable on account of damage or the stress of weather. The foregoing rule does not apply in international straits and waters in which the right of archipelagic sea lanes passage is exercised.
- 22 Should a belligerent State be in violation of the regime of neutral waters, as set out in this document, the neutral State is under an obligation to take the measures necessary to terminate the violation. If the neutral State fails to terminate the violation of its neutral waters

by a belligerent, the opposing belligerent must so notify the neutral State and give that neutral State a reasonable time to terminate the violation by the belligerent. If the violation of the neutrality of the State by the belligerent constitutes a serious and immediate threat to the security of the opposing belligerent and the violation is not terminated, then that belligerent may, in the absence of any feasible and timely alternative, use such force as is strictly necessary to respond to the threat posed by the violation.

SECTION II

INTERNATIONAL STRAITS AND ARCHIPELAGIC SEA LANES

General rules

- 23 Belligerent warships and auxiliary vessels and military and auxiliary aircraft may exercise the rights of passage through, under or over neutral international straits and of archipelagic sea lanes passage provided by general international law.
- 24 The neutrality of a State bordering an international strait is not jeopardized by the transit passage of belligerent warships, auxiliary vessels, or military or auxiliary aircraft, nor by the innocent passage of belligerent warships or auxiliary vessels through that strait.
- 25 The neutrality of an archipelagic State is not jeopardized by the exercise of archipelagic sea lanes passage by belligerent warships, auxiliary vessels, or military or auxiliary aircraft.
- 26 Neutral warships, auxiliary vessels, and military and auxiliary aircraft may exercise the rights of passage provided by general international law through, under and over belligerent international straits and archipelagic waters. The neutral State should, as a precautionary measure, give timely notice of its exercise of the rights of passage to the belligerent State.

Transit passage and archipelagic sea lanes passage

- 27 The rights of transit passage and archipelagic sea lanes passage applicable to international straits and archipelagic waters in peacetime continue to apply in times of armed conflict. The laws and regulations of States bordering straits and archipelagic States relating to transit passage and archipelagic sea lanes passage adopted in accordance with general international law remain applicable.
- 28 Belligerent and neutral surface ships, submarines and aircraft have the rights of transit passage and archipelagic sea lanes passage through, under, and over all straits and archipelagic waters to which these rights generally apply.
- 29 Neutral States may not suspend, hamper, or otherwise impede the right of transit passage nor the right of archipelagic sea lanes passage.
- 30 A belligerent in transit passage through, under and over a neutral international strait, or in archipelagic sea lanes passage through, under and over neutral archipelagic waters, is required to proceed without delay, to refrain from the threat or use of force against the territorial integrity or political independence of the neutral littoral or archipelagic State, or in any other manner inconsistent with the purposes of the Charter of the United Nations, and otherwise to refrain from any hostile actions or other activities not incident to their transit. Belligerents passing through, under and over neutral straits or waters in which the right of archipelagic sea lanes passage applies are permitted to take defensive measures consistent with their security, including launching and recovery of aircraft, screen formation steaming, and acoustic and electronic surveillance. Belligerents in transit or archipelagic sea lanes passage may not, however, conduct offensive operations against enemy forces, nor use such neutral waters as a place of sanctuary nor as a base of operations.

Innocent passage

- 31 In addition to the exercise of the rights of transit and archipelagic sea lanes passage, belligerent warships and auxiliary vessels may, subject to paragraphs 19 and 21, exercise the right of innocent passage through neutral international straits and archipelagic waters in accordance with general international law.

- 32 Neutral vessels may likewise exercise the right of innocent passage through belligerent international straits and archipelagic waters.
- 33 The right of non-suspendable innocent passage ascribed to certain international straits by international law may not be suspended in time of armed conflict.

SECTION III

EXCLUSIVE ECONOMIC ZONE AND CONTINENTAL SHELF

- 34 If hostile actions are conducted within the exclusive economic zone or on the continental shelf of a neutral State, belligerent States shall, in addition to observing the other applicable rules of the law of armed conflict at sea, have due regard for the rights and duties of the coastal State, *inter alia*, for the exploration and exploitation of the economic resources of the exclusive economic zone and the continental shelf and the protection and preservation of the marine environment. They shall, in particular, have due regard for artificial islands, installations, structures and safety zones established by neutral States in the exclusive economic zone and on the continental shelf.
- 35 If a belligerent considers it necessary to lay mines in the exclusive economic zone or the continental shelf of a neutral State, the belligerent shall notify that State, and shall ensure, *inter alia*, that the size of the minefield and the type of mines used do not endanger artificial islands, installations and structures, nor interfere with access thereto, and shall avoid so far as practicable interference with the exploration or exploitation of the zone by the neutral State. Due regard shall also be given to the protection and preservation of the marine environment.

SECTION IV

HIGH SEAS AND SEA-BED BEYOND NATIONAL JURISDICTION

- 36 Hostile actions on the high seas shall be conducted with due regard for the exercise by neutral States of rights of exploration and exploi-

tation of the natural resources of the sea-bed, and ocean floor, and the subsoil thereof, beyond national jurisdiction.

- 37 Belligerents shall take care to avoid damage to cables and pipelines laid on the sea-bed which do not exclusively serve the belligerents.

PART III
BASIC RULES AND
TARGET DISCRIMINATION

SECTION I
BASIC RULES

- 38 In any armed conflict the right of the parties to the conflict to choose methods or means of warfare is not unlimited.
- 39 Parties to the conflict shall at all times distinguish between civilians or other protected persons and combatants and between civilian or exempt objects and military objectives.
- 40 In so far as objects are concerned, military objectives are limited to those objects which by their nature, location, purpose or use make an effective contribution to military action and whose total or partial destruction, capture or neutralization, in the circumstances ruling at the time, offers a definite military advantage.
- 41 Attacks shall be limited strictly to military objectives. Merchant vessels and civil aircraft are civilian objects unless they are military objectives in accordance with the principles and rules set forth in this document.
- 42 In addition to any specific prohibitions binding upon the parties to a conflict, it is forbidden to employ methods or means of warfare which:
- (a) are of a nature to cause superfluous injury or unnecessary suffering; *or*
 - (b) are indiscriminate, in that:
 - (i) they are not, or cannot be, directed against a specific military objective; *or*

- (ii) their effects cannot be limited as required by international law as reflected in this document.
- 43 It is prohibited to order that there shall be no survivors, to threaten an adversary therewith or to conduct hostilities on this basis.
- 44 Methods and means of warfare should be employed with due regard for the natural environment taking into account the relevant rules of international law. Damage to or destruction of the natural environment not justified by military necessity and carried out wantonly is prohibited.
- 45 Surface ships, submarines and aircraft are bound by the same principles and rules.

SECTION II

PRECAUTIONS IN ATTACK

- 46 With respect to attacks, the following precautions shall be taken:
 - (a) those who plan, decide upon or execute an attack must take all feasible measures to gather information which will assist in determining whether or not objects which are not military objectives are present in an area of attack;
 - (b) in the light of the information available to them, those who plan, decide upon or execute an attack shall do everything feasible to ensure that attacks are limited to military objectives;
 - (c) they shall furthermore take all feasible precautions in the choice of methods and means in order to avoid or minimize collateral casualties or damage; *and*
 - (d) an attack shall not be launched if it may be expected to cause collateral casualties or damage which would be excessive in relation to the concrete and direct military advantage anticipated from the attack as a whole; an attack shall be cancelled or suspended as soon as it becomes apparent that the collateral casualties or damage would be excessive.

Section VI of this Part provides additional precautions regarding civil aircraft.

SECTION III
**ENEMY VESSELS AND AIRCRAFT EXEMPT
FROM ATTACK**

Classes of vessels exempt from attack

- 47 The following classes of enemy vessels are exempt from attack:
- (a) hospital ships;
 - (b) small craft used for coastal rescue operations and other medical transports;
 - (c) vessels granted safe conduct by agreement between the belligerent parties including:
 - (i) cartel vessels, e.g., vessels designated for and engaged in the transport of prisoners of war;
 - (ii) vessels engaged in humanitarian missions, including vessels carrying supplies indispensable to the survival of the civilian population, and vessels engaged in relief actions and rescue operations;
 - (d) vessels engaged in transporting cultural property under special protection;
 - (e) passenger vessels when engaged only in carrying civilian passengers;
 - (f) vessels charged with religious, non-military scientific or philanthropic missions, vessels collecting scientific data of likely military applications are not protected;
 - (g) small coastal fishing vessels and small boats engaged in local coastal trade, but they are subject to the regulations of a belligerent naval commander operating in the area and to inspection;
 - (h) vessels designated or adapted exclusively for responding to pollution incidents in the marine environment;
 - (i) vessels which have surrendered;
 - (j) life rafts and life boats.

Conditions of exemption

- 48 Vessels listed in paragraph 47 are exempt from attack only if they:
- (a) are innocently employed in their normal role;
 - (b) submit to identification and inspection when required; *and*
 - (c) do not intentionally hamper the movement of combatants and obey orders to stop or move out of the way when required.

Loss of exemption

Hospital ships

- 49 The exemption from attack of a hospital ship may cease only by reason of a breach of a condition of exemption in paragraph 48 and, in such a case, only after due warning has been given naming in all appropriate cases a reasonable time limit to discharge itself of the cause endangering its exemption, and after such warning has remained unheeded.
- 50 If after due warning a hospital ship persists in breaking a condition of its exemption, it renders itself liable to capture or other necessary measures to enforce compliance.
- 51 A hospital ship may only be attacked as a last resort if:
- (a) diversion or capture is not feasible;
 - (b) no other method is available for exercising military control;
 - (c) the circumstances of non-compliance are sufficiently grave that the hospital ship has become, or may be reasonably assumed to be, a military objective; *and*
 - (d) the collateral casualties or damage will not be disproportionate to the military advantage gained or expected.

All other categories of vessels exempt from attack

- 52 If any other class of vessel exempt from attack breaches any of the conditions of its exemption in paragraph 48, it may be attacked only if:
- (a) diversion or capture is not feasible;

- (b) no other method is available for exercising military control;
- (c) the circumstances of non-compliance are sufficiently grave that the vessel has become, or may be reasonably assumed to be, a military objective; *and*
- (d) the collateral casualties or damage will not be disproportionate to the military advantage gained or expected.

Classes of aircraft exempt from attack

53 The following classes of enemy aircraft are exempt from attack:

- (a) medical aircraft;
- (b) aircraft granted safe conduct by agreement between the parties to the conflicts; *and*
- (c) civil airliners.

Conditions of exemption for medical aircraft

54 Medical aircraft are exempt from attack only if they:

- (a) have been recognized as such;
- (b) are acting in compliance with an agreement as specified in paragraph 177;
- (c) fly in areas under the control of own or friendly forces; *or*
- (d) fly outside the area of armed conflict.

In other instances, medical aircraft operate at their own risk.

Conditions of exemption for aircraft granted safe conduct

55 Aircraft granted safe conduct are exempt from attack only if they:

- (a) are innocently employed in their agreed role;
- (b) do not intentionally hamper the movements of combatants; *and*

- (c) comply with the details of the agreement, including availability for inspection.

Conditions of exemption for civil airliners

- 56 Civil airliners are exempt from attack only if they:
- (a) are innocently employed in their normal role; *and*
 - (b) do not intentionally hamper the movements of combatants.

Loss of exemption

- 57 If aircraft exempt from attack breach any of the applicable conditions of their exemption as set forth in paragraphs 54-56, they may be attacked only if:
- (a) diversion for landing, visit and search, and possible capture, is not feasible;
 - (b) no other method is available for exercising military control;
 - (c) the circumstances of non-compliance are sufficiently grave that the aircraft has become, or may be reasonably assumed to be, a military objective; *and*
 - (d) the collateral casualties or damage will not be disproportionate to the military advantage gained or anticipated.
- 58 In case of doubt whether a vessel or aircraft exempt from attack is being used to make an effective contribution to military action, it shall be presumed not to be so used.

SECTION IV

OTHER ENEMY VESSELS AND AIRCRAFT

Enemy merchant vessels

- 59 Enemy merchant vessels may only be attacked if they meet the definition of a military objective in paragraph 40.

- 60 The following activities may render enemy merchant vessels military objectives:
- (a) engaging in belligerent acts on behalf of the enemy, e.g., laying mines, minesweeping, cutting undersea cables and pipelines, engaging in visit and search of neutral merchant vessels or attacking other merchant vessels;
 - (b) acting as an auxiliary to an enemy's armed forces, e.g., carrying troops or replenishing warships;
 - (c) being incorporated into or assisting the enemy's intelligence gathering system, e.g., engaging in reconnaissance, early warning, surveillance, or command, control and communications missions;
 - (d) sailing under convoy of enemy warships or military aircraft;
 - (e) refusing an order to stop or actively resisting visit, search or capture;
 - (f) being armed to an extent that they could inflict damage to a warship; this excludes light individual weapons for the defence of personnel, e.g., against pirates, and purely deflective systems such as 'chaff'; *or*
 - (g) otherwise making an effective contribution to military action, e.g., carrying military materials.
- 61 Any attacks on these vessels is subject to the basic rules set out in paragraphs 38-46.

Enemy civil aircraft

- 62 Enemy civil aircraft may only be attacked if they meet the definition of a military objective in paragraph 40.
- 63 The following activities may render enemy civil aircraft military objectives:
- (a) engaging in acts of war on behalf of the enemy, e.g., laying mines, minesweeping, laying or monitoring acoustic sensors, engaging in electronic warfare, intercepting or attacking other civil aircraft, or providing targeting information to enemy forces;
 - (b) acting as an auxiliary aircraft to an enemy's armed forces, e.g., transporting troops or military cargo, or refuelling military aircraft;

- (c) being incorporated into or assisting the enemy's intelligence-gathering system, e.g., engaging in reconnaissance, early warning, surveillance, or command, control and communications missions;
 - (d) flying under the protection of accompanying enemy warships or military aircraft;
 - (e) refusing an order to identify itself, divert from its track, or proceed for visit and search to a belligerent airfield that is safe for the type of aircraft involved and reasonably accessible, or operating fire control equipment that could reasonably be construed to be part of an aircraft weapon system, or on being intercepted clearly manoeuvring to attack the intercepting belligerent military aircraft;
 - (f) being armed with air-to-air or air-to-surface weapons; *or*
 - (g) otherwise making an effective contribution to military action.
- 64 Any attack on these aircraft is subject to the basic rules set out in paragraphs 38-46.

Enemy warships and military aircraft

- 65 Unless they are exempt from attack under paragraphs 47 or 53, enemy warships and military aircraft and enemy auxiliary vessels and aircraft are military objectives within the meaning of paragraph 40.
- 66 They may be attacked, subject to the basic rules in paragraphs 38-46.

SECTION V

**NEUTRAL MERCHANT VESSELS
AND CIVIL AIRCRAFT**

Neutral merchant vessels

- 67 Merchant vessels flying the flag of neutral States may not be attacked unless they:
- (a) are believed on reasonable grounds to be carrying contraband or breaching a blockade, and after prior warning they intentionally

and clearly refuse to stop, or intentionally and clearly resist visit, search or capture;

- (b) engage in belligerent acts on behalf of the enemy;
 - (c) act as auxiliaries to the enemy's armed forces;
 - (d) are incorporated into or assist the enemy's intelligence system;
 - (e) sail under convoy of enemy warships or military aircraft; *or*
 - (f) otherwise make an effective contribution to the enemy's military action, e.g., by carrying military materials, and it is not feasible for the attacking forces to first place passengers and crew in a place of safety. Unless circumstances do not permit, they are to be given a warning, so that they can re-route, off-load, or take other precautions.
- 68 Any attack on these vessels is subject to the basic rules in paragraphs 38-46.
- 69 The mere fact that a neutral merchant vessel is armed provides no grounds for attacking it.

