

PROPERTY OF U.S. ARMY
THE JUDGE ADVOCATE GENERAL'S SCHOOL
LIBRARY

INTERNATIONAL REVIEW

OF THE RED CROSS



Published every two months by the
International Committee of the Red Cross
for the International Red Cross
and Red Crescent Movement



INTERNATIONAL COMMITTEE OF THE RED CROSS

- Mr. CORNELIO SOMMARUGA, Doctor of Laws of Zurich University, Doctor h.c. *rer. pol.* of Fribourg University (Switzerland), Doctor h.c. in International Relations of Minho University, Braga (Portugal), Doctor h.c. of medicine of Bologna University (Italy), *President* (member since 1986)
- Mr. MAURICE AUBERT, Doctor of Laws, *Vice-President* (1979)
- Mr. CLAUDIO CARATSCH, Bachelor of Arts, *Vice-President* (1990)
- Mr. ULRICH MIDDENDORP, Doctor of Medicine, head of surgical department of the Cantonal Hospital, Winterthur (1973)
- Mr. RUDOLF JÄCKLI, Doctor of Sciences (1979)
- Mr. DIETRICH SCHINDLER, Doctor of Laws, Professor at the University of Zurich (1961-1973) (1980)
- Mr. HANS HAUG, Doctor of Laws, Honorary Professor at the University of St. Gallen for Business Administration, Economics, Law and Social Sciences, former President of the Swiss Red Cross (1983)
- Mr. PIERRE KELLER, Doctor of Philosophy in International Relations (Yale), Banker (1984)
- Mr. ANDRÉ GHELFI, former Central Secretary and Vice-President of the Swiss Federation of Metal Workers (1985)
- Mrs. RENÉE GUISAN, General Secretary of the International "Institut de la Vie", member of the Swiss *Pro Senectute* Foundation, member of the International Association for Volunteer Effort (1986)
- Mrs. ANNE PETITPIERRE, Doctor of Laws, barrister, lecturer at Geneva Law Faculty (1987)
- Mr. PAOLO BERNASCONI, Barrister, LL. L., lecturer in economic penal law at the Universities of St. Gallen and Zurich, former Public Prosecutor at Lugano, member of the Swiss *Pro Juventute* Foundation (1987)
- Mrs. LISELOTTE KRAUS-GURNY, Doctor of Laws of Zurich University (1988)
- Mrs. SUSY BRÜSCHWEILER, nurse, Director of the Bois-Cerf Nursing School in Lausanne and professor at the College of Nursing in Aarau, President of the Swiss Association of Nursing School Directors (1988)
- Mr. JACQUES FORSTER, Doctor of Economics, Director of the Institute of Development Studies in Geneva (1988)
- Mr. PIERRE LANGUETIN, Master of Economics and Social Studies, Doctor h.c. of the University of Lausanne, former President of the Governing Board of the Swiss National Bank (1988)
- Mr. JACQUES MOREILLON, Bachelor of Laws, Doctor of Political Science, Secretary General of the World Organization of the Scout Movement, former Director General at the ICRC (1988)
- Mr. MAX DAETWYLER, graduate in Economics and Social Sciences of the University of Geneva, Scholar in Residence of the International Management Institute (IMI) of Geneva (1989)
- Mr. MARCO MUMENTHALER, Doctor of Medicine, Professor of Neurology and Rector of the University of Bern (1989)
- Mr. RODOLPHE DE HALLER, M. D., former lecturer at the Faculty of Medicine of the University of Geneva, President of the Swiss Association against Tuberculosis and Lung Diseases (1991)
- Mr. DANIEL THURER, LL.M. (Cambridge) LL. D., professor at the University of Zurich (1991)

EXECUTIVE BOARD

Mr. CORNELIO SOMMARUGA, *President*

Mr. CLAUDIO CARATSCH, *permanent Vice-President*

Mr. RUDOLF JÄCKLI, *member of the ICRC*

Mrs. ANNE PETITPIERRE, *member of the ICRC*

Mr. GUY DELUZ, *Director General*

Mr. JEAN DE COURTEN, *Director of Operations*

Mr. YVES SANDOZ, *Director for Principles, Law
and Relations with the Movement*

INTERNATIONAL REVIEW
OF THE RED CROSS

CONTENTS

MAY-JUNE
No. 282

**IMPLEMENTATION OF
INTERNATIONAL HUMANITARIAN LAW**
(Part II)

José Luis Fernández Flores: Repression of breaches of the law of war committed by individuals.	247
George H. Aldrich: Compliance with International Humanitarian Law	294

PROTECTION OF VICTIMS OF WAR

World Campaign for the Protection of Victims of War	307
World Red Cross and Red Crescent Day 1991 — Joint Message of the League of Red Cross and Red Crescent Societies and the International Committee of the Red Cross	313

INTERNATIONAL COMMITTEE OF THE RED CROSS

<i>News from Headquarters</i> — New executive structure	315
<i>Presidential missions</i>	316

IN THE RED CROSS AND RED CRESCENT WORLD

National Red Cross and Red Crescent Societies:

The Albanian Red Cross yesterday and today	319
Silver Jubilee of the Kenya Red Cross Society:	
Henry Wahinya: 25 years at work... Protecting human life and dignity	322
Death of Yvonne Hentsch	327

MISCELLANEOUS

Internal disturbances and tension:

Hans-Peter Gasser: New draft declaration on minimum humanitarian standards	328
Declaration of Minimum Humanitarian Standards	330

New Parties to the Additional Protocols:

Accession to the Protocols by Uganda	337
Accession to the Protocols by Djibouti	337
Chile ratifies the Protocols	338

BOOKS AND REVIEWS

Bedeutung einer Kodifikation für das allgemeine Völkerrecht, mit besonderer Betrachtung der Regeln zum Schutze der Zivilbevölkerung vor den Auswirkungen von Feindseligkeiten (<i>The significance of codification for general international law with particular attention to the rules for the protection of civilians against the effects of hostilities</i>) (<i>Marco Sassòli</i>)	339
Casualties of Conflict — Report for the World Campaign for the Protection of Victims of War (<i>Christer Ahlström</i> with contributions by <i>Kjell-Åke Nordquist</i>)	342

Repression of breaches of the law of war committed by individuals

by José Luis Fernández Flores

The law of war — international humanitarian law — has a place of its own and its own special characteristics in the general scheme for the repression of offences. International law is, in a sense, on the fringe of the provisions made by States in their domestic law for the repression of unlawful acts. It has its own system of repression, which imposes sanctions for breaches of international law committed by States, international organizations or individuals.

Inasmuch as these breaches may violate the rules that govern armed conflicts, and that the law of war is part of international law, the latter provides sanctions for such violations, whether committed by States, international organizations or individuals.

This article is concerned only with the repression of breaches of the law of war committed by individuals.¹ It will consider the system of repression in general and its substantive and procedural aspects in particular.