Neutral civil aircraft

- 70 Civil aircraft bearing the marks of neutral States may not be attacked unless they:
- (a) are believed on reasonable grounds to be carrying contraband, and, after prior warning or interception, they intentionally and clearly refuse to divert from their destination, or intentionally and clearly refuse to proceed for visit and search to a belligerent airfield that is safe for the type of aircraft involved and reasonably accessible;
 - (b) engage in belligerent acts on behalf of the enemy;
 - (c) act as auxiliaries to the enemy's armed forces;
 - (d) are incorporated into or assist the enemy's intelligence system; *or*
 - (e) otherwise make an effective contribution to the enemy's military action, e.g., by carrying military materials, and, after prior warning or interception, they intentionally and clearly refuse to divert from their destination, or intentionally and clearly refuse to pro-

ceed for visit and search to a belligerent airfield that is safe for the type of aircraft involved and reasonably accessible.

- 71 Any attack on these aircraft is subject to the basic rules in paragraphs 38-46.

SECTION VI

PRECAUTIONS REGARDING CIVIL AIRCRAFT

- 72 Civil aircraft should avoid areas of potentially hazardous military activity.
- 73 In the immediate vicinity of naval operations, civil aircraft shall comply with instructions from the belligerents regarding their heading and altitude.
- 74 Belligerent and neutral States concerned, and authorities providing air traffic services, should establish procedures whereby commanders of warships and military aircraft are aware on a continuous basis of designated routes assigned to or flight plans filed by civil aircraft in the area of military operations, including information on communication channels, identification modes and codes, destination, passengers and cargo.
- 75 Belligerent and neutral States should ensure that a Notice to Airmen (NOTAM) is issued providing information on military activities in areas potentially hazardous to civil aircraft, including activation of danger areas or temporary airspace restrictions. This NOTAM should include information on:
- (a) frequencies upon which the aircraft should maintain a continuous listening watch;
 - (b) continuous operation of civil weather-avoidance radar and identification modes and codes;
 - (c) altitude, course and speed restrictions;
 - (d) procedures to respond to radio contact by the military forces and to establish two-way communications; *and*
 - (e) possible action by the military forces if the NOTAM is not complied with and the civil aircraft is perceived by those military forces to be a threat.

- 76 Civil aircraft should file the required flight plan with the cognizant Air Traffic Service, complete with information as to registration, destination, passengers, cargo, emergency communication channels, identification modes and codes, updates en route and carry certificates as to registration, airworthiness, passengers and cargo. They should not deviate from a designated Air Traffic Service route or flight plan without Air Traffic Control clearance unless unforeseen conditions arise, e.g., safety or distress, in which case appropriate notification should be made immediately.
- 77 If a civil aircraft enters an area of potentially hazardous military activity, it should comply with relevant NOTAMs. Military forces should use all available means to identify and warn the civil aircraft, by using, *inter alia*, secondary surveillance radar modes and codes, communications, correlation with flight plan information, interception by military aircraft, and, when possible, contacting the appropriate Air Traffic Control facility.

PART IV

METHODS AND MEANS OF WARFARE AT SEA

SECTION I

MEANS OF WARFARE

Missiles and other projectiles

- 78 Missiles and projectiles, including those with over-the-horizon capabilities, shall be used in conformity with the principles of target discrimination as set out in paragraphs 38-46.

Torpedoes

- 79 It is prohibited to use torpedoes which do not sink or otherwise become harmless when they have completed their run.

Mines

- 80 Mines may only be used for legitimate military purposes including the denial of sea areas to the enemy.
- 81 Without prejudice to the rules set out in paragraph 82, the parties to the conflict shall not lay mines unless effective neutralization occurs when they have become detached or control over them is otherwise lost.
- 82 It is forbidden to use free-floating mines unless:
- (a) they are directed against a military objective; *and*
 - (b) they become harmless within an hour after loss of control over them.
- 83 The laying of armed mines or the arming of pre-laid mines must be notified unless the mines can only detonate against vessels which are military objectives.
- 84 Belligerents shall record the locations where they have laid mines.
- 85 Mining operations in the internal waters, territorial sea or archipelagic waters of a belligerent State should provide, when the mining is first executed, for free exit of shipping of neutral States.
- 86 Mining of neutral waters by a belligerent is prohibited.
- 87 Mining shall not have the practical effect of preventing passage between neutral waters and international waters.
- 88 The minelaying States shall pay due regard to the legitimate uses of the high seas by, *inter alia*, providing safe alternative routes for shipping of neutral States.
- 89 Transit passage through international straits and passage through waters subject to the right of archipelagic sea lanes passage shall not be impeded unless safe and convenient alternative routes are provided.
- 90 After the cessation of active hostilities, parties to the conflict shall do their utmost to remove or render harmless the mines they have laid, each party removing its own mines. With regard to mines laid in the territorial seas of the enemy, each party shall notify their position and shall proceed with the least possible delay to remove the mines in its territorial sea or otherwise render the territorial sea safe for navigation.
- 91 In addition to their obligations under paragraph 90, parties to the conflict shall endeavour to reach agreement, both among themselves

and, where appropriate, with other States and with international organizations, on the provision of information and technical and material assistance, including in appropriate circumstances joint operations, necessary to remove minefields or otherwise render them harmless.

- 92 Neutral States do not commit an act inconsistent with the laws of neutrality by clearing mines laid in violation of international law.

SECTION II

METHODS OF WARFARE

Blockade

- 93 A blockade shall be declared and notified to all belligerents and neutral States.
- 94 The declaration shall specify the commencement, duration, location, and extent of the blockade and the period within which vessels of neutral States may leave the blockaded coastline.
- 95 A blockade must be effective. The question whether a blockade is effective is a question of fact.
- 96 The force maintaining the blockade may be stationed at a distance determined by military requirements.
- 97 A blockade may be enforced and maintained by a combination of legitimate methods and means of warfare provided this combination does not result in acts inconsistent with the rules set out in this document.
- 98 Merchant vessels believed on reasonable grounds to be breaching a blockade may be captured. Merchant vessels which, after prior warning, clearly resist capture may be attacked.
- 99 A blockade must not bar access to the ports and coasts of neutral States.
- 100 A blockade must be applied impartially to the vessels of all States.
- 101 The cessation, temporary lifting, re-establishment, extension or other alteration of a blockade must be declared and notified as in paragraphs 93 and 94.

- 102 The declaration or establishment of a blockade is prohibited if:
- (a) it has the sole purpose of starving the civilian population or denying it other objects essential for its survival; *or*
 - (b) the damage to the civilian population is, or may be expected to be, excessive in relation to the concrete and direct military advantage anticipated from the blockade.
- 103 If the civilian population of the blockaded territory is inadequately provided with food and other objects essential for its survival, the blockading party must provide for free passage of such foodstuffs and other essential supplies, subject to:
- (a) the right to prescribe the technical arrangements, including search, under which such passage is permitted; *and*
 - (b) the condition that the distribution of such supplies shall be made under the local supervision of a Protecting Power or a humanitarian organization which offers guarantees of impartiality, such as the International Committee of the Red Cross.
- 104 The blockading belligerent shall allow the passage of medical supplies for the civilian population or for the wounded and sick members of armed forces, subject to the right to prescribe technical arrangements, including search, under which such passage is permitted.

Zones

- 105 A belligerent cannot be absolved of its duties under international humanitarian law by establishing zones which might adversely affect the legitimate uses of defined areas of the sea.
- 106 Should a belligerent, as an exceptional measure, establish such a zone:
- (a) the same body of law applies both inside and outside the zone;
 - (b) the extent, location and duration of the zone and the measures imposed shall not exceed what is strictly required by military necessity and the principles of proportionality;
 - (c) due regard shall be given to the rights of neutral States to legitimate uses of the seas;
 - (d) necessary safe passage through the zone for neutral vessels and aircraft shall be provided:

- (i) where the geographical extent of the zone significantly impedes free and safe access to the ports and coasts of a neutral State;
 - (ii) in other cases where normal navigation routes are affected, except where military requirements do not permit; *and*
 - (e) the commencement, duration, location and extent of the zone, as well as the restrictions imposed, shall be publicly declared and appropriately notified.
- 107 Compliance with the measures taken by one belligerent in the zone shall not be construed as an act harmful to the opposing belligerent.
- 108 Nothing in this Section should be deemed to derogate from the customary belligerent right to control neutral vessels and aircraft in the immediate vicinity of naval operations.

SECTION III

DECEPTION, RUSES OF WAR AND PERFIDY

- 109 Military and auxiliary aircraft are prohibited at all times from feigning exempt, civilian or neutral status.
- 110 Ruses of war are permitted. Warships and auxiliary vessels, however, are prohibited from launching an attack whilst flying a false flag, and at all times from actively simulating the status of:
- (a) hospital ships, small coastal rescue craft or medical transports;
 - (b) vessels on humanitarian missions;
 - (c) passenger vessels carrying civilian passengers;
 - (d) vessels protected by the United Nations flag;
 - (e) vessels guaranteed safe conduct by prior agreement between the parties, including cartel vessels;
 - (f) vessels entitled to be identified by the emblem of the red cross or red crescent; *or*
 - (g) vessels engaged in transporting cultural property under special protection.

- 111 Perfidy is prohibited. Acts inviting the confidence of an adversary to lead it to believe that it is entitled to, or is obliged to accord, protection under the rules of international law applicable in armed conflict, with intent to betray that confidence, constitute perfidy. Perfidious acts include the launching of an attack while feigning:
- (a) exempt, civilian, neutral or protected United Nations status;
 - (b) surrender or distress by, e.g., sending a distress signal or by the crew taking to life rafts.

PART V

MEASURES SHORT OF ATTACK: INTERCEPTION, VISIT, SEARCH, DIVERSION AND CAPTURE

SECTION I

DETERMINATION OF ENEMY CHARACTER OF VESSELS AND AIRCRAFT

- 112 The fact that a merchant vessel is flying the flag of an enemy State or that a civil aircraft bears the marks of an enemy State is conclusive evidence of its enemy character.
- 113 The fact that a merchant vessel is flying the flag of a neutral State or a civil aircraft bears the marks of a neutral State is *prima facie* evidence of its neutral character.
- 114 If the commander of a warship suspects that a merchant vessel flying a neutral flag in fact has enemy character, the commander is entitled to exercise the right of visit and search, including the right of diversion for search under paragraph 121.
- 115 If the commander of a military aircraft suspects that a civil aircraft with neutral marks in fact has enemy character, the commander is entitled to exercise the right of interception and, if circumstances require, the right to divert for the purpose of visit and search.
- 116 If, after visit and search, there is reasonable ground for suspicion that the merchant vessel flying a neutral flag or a civil aircraft with

neutral marks has enemy character, the vessel or aircraft may be captured as prize subject to adjudication.

- 117 Enemy character can be determined by registration, ownership, charter or other criteria.

SECTION II

VISIT AND SEARCH OF MERCHANT VESSELS

Basic rules

- 118 In exercising their legal rights in an international armed conflict at sea, belligerent warships and military aircraft have a right to visit and search merchant vessels outside neutral waters where there are reasonable grounds for suspecting that they are subject to capture.
- 119 As an alternative to visit and search, a neutral merchant vessel may, with its consent, be diverted from its declared destination.

Merchant vessels under convoy of accompanying neutral warships

- 120 A neutral merchant vessel is exempt from the exercise of the right of visit and search if it meets the following conditions:
- (a) it is bound for a neutral port;
 - (b) it is under the convoy of an accompanying neutral warship of the same nationality or a neutral warship of a State with which the flag State of the merchant vessel has concluded an agreement providing for such convoy;
 - (c) the flag State of the neutral warship warrants that the neutral merchant vessel is not carrying contraband or otherwise engaged in activities inconsistent with its neutral status; *and*
 - (d) the commander of the neutral warship provides, if requested by the commander of an intercepting belligerent warship or military aircraft, all information as to the character of the merchant vessel and its cargo as could otherwise be obtained by visit and search.

Diversion for the purpose of visit and search

- 121 If visit and search at sea is impossible or unsafe, a belligerent warship or military aircraft may divert a merchant vessel to an appropriate area or port in order to exercise the right of visit and search.

Measures of supervision

- 122 In order to avoid the necessity of visit and search, belligerent States may establish reasonable measures for the inspection of cargo of neutral merchant vessels and certification that a vessel is not carrying contraband.
- 123 The fact that a neutral merchant vessel has submitted to such measures of supervision as the inspection of its cargo and grant of certificates of non-contraband cargo by one belligerent is not an act of unneutral service with regard to an opposing belligerent.
- 124 In order to obviate the necessity for visit and search, neutral States are encouraged to enforce reasonable control measures and certification procedures to ensure that their merchant vessels are not carrying contraband.

SECTION III

**INTERCEPTION, VISIT AND SEARCH
OF CIVIL AIRCRAFT**

Basic rules

- 125 In exercising their legal rights in an international armed conflict at sea, belligerent military aircraft have a right to intercept civil aircraft outside neutral airspace where there are reasonable grounds for suspecting they are subject to capture. If, after interception, reasonable grounds for suspecting that a civil aircraft is subject to capture still exist, belligerent military aircraft have the right to order the civil aircraft to proceed for visit and search to a belligerent airfield that is safe for the type of aircraft involved and reasonably accessible.

If there is no belligerent airfield that is safe and reasonably accessible for visit and search, a civil aircraft may be diverted from its declared destination.

126 As an alternative to visit and search:

- (a) an enemy civil aircraft may be diverted from its declared destination;
- (b) a neutral civil aircraft may be diverted from its declared destination with its consent.

***Civil aircraft under the operational control
of an accompanying neutral military aircraft or warship***

127 A neutral civil aircraft is exempt from the exercise of the right of visit and search if it meets the following conditions:

- (a) it is bound for a neutral airfield;
- (b) it is under the operational control of an accompanying:
 - (i) neutral military aircraft or warship of the same nationality; *or*
 - (ii) neutral military aircraft or warship of a State with which the flag State of the civil aircraft has concluded an agreement providing for such control;
- (c) the flag State of the neutral military aircraft or warship warrants that the neutral civil aircraft is not carrying contraband or otherwise engaged in activities inconsistent with its neutral status; *and*
- (d) the commander of the neutral military aircraft or warship provides, if requested by the commander of an intercepting belligerent military aircraft, all information as to the character of the civil aircraft and its cargo as could otherwise be obtained by visit and search.

Measures of interception and supervision

128 Belligerent States should promulgate and adhere to safe procedures for intercepting civil aircraft as issued by the competent international organization.

- 129 Civil aircraft should file the required flight plan with the cognizant Air Traffic Service, complete with information as to registration, destination, passengers, cargo, emergency communication channels, identification modes and codes, updates en route and carry certificates as to registration, airworthiness, passengers and cargo. They should not deviate from a designated Air Traffic Service route or flight plan without Air Traffic Control clearance unless unforeseen conditions arise, e.g., safety or distress, in which case appropriate notification should be made immediately.
- 130 Belligerents and neutrals concerned, and authorities providing air traffic services, should establish procedures whereby commanders of warships and military aircraft are continuously aware of designated routes assigned to and flight plans filed by civil aircraft in the area of military operations, including information on communication channels, identification modes and codes, destination, passengers and cargo.
- 131 In the immediate vicinity of naval operations, civil aircraft shall comply with instructions from the combatants regarding their heading and altitude.
- 132 In order to avoid the necessity of visit and search, belligerent States may establish reasonable measures for the inspection of the cargo of neutral civil aircraft and certification that an aircraft is not carrying contraband.
- 133 The fact that a neutral civil aircraft has submitted to such measures of supervision as the inspection of its cargo and grant of certificates of non-contraband cargo by one belligerent is not an act of unneutral service with regard to an opposing belligerent.
- 134 In order to obviate the necessity for visit and search, neutral States are encouraged to enforce reasonable control measures and certification procedures to ensure that their civil aircraft are not carrying contraband.