I. THE SPECIAL STRUCTURE OF THE SYSTEM OF REPRESSION

At this point we have to distinguish between what may be called the conventional or traditional system, the exceptional system in force at the end of the Second World War, and the mixed system now in force.

¹ This study was written as part of a general survey of breaches committed by States, international organizations or individuals. That survey proved too long for publication in full in the *Review*. We have therefore published only the part that concerns breaches by individuals.

1. The conventional or traditional system

This may, very roughly, be called the penal international law of war.

A. State systems

The traditional system of repression of breaches of the law of war was essentially an internal or State one. This is shown by the precedents usually quoted² and the classical concepts of doctrine.³ It should therefore more properly be called the international penal law of war.

Only in the nineteenth century did a really international system⁴ begin to emerge as a result of domestic legislation;⁵ but this did not lead to the inclusion in international instruments of penalties for breaches of international humanitarian law.⁶

B. Non-existence of an international system

What existed, therefore, was not a system. Nor was it truly international; it comprised no international typification, and did not assign penal responsibility or penal sanctions to persons committing breaches. Still less did it provide for tribunals and international procedure for any such purpose.

C. Deadlock

It was accordingly impossible to apply sanctions under international penal law. Breaches of the law of war went unpunished because it was not accepted that States had any penal responsibility for war

² Cherif Bassiouni, *Derecho penal internacional, Proyecto de Código penal internacional*, Tecnos, Madrid, 1984, pp. 60-61.

³ Spanish "classical" authors, and subsequently authors of other nationalities, did much to lay the foundations of what became the domestic system for the repression of such breaches.

⁴ See Alexandre Plawski, who points out on p. 18 of his *Etudes des principes fondamentaux du droit international pénal*, Librairie générale de droit et de jurisprudence, Paris, 1972, that international penal law originated only in the nineteenth century and that previously any such ideas had been only tentatively explored.

⁵ E.g. Francis Lieber, *Instructions for the Government of Armies of the United States in the Field*, of 24 April 1863, ordering that soldiers guilty of breaches of the law of war should be prosecuted, whether they belonged to the United States armed forces or were enemy prisoners.

⁶ As was done in The Hague Conventions of 1899 and 1907.

crimes or other breaches of international law and because individuals were not regarded as answerable to international law.⁷ The only thing that ensured that the laws and customs of war would be internationally observed was good faith.⁸

To avoid this consequence, and because for various reasons it was not possible to prosecute a State, the decisive step was taken of recognizing individuals as subject to penal prosecution under international law, so that they could be indicted under that law.

2. The emergency post-war system

This was in fact done: individuals were recognized as responsible under international law for war crimes. This laid the foundations of the system that was subsequently applied.

A. Its precedents

The forerunner of that system emerged immediately after the First World War. As soon as the war ended on 11 November 1918 an Inter-Allied Commission was formed to establish the responsibility of “war criminals” (a term used for the first time). The Treaty of Versailles proposed to try Kaiser Wilhelm II and other Germans accused of war crimes,⁹ and to set up an international court of justice, and national courts, to try all kinds of war criminals. These proposals were not carried out; the Kaiser was by then a refugee in Holland, which refused to extradite him, and the few alleged war criminals put on trial were either acquitted or given only nominal sentences.¹⁰

⁷ See Antonio Quintano Ripollés (*Criminalidad de Guerra*, Nueva Enciclopedia Jurídica Seix, Editorial Seix, Barcelona, 1954, vol. VI, p. 10), who remarks that attempts to assign responsibility are rarely successful because of the dictum *universitas delinquere non potest*, and that if the State were the only entity answerable to the law but as a State could not commit an offence, and if an individual were not answerable to international law, both would enjoy impunity and anarchy would result.

⁸ As stated in Article 851 of the Spanish *Field Service Regulations* of 5 January 1882.

⁹ Articles 227, 228 and 229 of the Treaty of Versailles arraigned the Kaiser for “a supreme offence against international morality and the sanctity of treaties”.

¹⁰ Some of the accused were tried by German courts, which awarded only light sentences. Others were not handed over to foreign courts for trial. This contravened the spirit of the Treaty.

B. How the system worked

The system really worked at the end of the Second World War, when an effective international system of repression was introduced. It was the result of various documents¹¹ leading to the London Agreement and its Charter of 8 August 1945, whose most important provision was to establish the tribunal in Nuremberg which tried the “major war criminals” of the Axis countries, whose offences had no particular geographical location. Many other tribunals were also established, some by the Allies in their own occupation zones of Germany,¹² and others in, and by the governments of, the countries formerly occupied by the Germans.¹³

The other major instrument for international repression of wartime offences against international law was the Far Eastern International Military Tribunal set up on 19 January 1946. Sitting in Tokyo, it tried Japanese war criminals, applying the European system with few variations.¹⁴ Other similar tribunals, most of them military, were set up, mainly by the Americans, to sentence persons accused of particular offences.¹⁵

This special system continued to operate without significant changes until 1949.

a) *Its substance* — Its substantive law defined offences, assigned responsibilities, and imposed sentences in a number of cases.

Article 6 of the Charter of the Tribunal regards as “crimes coming within its jurisdiction” “crimes against peace”, “war crimes” and “crimes against humanity”.¹⁶ It typifies them as follows:

¹¹ On 13 January 1942 the governments of the Allied countries occupied by Germany drew up the “Declaration of St. James’ Palace” for the punishment of war criminals, and on 1 November 1943 the Allies published the “Moscow Declaration” to the same effect.

¹² These tribunals were standardized by *Kontrollratsgesetz* No. 10 of 20 December 1945, which followed the principles of the International Military Tribunal.

¹³ Although the War Crimes Commission was set up in London to order the handover of accused persons, there is no doubt that each country followed its own rules of procedure: Belgium on 20 July 1947, Holland on 10 July 1947, Norway on 4 May 1945, the United Kingdom on 14 June 1945, and France on 28 August 1944.

¹⁴ This Tribunal followed the London Charter, with a few amendments; thus the penal concept of “conspiracy” was dropped, the number of members of the tribunal was increased and its jurisdiction was extended to other individuals and territories.

¹⁵ Such as the tribunals set up to try the persons responsible for the murder on the Jaluit Atoll of three captive American airmen, and to try the Yamashita case (of failure to act to prevent the commission of war crimes).

¹⁶ It also included the concept of criminal “conspiracy” (an Anglo-American innovation later dropped) by providing in the last paragraph of Article 6 that “Leaders,

“● **Crimes against peace:** namely, planning, preparation, initiation or waging of a war of aggression, or a war in violation of international treaties, agreements or assurances, or participation in a common plan or conspiracy for the accomplishment of any of the foregoing;

● **War crimes:** namely, violations of the laws or customs of war. Such violations shall include, but not be limited to, murder, ill-treatment or deportation to slave labor or for any other purpose of civilian population of or in occupied territory, murder or ill-treatment of prisoners of war or persons on the seas, killing of hostages, plunder of public or private property, wanton destruction of cities, towns or villages, or devastation not justified by military necessity;

● **Crimes against humanity:** namely, murder, extermination, enslavement, deportation, and other inhumane acts committed against any civilian population, before or during the war; or persecutions on political, racial or religious grounds in execution of or in connection with any crime within the jurisdiction of the Tribunal, whether or not in violation of the domestic law of the country where perpetrated”.

Article 6, when providing that the Tribunal should have the power to try and punish persons accused of committing crimes, laid down the general principle that “there shall be individual responsibility” for crimes, including, where appropriate, responsibility for membership of a group or organization declared to be a criminal group or organization.¹⁷

Article 27 of the Charter allowed judges great latitude in awarding sentences; it states that “*The Tribunal shall have the right to impose upon a Defendant, on conviction, death or such other punishment as shall be determined by it to be just.*”

b) **Its procedure** — With respect to procedure, the Charter established not only the international tribunals but also adequate procedure for their operation.

organizers, instigators and accomplices participating in the formulation or execution of a common plan or conspiracy to commit any of the foregoing crimes are responsible for all acts performed by any persons in execution of such plan”.

¹⁷ The first paragraph of Article 9 of the Charter reads: “At the trial of any individual member of any group or organization the Tribunal may declare (in connection with any act of which the individual may be convicted) that the group or organization of which the individual was a member was a criminal organization.” See H. de Touzalin, “Réflexions à propos du délit d’appartenance sur un essai d’unification des règles de répression en matière d’infraction aux lois et coutumes de la guerre”, *Revue de droit pénal militaire et de droit de la guerre*, Brussels, IV-I, 1965, pp. 133ff.

The Nuremberg Tribunal adopted the title of “International Military Tribunal”, and agreed that other tribunals should be set up if necessary whose composition, purpose and procedure should be identical to those of the principal Tribunal.

The Charter also set up a general procedure for prosecuting, bringing to trial and sentencing, without prejudice to the Tribunal’s powers to issue regulations for its own procedure.

C. Consequences

Once this complex system of international tribunals and/or tribunals trying offences against international law¹⁸ ceased to operate it left little permanent trace.¹⁹

As far as what might broadly be called war crimes is concerned, all we now have are the “Nürnberg Principles”,²⁰ the Convention on the Non-Applicability of Statutory Limitations to War Crimes,²¹ and the “concern” for the repression of war breaches that has produced the present system.

3. The system now in force

At present the system for the repression of breaches of the law of war committed by individuals is a mixed one, partly international and partly domestic. It comprises a number of basic international principles that form its essential legal framework, and ancillary provisions, contained in legislation, that fit in, or should fit in, with them.

¹⁸ The Nuremberg Tribunal gave judgment on 1 October 1946 and the Tokyo Tribunal on 12 November 1948. The remaining tribunals ceased to function in 1949, except for a few local ones whose activities continued.

¹⁹ The remaining instruments dealing with the general question of repression of breaches of international law committed by individuals are mentioned above.

²⁰ The Second Session (5 June to 29 July 1950) of the International Law Commission of the United Nations formulated the seven “Nürnberg Principles”, adopting practically the same definition of offences as the London Charter of 1945.

²¹ This Convention of 26 November 1968 also applies to crimes against humanity.

Whilst the basic international precepts are shared, their development and the form they actually take depend on various national regulations. The resulting system is a heterogeneous one providing only the illusion of the international repression to which it lays claim. Its consequences are anomalous²² and the situation cannot be remedied at present.²³

A. The international framework

Basic international regulations have established only a general scheme of repression based on minimum observable regulations.

a) *The basic texts* — The basic international texts now in force (disregarding some previous ones)²⁴ are the Geneva Conventions of 1949 and Additional Protocol I of 1977.²⁵

²² Each country has its own regulations and its own ways of applying international law. As a result, a particular offence may be classed as an offence, a crime or a misdemeanour in some national legislations, and simply ignored in others. Consequently some States apply severe penal sanctions, others minor penalties, and still others no penalties at all, and the accused person's fate will depend on where the offence was committed and on the country that has to try him. He may even prefer to be tried by a foreign court rather than by the courts of his own country.

²³ Various proposals have been put forward to remedy this state of affairs. The most modest is for a "model law" as a basis for governmental action. A rather more ambitious proposal is that there should be an "international law to cover criminal offences". The most ambitious proposal is that an international court be empowered to try at least this kind of breach. But as Henri Bosly observes (in "Responsabilités des Etats Parties à un conflit et des individus quant à l'application des règles de droit humanitaire", *Revue de droit pénal militaire et de droit de la guerre*, XII-2, 1973, pp. 201ff) the first solution "has been sought for several years past", the second is "unlikely in the foreseeable future", and the third is at present impracticable because many States regard it as "an unacceptable limitation of national sovereignty". Accordingly, at present only two kinds of courts can possibly try these breaches: national courts, and perhaps international courts set up *ad hoc* as and when armed conflicts break out. There is no doubt that in this as in many other situations the international community has gone as far as it can, given its present state of maturity.

²⁴ Previous ones are Articles 27 and 28 of the Geneva Convention of 6 July 1906 for the amelioration of the condition of the wounded and sick in armed forces in the field, Article 46, para. 2, of the Regulations respecting the laws and customs of war on land, annexed to The Hague Convention of 18 October 1907, and Articles 28 and 29 of the Geneva Convention of 27 July 1929 for the amelioration of the condition of the wounded and sick in armed forces in the field.

²⁵ The Conventions, but not Protocol I, are now binding on practically all States, and this has to be taken into account when considering the effects of international regulations mandatory for all States.

The Geneva Conventions (Article 49 of C I, Article 50 of C II, Article 129 of C III and Article 146 of C IV) contain a general provision in identical terms.^{26,27}

The general principles of Protocol I are contained in Article 85, para. 1, which states:

“The provisions of the Conventions relating to the repression of breaches and grave breaches, supplemented by this Section, shall apply to the repression of breaches and grave breaches of this Protocol”.

and Article 86, para. 1, which states:

“The High Contracting Parties and the Parties to the conflict shall repress grave breaches, and take measures necessary to suppress all other breaches, of the Conventions or of this Protocol which result from a failure to act when under a duty to do so”.

b) **Comment and conclusions** — These texts lead to the following conclusions:

The general scheme of repression is the same in the Conventions and in Protocol I; the only variation (which for the moment does not concern us) lies in the nature of the breaches to be punished.²⁸

²⁶ “The High Contracting Parties undertake to enact any legislation necessary to provide effective penal sanctions for persons committing, or ordering to be committed, any of the grave breaches of the present Convention defined in the following Article.