SECTION IV

CAPTURE OF ENEMY VESSELS AND GOODS

- 135 Subject to the provisions of paragraph 136, enemy vessels, whether merchant or otherwise, and goods on board such vessels may be

captured outside neutral waters. Prior exercise of visit and search is not required.

136 The following vessels are exempt from capture:

- (a) hospital ships and small craft used for coastal rescue operations;
- (b) other medical transports, so long as they are needed for the wounded, sick and shipwrecked on board;
- (c) vessels granted safe conduct by agreement between the belligerent parties including:
 - (i) cartel vessels, e.g., vessels designated for and engaged in the transport of prisoners of war; *and*
 - (ii) vessels engaged in humanitarian missions, including vessels carrying supplies indispensable to the survival of the civilian population, and vessels engaged in relief actions and rescue operations;
- (d) vessels engaged in transporting cultural property under special protection;
- (e) vessels charged with religious, non-military scientific or philanthropic missions; vessels collecting scientific data of likely military applications are not protected;
- (f) small coastal fishing vessels and small boats engaged in local coastal trade, but they are subject to the regulations of a belligerent naval commander operating in the area and to inspection; *and*
- (g) vessels designed or adapted exclusively for responding to pollution incidents in the marine environment when actually engaged in such activities.

137 Vessels listed in paragraph 136 are exempt from capture only if they:

- (a) are innocently employed in their normal role;
- (b) do not commit acts harmful to the enemy;
- (c) immediately submit to identification and inspection when required; *and*
- (d) do not intentionally hamper the movement of combatants and obey orders to stop or move out of the way when required.

- 138 Capture of a merchant vessel is exercised by taking such vessel as prize for adjudication. If military circumstances preclude taking such a vessel as prize at sea, it may be diverted to an appropriate area or port in order to complete capture. As an alternative to capture, an enemy merchant vessel may be diverted from its declared destination.
- 139 Subject to paragraph 140, a captured enemy merchant vessel may, as an exceptional measure, be destroyed when military circumstances preclude taking or sending such a vessel for adjudication as an enemy prize, only if the following criteria are met beforehand;
- (a) the safety of passengers and crew is provided for; for this purpose, the ship's boats are not regarded as a place of safety unless the safety of the passengers and crew is assured in the prevailing sea and weather conditions by the proximity of land or the presence of another vessel which is in a position to take them on board;
 - (b) documents and papers relating to the prize are safeguarded; *and*
 - (c) if feasible, personal effects of the passengers and crew are saved.
- 140 The destruction of enemy passenger vessels carrying only civilian passengers is prohibited at sea. For the safety of the passengers, such vessels shall be diverted to an appropriate area or port in order to complete capture.

SECTION V

CAPTURE OF ENEMY CIVIL AIRCRAFT AND GOODS

- 141 Subject to the provisions of paragraph 142, enemy civil aircraft and goods on board such aircraft may be captured outside neutral air-space. Prior exercise of visit and search is not required.
- 142 The following aircraft are exempt from capture:
- (a) medical aircraft; *and*
 - (b) aircraft granted safe conduct by agreement between the parties to the conflict.

- 143 Aircraft listed in paragraph 142 are exempt from capture only if they;
- (a) are innocently employed in their normal role;
 - (b) do not commit acts harmful to the enemy;
 - (c) immediately submit to interception and identification when required;
 - (d) do not intentionally hamper the movement of combatants and obey orders to divert from their track when required; *and*
 - (e) are not in breach of a prior agreement.
- 144 Capture is exercised by intercepting the enemy civil aircraft, ordering it to proceed to a belligerent airfield that is safe for the type of aircraft involved and reasonably accessible and, on landing, taking the aircraft as a prize for adjudication. As an alternative to capture, an enemy civil aircraft may be diverted from its declared destination.
- 145 If capture is exercised, the safety of passengers and crew and their personal effects must be provided for. The documents and papers relating to the prize must be safeguarded.

SECTION VI

CAPTURE OF NEUTRAL MERCHANT VESSELS AND GOODS

- 146 Neutral merchant vessels are subject to capture outside neutral waters if they are engaged in any of the activities referred to in paragraph 67 or if it is determined as a result of visit and search or by other means, that they:
- (a) are carrying contraband;
 - (b) are on a voyage especially undertaken with a view to the transport of individual passengers who are embodied in the armed forces of the enemy;
 - (c) are operating directly under enemy control, orders, charter, employment or direction;
 - (d) present irregular or fraudulent documents, lack necessary documents, or destroy, deface or conceal documents;

(e) are violating regulations established by a belligerent within the immediate area of naval operations; *or*

(f) are breaching or attempting to breach a blockade.

Capture of a neutral merchant vessel is exercised by taking such vessel as prize for adjudication.

147 Goods on board neutral merchant vessels are subject to capture only if they are contraband.

148 Contraband is defined as goods which are ultimately destined for territory under the control of the enemy and which may be susceptible for use in armed conflict.

149 In order to exercise the right of capture referred to in paragraphs 146(a) and 147, the belligerent must have published contraband lists. The precise nature of a belligerent's contraband list may vary according to the particular circumstances of the armed conflict. Contraband lists shall be reasonably specific.

150 Goods not on the belligerent's contraband list are 'free goods', that is, not subject to capture. As a minimum, 'free goods' shall include the following:

(a) religious objects;

(b) articles intended exclusively for the treatment of the wounded and sick and for the prevention of disease;

(c) clothing, bedding, essential foodstuffs, and means of shelter for the civilian population in general, and women and children in particular, provided there is not serious reason to believe that such goods will be diverted to other purpose, or that a definite military advantage would accrue to the enemy by their substitution for enemy goods that would thereby become available for military purposes;

(d) items destined for prisoners of war, including individual parcels and collective relief shipments containing food, clothing, educational, cultural, and recreational articles;

(e) goods otherwise specifically exempted from capture by international treaty or by special arrangement between belligerents; *and*

(f) other goods not susceptible for use in armed conflict.

151 Subject to paragraph 152, a neutral vessel captured in accordance with paragraph 146 may, as an exceptional measure, be destroyed when military circumstances preclude taking or sending such a

vessel for adjudication as an enemy prize, only if the following criteria are met beforehand:

- (a) the safety of passengers and crew is provided for; for this purpose the ship's boats are not regarded as a place of safety unless the safety of the passengers and crew is assured in the prevailing sea and weather conditions, by the proximity of land, or the presence of another vessel which is in a position to take them on board;
- (b) documents and papers relating to the captured vessel are safeguarded; *and*
- (c) if feasible, personal effects of the passengers and crew are saved.

Every effort should be made to avoid destruction of a captured neutral vessel. Therefore, such destruction shall not be ordered without there being entire satisfaction that the captured vessel can neither be sent into a belligerent port, nor diverted, nor properly released. A vessel may not be destroyed under this paragraph for carrying contraband unless the contraband, reckoned either by value, weight, volume or freight, forms more than half the cargo. Destruction shall be subject to adjudication.

- 152 The destruction of captured neutral passenger vessels carrying civilian passengers is prohibited at sea. For the safety of the passengers, such vessels shall be diverted to an appropriate port in order to complete capture provided for in paragraph 146.

SECTION VII

CAPTURE OF NEUTRAL CIVIL AIRCRAFT AND GOODS

- 153 Neutral civil aircraft are subject to capture outside neutral airspace if they are engaged in any of the activities in paragraph 70 or if it is determined as a result of visit and search or by any other means, that they:
- (a) are carrying contraband;
 - (b) are on a flight especially undertaken with a view to the transport of individual passengers who are embodied in the armed forces of the enemy;

- (c) are operating directly under enemy control, orders, charter, employment or direction;
 - (d) present irregular or fraudulent documents, lack necessary documents, or destroy, deface or conceal documents;
 - (e) are violating regulations established by a belligerent within the immediate area of naval operations; *or*
 - (f) are engaged in a breach of blockade.
- 154 Goods on board neutral civil aircraft are subject to capture only if they are contraband.
- 155 The rules regarding contraband as prescribed in paragraphs 148-150 shall also apply to goods on board neutral civil aircraft.
- 156 Capture is exercised by intercepting the neutral civil aircraft, ordering it to proceed to a belligerent airfield that is safe for the type of aircraft involved and reasonably accessible and, on landing and after visit and search, taking it as prize for adjudication. If there is no belligerent airfield that is safe and reasonably accessible, a neutral civil aircraft may be diverted from its declared destination.
- 157 As an alternative to capture, a neutral civil aircraft may, with its consent, be diverted from its declared destination.
- 158 If capture is exercised, the safety of passengers and crew and their personal effects must be provided for. The documents and papers relating to the prize must be safeguarded.

PART VI

PROTECTED PERSONS, MEDICAL TRANSPORTS AND MEDICAL AIRCRAFT

GENERAL RULES

- 159 Except as provided for in paragraph 171, the provisions of this Part are not to be construed as in any way departing from the provisions of the Second Geneva Convention of 1949 and Additional Protocol I of 1977 which contain detailed rules for the treatment of the wounded, sick and shipwrecked and for medical transports.

- 160 The parties to the conflict may agree, for humanitarian purposes, to create a zone in a defined area of the sea in which only activities consistent with those humanitarian purposes are permitted.

SECTION I

PROTECTED PERSONS

- 161 Persons on board vessels and aircraft having fallen into the power of a belligerent or neutral shall be respected and protected. While at sea and thereafter until determination of their status, they shall be subject to the jurisdiction of the State exercising power over them.
- 162 Members of the crews of hospital ships may not be captured during the time they are in the service of these vessels. Members of the crews of rescue craft may not be captured while engaging in rescue operations.
- 163 Persons on board other vessels or aircraft exempt from capture listed in paragraphs 136 and 142 may not be captured.
- 164 Religious and medical personnel assigned to the spiritual and medical care of the wounded, sick and shipwrecked shall not be considered prisoners of war. They may, however, be retained as long as their services for the medical or spiritual needs of prisoners of war are needed.
- 165 Nationals of an enemy State, other than those specified in paragraphs 162-164, are entitled to prisoner-of-war status and may be made prisoners of war if they are:
- (a) members of the enemy's armed forces;
 - (b) persons accompanying the enemy's armed forces;
 - (c) crew members of auxiliary vessels or auxiliary aircraft;
 - (d) crew members of enemy merchant vessels or civil aircraft not exempt from capture, unless they benefit from more favourable treatment under other provisions of international law; *or*
 - (e) crew members of neutral merchant vessels or civil aircraft that have taken a direct part in the hostilities on the side of the enemy, or served as an auxiliary for the enemy.

- 166 Nationals of a neutral State:
- (a) who are passengers on board enemy or neutral vessels or aircraft are to be released and may not be made prisoners of war unless they are members of the enemy's armed forces or have personally committed acts of hostility against the captor;
 - (b) who are members of the crew of enemy warships or auxiliary vessels or military aircraft or auxiliary aircraft are entitled to prisoner-of-war status and may be made prisoners of war;
 - (c) who are members of the crew of enemy or neutral merchant vessels or civil aircraft are to be released and may not be made prisoners of war unless the vessel or aircraft has committed an act covered by paragraphs 60, 63, 67 or 70, or the member of the crew has personally committed an act of hostility against the captor.
- 167 Civilian persons other than those specified in paragraphs 162-166 are to be treated in accordance with the Fourth Geneva Convention of 1949.
- 168 Persons having fallen into the power of a neutral State are to be treated in accordance with Hague Conventions V and XIII of 1907 and the Second Geneva Convention of 1949.

SECTION II

MEDICAL TRANSPORTS

- 169 In order to provide maximum protection for hospital ships from the moment of the outbreak of hostilities, States may beforehand make general notification of the characteristics of their hospital ships as specified in Article 22 of the Second Geneva Convention of 1949. Such notification should include all available information on the means whereby the ship may be identified.
- 170 Hospital ships may be equipped with purely deflective means of defence, such as chaff and flares. The presence of such equipment should be notified.
- 171 In order to fulfil most effectively their humanitarian mission, hospital ships should be permitted to use cryptographic equipment. The

- equipment shall not be used in any circumstances to transmit intelligence data nor in any other way to acquire any military advantage.
- 172 Hospital ships, small craft used for coastal rescue operations and other medical transports are encouraged to implement the means of identification set out in Annex I of Additional Protocol I of 1977.
- 173 These means of identification are intended only to facilitate identification and do not, of themselves, confer protected status.

SECTION III

MEDICAL AIRCRAFT

- 174 Medical aircraft shall be protected and respected as specified in the provisions of this document.
- 175 Medical aircraft shall be clearly marked with the emblem of the red cross or red crescent, together with their national colours, on their lower, upper and lateral surfaces. Medical aircraft are encouraged to implement the other means of identification set out in Annex I of Additional Protocol I of 1977 at all times. Aircraft chartered by the International Committee of the Red Cross may use the same means of identification as medical aircraft. Temporary medical aircraft which cannot, either for lack of time or because of their characteristics, be marked with the distinctive emblem should use the most effective means of identification available.
- 176 Means of identification are intended only to facilitate identification and do not, of themselves, confer protected status.
- 177 Parties to the conflict are encouraged to notify medical flights and conclude agreements at all times, especially in areas where control by any party to the conflict is not clearly established. When such an agreement is concluded, it shall specify the altitudes, times and routes for safe operation and should include means of identification and communications.
- 178 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.

- 179 Other aircraft, military or civilian, belligerent or neutral, that are employed in the search for, rescue or transport of the wounded, sick and shipwrecked, operate at their own risk, unless pursuant to prior agreement between the parties to the conflict.
- 180 Medical aircraft flying over areas which are physically controlled by the opposing belligerent, or over areas the physical control of which is not clearly established, may be ordered to land to permit inspection. Medical aircraft shall obey any such order.
- 181 Belligerent medical aircraft shall not enter neutral airspace except by prior agreement. When within neutral airspace pursuant to agreement, medical aircraft shall comply with the terms of the agreement. The terms of the agreement may require the aircraft to land for inspection at a designated airport within the neutral State. Should the agreement so require, the inspection and follow-on action shall be conducted in accordance with paragraphs 182-183.
- 182 Should a medical aircraft, in the absence of an agreement or in deviation from the terms of an agreement, enter neutral airspace, either through navigational error or because of an emergency affecting the safety of the flight, it shall make every effort to give notice and to identify itself. Once the aircraft is recognized as a medical aircraft by the neutral State, it shall not be attacked but may be required to land for inspection. Once it has been inspected, and if it is determined in fact to be a medical aircraft, it shall be allowed to resume its flight.
- 183 If the inspection reveals that the aircraft is not a medical aircraft, it may be captured, and the occupants shall, unless agreed otherwise between the neutral State and the parties to the conflict, be detained in the neutral State where so required by the rules of international law applicable in armed conflict, in such a manner that they cannot again take part in the hostilities.
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Safety of United Nations personnel

“Convention on the Safety of United Nations and Associated Personnel”: Presentation and analysis

by **Antoine Bouvier**

Introduction

On 9 December 1994 the United Nations General Assembly adopted by consensus the Convention on the Safety of United Nations and Associated Personnel. In so doing it completed a process of *codification* and *progressive development* of international law at an unusually fast pace, considering that the Ad Hoc Committee entrusted by the 48th General Assembly (1993) with drafting the Convention took less than nine months to complete its task.

Such speed can be explained only by the urgent need to give United Nations staff better protection in the accomplishment of their increasingly numerous, dangerous and complex duties.

At the time, the General Assembly fully recognized that need, declaring itself “(...) *gravely concerned at the increasing number of attacks on United Nations and associated personnel that have caused death or serious injury*” and “(...) *recognizing the need to strengthen and keep under review arrangements for the protection*” of that staff.¹

The Convention on the Safety of United Nations and Associated Personnel (referred to hereinafter as “the Convention”) has of course been prompted by the considerable increase in the number and scope of *peace-keeping* and *peace-making* operations.

¹ See Preamble to resolution 49/59 adopted by the United Nations General Assembly on 9 December 1994.

Its provisions must therefore be analysed first and foremost from that point of view, although such an approach, limited as it is to *jus ad* or *contra bellum*, would not suffice in itself because the Convention must also be considered in relation to *jus in bello*. Thought should accordingly be given to *where*, *how* and *in what circumstances* the Convention can or must fit within the broader framework of international humanitarian law.

That is the purpose of this study. Some aspects, such as the repression of breaches, have intentionally been left outside the scope of our analysis.

Part I of the study is devoted to a general presentation of the Convention, including a reminder of how it came into being. In view of the small number of studies hitherto devoted to the Convention it seemed appropriate to highlight its “legislative history”. Part I concludes with a summary of its main provisions.

Part II is more analytical and examines certain provisions of the Convention from the standpoint of international humanitarian law. Special attention is therefore given to the *formal* and *material scope of application* of the Convention, i.e. the categories of personnel protected and the situations in which the treaty is applicable.

The study ends with a few comments on the strengths and weaknesses of the Convention and the pitfalls that may lie ahead of it.

I. Origin, negotiation and content of the Convention

A. Origin of the Convention

Although from its earliest years the United Nations has had cause to deplore the loss of colleagues engaged on dangerous missions,² the perils sometimes encountered by United Nations personnel have not seriously hampered the organization’s activities.

Consequently, it was generally accepted that “working under the banner of the United Nations ... provided its personnel with safe passage and an unwritten guarantee of protection”.³

² For details of these losses see M. Arsanjani: *Protection of United Nations Personnel*, paper submitted on 11 March 1995 during a colloquium held at the University of Durham, draft, pp. 2 and 3.

³ See Note by the Secretary-General, Doc. A/AC.24/1 of 25 March 1994, paragraph 4.

Since the early 1990s, the situation has radically changed and risks to life and limb of personnel engaged by the United Nations have greatly increased. Whereas injuries in the past were largely accidental, nowadays United Nations personnel are often deliberately attacked with the sole aim of paralysing the operation in which they are engaged. To give but one example of how the situation has worsened, out of a total of 1,074 dead in all past and ongoing missions by United Nations military contingents up to late March 1994, 202 military personnel were killed in 1993 alone.⁴

Many factors lie behind this increase in the number of victims, especially the greater frequency with which the United Nations is required to intervene in internal conflicts and situations in which all authority has disappeared.

The United Nations quickly realized the need to take steps to enhance the safety of personnel. As early as 1992, the Secretary-General drew attention to "(...) the pressing need to afford adequate protection to UN personnel engaged in life-endangering circumstances".⁵

The international community as a whole, and States regularly contributing to peace-keeping operations in particular, lost no time in responding to the issues highlighted by the United Nations Secretary-General. In a statement read out by its President on 31 March 1993, for instance, the Security Council declared that attacks against United Nations forces and personnel were unacceptable, and demanded that States act promptly and effectively to prosecute and punish the perpetrators of such acts.⁶

Furthermore, in a letter to the Secretary-General dated 25 June 1993, the New Zealand representative called for the question of protection for United Nations personnel to be considered at the 48th Session of the General Assembly. In a memorandum annexed to that letter, New Zealand noted that personnel were inadequately protected by the existing international rules and that the Member States had only limited means for prosecuting infringements of the security of United Nations staff. It was suggested that a Convention be concluded to that effect.⁷

⁴ *Ibid.* For other statistics on the number of victims see Arsanjani, *op. cit.*, p. 1; United Nations Press Release GA/PK/125, 11 April 1995, p. 1; United States Mission to the United Nations, Press Release, 217-(94), 9 December 1994, p. 1.

⁵ See Boutros Boutros-Ghali, *An Agenda for Peace*, Doc. A/47/277-S/24111, June 1992, paragraph 68.

⁶ See Press Release GA/PK/125, 11 April 1994, p. 5; Doc. S/25493.

⁷ *Ibid.*, UNGA 49th Session, item 141, Statement delivered by the representative of New Zealand, Friday, 9 December 1994, p. 1; Doc. A/48/144.

Responding on 27 August 1993 to the above statement, the Secretary-General presented a report to the Security Council on the security of United Nations operations,⁸ proposing various improvements. Referring to the possibility of drafting a new convention devoted exclusively to the protection of United Nations personnel, the Secretary-General stressed that such an instrument "should codify and further develop customary international law as reflected in the recent practice of the United Nations and Member States and should consolidate the set of principles and obligations contained in current multilateral and bilateral treaties".⁹

The Security Council took account of that report in its resolution 868,¹⁰ which provided for certain measures for the protection of personnel to be taken when setting up future peace-keeping operations.

Following the request by New Zealand, the question of protection for United Nations personnel was considered at the 48th Session of the General Assembly (1993) and referred for consideration to the Sixth (Legal) Committee, which set up an Ad Hoc Working Group.

The Working Group members recognized the need to improve the protection of personnel¹¹ and agreed that a convention should be elaborated on the subject. To that end New Zealand and Ukraine submitted two draft conventions.¹² Both the Working Group and the Sixth Committee recognized the usefulness of both drafts but called for a single draft convention to be prepared.

The outcome of the work by the Sixth Committee was reported to the General Assembly which, on 9 December 1993, adopted resolution 48/37, expressing its concern at the increasing number of attacks on United Nations personnel.

The resolution provided for the establishment of an Ad Hoc Committee, open to all Member States, to elaborate an international convention

⁸ Doc. A/48/349 of 27 August 1993.

⁹ See Doc. A/AC.242/1, Note by the Secretary-General, 25 March 1994, paragraphs 11, 17.

¹⁰ Resolution SC 868 (1993) of 29 September 1993. For an analysis of the resolution, see Doc. A/AC/241/1, paragraphs 12, 17.

¹¹ This need had also been recognized at the International Conference for the Protection of War Victims convened by the Swiss government (Geneva, 30 August-1 September 1993). Particular attention was drawn to it in paragraph 7 of Part I and in paragraphs 8 and 9 of Part II of the Declaration adopted there. For the text of the Declaration, see *International Review of the Red Cross*, No. 296, September-October 1993, pp. 377-381.

¹² Doc. A/C.6/48/L.2 and Doc. A/C.6/48/L.3.

taking into account “any suggestions and proposals from States, as well as comments and suggestions that the Secretary-General may wish to provide”.¹³ The General Assembly further specified that the future convention “should not be limited to the issue of responsibility for attacks on the said personnel”¹⁴, thus implying some modification to the approach adopted in the drafts submitted by New Zealand and Ukraine.¹⁵

B. Elaboration and negotiation of the Convention

Responding to the wishes expressed by the General Assembly during the adoption of resolution 48/37, New Zealand and Ukraine agreed to merge their respective draft conventions in a single document¹⁶ which, they suggested, should be accepted as the Committee’s main working document.

Presenting the joint draft Convention, the New Zealand representative emphasized that it contained relatively few new elements in comparison with the drafts¹⁷ examined by the General Assembly in 1993;¹⁸ it reflected above all an effort of harmonization.

However, he drew the attention of the Ad Hoc Committee to the absence of a draft preamble (which he said should be prepared once the draft Convention was in a more advanced state of development) and to the insertion in the joint draft of a new Article 21 on the settlement of disputes.

Availing themselves of resolution 48/37, which invited States to let the Ad Hoc Committee have their suggestions and proposals, the Nordic countries submitted “a set of elements which we believe should be included in any new legally binding instrument concerning the safety and security of United Nations and associated personnel”.¹⁹ For the most part, those elements related to the material and formal scope of application of

¹³ See Doc. A/AC.242/1 of 25 March 1994, paragraph 3.

¹⁴ *Ibid*, paragraph 8.

¹⁵ See note 12 above.

¹⁶ Doc. A/AC.242/L.2 of 16 March 1994.

¹⁷ See note 12 above and Press Release GA/PK/125 of 11 April 1994, pp. 2-3.

¹⁸ A comparison of the different drafts shows that, subject to a few amendments, Articles 1, 2 and 10-20 of Doc. A/AC.242/L.2 are drawn from the earlier New Zealand draft and Articles 3-9 and 22-27 from the text proposed by Ukraine.

¹⁹ See Doc. A/AC.242/L.3.

the Convention; the fundamental protection to be provided to personnel; the obligation to disseminate the rules of international humanitarian law and the need to offer the United Nations the possibility of acceding to the future Convention.

The Ad Hoc Committee was thus able to start work on 28 March 1994 on the basis of (a) the joint proposal submitted by New Zealand and Ukraine, (b) the proposals of the Nordic countries and, (c) a note by the Secretary-General giving an overview of the problem.²⁰

(a) Organization of work

The Ad Hoc Committee entrusted with elaborating the Convention held its first session from 28 March to 8 April 1994 and its second session from 1 to 12 August 1994.²¹ Open to all Member States, it also agreed to allow Switzerland and the International Committee of the Red Cross to participate with observer status.

During its two sessions, the Ad Hoc Committee decided to constitute itself as a Working Group of the Whole to examine the texts submitted to it.

First session

After a brief general debate, the Committee set up a Working Group to consider the above-mentioned proposals and a number of amendments submitted during the debates.²²

Its deliberations took place in three stages. In the *first stage* it examined on first reading all the draft articles submitted in Doc. A/AC.242/L.2. In the *second stage* the Working Group reviewed on second reading Articles 1 (Definitions) and 2 (Application of Convention). Lastly, in a *third stage*, work continued in the framework of two consultation groups respectively entrusted with the examination of Articles 1-9 and 10-27 of the draft. The work of the consultation groups resulted in a "negotiating text" consisting of Articles 3-27.²³ No agreement was reached on Articles 1 and 2.

²⁰ See Doc. A/AC/242/1 of 25 March 1994.

²¹ See Doc. A/49/22, Report by the Ad Hoc Committee on the elaboration of an international convention dealing with the safety and security of United Nations and associated personnel.

²² *Ibid.*, Annex.

²³ See Doc. A/AC.242/1994/CRP.2 of 8 April 1994.

After its first session, the Ad Hoc Committee decided to hold a second session to review the negotiating text.

Second session

After briefly examining Articles 3-27 of the negotiating text, the Ad Hoc Committee entrusted an Informal Working Group with the preparation of a negotiating text for Articles 1 (Definitions) and 2 (Scope of the Convention). The Working Group completed its task and proposed to the Committee a single draft article entitled "Scope of application and definitions".

The Ad Hoc Committee then examined all the draft articles.²⁴ It concluded its work by adopting a "consolidated negotiating text".²⁵ The text was then transmitted to the Sixth (Legal) Committee of the General Assembly, which took note of it and passed it on to a Working Group which it established on 26 September 1994.

Consideration of the draft Convention by the Working Group of the Sixth Committee

Although set up by a different body, the Working Group was similar in composition to the earlier Ad Hoc Committee.²⁶

At the 11 meetings it held between 3 and 14 October 1994, the Working Group prepared a draft preamble and reviewed the entire draft submitted by the Ad Hoc Committee.

It completed its work on 14 October 1994 and decided to submit a revised draft convention to the Sixth Committee for consideration with a view to its adoption.²⁷

Careful scrutiny of the different drafts that led up to the final text of the Convention reveal that the discussions within the Ad Hoc Committee and later within the Working Group of the Sixth Committee centred on only a limited number of provisions.

In fact, many of the draft articles submitted by New Zealand and Ukraine had simply been the subject of terminological, drafting or tech-

²⁴ See Doc. A/49/22, Annex I, summary of the debate.

²⁵ See Doc. A/AC.242/1994/CRP.13/Rev. 1 of 11 August 1994.

²⁶ See Doc. A/C.6/49/L.4 of 25 October 1994, Report of the Working Group.

²⁷ *Ibid.*, Annex.

nical amendments (numbering changes and running together of sub-paragraphs).²⁸

Several reasons may be advanced to explain the relative ease with which those provisions were adopted, for instance: (a) the quality of the initial draft (which was itself the outcome of numerous consultations and reflected the views stated by the Sixth Committee in 1993); (b) the fact that the Convention is clearly modelled on other international instruments²⁹ and that some of its provisions could thus be adapted to the specific case of staff protection without major difficulty and, (c) the widespread feeling among delegations that urgent solutions had to be found to increasingly disturbing problems.

Another hypothesis, admittedly less satisfying but one which cannot be ruled out in the light of certain ambiguities in the final text, is that there was simply not enough time to amend some of the articles.

(b) Provisions which raised negotiating difficulties

Of those provisions which raised particular drafting difficulties, mention must be made first and foremost of Articles 1 (Definitions), 2 (Scope of application) and 20 (Saving clauses).³⁰

The discussions also led to the adoption of articles which were not in the initial draft; for example, the Preamble³¹ and Articles 4 (Agreements on the status of the operation),³² 5 (Transit),³³ 8 (Duty to release or return United Nations and associated personnel captured or detained)³⁴ and 23 (Review meetings).³⁵

Incidentally, substantive amendments were made to some of the provisions: Articles 3 (Identification),³⁶ 6 (Respect for laws and regula-

²⁸ *Inter alia* in the case of Articles 9, 11, 12, 14-21, 24 and 25-29 of the final text of the Convention.

²⁹ See, for example, the International Convention against the Taking of Hostages of 1979.

³⁰ See II B, C and D below for an analysis of these articles.

³¹ See Doc. A/C.6/49/L.4, paragraph 8; Doc. A/49/22, p. 54.

³² See Doc. A/49/22, paragraphs 24-30.

³³ *Ibid.*, paragraphs 31-35.

³⁴ *Ibid.*, paragraphs 66-67.

³⁵ See Doc. A/C.6/49/L.4, paragraph 13.

³⁶ See A/49/22, paragraphs 15-23.

tions),³⁷ 7 (Duty to ensure the safety and security of United Nations and associated personnel),³⁸ 10 (Establishment of jurisdiction),³⁹ 13 (Measures to ensure prosecution or extradition)⁴⁰ and 22 (Dispute settlement).⁴¹

(c) Adoption of the Convention

The report by the Working Group was introduced on 8 November at a plenary meeting of the Sixth Committee under agenda item 141.⁴² It was presented by the Chairman of the Working Group as reflecting a compromise likely to meet the concerns of all Member States. All the delegations which spoke on the issue stressed the speed with which the work had been completed and most delegations indicated their readiness to adopt the draft Convention.

However, several delegations expressed concern about the scope of application of the Convention, which some deemed too broad and diffuse.

A draft resolution⁴³ was tabled by the representatives of New Zealand and Ukraine, calling upon the General Assembly to adopt the draft Convention and open it for signature by States. The Sixth Committee adopted the draft resolution by consensus on 16 November 1994.

The draft Convention⁴⁴ was then submitted to the General Assembly on 9 December 1994 and adopted the same day.⁴⁵ Most of the delegations which spoke following the vote expressed satisfaction at the speed with which the work had been completed, stressed the importance of the Convention and invited the Member States to ratify it as soon as possible.

The Convention was opened for signature by Parties on 15 December 1994. Ten States had signed it by 31 December.⁴⁶ On 11 April 1995, Denmark became the first State to ratify the instrument.

³⁷ *Ibid.*, paragraphs 36-41.

³⁸ *Ibid.*, paragraphs 55-65.

³⁹ *Ibid.*, paragraphs 81-83.

⁴⁰ *Ibid.*, paragraphs 88-91.

⁴¹ See Doc. A/C.6/49/L.4, paragraph 13.

⁴² "Question of responsibility for attacks on United Nations and associated personnel and measures to ensure that those responsible for such attacks are brought to justice".

⁴³ Doc. A/C.6/49/L.9.

⁴⁴ *Ibid.*

⁴⁵ Res. AG49/59.

⁴⁶ At 1 December 1995, 36 States had signed the Convention.