Each High Contracting Party shall be under the obligation to search for persons alleged to have committed, or to have ordered to be committed, such grave breaches, and shall bring such persons, regardless of their nationality, before its own courts. It may also, if it prefers, and in accordance with the provisions of its own legislation, hand such persons over for trial to another High Contracting Party concerned, provided such High Contracting Party has made out a *prima facie* case.

Each High Contracting Party shall take measures necessary for the suppression of all acts contrary to the provisions of the present Convention other than the grave breaches defined in the following Article.

In all circumstances, the accused persons shall benefit by safeguards of proper trial and defence, which shall not be less favourable than those provided by Article 105 and those following of the Geneva Convention relative to the Treatment of Prisoners of War of August 12, 1949”.

²⁷ Articles 105ff. of the Convention of 1949 relative to the treatment of prisoners of war refer to prisoners’ rights and means of defence, appeals, notification of sentence and penal regulations.

²⁸ As stated in the *Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949*, ed. Yves Sandoz, Christophe Swinarski, Bruno Zimmermann, ICRC, Martinus Nijhoff Publishers, Geneva, 1987, p. 992, para. 3467, “The system of repression in the Conventions is not to be replaced, but reinforced and developed ... so that it will in the future apply to the repression of breaches of both the Protocol and the Conventions”.

The starting point of the system is the basic distinction between grave breaches and other breaches; the only provision in the international regulations concerning “other breaches” is that States should take steps to repress them.

The provisions of international law that deal with the repression of grave breaches are extensive, but cover only some regulations relating to breaches themselves, the responsibility of persons committing them, the penalties to be imposed, the courts that are to try the accused, their competence, and lastly procedure.

In repressing breaches States must conform to this international legal framework and must reinforce and develop it.

B. Supplementary national legislation

Supplementary legislation by States²⁹ covers a wide spectrum; each State has adopted a different position in developing international regulations.

In spite of the difficulty of knowing the present state of the various national legal provisions in this connection,³⁰ it is possible to outline a general picture of national legislation, distinguishing between States that have not complied with the requirement in the Conventions (or in Protocol I, if they have ratified it) and States that have, each in its own way, formally met that requirement.

a) *Some States have not fulfilled the undertaking they have given*, but here we must distinguish between two totally different sets of reasons for their non-compliance:

Certain States have not complied because they believe that it is unnecessary to take further action. They consider that their civil and military law already provides a sufficient basis for penal sanctions against grave breaches or, in other words, that they have already fulfilled that undertaking. This view is open to criticism, because breaches of the law of war are different from other breaches of law, and general domestic legislation does not provide adequate guarantees

²⁹ Barras, Raphaël, “Incidences des dispositions pénales du Protocol I additionnel aux Conventions de Genève de 1949 sur le système judiciaire national”, *Revue de droit pénal militaire et de droit de la guerre*, Vol. XXI, 1982, p. 416, says that international provisions are “imperfect” and that national legislations “have necessarily to bridge this gap”.

³⁰ For example, the *Société internationale de Droit Militaire et de Droit de la Guerre* has had great difficulty in eliciting national responses to its questionnaire on *Criminalistic and criminological aspects of national repression of grave breaches of humanitarian law*.

that they will be repressed.³¹ These countries have generally not ratified Protocol I.³²

Some other countries have not complied as yet, but since they have introduced Bills in this respect they will presumably meet their obligation at some future date. Meanwhile their previous legislation remains in force. There are also many other States that simply have no plans to comply or, if they have, have not made them known. This delay and, in some cases, the total disregard shown for the commitment they made when they signed and ratified the Conventions can only be regretted. Many of these countries are also party to Protocol I.³³

³¹ The International Committee of the Red Cross observes that ordinary penal legislation (i.e. the civilian and military penal codes) does not adequately ensure repression of breaches of the Geneva Conventions. See *Respect of the Geneva Conventions — Measures taken to repress violations (Reports submitted to the International Committee of the Red Cross to the XXth and the XXIst International Conferences of the Red Cross)*, Geneva, 1971, vol. I, p. X.

³² Among these countries are the following. *France*, which let slip the opportunity of ratification offered by the reform of its Code of Military Justice. The projected reforms formally covered breaches of the law of war. Instead the French Government listed in its Code of Military Justice and in the recent General Disciplinary Regulations for the Armed Forces of 12 July 1982 certain offences and misdemeanours which are partly the same as the breaches mentioned in the Conventions and Protocol I. The French Government replied to the ICRC that "Many articles of the Penal Code and Code of Military Justice, although not specifically covering the breaches mentioned in the Geneva Conventions, ensure repression of the crimes and offences prohibited by the Conventions. The French Government accordingly considers that it has duly complied with the undertaking required by the Conventions". *Portugal*, Article 87 of whose Code of Military Justice states in general terms and without specifically referring to the Geneva Conventions that any member of the armed forces "who has committed any act condemned by an international Convention to which the Portuguese Government has acceded" will be punished "unless such acts are essential to the success of military operations". That proviso is evidently not in accordance with the spirit or the letter of the Geneva Conventions. The *United States*, which maintains that the penalties prescribed in its military and civil legislation adequately punish the breaches of the law of war specified in the Geneva Conventions. Under Articles 18 and 21 of the Uniform Code of Military Justice, war crimes committed by persons subject to that Code are punishable by military courts. Similarly, the United States government maintains that many grave breaches, if committed in the United States, are breaches of its domestic legislation and are therefore punishable by civil courts. The United States only punishes war crimes as such when these are committed by enemy nationals or persons in the service of the enemy. There is then no conflict with international law because the circumstances are covered by the country's own legal system. *Japan*, which maintains that since its Constitution condemns resort to war, citizens of Japan can obviously never be in the situation envisaged by the Conventions. It nevertheless also alleges that breaches of the Conventions are punishable under its criminal law. Other countries such as Iraq and South Africa.

³³ Among the countries that have shown by introducing Bills into Parliament that they intend to meet their commitment are the following. *Belgium*, which previously put forward a government Bill which was not approved, and subsequently presented another one comprising eleven articles in two chapters. The first of these lists and typifies grave breaches, and the second covers competence, procedure and the

b) *Other States have formally complied*, but in different ways.