C. Brief presentation of the text of the Convention

A brief presentation of the provisions of the Convention is given below. Those provisions which have a closer link with international humanitarian law are analysed in greater depth.

The *Preamble* to the Convention recalls the increasing number of attacks on United Nations and associated personnel; it stresses the inadequacy of the measures then in force and the urgent need to adopt appropriate and effective supplementary measures.

Article 1 contains certain definitions necessary to an understanding of the Convention. It defines *United Nations personnel* as persons directly engaged by the United Nations or its specialized agencies. *Associated personnel* means persons assigned by a government or by an intergovernmental or non-governmental organization under an agreement with the Secretary-General of the United Nations to carry out activities in support of the fulfilment of the mandate of a United Nations operation. The term *United Nations operation* means an operation established by the competent organ of the United Nations and conducted under United Nations authority and control. This covers operations for the purpose of maintaining or restoring international peace and security, and those involving "an exceptional risk to the safety of the personnel".

Article 1 also defines the notions of *host State*, meaning States in whose territory an operation is conducted, and *transit States*, i.e. States in whose territory United Nations and associated personnel or their equipment are in transit or temporarily present in connection with a United Nations operation.

Article 2 defines the actual scope of application of the Convention, in other words those situations in which the Convention is or is not applicable. In particular, it specifies that the Convention shall *not* apply to operations "authorized by the Security Council as an enforcement action under Chapter VII of the Charter of the United Nations in which any of the personnel are engaged as combatants against organized armed forces and to which the law of international armed conflict applies".

Article 3 stipulates that personnel and means of transport involved in a United Nations operation shall bear distinctive identification.

Article 4, which meets a concern expressed by the Secretary-General,⁴⁷ calls for the conclusion of an agreement on the status of each operation,

⁴⁷ See Doc. A/AC.242/1, paragraphs 11-14 and 16.

including provisions on privileges and immunities for military and police components of the operation.⁴⁸

Article 5 requires transit States to facilitate the unimpeded transit of United Nations and associated personnel and their equipment to and from the host State.

Article 6 obliges United Nations and associated staff to respect the laws and regulations of the host State and the transit State, without prejudice to such privileges and immunities as they may enjoy.

Articles 7 and 8 define the obligations incumbent upon States hosting an operation. *Article 7* requires them to guarantee the inviolability of personnel, premises and equipment assigned to an operation. *Article 8* lays down the duty to release United Nations personnel captured or detained. It further provides that, pending their release, such personnel must be treated in accordance with the principles and spirit of the Geneva Conventions of 1949.

Article 9 lists a series of acts regarded as breaches of the Convention, including the murder and kidnapping of personnel. It prohibits not only the commission of such offences but also any attempts to commit them and participation as an accomplice. Those offences must be regarded by the States Parties as a crime under their own national law.

Article 10 obliges each State Party to take such measures as may be necessary to establish its jurisdiction over the crimes set out in Article 9.

Articles 11, 12, 13 and 16 provide for measures, under criminal law, for the prevention of offences, the exchange of information, and the prosecution or extradition of offenders, and lay down the principle of mutual assistance in criminal matters.

Articles 14 and 15 stipulate the applicability of the *aut judicare aut dedere* principle⁴⁹ to the Convention. *Article 14* requires the State Party in whose territory an offence has been committed to prosecute the alleged

⁴⁸ See, *Ibid.*; during negotiation of the Convention, the United Nations Secretariat frequently indicated the advisability of using as a working document the "Model agreement between the United Nations and Member States contributing personnel and equipment for United Nations peace-keeping operations", Doc. A/46/185.

⁴⁹ This principle, whereby States are obliged to prosecute or extradite alleged offenders, is common to many international treaties, including the Geneva Conventions of 1949 and Additional Protocol I of 1977, and the International Convention against the Taking of Hostages of 1979. See Arsanjani, *op. cit.*, p. 21.

offender without delay. *Article 15* imposes the obligation to extradite alleged offenders who have not been prosecuted under *Article 14*.

Article 17 defines the fair treatment to be guaranteed to alleged offenders against *Article 9*. *Article 18* makes notification of the outcome of proceedings instituted in response to violations of *Article 9* mandatory.

Article 19, inviting States to disseminate the Convention as widely as possible,⁵⁰ is intended to serve a general preventive purpose.

Article 20 contains a number of saving clauses. In particular, it stipulates that nothing in the Convention shall affect: the applicability of international humanitarian law and human rights standards; the rights of States regarding the entry of persons into their territories; the obligation of United Nations personnel to act in accordance with the terms of the mandate of a United Nations operation; the right of States which voluntarily contribute personnel to withdraw them from an operation, and the entitlement to appropriate compensation payable in the event of death, disability, injury or illness attributable to service during a United Nations operation.

Article 21 stipulates that the Convention shall not be so construed as to derogate from the right to act in self-defence.

Article 22 invites States to submit any dispute concerning the interpretation or application of the Convention to negotiation or arbitration.

Article 23 provides for review meetings, at the request of one or more States Parties, to study problems relating to the implementation of the Convention.

Articles 24-27 deal with the signature, ratification, accession and entry into force of the Convention. *Article 28* provides for a denunciation procedure and *Article 29* settles the question of authenticity of texts.

II. Consideration of certain provisions of the Convention from the standpoint of international humanitarian law

A. Introductory remarks

Before analysing specific provisions of the Convention, a word should be said about some aspects of a related problem, namely the applicability

⁵⁰ In both its wording and its purpose, this provision is broadly based on Articles 47, 48, 127 and 144 of the Geneva Conventions of 1949, and on Articles 89 and 19 of the Additional Protocols of 1977.

of international humanitarian law to peace-keeping and peace-making operations.⁵¹

The two subjects are closely interrelated⁵² because — if and when it is applicable — current international humanitarian law can in fact offer some protection to United Nations personnel engaged in such operations.

As it would be superfluous to go into the entire debate concerning the applicability of international humanitarian law to peace-keeping operations, only a brief reminder will be given here of those considerations which must be borne in mind when examining certain provisions of the Convention.

The question of the applicability of international humanitarian law to forces deployed by the United Nations has arisen ever since the first such forces were created.⁵³ For several decades it was of purely academic interest: operations *were few in number, had very limited terms of*

⁵¹ For the most recent contributions on this problem, see E. David: *Précis de droit des conflits armés*, Université libre de Bruxelles, Bruylant, Brussels 1994, pp. 138; C. Emanuelli: *Les actions militaires de l'Organisation des Nations Unies et le droit international humanitaire*, Wilson and Lafleur, Montreal 1995; H.-P. Gasser "Die Anwendbarkeit des humanitären Völkerrechts auf militärische Operationen der Vereinten Nationen", in *Schweizerische Zeitschrift für internationale und europäisches Recht*, 5/1994, pp. 443-473; O. Otunu: "Peacekeeping: from a crossroads to the future", statement delivered at the United Nations Special Committee on Peace-keeping operations, New York, 14 April 1995; U. Palwankar: "Applicability of international humanitarian law to United Nations peace-keeping forces", in *International Review of the Red Cross*, No. 294, May-June 1993, pp. 227-240; T. Pfanner: "Application of international humanitarian law and military operations undertaken under the United Nations Charter", in *Symposium on Humanitarian Action and Peace-keeping Operations*, ICRC, 1995, pp. 51-62; D. Shraga and R. Zacklin: "The applicability of international humanitarian law to United Nations peace-keeping operations: conceptual, legal and practical issues", *ibid.*, pp. 41-50; B. Simma (ed.): *The Charter of the United Nations, a Commentary*, Oxford University Press 1994, pp. 600 ff. For a more detailed analysis of the Convention, see E.T. Bloom: "Protecting Peacekeepers: The Convention on the Safety of United Nations and Associated Personnel", in *American Journal of International Law*, July 1995, Vol. 89, No. 3, pp. 621-631; M.-C. Bourloyannis-Vrailas: "The Convention on the Safety of United Nations and Associated Personnel", in *International and Comparative Law Quarterly*, July 1995, Vol. 44, pp. 560-590.

⁵² See Emanuelli, *op. cit.*, p. 75. The existence of links between the question of the applicability of the rules of international humanitarian law to United Nations operations and the conclusion of a Convention granting special protection to United Nations and associated personnel was a matter raised from the start of the negotiations on the Convention.

⁵³ For instance, in a *Memorandum* addressed on 10 November 1961 to the States party to the Geneva Conventions and United Nations Member States, the ICRC drew the attention of the United Nations Secretary-General to the need to ensure application of the Conventions by the forces placed at the United Nation's disposal, see Palwankar, *op. cit.*, p. 230.

reference and practically excluded the use of force, which meant that, objectively, situations in which international humanitarian law could or should have been applied were rare.

However, the question again became highly relevant at the end of the Cold War. The Security Council gained much greater room for manoeuvre and peace-keeping operations have since then become *far more numerous, diversified* and, at the same time, singularly *complex*.

Since recourse to the use of force in such operations is now much more frequent, the question of the applicability of international humanitarian law can no longer be ignored.

Without going into detail on the largely opposing positions upheld on the subject by the ICRC and the United Nations, it should simply be recalled that whereas the ICRC has systematically spoken up for the applicability of international humanitarian law whenever United Nations forces had to resort to force, the United Nations itself has constantly opposed such an interpretation. Indeed, it put forward various arguments against it, both *legal* (in particular, the fact that the international humanitarian law treaties made no provision for the participation of international organizations); *political* (the impossibility of classifying the United Nations as a "party to conflict")⁵⁴ and *practical* (the extreme difficulty, if not impossibility, for a non-State body to implement certain provisions of international humanitarian law, such as the rules on the role of Protecting Powers or on the prosecution and punishment of offences).

In those discussions, the United Nations preferred to adopt a pragmatic position, declaring that the forces it deployed should observe the principles and spirit of the general international conventions applicable to the conduct of military personnel.⁵⁵

Such a clause now features in a growing number of agreements, such as those between the United Nations and States providing troops.

Since 1992, and this is a major development as it implies direct United Nations responsibility for ensuring respect for international humanitarian law by members of its forces,⁵⁶ a similar clause has been incorporated in

⁵⁴ See Shraga/Zacklin, *op. cit.*, p. 47.

⁵⁵ Such a clause, now standard, appears for the first time in Article 44 of the UNEF Regulations; see UNTS, Vol. 271, p. 168.

⁵⁶ See Shraga/Zacklin, *op. cit.*, p. 47.

the Model agreement on the status of forces for peace-keeping operations⁵⁷ and subsequently in several other agreements.⁵⁸

Such a development in United Nations practice is of course welcome, although the new position falls far short of the interpretation embraced by the ICRC and a growing number of authors.

Indeed, the latter maintain that international humanitarian law (or at least its customary rules) becomes applicable and should therefore be respected as soon as United Nations forces actually resort to the use of force. They hold that while reasons relating to the structure and competence of the United Nations make it impossible to demand respect for all the rules of international humanitarian law, their applicability *mutatis mutandis* should nonetheless be guaranteed.

That interpretation stems from a main principle of humanitarian law, namely that a strict distinction must be drawn between *jus ad bellum* and *jus in bello*, from which the equality of parties in the eyes of international humanitarian law is derived. Under that principle, humanitarian law is applicable as soon as actual hostilities occur between organized armed forces,⁵⁹ regardless of the nature or legal origin of the conflict, the legality of recourse to force or the legitimacy of the cause of the parties in international law.⁶⁰

Mention should also be made of a related but nonetheless important question, namely whether United Nations forces are bound by the rules applicable to international armed conflicts or only by those relating to non-international armed conflicts. It is nowadays generally accepted (and that is the position of the ICRC in particular) that, given the outsider status of United Nations forces and the fact that the United Nations intervenes in an internal conflict not to help one of the parties but to see that Security Council resolutions *are implemented with regard to all parties to the conflict*, those forces should logically be subject to the rules of international humanitarian law applicable in international armed conflicts.⁶¹

⁵⁷ The importance of this Model agreement (Doc. A/45/594) was expressly emphasized by the United Nations Secretary-General during negotiation of the Convention when he said that "(...) it would logically follow that, in drafting the proposed Convention, existing status-of-forces agreements should be used as examples." See Doc. A/AC.242/1, paragraph 13.

⁵⁸ See Shraga/Zacklin, *op. cit.*, p. 47 and note 10.

⁵⁹ See J. Pictet (ed.), *The Geneva Conventions of 12 August 1949, Commentary*, Vol. I, on the First Geneva Convention, ICRC, Geneva 1952, p. 32.

⁶⁰ See Protocol I to the Geneva Conventions of 1949, preambular paragraph 5.

⁶¹ See Emanuelli, *op. cit.*, pp. 24-41.

The question of the applicability of international humanitarian law to peace-keeping operations was often raised during the negotiation of the Convention. While the Convention is not free from ambiguities in that respect, as will be seen in II B and C below, it has nonetheless enabled certain aspects of the problem to be clarified. The discussions leading up to its adoption revealed that international humanitarian law in its present formulation does not completely protect (or at least not as broadly as the United Nations would like) all personnel engaged in humanitarian operations⁶² and that additional rules were therefore needed: as stated above, in the event of hostilities international humanitarian law cannot offer United Nations forces more rights than it does to their adversaries.

Then again (and this is a considerable development), the Convention stipulates that — in some cases⁶³ and *mutatis mutandis* — international humanitarian law as a whole and not just “its principles and spirit” is applicable to United Nations forces,⁶⁴ who hence may then be regarded as a party to conflict.⁶⁵

B. Scope of application in terms of personnel

The Convention protects certain categories of personnel engaged in United Nations operations. Those categories are strictly defined in Article 1 of the Convention as follows:

- a) “United Nations personnel” means:
 - (i) Persons engaged or deployed by the Secretary-General of the United Nations as members of the military, police or civilian components of a United Nations operation;
 - (ii) Other officials and experts on mission of the United Nations or its specialized agencies or the International Atomic Energy Agency who are present in an official capacity in the area where a United Nations operation is being conducted;

⁶² See “Protection afforded to personnel engaged in humanitarian activities by the Geneva Conventions and their Additional Protocols”, ICRC statement to the Ad Hoc Committee, 6 April 1994, p. 4.

⁶³ See II.C below.

⁶⁴ See Shraga/Zacklin, *op. cit.*, pp. 49-50.

⁶⁵ See Emanuelli, *op. cit.*, pp. 87-88.

b) "Associated personnel" means:

- (i) Persons assigned by a government or an intergovernmental organization with the agreement of the competent organ of the United Nations,
- (ii) Persons engaged by the Secretary-General of the United Nations or by a specialized agency or by the International Atomic Energy Agency,
- (iii) Persons deployed by a humanitarian non-governmental organization or agency under an agreement with the Secretary-General of the United Nations or with a specialized agency or with the International Atomic Energy Agency,

to carry out activities in support of the fulfilment of the mandate of a United Nations operation.

At least partially, those definitions meet a desire expressed by the Secretary-General, who proposed that "consideration could be given to extending some of the privileges and immunities presently enjoyed by the Organization and its personnel to civilian contractors and non-governmental organizations (NGOs) and their personnel who are engaged in United Nations operations through contractual or other arrangements".⁶⁶ Incidentally, that wish had already been partially taken into account in the draft Convention submitted by New Zealand and Ukraine, as well as in the working document submitted by the Nordic countries.

Discussions on the definition of categories of protected personnel continued throughout all three sessions of the Ad Hoc Committee and the Working Group of the Sixth Committee. They were singularly complicated because questions relating to the scope of application with regard to *personnel* (the categories of personnel to be protected) and *material* scope of application of the Convention (situations in which that protection should take effect) were often dealt with simultaneously and on occasion were somewhat confused.

Throughout the negotiations, those drafting the Convention had to pursue two almost irreconcilable objectives, namely to ensure protection under the Convention to as many categories of personnel as possible without unduly extending its scope of application, which would have prevented certain States from ratifying it.