In the first place there are the States which by means of special laws or laws supplementing their legislation on repression in general have fully met their undertaking, and in various ways provide for all the grave breaches specified in the Conventions, and in Protocol I if they have ratified it. These are the States which, although possibly open to criticism on technical grounds, have fully complied with the undertaking they gave when ratifying the Conventions, and Protocol I if they did ratify it.³⁴

execution of penalties. That Bill, No. 577, was put before Parliament in its 1962-1963 session in compliance with the obligation undertaken when Belgium ratified the Geneva Conventions. It is a very comprehensive Bill which imposes severe penalties for breaches and even deals with exemption from penal responsibility. The *Federal Republic of Germany*, which although it declared in 1964 that all the breaches of the laws of armed conflicts mentioned in the Conventions are punishable under its ordinary criminal law, has put forward a government Bill relating to offences against the laws and customs of war. This Bill provides for special legislation supplementing ordinary criminal law, in some cases by broadening the definition of offences under ordinary law, and in others defining offences *ex novo* where there are no other means of punishing certain breaches. The penalties prescribed are comparatively moderate. *Italy's* position is different; it has not brought in any Bill. Its penal laws are insufficient to punish the breaches mentioned in the Geneva Conventions; the Italian wartime Code of Military Justice, dating from 1941, merely contains a number of provisions that whilst repressing acts contrary to the laws and customs of war make no provision for including the breaches specified in the Conventions. Part III, Chapter III of that Code, ambitiously entitled "Prohibited Acts of War", is anything but comprehensive. Nevertheless *Italy*, which in 1986 ratified both Protocols although with reservations, has not put forward any Bill covering the breaches specified in the Conventions or Protocol I. Many other States are in this situation, which is regrettable, for even a heterogeneous system of organized repression is better than having no provisions at all to supplement international regulations.

³⁴ This category comprises a long list of countries, among them *Spain*, whose Military Penal Code of 1985, Articles 68-79, mention (in their own words) all the breaches specified in the Conventions; *Switzerland*, which has added the breaches specified in the Conventions to Articles 109ff of its Military Penal Code of 1950; *Holland*, whose Acts of 19 May 1954 and 10 July 1962 have adapted its provisions on war crimes to the provisions of the Geneva Conventions; the *United Kingdom*, whose Geneva Conventions Act of 1957 adapts its legislation to the Geneva Conventions of 1949, repressing the grave breaches specified therein and making rules affecting both the substance and procedure of its penal laws; *Australia*, in an Act of 1957 on the same lines as that of the United Kingdom; *Canada*, which has introduced regulations that are also on the same lines as those of the United Kingdom; *Ireland*, in an Act of 1962 on the British model; *India*, which complied with its undertaking in the same way in an Act of 1960; *New Zealand*, in a special Act of 1958 worded in much the same way as the British one; *Uganda*, in an Act of 1964; *Malaysia*, in an Act of 1962; *Kenya*, in an Act of 1968, and other countries that are members of the British Commonwealth. Much the same lines have been followed in *Sweden*, which carried out a reform of its legislation in 1964, when it introduced far-reaching regulations to comply with its undertaking; *Norway*, which has amended Article 108 of its Military Penal Code to prosecute persons committing any of the grave breaches mentioned in the Conventions; *Denmark*, Chapter 25 of whose Military Penal Code has been brought into line with

Secondly, we have to mention other countries that have partially complied by incorporating some but not all breaches of the Conventions in their domestic legislation.³⁵

C. Conclusions

To conclude, some of the States that have ratified the Geneva Conventions and, as the case may be, 1977 Protocol I, have supplemented the international regulations, while others have not. As a result there are differences in the substance and procedure of penal law in various States.

This obliges us to study the two problems separately. As regards the substance of penal law, we have to study the typification of breaches, the consequent penal responsibility, and the penalties applicable. As regards procedure, we have to examine what courts try such cases, the details of their competence, and the procedure they adopt to impose penalties.

the Conventions by rendering punishable all the breaches mentioned in the Conventions; and *Yugoslavia*, which has added to its Penal Code a series of provisions covering the breaches mentioned in the Conventions. A special case worthy of separate mention as one that most fully complies with the undertaking to introduce regulations supplementing those of international law is *Ethiopia*, whose Penal Code of 1957, drawn up by Professor Jean Graven of Switzerland, "boldly incorporates in the laws of the country, more systematically and completely than some other legislations have done since the Geneva Conventions of 1949, the whole new field of breaches of international law" by adding all the breaches specified in the Geneva Conventions to its Articles 282ff.

Many countries, therefore, have formally complied with their undertaking. But as Georges Levasseur and R. Merle (from whom we have borrowed heavily in drawing up the above classifications of countries) say in *L'état des législations internes au regard des obligations contenues dans les Conventions internationales de droit humanitaire*, Centre de droit international de l'Université de Bruxelles, Brussels, 1970, p. 251, the important thing is "to know whether the countries that have special legislation do in fact apply it effectively, and if so, how". As they point out, it would be difficult to reach a reliable conclusion on this point, because of the lack of information, the ICRC's wholly justified discretion, and the evident unwillingness of the local authorities responsible to comment on violations of the law of war. It has not always been possible for the author to obtain the latest information on the legal situation in various countries, which may have changed since the time of writing.

³⁵ Those countries include the *USSR*, whose Penal Code of 1960 covers breaches committed by members of the armed forces who are prisoners of war, and offences committed against them. A similar practice was followed by *Hungary*, which punishes breaches committed against prisoners of war and certain breaches committed against the civilian population; and *Czechoslovakia*, whose law of 1961 provides sanctions for offences committed against prisoners of war, the wounded, sick and shipwrecked and the civilian population. In all these countries the special rules refer only to substance, i.e., the breach. No special rules having been adopted for procedure, the usual general rules, or special military rules, are applied.

We shall therefore consider two major headings: penal law, and the relevant procedural law.

II. THE PENAL LAW OF WAR

As just stated, the penal law of war raises three problems: typification of breaches, the consequent penal responsibility, and the penal sanctions applicable.

1. Typification of breaches

Here as in the entire system, the law of armed conflicts contained in the Geneva Conventions of 1949 and the additional provisions contained in Protocol I of 1977 form the legal frame and basis for definition or typification of the breaches that have to be punished. In other words, the international regulations indicate the types of crimes or offences considered as breaches and which by their very nature and enormity cannot go unpunished by States.

Any further typification is a matter for the States themselves. Their only obligation is to list these categories of crimes and offences, either in the form in which they are typified in international law or in a different form having the same content. The goal is the same but the ways of arriving at it may be different.³⁶

A. The international basis

The common basis is the international texts, which when carefully considered prove to be quite systematic.

³⁶ See *The Geneva Conventions of 12 August 1949 — Commentary* published under the editorship of Jean S. Pictet, ICRC, Geneva, 1962, *First Geneva Convention*, p. 353: "There is no unity of inspiration between the different systems. In the Anglo-Saxon countries it would appear that the existence of a rule of international law, whether explicit or customary, and whether it makes provision for penal sanctions or not, entitles national tribunals to pass sentence when the rule is violated. In the countries of the European continent, on the other hand, a penal law can only be applied if it embodies a normative rule, and further carries explicit provisions with regard to the nature and severity of the penalty. In these latter countries the maxim *nulla pena sine lege* has lost none of its force.