⁶⁶ See Doc. A/AC.242/1, paragraph 11.

While the material scope of application of the Convention was confined to operations approved by a Security Council resolution, during both sessions of the Ad Hoc Committee several organizations directly concerned expressed the hope that its coverage would be extended to other categories of operations.

For instance, the Office of the United Nations Security Coordinator⁶⁷ apprised the Committee of the concerns expressed by United Nations specialized agencies regarding the material scope of application proposed, noting that many United Nations staff-members had been killed or wounded in operations mandated not by the Security Council but by other United Nations bodies.⁶⁸

The ICRC also spoke during the discussions. In a statement delivered during the first session of the Ad Hoc Committee, it indicated that it did not believe it should wish to be protected under the Convention being drawn up, because application of the Convention to the ICRC would necessarily imply a fairly close association between it and the United Nations; this would include contexts in which it would generally be essential for the ICRC to be separate and different, and also clearly seen as such.

The explicit desire of the ICRC not to enjoy protection under the Convention may at first sight seem surprising given the daily risks to which its delegates are exposed. However, there are at least two reasons for this.

First, and unlike other categories of personnel, ICRC personnel already enjoy the international protection deriving from the Geneva Conventions, which afford it in particular the protection of the red cross or red crescent emblem.

Secondly, the wish expressed by the ICRC also stemmed from its concern to be able at all times to act as a *neutral humanitarian intermediary* between parties to conflict, a role which might be jeopardized if the ICRC were perceived as being closely linked with the United Nations.

⁶⁷ Doc. A/49/22, paragraph 19.

⁶⁸ Such fears were expressed *inter alia* by the United Nations High Commissioner for Refugees in a document entitled "UNHCR Comments on the proposals by New Zealand and Ukraine for a draft Convention on the Protection of UN Personnel" circulated during the first session of the Ad Hoc Committee. In it, the UNHCR declared that: "(...) an unfortunate result of the present draft would be to extend greater protection to one UN colleague than to another, although they might face similar levels of danger and even be working in the same place".

If hostilities break out between United Nations forces and organized armed groups, the ICRC must have the ability to play that role. Consequently, it cannot be protected by the same rules as United Nations forces, which by definition are infringed whenever such hostilities occur.

The definitions of categories of protected personnel that were finally adopted were for the most part drawn up by an informal working group set up during the second session of the Ad Hoc Committee. They were then finalized during the third session.⁶⁹

The definitions themselves seem clear enough not to warrant lengthy comment. However, it should be stressed that a compromise had to be reached on the thorny question of *associated personnel* (which some delegations wanted to extend to all non-governmental organizations). This made the protection of non-governmental organizations subject to a very close contractual link⁷⁰ with the United Nations. That formulation meets a concern expressed by the ICRC, whose delegates are clearly excluded from the scope of the Convention.

C. Material scope of application

Delimitation of its material scope of application, i.e. the types of situation in which it should apply, gave rise to difficult discussions throughout negotiation of the Convention. The clauses ultimately adopted (Articles 1 c and 2) were finalized only at the very last meetings of the third session.

Given the importance of this subject and the complexity of the discussions to which it gave rise, it would be appropriate to recall chronologically the main stages leading up to the adoption of the final text before analysing the text itself in greater depth.

a) First session of the Ad Hoc Committee

The material scope of application proposed by the authors of the first draft Convention was fairly narrow in that it limited the applicability of the Convention to operations “established pursuant to a mandate approved by a resolution of the Security Council”.⁷¹

⁶⁹ See Doc. A/C.6/49/L.4, paragraphs 9-11.

⁷⁰ See Article 1 b) iii of the Convention; C. Emanuelli, *op. cit.*, p. 76.

⁷¹ See Doc. A/AC.242/L.2, proposal by New Zealand and Ukraine, Article 1, paragraph 2.

Introducing the draft text, the New Zealand representative acknowledged that the issue was one of the most delicate to be discussed and said he was prepared to broaden the scope of application proposed.⁷²

A broader material scope of application was proposed by the Nordic States, which suggested that the Convention should apply “in all situations where United Nations or associated personnel are operating, be it in time of peace or during armed conflict, whether of an international or a non-international character”.

From the earliest meetings of the Ad Hoc Committee, most delegations realized the tremendous complexity of the problem and the need to find a solution compatible with existing law. Throughout the discussions, the question of the applicability of international humanitarian law to peace-keeping and peace-making operations was often raised, as was the need to incorporate in the Convention an exclusion clause defining situations in which the Convention would not apply.

During the debate, the United States delegation proposed a very broad scope of application for the Convention, whereby only operations that were classifiable as an international armed conflict under the terms of Article 2 common to all four Geneva Conventions of 1949 should be excluded.⁷³ That proposal was to influence the discussions until the final text was eventually adopted.

Although, as we have seen, governmental delegations expressed some perplexity as to the scope of application to be given to the Convention, the United Nations Secretariat did not appear at that stage of the negotiations to have any clear-cut stance on the subject.⁷⁴

UNHCR came out strongly against the proposed scope of application set out in the draft submitted by New Zealand and Ukraine,⁷⁵ objecting

⁷² See statement by the Permanent Representative of New Zealand, 28 March 1994, pp. 2 and 3: “... we recognized, however, that this question will be one of the key issues for negotiation ... But we are open to suggestion on this point ... For New Zealand’s part, we would support a wider coverage ...”.

⁷³ See Doc. A/49/22, pp. 46 and 51.

⁷⁴ See Doc. A/AC.242/1, paragraph 22: “Another issue relates to enforcement measures under Article 42 of the Charter of the United Nations. *The question arises* (our underlining) whether attacks on United Nations military contingents engaged in an enforcement operation should be considered, for the purposes of such a convention, as an attack on United Nations personnel.”

⁷⁵ See II.B and note 68 above.

in particular to any application that was confined to operations established pursuant to a Security Council resolution.

Called upon to comment on the issue, the ICRC gave a reminder of its own opinion as to the applicability of international humanitarian law and drew the attention of delegations to the problems inherent in *hybrid* operations involving both peace-keeping and peace-making, i.e. enforcement.

By the end of the first session, no consensus had been reached on the scope of application or the definitions, the discussion of which was postponed until the next session.⁷⁶

b) Second session of the Ad Hoc Committee

Here again, the main stumbling-block was to define the Convention's material scope of application.

The issue was first raised during the general debate within the Ad Hoc Committee. While some delegations insisted that the Convention should cover only peace-keeping operations conducted with the consent of the host State, the majority were in favour of a scope of application also covering certain coercive operations. However, it remained necessary to identify those operations in which international humanitarian law rather than the Convention would apply, since both legal systems were in principle mutually exclusive.

When invited to speak on the subject, the ICRC commented that an exclusion clause limited to operations that could be classified as an international armed conflict within the meaning of common Article 2 to the Conventions of 1949 (United States proposal, see above) seemed dubious because the United Nations was not party to those Conventions. Incidentally, it is doubtful whether any such limitation would be compatible with the United Nations' own much earlier undertaking to respect "the principles and spirit" of international humanitarian law.

The elaboration of a negotiating text for Articles 1 (Definitions) and 2 (Scope of application) was then entrusted to an informal working group which eventually produced a single draft article entitled "Scope of application and definitions".

⁷⁶ See Doc. A/49/22, Annex I, pp. 16-17.

That single article spelled out *inter alia* some of the definitions contained in the first draft. It also contained several important elements concerning the scope of application. First, in response to concerns expressed by UNHCR and other specialized agencies, the article provided that the Convention should also apply to operations in which there was “exceptional risk to the life or liberty of United Nations and associated personnel”. In the case of the exclusion clause (paragraph 3 of the draft), the United States proposal was adopted.

Those proposals were then discussed by the Ad Hoc Committee.⁷⁷ Several delegations, including that of France, took account of the views expressed by the ICRC and proposed that the exclusion clause should not be limited to international armed conflicts. Accordingly, they suggested that the reference to Article 2 common to the Geneva Conventions of 1949 should be deleted and replaced by a general reference to international humanitarian law. The United States delegation objected to those proposals, claiming that only the reference to common Article 2 would enable the scope of application of the Convention to be defined with sufficient clarity. The proposals were not adopted and those of the informal working group were submitted to the third session practically as they stood.⁷⁸

c) Third session, Working Group of the Sixth Committee

In opening the work of the Sixth Committee’s Working Group, its Chairman noted that of the subjects pending before an agreement could be reached on the text as a whole, the finalization of Articles 1 and 2 was the main one. In that connection several delegations drew attention to the exclusion clause, pointing out that differences persisted as to the delimitation between the scope of application of the Convention and that of international humanitarian law. Some stressed the need for a re-examination of the proposals made by France and the ICRC during the preceding session.

The Chairman of the Working Group then decided to suspend the meetings so that informal negotiations leading to an agreement could proceed.

Those informal negotiations led to the adoption of Articles 1 and 2 of the final text of the Convention. The exclusion clause (which now

⁷⁷ See Doc. A/49/22, Annex I, paragraphs 10-14.

⁷⁸ See Emanuelli, *op. cit.*, pp. 76-78.

appears as Article 2 (2)) is a compromise between the United States and French proposals. It stipulates 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."⁷⁹

d) Analysis of the provisions adopted

First let us analyse the definition of the *types of operation* in which the Convention is intended to apply. In that respect, the negotiations fortunately enabled the scope of application proposed in the initial draft to be considerably extended.

The withdrawal of the condition whereby only operations mandated by the Security Council could be covered by the Convention is particularly welcome. Equally welcome is the broadening (thanks to vigorous efforts by the United Nations Secretariat and specialized agencies) of the scope of application to operations involving an "exceptional risk" (Article 1 (c, ii)), even though it is likely to raise thorny problems of application.⁸⁰

As to the exclusion clause (Article 2 (2)), the outcome of hard-won compromise, we have already noted that it poses several tricky problems in itself.

The clause might at first sight seem to imply that international humanitarian law applies only to coercive operations (defined as operations undertaken by the Security Council or at its invitation and motivated either by an aggression or by armed opposition to the accomplishment of a peace-keeping operation) carried out within the framework of Chapter VII

⁷⁹ It should be noted that whereas Article 2, paragraph 2 mentions operations *authorized* by the Security Council, Article 1 (c) refers to operations *established* by a competent organ. In our view, bearing in mind the way the work progressed and the general haste in efforts to find an acceptable compromise on Article 2, paragraph 2, it would be inappropriate to attach too much importance to this use of differing terms. It is simply an example of the terminological inconsistencies which occur throughout the text of the Convention.

⁸⁰ To Arsanjani, *op. cit.*, p. 23, this was even a "virtually non-invokable criterion. The political pressure mounted on the Secretary-General would make it impossible for him to request the General Assembly or the Security Council to declare that there is an exceptional risk to the safety and security of United Nations personnel in a particular part of the world. Even assuming that he overcame that pressure, the Assembly or the Council would not be able to make such a declaration, due to pressure from many Member States."

of the Charter, and not to military operations conducted under Chapter VI (or “VI bis”) of the Charter. As mentioned earlier, such an interpretation would run counter to the opinions most widely held,⁸¹ not to mention the long-standing practice of the United Nations itself.

Incidentally, the terms used in the exclusion clause might be read in two ways. They might be taken to mean that (a) when personnel are engaged as combatants *and* international law relating to international conflicts is declared applicable, then the Convention is not applicable, or (b) that when personnel are engaged as combatants against organized armed forces then international humanitarian law applies, not the Convention.

In our view, bearing in mind how the negotiations proceeded, it is the second of those readings which should prevail.

Lastly, the mere fact that an action is based on Chapter VII of the Charter does not automatically rule out application of the Convention and render international humanitarian law applicable instead. As seen earlier, the latter is applicable only in cases of armed confrontation between forces deployed by the United Nations and organized armed forces.

The text finally adopted is therefore still ambiguous and it is simply regrettable that the question of the applicability of international humanitarian law to United Nations operations was not solved once and for all.⁸²

Moreover, the exclusion clause provides only a partial answer to the need for protection in “hybrid” operations involving very diverse categories of personnel. By stipulating that the Convention does not apply once personnel are engaged as combatants, it could deprive non-combatants engaged in the same operation of the special protection conferred by the Convention.⁸³ In that eventuality, however, such personnel would enjoy the protection afforded by the provisions of international humanitarian law.

⁸¹ In this connection see H.-P. Gasser, Comment on the 1994 Convention on the Safety of United Nations and Associated Personnel: Proceedings of the Third Joint Conference of the American Society of International Law and the Netherlands Society of International Law, 13-15 July 1995 (to be published): “Thus it would be wrong to conclude *a contrario* from Article 1, paragraph 2 of the 1994 Convention that, as the Convention does not apply in enforcement situations, its applicability in other situations should automatically exclude that of international humanitarian law”.

⁸² See Emanuelli, *op. cit.*, p. 84.

⁸³ See Arsanjani, *op. cit.*, p. 25.

In view of the difficulty with which the provisions establishing the material scope of application were negotiated, the final outcome would appear acceptable. However, only the way in which they are put into practical effect by the organs of the United Nations and by the States Parties to the Convention will enable the merits or otherwise of those provisions, and above all their realism, to be judged. The exclusion clause cannot be interpreted as marking a setback in the debate on the applicability of humanitarian law to peace-keeping and peace-making forces, even if the terms used are, as noted above, sometimes unclear. On the contrary the clause implies that in the event of clashes between United Nations forces and organized armed forces, international humanitarian law — that relating to international armed conflicts and not to internal conflicts — then applies.

D. Saving clause

As soon as the process of *progressive legal development* that was to culminate in the final text began, it was clear that the Convention would have close links with international humanitarian law and that a saving clause in favour of that law would thus be necessary.

Such a clause was included in the proposal submitted by New Zealand and Ukraine, Article 6 of which stipulated that: "In cases not covered by this Convention or by other international agreements, United Nations personnel remain under the protection of universally recognized principles of international law, in particular, the norms of international humanitarian law".

There were also similar clauses in the working document submitted by the Nordic States⁸⁴ and in another put forward by Austria, Denmark, Finland, the Netherlands, Norway and Sweden.⁸⁵

During the first reading of the draft, the ICRC stressed the importance of the problem and the need to clarify the scope of Article 6.⁸⁶ An

⁸⁴ See Doc. A/AC.242/L.3, third element: "Besides the protection offered under the new instrument, United Nations and associated personnel remain under the protection and authority of the principles of international law derived from established custom, from the principles of humanity and from the dictates of public conscience".

⁸⁵ See Doc. A/AC.242/1994, Informal paper 2, 31 March 1994, Article 3: "The protection provided under the present Convention is without prejudice to that afforded by (...) the principles of international law derived from established custom, from the principles of humanity and from the dictates of public conscience."

⁸⁶ See statement by the ICRC on 29 March 1994: "It is now conceivable that the real function of Article 6 may have to be clarified in one of two ways:

- as a cross-reference to other rules for situations other than those covered by the Convention;
- as a remedy for omissions in the Convention in those situations which it covers (that was the main purpose of the 'Martens Clause')."

amended version of Article 6 was adopted at the end of the first session of the Ad Hoc Committee.⁸⁷

It was decided during the second session of the Ad Hoc Committee that as Article 6 had been drafted in terms of a saving clause, it should be placed at the end of the Convention. It thus became Article 21, paragraph 1 of the revised negotiating text. Various terminological amendments were also adopted, as was a reference in the body of the article to associated personnel.

Lastly, a few essentially drafting amendments were made to the text during the final phase of the negotiations.

The text ultimately adopted (Article 20 (a)) stipulates that nothing in the Convention shall affect "the applicability of international humanitarian law and universally recognized standards of human rights as contained in international instruments in relation to the protection of United Nations operations and United Nations and associated personnel or the responsibility of such personnel to respect such laws and standards".

Here again, the text adopted is not absolutely clear. It leaves room for conjecture whether humanitarian law may be applicable when the Convention itself applies, or whether that law may be brought to bear only in situations not covered by the Convention.

It can however be unquestionably deduced both from the text of the Convention⁸⁸ and from the negotiations leading up to its adoption (in this connection, see how the text developed as the sessions proceeded) that the first hypothesis should prevail.

The material scope of application of the Convention is therefore distinct from that of international humanitarian law, even if both overlap. Consequently two types of situation may be distinguished: (1) those in which the Convention and humanitarian law apply and, (2) those in which only humanitarian law is applicable (i.e. those situations specified in the exclusion clause in Article 2 (2)).

⁸⁷ See Doc. A/49/22, Annex I, paragraph 47: "Nothing in this Convention shall in any way affect the application of international humanitarian law and international human rights law in relation to the protection of United Nations operations and personnel or the responsibility of such personnel to respect such law."; see also Emanuelli, *op. cit.*, pp. 75-76.

⁸⁸ See in particular Article 8 which stipulates that, pending their release, United Nations personnel must be treated in accordance with the principles and spirit of the Geneva Conventions.

This duality between the Convention and humanitarian law is not a problem in itself, since both have a common aim, namely that of ensuring the safety of United Nations personnel. It is explained by the fact that, as shown above, the Convention must be regarded as coming under *jus ad bellum*, which absolutely prohibits attacks on United Nations forces,⁸⁹ not under *jus in bello*.

The complementarity of the Convention's provisions on the one hand and those of humanitarian law on the other is consistent with the distinction that must be drawn between *jus in bello* and *jus ad bellum*. Given that distinction, therefore, it may be accepted that the prohibition of attacks on United Nations and/or associated personnel does not preclude such personnel from the coverage — or from the obligations — of humanitarian law if that prohibition is violated.⁹⁰

Consequently, although unsatisfactory in formulation (a simpler and clearer text could presumably have been adopted), the saving clause in Article 20 (a) is extremely important: it felicitously supplements the exclusion clause in Article 2 (2) of the Convention by guaranteeing that whenever the Convention proves insufficient to ensure the protection of United Nations and associated personnel, international humanitarian law should take effect.⁹¹

Conclusion

In a statement to the United Nations General Assembly, the United States representative remarked that the adoption of the Convention was one of the key accomplishments of the 49th Session.

Now, a few months later, consideration may well be given to the intrinsic value of the Convention and the results that may be expected of it.

⁸⁹ See Emanuelli, *op. cit.*, p. 83.

⁹⁰ *Ibid.*, p. 85.

⁹¹ *Ibid.*, p. 84; for an analysis of the scope of this clause, see Shraga/Zacklin, *op. cit.*, pp. 49-50. It is surprising that besides the aforesaid shortcomings of Article 20 (a) of the Convention makes no provision concerning the relationship between the Convention and other instruments dealing with related areas, such as the Convention of 1946 on United Nations Privileges and Immunities and the Convention of 1979 against the Taking of Hostages.

While there can be no doubt as to the validity of its objectives, since the need for better protection of personnel engaged by the United Nations has unfortunately been amply demonstrated by recent events, questions inevitably arise as to the effectiveness of some of its clauses.

A careful examination of the treaty reveals that some major issues have not been considered in sufficient depth and that, as a result, the Convention may prove extremely difficult to implement.

At times one also cannot help feeling that in too many respects the desire for a speedy end to the negotiations took precedence over mature reflection.

It would probably be wrong to claim that such a Convention might have no effect whatsoever;⁹² it must nonetheless be recognized that its provisions will sometimes prove difficult to respect and implement. Some aspects of the Convention will be clarified only by consistency on the part of the United Nations Member States in implementing it and the practice thereby established.

Among the chief weaknesses of the Convention — which will perhaps be corrected by the way in which States interpret it — mention should first be made of the insufficient attention apparently paid to problems specific to “hybrid” operations combining both peace-keeping and peace-making mandates, in which the forces engaged by the United Nations (or under its auspices) are entrusted with extremely diverse tasks. The complex operations carried out in Somalia and in the former Yugoslavia are example enough of such problems.

Furthermore, the scope of application finally adopted with regard to personnel appears too narrow. Practical experience in present operations shows that many categories of personnel not protected by the Convention are actually subject to sometimes serious attacks and injury. The “answer” provided in Article 1 (c, ii) of the Convention therefore seems very inadequate.

Certain key provisions of the Convention, including those specifying its material scope of application, are couched in somewhat confusing terms and therefore imperatively require interpretation. Only the actual practice adopted by the United Nations and its Member States will make

⁹² See Arsanjani, *op. cit.*, pp. 21-22: “...the effect of a Convention of this nature is even more minimal than other similar Conventions”.

such an interpretation possible. We can but hope that it will not run counter to the tendency to recognize that international humanitarian law is applicable *mutatis mutandis* to United Nations operations whenever they involve recourse to force against organized armed forces. In our opinion, any other interpretation would be contrary to the views expressed when the Convention was being negotiated.

Lastly, with regard to the links between the Convention and international law, it must be acknowledged that despite the clear advances made during the negotiation process, some ambiguity persists. It can only be regretted that the opportunity to settle the question of the applicability of international humanitarian law to United Nations operations once and for all was missed.

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ICRC LAUNCHES MEDIA CAMPAIGN AGAINST ANTI-PERSONNEL MINES

“Landmines must be stopped”. With this unequivocal message, the International Committee of the Red Cross launched on 22 November 1995 an international media campaign to ban anti-personnel mines. In a stirring appeal to the media, political leaders and humanitarian organizations, ICRC President Cornelio Sommaruga declared: “Despite your sustained work and ours, the scourge of landmines continues unabated. In the hour we meet here, and in every hour which passes, three people will be killed or crippled for life by these mines”. This mindless carnage, he stressed, “is an affront to humanitarian values. It is an affront to civilization. It can and must be ended”.

The wide-ranging campaign includes a series of advertisements in print and on television and radio designed to mobilize public opinion and to stigmatize the production, stockpiling, transfer and use of anti-personnel mines in the eyes of the world, particularly in anticipation of the forthcoming sessions of the Review Conference of the UN Weapons Convention, which will reconvene in Geneva in January and April 1996. The campaign will be taken up at national level in 1996 by National Red Cross and Red Crescent Societies worldwide. The creative aspects were developed by Abbott Mead Vickers — BBDO, a leading London-based agency with a network of offices in 61 countries.

According to President Sommaruga, the stalemate reached at the Vienna Review Conference reflects the failure of the international community to strike a balance between military interests and humanitarian necessity. He deplored the fact that “there is little political will for dramatic change, and that most military powers, North and South, still resist the elimination of anti-personnel mines from their armouries”. In such circumstances, he warned, “the solution to the mines disaster will have to rely on the dictates of the public conscience”.

The President was joined in his appeal by Archbishop Desmond Tutu and a group of Nobel Peace laureates, including Mairead Maguire, Lech Walesa, Oscar Arias Sanchez, Elie Wiesel, the Dalai Lama and Aung San Suu Kyi.

Mr. Sommaruga concluded by highlighting the role of the media in shaping the public conscience. It was public pressure that led to the banning of chemical weapons and the abolition of apartheid, to the response to famine in West Africa and Eritrea and to the prohibition of torture. "Humanity", he added, "is not impotent in the face of brutality and injustice".

DEATH OF AN OUTSTANDING RED CROSS FIGURE

SACHIKO HASHIMOTO

It is with deep sorrow that the ICRC learned of the death in Tokyo on 6 October 1995 of Mrs Sachiko Hashimoto, former National Director of the Japanese Junior Red Cross and founder of the Henry Dunant Study Centre in Japan.

Mrs Hashimoto was one of the leading Red Cross figures of the past 50 years, a pioneering spirit who devoted her life to promoting the ideas of Henry Dunant and the Fundamental Principles of the Red Cross and Red Crescent and to spreading knowledge of international humanitarian law.

Born in Shanghai in 1909, Mrs Hashimoto graduated from the Japan Women's University in 1930, and from 1946 on she taught English there and at the Japan Women's Social Education Association. She joined the Junior Section of the Japanese Red Cross Society in 1948 and attended many youth gatherings in Europe and the United States. In 1960 she was appointed National Director of the Japanese Junior Red Cross, and she initiated many youth projects both at home and abroad.

"My aim", she said, "is to encourage the growth of the free spirit of the volunteer through individual wisdom and creative cooperation. Thought without action is just as futile as action without thought".

Mrs Hashimoto's great merit was to have realized that in Japan, especially after the Second World War, many people had never heard of the Red Cross or knew only of its wartime activities for wounded or sick soldiers. She launched a vast youth education programme, setting up a volunteer sewing service for disaster victims in 1959, a hospital visits programme in 1960 and then a volunteer corps to help the disabled.

Mrs Hashimoto's gracious personality, dynamic leadership and deep commitment to the goals of the Red Cross earned her an international reputation that spread throughout South-East Asia after she organized "Konichiwa 70", a semi-

nar bringing together young people from the 18 countries of the South-East Asian and Pacific region: This seminar, which examined the responsibilities and obligations of Red Cross youth and the ways in which Red Cross ideals should be applied in practice, was a great success and a source of inspiration for many National Societies throughout the world.

After she retired in February 1971, Mrs Hashimoto set up the Henry Dunant Study Centre to disseminate the ideals of the founder of the Red Cross, a man for whom she had the deepest admiration. In connection with the Centre's activities, which involved research, training and publication programmes, she visited many research centres throughout the world, in particular the Henry Dunant Institute in Geneva, with which she remained in close contact to the end of her life.

Mrs Hashimoto's ideas are set out in her book *Henry Dunant and myself* and in the many articles which the *Review* had the privilege of publishing.

Both in recognition of her humanitarian activities and of her intellectual contribution to the Movement, Mrs Hashimoto was awarded the Henry Dunant Medal on 11 April 1972. Angela, Countess of Limerick, the then Chairwoman of the Standing Commission of the International Red Cross, commented on this award in the following terms:

“Since the beginning of her period of service with the Japanese Red Cross in 1948, Mrs Hashimoto has concentrated on the promotion of world peace through international understanding, and on the dissemination of the Geneva Conventions. It is no exaggeration to say that in its work to disseminate knowledge of the Conventions among young people, the Japanese Red Cross has been among the world leaders. Its achievements in this field have been almost wholly due to the efforts of Mrs Hashimoto, [who has] worked unceasingly for the promotion of the type of international understanding which is the only lasting basis for a peaceful world. The number of imaginative projects by which the youth of Japan have learned more about the rest of the world, and the forms of international activities which they have pioneered, have been outstanding”.

Today, Mrs Hashimoto's many friends mourn the passing of one who took a leading role in disseminating the principles of the Red Cross and Red Crescent and set a lasting example for the Movement's volunteers. The best way to perpetuate her memory is to make her words our own: “The Red Cross cannot solve the ills of the world, but at least it can certainly set it in the right direction, provide a compass with which to direct humanity. If we keep the Red Cross fire burning within us all along the way, there will always be light in any darkness, light to see the person before you and the person who comes after. One is never

alone when one is part of the Red Cross family. It is a big family stretching across continents and seas. I am proud to be a part of it as long as I live”.

Along with all her friends in the International Red Cross and Red Crescent Movement, the ICRC, with which Mrs Hashimoto maintained close relations over the years, offers her family its heartfelt sympathy.

J. M.

THE VIENNA REVIEW CONFERENCE:

**SUCCESS ON BLINDING LASER WEAPONS
BUT DEADLOCK ON LANDMINES**

The International Committee of the Red Cross welcomes the adoption, by the recent Vienna session of the Review Conference of the 1980 United Nations Convention on Certain Conventional Weapons (CCW), of a new legally binding instrument of humanitarian law prohibiting the use of laser weapons to blind soldiers or civilians. This is only the second time in history that a particularly barbarous form of warfare has been prohibited before it has ever been used. However, the Review Conference, which adjourned on 13 October after three weeks of negotiations, was unable to fulfil its principal mandate of negotiating new restrictions on the use of landmines, which currently kill or maim some 2,000 persons a month.

The ICRC deeply regrets that no agreement was reached on new measures to prohibit or severely restrict the production, use and transfer of anti-personnel landmines. The Conference, which had been nearly two years in preparation, was seen as a unique opportunity to address the humanitarian crisis caused by landmines. Its unfortunate outcome can be attributed both to the excessively technical nature of many of the proposals considered and to the unwillingness of many States to limit the use of landmines to any significant extent and thus enable the Conference to achieve its humanitarian goals.

The ICRC is urging governments and the public to ensure that humanitarian considerations are put at the centre of negotiations when the Review Conference reconvenes in Geneva from 15 to 19 January and from 22 April to 3 May 1996. Furthermore, it is calling for increased efforts to be made at the national and regional levels in order to ensure that humanitarian responsibilities are met even if international agreement on comprehensive measures is not possible in the near future.

1. Landmines: progress and new obstacles in Vienna

Although it adjourned in deadlock over a number of important technical issues, the Vienna session of the Review Conference reached substantial agreement in principle on new measures which the ICRC considers important steps forward. Among other things, these measures:

- extend the scope of the CCW's landmine restrictions to cover internal as well as international armed conflicts;
- assign responsibility for the clearance of landmines to those who lay them;
- increase obligations on the part of combatants to protect humanitarian workers, including ICRC and National Red Cross and Red Crescent Society personnel, from landmines so that they can reach people in need;
- require *all*, rather than only certain types of minefields, to be recorded; and
- prohibit the use of mechanisms which cause a mine to explode when an electromagnetic detector, such as those used by mine-clearance teams, comes near it.

However, no agreement was reached on the key restrictions which had been drawn up over the previous two years by the Group of Governmental Experts charged with preparing the Review Conference. These restrictions included the following:

- all anti-personnel mines must be detectable;
- remotely delivered mines must be equipped with a self-destruct mechanism; and
- all hand or machine-emplaced anti-personnel mines used outside marked, guarded and fenced minefields must be equipped with a self-destruct mechanism.

The deadlock in Vienna was due partly to the fact that some governments argued for measures far less restrictive than the ones they had appeared willing to accept in previous meetings of the Group of Governmental Experts. Although most countries accepted the above restrictions in principle, and in many cases supported stronger ones, including a total ban, the disputes which led to deadlock centred on technical aspects such as:

- whether self-neutralizing mines, which remain in the ground indefinitely and must be treated by civilians and clearance teams as if they were live, could be substituted for self-destructing ones;
- whether self-destructing mines should remain active for only 30 days or whether they could remain active for as long as a year;
- whether the maximum permissible failure rate for self-destructing mines should be as low as 1 in 1000 (0.1%) or as high as 100 in 1000 (10%);
- whether a minimum metallic content, such as 8 grams, should be specified so that mines can be detectable after a conflict by currently available means; and
- whether the technical measures listed above (a) should be implemented immediately for all new mines used, (b) should be subject to a “grace period” of up to 15 years, or (c) should be implemented “as soon as feasible”.

Most of these technical disputes reflect the inability or unwillingness of certain countries to work towards the humanitarian goals of the Review Conference by making changes in the types of mines they produce or use. Moreover, States promoting new mine technologies were reluctant to consider simpler and more comprehensive measures.

The ICRC regrets the rejection of proposals that would have required anti-tank mines to be detectable and would have prohibited anti-handling mechanisms which cause such mines to explode when clearance teams attempt to remove them. It also regrets that no verification provisions were agreed on.

2. Landmines: where do we go from here?

The ICRC remains convinced that the only effective means of ending the scourge of anti-personnel landmines is to impose a total ban on their production, transfer and use. The difficulties encountered in the Vienna negotiations demonstrate, as the ICRC had feared, that the complex and costly technical measures proposed will not solve the landmine crisis. Because many States are either unable or unwilling to make the technical changes suggested, and because the promotion of self-destructing mines could lead to an overall increase in the number of mines used, simpler and more comprehensive measures should now be considered. Not only would such measures be far more effective; in all

likelihood verification would be easier than under the complex regime discussed in Vienna.