Whatever one's views may be on the repressive action taken after the Second World War, it will be agreed that it would have been more satisfactory, had it been possible to base it on existing rules without being obliged to have recourse to *ad hoc* measures."

a) *These international texts* are contained in the Geneva Conventions of 1949 and Protocol I of 1977.

The Geneva Conventions of 1949 (Articles 49 of C I, 50 of C II, 129 of C III, and 146 of C IV) refer to “acts contrary to the provisions of the present Convention”.

Article 50 of Convention I and Article 51 of Convention II state in identical terms that:

“Grave breaches to which the preceding Article relates shall be those involving any of the following acts, if committed against persons or property protected by the Convention: wilful killing, torture or inhuman treatment, including biological experiments, wilfully causing great suffering or serious injury to body or health, and extensive destruction and appropriation of property, not justified by military necessity and carried out unlawfully and wantonly”.

The corresponding article in Convention III is Article 130, which instead of ending with a reference to destruction and appropriation of property replaces it with:

“compelling a prisoner of war to serve in the forces of the hostile Power, or wilfully depriving a prisoner of war of the rights of fair and regular trial prescribed in this Convention”.

The corresponding article in Convention IV is Article 147, in which that passage is replaced by:

“unlawful deportation or transfer or unlawful confinement of a protected person, compelling a protected person to serve in the forces of a hostile Power, or wilfully depriving a protected person of the rights of fair and regular trial prescribed in the present Convention, taking of hostages and extensive destruction and appropriation of property, not justified by military necessity and carried out unlawfully and wantonly”.

These Conventions do not mention any “acts contrary” that are not grave breaches.³⁷

³⁷ To list all the acts regarded by the Conventions as “acts contrary” would be never-ending and would require examination of all the obligations imposed by the treaties.

Because of their special significance, we quote here Article 54 of the First Convention and the corresponding Article 45 of the Second Convention, both of which state that “The High Contracting Parties shall, if their legislation is not already adequate, take measures necessary for the prevention and repression at all times, of the abuses...” of the protective emblem of the Red Cross (even when used only for purposes of indication).

In this connection, Article 11, para. 4, of Protocol I states:

“Any wilful act or omission which seriously endangers the physical or mental health or integrity of any person who is in the power of a Party other than the one on which he depends and which either violates any of the prohibitions in paragraphs 1 and 2³⁸ or fails to comply with the requirements of paragraph 3³⁹ shall be a grave breach of this Protocol”.

There is a further list of breaches⁴⁰ in Article 85, which reads:

1. The provisions of the Conventions relating to the repression of breaches and grave breaches, supplemented by this Section, shall apply to the repression of breaches and grave breaches of this Protocol.

2. Acts described as grave breaches in the Conventions are grave breaches of this Protocol if committed against persons in the power of an adverse Party protected by Articles 44, 45 and 73 of this Protocol,⁴¹ or against the wounded, sick and shipwrecked of the adverse Party who are protected by this Protocol, or against those medical or religious personnel, medical units or medical transports which are under the control of the adverse Party and are protected by this Protocol.

³⁸ Article 11, paras. 1 and 2, reads:

“1. The physical or mental health and integrity of persons who are in the power of the adverse Party or who are interned, detained or otherwise deprived of liberty as a result of a situation referred to in Article 1 shall not be endangered by any unjustified act or omission. Accordingly, it is prohibited to subject the persons described in this Article to any medical procedure which is not indicated by the state of health of the person concerned and which is not consistent with generally accepted medical standards which would be applied under similar medical circumstances to persons who are nationals of the Party conducting the procedure and who are in no way deprived of liberty.

2. It is, in particular, prohibited to carry out on such persons, even with their consent:

- a) physical mutilations;
- b) medical or scientific experiments;
- c) removal of tissue or organs for transplantation,

except where these acts are justified in conformity with the conditions provided for in paragraph 1”.

³⁹ Article 11, para. 3, considers a number of commonsense exceptions to the above rules.

⁴⁰ See Additional Protocol I, Article 85.

⁴¹ Article 44 of the Protocol protects (and defines) combatants and prisoners of war. Article 45 protects persons who have taken part in hostilities, to whom it grants provisional prisoner-of-war status. Article 73 relates to refugees and stateless persons, specifying that they are protected persons.

3. *In addition to the grave breaches defined in Article 11, the following acts shall be regarded as grave breaches of this Protocol, when committed wilfully, in violation of the relevant provisions of this Protocol, and causing death or serious injury to body or health:*

a) *making the civilian population or individual civilians the object of attack;*

b) *launching an indiscriminate attack affecting the civilian population or civilian objects in the knowledge that such attack will cause excessive loss of life, injury to civilians or damage to civilian objects, as defined in Article 57, paragraph 2 a) iii),*

c) *launching an attack against works or installations containing dangerous forces in the knowledge that such attack will cause excessive loss of life, injury to civilians or damage to civilian objects, as defined in Article 57, paragraph 2 a) iii);⁴²*

d) *making non-defended localities and demilitarized zones the object of attack;*

e) *making a person the object of attack in the knowledge that he is hors de combat;*

f) *the perfidious use, in violation of Article 37,⁴³ of the distinctive emblem of the red cross, red crescent or red lion and sun or of other protective signs recognized by the Conventions or this Protocol.*

4. *In addition to the grave breaches defined in the preceding paragraphs and in the Conventions, the following shall be regarded as grave breaches of this Protocol, when committed wilfully and in violation of the Conventions or the Protocol;*

a) *the transfer by the Occupying Power of parts of its own civilian population into the territory it occupies, or the deportation or transfer of all or parts of the population of the occupied territory within or outside this territory, in violation of Article 49 of the Fourth Convention;⁴⁴*

⁴² Article 57 relates to precautions in attack and requires that an attack shall not be decided upon if it "may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated".

⁴³ Article 37 prohibits perfidy in general, including the feigning of protected status by the use of signs or emblems.

⁴⁴ Article 49 of the Fourth Convention prohibits individual or mass forcible transfers and deportations other than a total or partial evacuation necessary for the security of the population.

b) *unjustifiable delay in the repatriation of prisoners of war or civilians;*

c) *practices of apartheid and other inhuman and degrading practices involving outrages upon personal dignity, based on racial discrimination;*

d) *making the clearly-recognized historic monuments, works of art or places of worship which constitute the cultural or spiritual heritage of peoples and to which special protection has been given by special arrangement, for example, within the framework of a competent international organization, the object of attack, causing as a result extensive destruction thereof, where there is no evidence of the violation by the adverse Party of Article 32, sub-paragraph b),⁴⁵ and when such historic monuments, works of art and places of worship are not located in the immediate proximity of military objectives;*

e) *depriving a person protected by the Conventions or referred to in paragraph 2 of this Article of the rights of fair and regular trial.*

5. *Without prejudice to the application of the Conventions and of this Protocol, grave breaches of these instruments shall be regarded as war crimes”.*⁴⁶

Article 86, para. 1, adds a reference to breaches consisting in failure to act. Paragraph 1 states that:

“The High Contracting Parties and the Parties to the conflict shall repress grave breaches, and take measures necessary to suppress all other breaches, of the Conventions or of this Protocol which result from a failure to act when under a duty to do so”.

b) **Comment and conclusion** — The following general conclusions may be drawn from the texts just quoted:

As regards the organization and mechanism of repression, the Conventions and Protocol I necessarily start by stating that certain acts contrary to its regulations are illegal and in principle punishable.⁴⁷

⁴⁵ Article 53 of the Protocol prohibits acts of hostility directed against historic monuments, works of art or places of worship. Its sub-paragraph (b) states that it is prohibited “to use such objects in support of the military effort”.

⁴⁶ What is meant by grave breaches being “regarded as” war crimes is not altogether clear. Perhaps the only reason for this provision is to avoid ambiguity by putting grave breaches of any kind on the same footing as war crimes and using the latter term to cover both.

⁴⁷ The regulations relating to repression in the law of war are inevitably on the lines of all punitive systems, which are based on a conditional proposition consisting of a supposition (delinquent conduct) and a consequence (its penal sanction). (See J. M. Rodríguez Devesa: *Derecho Penal Español, Parte General*, Madrid, 1973,

Such unlawful acts are defined by means of what is technically called a “typification” or “Tatbestand”; that is, a process in which all the elements of each unlawful act are reduced to a single whole, always comprising actions or voluntary failure to act, resulting in prejudice to persons or objects specially protected.⁴⁸

These kinds of unlawful acts have been generically designated as “breaches”. The word entails no commitment, and was doubtless chosen in order to prevent any confusion that might arise from the use of other words such as “offence”, “crime” or “misdemeanour”, which have special connotations and very definite meanings in the penal legislation of various States.

All the breaches have been classified into two major groups of greater or lesser gravity, or in other words according to their enormity, for there is no qualitative or inherent difference between the breaches in the two groups.⁴⁹ The first group consists of what the international texts specifically call “grave breaches”, and the second of what we may call “minor violations”, although this expression is not used in the international texts.

Grave breaches,⁵⁰ sometimes also called “serious violations”,⁵¹ are those which most seriously prejudice the basic interests protected by

vol. I, p. 145). It has accordingly been necessary to define certain kinds of behaviour that violate its legal rules, as the basis of the sanction.

⁴⁸ In the law of war, generally speaking, the victim of breaches may be an individual or a group, always provided that such individual or group forms part of one of the “categories” defined in the Conventions and Protocol I. It follows that the law of war does not protect all and sundry in a special way, but only persons who are “specially protected” because they are comprised in the said categories. This is no obstacle to the existence of general protection, which is also recognized by humanitarian law. In some cases, belonging to these categories makes no very great difference; but in others, for example where prisoners of war are concerned, inclusion in this category is all-important (see the *Commentary on the Third Geneva Convention*, Geneva, 1960, pp. 50ff).

⁴⁹ Here we come upon the difficulty which criminal law in general finds in constructing a concept of its own of what is called the “natural offence” (see Giuseppe Maggiore: “Delitto naturale e delitto legale”, *Riv. de Crim. e Diritto Crim.*, 1948), and consequently the difficulty of constructing a separate concept of what might be called a “natural” grave breach.

⁵⁰ The *Commentary on the First Geneva Convention*, *op. cit.*, p. 371, states: “The actual expression ‘grave breaches’ was discussed at considerable length. The USSR Delegation would have preferred the expression ‘grave crimes’ or ‘war crimes’. The reason why the Conference preferred the words ‘grave breaches’ was that it felt that, though such acts were described as crimes in the penal laws of almost all countries, it was nevertheless true that the word ‘crimes’ had different legal meanings in different countries.”

⁵¹ As the *Commentary on the Additional Protocols*, *op. cit.*, para. 3621, p. 1045, explains, “virtually no distinction is made between grave breaches and serious violations in the text of the Conventions or the Protocol, which almost always refers to ‘grave breaches’ ”.

humanitarian law. They are accordingly known as “war crimes”.⁵² What this term means is not clear, but we interpret it to mean violations of international law seriously affecting the persons and objects protected and, moreover, directly affecting the vital interests of the international community.⁵³

Since, as stated above, it is difficult to define grave breaches because they are not in a class of their own, the Conventions and Protocol I enumerate them, but not exhaustively. The list is left open for the possible inclusion of other grave breaches,⁵⁴ which may be subject to universal jurisdiction as are those expressly enumerated, under customary law or other treaties.⁵⁵

⁵² Article 85, para. 5, of Protocol I, which contains this term, was criticized. See the *Commentary on the Additional Protocols*, *op. cit.*, paras. 3521 and 3522, p. 1003: “This paragraph, which was considered indispensable or self-evident by some delegations, seemed out of place or dangerous to others. The former emphasized the need to confirm that there is only one concept of war crimes, whether the specific crimes are defined under the law of Geneva or The Hague and Nuremberg law. Without denying that grave breaches of the Conventions and the Protocol are indeed war crimes, the latter preferred those instruments to stick to their own terminology in view of their purely humanitarian objectives”.

⁵³ The Preamble of the Agreement of 8 August 1945 of the Quadripartite Commission for the prosecution of war crimes states that the four Governments are “acting in the interests of all the United Nations”.

Article 19 of the Draft Article on the responsibility of States, approved by the United Nations International Law Commission, states that the internationally unlawful event resulting from violation by a State of an international obligation so essential to the safeguard of fundamental interests of the international community that its violation is recognized as a crime by that community as a whole constitutes an international crime. The inference appears to be that an international crime is a violation of the interests of the international community, which are fundamental. This, in our opinion, is where war crimes should be placed. Furthermore, in legislation that recognizes a difference between “crime” and “offence”, “crime” means a more serious violation.

⁵⁴ The enumeration of grave breaches in Article 50 of the First Convention (and its corresponding articles in the other three Conventions) begins: “Grave breaches... shall be those involving any of the following acts” — “any” being rendered in the French version “l’un ou l’autre” and in the Spanish version “algunos”. The enumeration is therefore not exhaustive. The *Commentary on the First Convention*, *op. cit.*, p. 367, states that “apart from the ‘grave breaches’ enumerated in Article 50, it is easy to think of other infractions which are also serious, such as the improper use of the red cross emblem in time of war”.

⁵⁵ In our opinion, grave breaches are not only those explicitly enumerated but also those which may be inferred from the Conventions and from the Protocol (because it refers to the Conventions) or from other texts of customary or treaty law. The *Commentary on the Protocols*, *op. cit.*, p. 976, note 11, states: “This means that only the conduct included in the list (Article 85, sub-paragraphs 2-4 of the Protocol) is subject to universal jurisdiction under the Conventions and the Protocol. It does not mean that other breaches cannot also be subject to universal jurisdiction by reason of customary or treaty law”.