In addition to continuing its efforts to increase support for a global ban on anti-personnel landmines, which now has the backing of 168 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, the ICRC will actively promote two new initiatives:

- a **ban on all transfers** of anti-personnel mines within the framework of the 1980 Convention; and
- **national and regional measures:** stopping landmines does not depend only on the success of international negotiations. States have a moral and political responsibility to end this scourge by acting either unilaterally on their own territory or cooperatively in various regions of the world. The prohibition of the production, transfer and use of anti-personnel mines and a commitment to clear and destroy existing mines, **in the field and in stockpiles**, would be an important step towards protecting one's own population and territory from their devastating effects. In post-conflict situations such measures could strengthen a country's case for mine-clearance assistance from the international community. Their adoption would also contribute significantly to the elimination of anti-personnel mines worldwide.

On 22 November 1995, for the first time in its history, the ICRC launched an international media campaign aimed at mobilizing public opinion and stigmatizing anti-personnel mines. The campaign will make use of free television, radio and print advertising to heighten public awareness of the human cost of landmines and increase pressure for change. The campaign will be taken up by National Red Cross and Red Crescent Societies in 1996.

At the *national level* the ICRC urges States to begin immediate and unilateral implementation of the measures to protect civilians which they advocated at the Review Conference. In addition, increased public pressure will be needed to ensure:

- the maintenance and strengthening of existing moratoria on the international transfer of anti-personnel mines (i.e. partial or temporary moratoria must be replaced with comprehensive and permanent measures);
- accession to the 1980 Convention, including its four Protocols, by States that are not yet party to it; and

- active participation in the 1996 sessions of the Review Conference and support there for the most stringent measures, including a total ban on anti-personnel mines.

The deadlock in Vienna suggests that many political leaders have not yet grasped the magnitude of the landmine crisis. Nor have they come to realize that the human, social and economic costs of these weapons outweigh their limited military utility. States participating in the future sessions of the Review Conference should be urged to place humanitarian concerns at the very centre of their negotiations and to include humanitarian experts in their delegations. These sessions will only succeed if States are able to rise above their narrow national interests in the general interest of humanity.

3. Vienna's historic success: blinding laser weapons

The adoption in Vienna of a new fourth Protocol prohibiting the use of blinding laser weapons represents a significant breakthrough in international humanitarian law. The prohibition of an abhorrent new weapon whose production and proliferation appeared imminent is an historic step for humanity. This is the first time since the use of exploding bullets was prohibited in 1868 that a weapon of military utility has been banned before it has been used on the battlefield and before a vast number of victims have given visible proof of its tragic effects.

The new Protocol prohibits both the use and the transfer of laser weapons specifically designed to cause permanent blindness as one of their combat functions. It also requires States to take all feasible precautions, including the training of their armed forces, to avoid permanent blinding through the legitimate use of other laser systems. This is the first time that *both the use and the transfer* of a weapon have been entirely prohibited under international humanitarian law.

Efforts to have this Protocol adopted were initiated by Sweden and Switzerland at the 1986 International Conference of the Red Cross and Red Crescent and pursued by the ICRC, which convened four international meetings of experts on this issue between 1989 and 1991. The results of these meetings were published in *Blinding Weapons*, the primary reference work on the subject. In recent years the issue has been addressed by a growing number of non-governmental organizations, including those representing war veterans and the blind.

Although the new Protocol currently applies to international conflicts alone, it was generally agreed in Vienna that it should also cover non-international conflicts. It was understood that the wording of any future provisions extending the scope of the Protocol to internal conflicts would be the same as that adopted for the landmines Protocol.

The ICRC stresses the importance of vigorous national efforts to ensure that the new Protocol is widely accepted by States and effectively implemented. In particular, it calls on States to:

- declare themselves bound by the Protocol at the earliest possible date;
- adopt national measures to prevent the production, transfer, use and proliferation of blinding laser weapons.

*
* *

Though disappointing, the deadlock on landmines shows that States were unwilling to paper over substantial differences and accept weak or ineffective measures in Vienna. This is a good sign, reflecting the fact that strong public pressure had been put on the Review Conference to achieve significant results and that many governments were committed to take decisive action. An end has now been put to the consensus that landmines are just another weapon of war, and this in itself is a step towards their stigmatization.

The international community is not powerless to deal with the scourge of landmines. As when it sought to abolish apartheid and impose a ban on chemical, biological and blinding laser weapons, it can and will succeed. Such efforts can last for years, even decades, but in pursuing the struggle individuals and governments are not only upholding fundamental standards of civilization; they are also affirming their common humanity.

THE KINGDOM OF SWAZILAND RATIFIES THE PROTOCOLS

The Kingdom of Swaziland ratified on 2 November 1995 the Protocols additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I) and Non-International Armed Conflicts (Protocol II), adopted in Geneva on 8 June 1977.

Pursuant to their provisions, the Protocols will come into force for the Kingdom of Swaziland on 2 May 1996.

This ratification brings to **141** the number of States party to Protocol I and to **132** those party to Protocol II.

ACCESSION TO THE PROTOCOLS BY THE REPUBLIC OF SOUTH AFRICA

The Republic of South Africa acceded on 21 November 1995 to the Protocols additional to the Geneva Conventions of 12 August 1949 and relating to the Protection of Victims of International Armed Conflicts (Protocol I) and Non-International Armed Conflicts (Protocol II), adopted in Geneva on 8 June 1977.

Pursuant to their provisions, the Protocols will come into force for the Republic of South Africa on 21 May 1996.

This accession brings to **142** the number of States party to Protocol I and to **133** those party to Protocol II.

Books and reviews

THE HANDBOOK OF HUMANITARIAN LAW IN ARMED CONFLICTS¹

In view of the grave and frequent breaches of international humanitarian law, and the inability of the international community to put an effective stop to them, enforcement measures now tend to stress prevention. This fact was recognized by the Intergovernmental Group of Experts for the Protection of War Victims, which, when it met in Geneva in January 1995, called on the States to adopt their own national enforcement measures. An important move in this direction — and one supported by the ICRC through the advisory services it is now setting up — is the issue of national military handbooks. The fourth recommendation of the Intergovernmental Group of Experts calls on the States to issue national handbooks and, in this regard, to consult each other for purposes of harmonization. It is further suggested that the ICRC should draw up a model handbook.

In 1992, the Federal Republic of Germany issued just such a military handbook for the *Bundeswehr*, in the form of the *Zentraler Dienstvorschrift (ZDV) 15/2*, or Central Service Manual. This work was the fruit of years of preparation, in which intensive consultations with experts from other countries quite properly — and fully within the spirit of the later, above-mentioned recommendation — played an important part. Particularly progressive from a humanitarian point of view is Paragraph 211 of the manual, which instructs German servicemen to comply with the whole of international humanitarian law during military operations in non-international armed conflicts (i.e. not just in the international conflicts to which it already applies).

The handbook under review here, produced in cooperation with academic experts from Germany and abroad under the direction of Dieter Fleck, now provides a commentary on the ZDV 15/2. It is compulsory reading for anyone in the German-speaking world who is concerned with international humanitarian law. It is particularly useful, moreover, for people involved at a practical level, who have hitherto searched existing commentaries in vain for answers to ques-

¹ *Handbuch des humanitären Völkerrechts in bewaffneten Konflikten*, edited by Dieter Fleck in collaboration with Michael Bothe, Horst Fischer, Hans-Peter Gasser, Christopher Greenwood, Wolff Heintschel von Heinegg, Knut Ipsen, Stefan Oeter, Karl Joseph Partsch, Walter Rabus and Rüdiger Wolfrum, Verlag C.H. Beck, Munich 1994, XVI + 476 pp.

tions which cannot be readily assigned to some particular rule in the code of law. Now, furthermore, thanks to the welcome publication of an English language edition,² the handbook will become available to an even wider readership.

In Chapters 1 and 2, Christopher Greenwood provides a lucid exposition of the historical development, the legal bases and the scope of application of international humanitarian law, dealing in particular with *jus ad bellum*. Since the distinction between *jus ad bellum* and *jus in bello* is the crucial question on which international humanitarian law stands or falls, this aspect is examined in every detail. Greenwood's explanation of *jus ad bellum* itself is unassailable theory, although, or perhaps because, it offers a wealth of references to practice.

In a commentary which tends to concentrate on concepts and takes a somewhat critical view of the ZDV 15/2, Knut Ipsen explains the rules for combatants and non-combatants, the latter term referring not, as might be expected, to civilians but to forces not engaged in fighting. The distinction made in German law between combatants and non-combatants is apparently not just of much greater significance than in international law but is also somewhat harder to grasp. However, even taking all this into account, it is surely going too far for Ipsen (p.101) to describe as a "cardinal error" Para. 1017 of the ZDV, according to which "the parties to the conflict shall at all times distinguish between combatants and non-combatants". Moreover, it is difficult for the non-German reader to follow the discussion of the distinction between *bewaffneter Macht* and *Streitkräften* when both are translated from the same term in the original English and French texts.

In another chapter, which displays a profound knowledge of the practice deriving from Additional Protocol I and which provides exhaustive references to the literature, Stefan Oeter comments on the provisions relating to the means and methods of combat. On pages 138-147, he sets forth in detail the official NATO line on the permissibility of the use of atomic weapons, though understandably he cannot be too precise about the limits of such uses under the general international law recognized as applying. Nevertheless, he goes on to point out — rightly in my opinion — that: "Only by recourse to reprisals, which remains permissible under customary law, can current nuclear strategies be legitimated under international law" (p. 207). Yet, does the author seriously wish to claim (p. 144) that there is all the more scope for the use of atomic weapons (against an international adversary) on its own territory, when he writes that Article 49, paragraph 2, of Additional Protocol I is "undoubtedly new"? This very point is contradicted by Oeter himself with a reference to the undersigned in footnote 252.

² *The Handbook of Humanitarian Law in Armed Conflicts*, edited by Dieter Fleck in collaboration with Michael Bothe, Horst Fischer, Hans-Peter Gasser, Christopher Greenwood, Wolff Heintschel von Heinegg, Knut Ipsen, Stefan Oeter, Karl Joseph Partsch, Walter Rabus and Rüdiger Wolfrum, Clarendon Press, Oxford, November 1995, XVI + 589 p.

Whether the frequency of attacks designed to terrorize the civilian population is connected with the prohibition of reprisals, as Oeter suggests (p. 169), is open to question, in particular when we recall that the parties to the conflict in Yugoslavia, to whom he himself refers, plead reciprocity with almost pathological insistence in seeking to justify the gravest breaches of international humanitarian law.

Hans-Peter Gasser clearly states the case on the protection of the civilian population, especially in occupied areas, and backs this up with an abundance of references to practice. From the point of view of international law and for the non-German reader in particular, it is particularly welcome that, in discussing any problem, Gasser always mentions the legal provisions relevant to non-international conflicts. The German serviceman who seeks to understand the ZDV 15/2 will do well to remember that Para. 211 stipulates that his conduct in non-international conflicts should be the same as in international ones. In principle, this also holds true for Geneva law. However, two points should be noted. First of all, Para. 540 of the ZDV 15/2, referring to Article 6, paragraph 3, of the Fourth Convention, speaks of the cessation of the applicability of many provisions of the Fourth Convention, forgetting that this provision was superseded by Article 3, paragraph b, of Additional Protocol I, which permits full application of the Fourth Convention until the occupation is over. Secondly, it is stated (p. 194) that nationals of a neutral or co-belligerent State whose interests can be protected by diplomatic representatives are not protected persons. However, according to Article 4, paragraph 2, of the Fourth Convention, while this rule may apply in the sovereign territory of a party to the conflict, it does not apply in an occupied area.

Walter Rabus sets forth the position with regard to wounded, sick and shipwrecked persons and the rules on religious personnel. The complex subject of the protective emblem is explained simply, if perhaps rather too briefly.

Horst Fischer deals with the protection of prisoners of war. After a very interesting historical survey, he sets out the relevant rules, together with many references to most recent practice, including in the former Yugoslavia. It is to his credit that he did so, although it might well be wondered whether the conduct of the warring parties in Yugoslavia or that of the international community with regard to the situation there can serve as a basis for drawing conclusions as to the practice of the States in relation to the Third Geneva Convention. The conflicts in the former Yugoslavia started out, after all, as internal conflicts, and their precise designation remains a matter of dispute. Nevertheless, experience has shown that, any special agreements notwithstanding, in conflicts which the parties involved themselves see as internal disputes, the law relating to prisoners of war is the first to be applied only *mutatis mutandis*.

Karl Josef Partsch discusses the provisions for the protection of cultural property, including the often problematic relationship between the Cultural Property Convention of 1954 and the Additional Protocols of 1977.

Wolff Heintschel von Heinegg deals with the law of armed conflict at sea and provides abundant references to current and earlier practice. His contribution is particularly valuable since, as is well known, this area of international law has not been supplemented since the beginning of the century, despite the fact that the technical circumstances and practice changed radically during the two World Wars. In the "San Remo Manual on International Law Applicable to Armed Conflicts at Sea", experts and lay practitioners from all over the world sought to restate the law. Their efforts also affected the ZDV 15/2. Here, too, with regard to war at sea, the notion of "military objective" is made the focus of provisions on the conduct of hostilities. Heintschel von Heinegg, who himself made a substantial contribution to the San Remo Manual, offers proposals and possibilities for development which are not only innovative but also logical and, from the point of view of practice, unavoidable. These have also appeared in the San Remo Manual and in the commentary on it edited by Louise Doswald-Beck.

Michael Bothe has succeeded in the difficult task of presenting the law on neutrality. He does not ignore the fundamental tensions between the Charter of the United Nations and the fundamental principles of neutrality in armed conflicts, but nor does he insult those involved in practice with the useless information that everything is subject to controversies. While he does not hesitate to describe some of the rules codified in the Hague Convention of 1907 — including humanitarian ones — as superseded by customary law, he demonstrates thoroughly satisfactory solutions in terms of this same customary law. He rightly recalls that, in the triangle of *jus ad bellum* — the law of neutrality — *jus in bello*, even self-defence cannot serve to justify a breach of the law of neutrality.

Rüdiger Wolfrum deals very briefly with the Achilles heel of the law of war — namely the question of enforcement — without being drawn into theoretical debates on international law when discussing the role of the United Nations or Article 1 common to the Geneva Conventions. As in the ZDV 15/2, the emphasis — quite properly for a military manual — is on the punishment of war criminals. The ZDV and Wolfrum (lines 428-432) refer almost incidentally to breaches of law in non-international conflicts as being among "serious breaches" to be punished. However, the description of these as war crimes is certainly a welcome step and is in line with the latest developments of practice, such as the *ad hoc* international courts. However, whether they can simply be subsumed under the legal term "serious breach" is another matter.

The manual also contains some very useful appendices, including a list of other military manuals.

Overall it may be said that, while this work is intended as a commentary on the German service manual, it is also, to a large extent, a commentary on international humanitarian law which should be of interest to a worldwide readership. Discussions of specifically German law are relatively few, indeed perhaps too few for a work intended for practical use. A negative aspect of the international law approach is the fact that, with the exception of Horst Fischer's con-

tribution, limitations of the ZDV 15/2 going beyond international law are frequently played down. There is also some overlapping — e.g. between the chapter on means and methods of warfare and that on protection of the civilian population. Whereas in an academic work this might have raised eyebrows, a certain degree of redundancy makes sense in a manual because the practical user needs to be able to seek information on “his” problem from various points of view. However, this implies a degree of coordination between the commentators which is not always apparent in the handbook.

Marco Sassòli

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**INTERNATIONAL
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WAR AT SEA

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UNITED NATIONS PERSONNEL**

*Media campaign against
anti-personnel mines*