Minor violations, sometimes referred to in the texts merely as “breaches” and in others as “acts contrary” to the Conventions or “other breaches” of the Conventions or the Protocol, are violations of or failures to comply with humanitarian law. They are not included under the heading of grave breaches because they do not fundamentally affect protected interests.

Simple breaches or minor violations have purposely not been expressly enumerated, because it was considered that they were not important enough to call for universal jurisdiction⁵⁶ and such a list would have been too long.⁵⁷ Undoubtedly many of these violations may be illegal acts, but equally certainly most of them are the result of failure to act when under a duty to do so.⁵⁸

There is no clear distribution between grave and minor breaches, for as stated above there are grave breaches other than those expressly enumerated. Minor violations, if repeated, may be classified as grave breaches in some circumstances.⁵⁹

c) *Classifying breaches* — Consequently, and using the proper terms, we can classify breaches of the laws of armed conflicts as follows:

1. GRAVE BREACHES

Expressly mentioned:

In the 1949 Geneva Conventions:

Breaches specified in all four Conventions:

- Wilful killing.
- Torture or inhuman treatment, including biological experiments.

⁵⁶ “Violations of certain of the detailed provisions of the Geneva Conventions might quite obviously be no more than offences of a minor or purely disciplinary nature, and there could be no question of providing for universal measures of repression in their case”. (*Commentary on the First Convention, op. cit.*, p. 370).

⁵⁷ See Stanislaw E. Nahlik, “Le problème des sanctions en droit international humanitaire”, in *Studies and essays on international humanitarian law and Red Cross principles, in honour of Jean Pictet*, ICRC, Martinus Nijhoff Publishers, Geneva, The Hague, 1984, p. 477, who states that it was intended to make such a list of breaches in the 1954 Convention on the protection of cultural property, and that “it only remains for some commentator to make it”.

⁵⁸ Article 86, para. 1, Protocol I.

⁵⁹ At least for the purposes of the competence of the International Fact-Finding Commission mentioned in Article 90, Protocol I, “Minor violations may become serious if they are repeated, and it is then up to the Commission to determine this” (*Commentary on the Protocols, op. cit.*, para. 3621, p. 1045). And, as stated above, a serious violation is a grave breach.

- Wilfully causing great suffering or serious injury to body or health.

Breaches specified in Conventions I, II and III:

- Extensive destruction and appropriation of property, not justified by military necessity and carried out unlawfully and wantonly.

Breaches specified in Conventions III and IV:

- Compelling a prisoner of war or a protected person to serve in the forces of a hostile Power.
- Depriving a prisoner of war or a protected person of the rights of fair and regular trial prescribed in the Conventions.

Breaches specified in Convention IV:

- Unlawful deportation and transfers.
- Unlawful detention.
- Taking of hostages.

In Protocol I:

- Any wilful act or omission which seriously endangers the physical or mental health or integrity of any person who is in the power of a Party other than the one on which he depends.
- Grave breaches of the Conventions committed against persons in the power of an adverse Party who are protected by Articles 44, 45 and 73 of the Protocol, or against the wounded, sick and shipwrecked of the adverse Party or against those medical and religious personnel, medical units or transports which are under the control of the adverse Party.
- Acts committed wilfully in violation of the Protocol and causing death or serious injury to body or health, consisting in: (a) attacks on the civilian population; (b) indiscriminate attacks on the civilian population or civilian objects; (c) attacks against works or installations containing dangerous forces; (d) attacks on non-defended localities and demilitarized zones; (e) attacks on persons who are *hors de combat*; and (f) the perfidious use of recognized protective signs.
- Acts committed wilfully and in violation of the Conventions or the Protocol, consisting in: (a) the transfer by the Occupying Power of parts of its own civilian population into the territory it occupies, or

the deportation or transfer of all or parts of the population of the occupied territory within or outside this territory; (b) delay in the repatriation of prisoners of war or civilians; (c) practices of *apartheid* and other inhuman and degrading practices based on racial discrimination; (d) attacks on historic monuments, works of art or places of worship; and (f) depriving a person protected by the Conventions or the Protocol of the rights of fair and regular trial.

- Breaches of the Conventions or of the Protocol which result from the failure to act when under a duty to do so are also grave breaches.

Grave breaches which may be tacitly deduced:

- Acts and failures to act which by virtue of the Conventions' "open list" may be considered as grave breaches.

2. MINOR VIOLATIONS

- Acts which are not grave breaches but are contrary to the conduct required by humanitarian law;
- Failures to act, when under a duty to do so expressly established in these regulations, not sufficiently serious to be classed as grave breaches.

B. Supplementary national legislation

National legislation to supplement these international regulations, as regards typification of breaches of the law of armed conflicts, is a matter of each of the States that have ratified the Geneva Conventions and, where appropriate, Protocol I.

a) *The texts* — It is worth while pointing out that by virtue of Article 49 (quoted above in its entirety) of the First Convention, and the corresponding articles in the other three Conventions, the High Contracting Parties: "*undertake to enact any legislation necessary to provide effective sanctions for ... any of the grave breaches of the present Convention*". The Article goes on to state that each Contracting Party "*shall take measures necessary for the suppression of all acts contrary to the provisions of the present Convention*".

Protocol I states in Article 85, para. 1 (also quoted in its entirety) that the provisions of the Conventions “*shall apply to the repression of breaches and grave breaches of this Protocol*”. Article 86, para. 1, adds that the Parties “*shall repress grave breaches and take measures necessary to suppress all other breaches ... which result from a failure to act when under a duty to do so*”.

These paragraphs show the decisive importance of the distinction between grave breaches, against which States are bound to pass punitive legislation, and minor violations, against which States need only take appropriate measures, which need not be legislative. This applies to breaches caused by an act or by failure to act.

Furthermore we may directly deduce that since States have to take legislative or other action to impose penal sanctions or repress acts contrary to the Conventions and Protocol, such measures must begin by typifying — to use the technical term — grave breaches and by giving a broad definition of other breaches.⁶⁰

Consequently, and solely as regards typification or definition of breaches, we shall now examine how States go about the task of supplementing international law.⁶¹

b) ***Grave breaches*** — In typifying grave breaches their approaches have basically been the following:

First come the countries whose typification is independent of that in the Conventions and the Protocol, being based on concepts of their own that are peculiar to their punitive legislation but are more or less easily comparable in essentials to the international classifications, without making any conclusive reference to them. Basically, this group comprises States that have not discharged the obligation they assumed in ratifying the Conventions and in certain cases Protocol I. Some States have resorted to specific typification of offences, others to a “mixed” system of specific offences plus a general offence or offences. The latter States use two typifications of breaches — the international one taken from the Conventions and Protocol, and their internal one varying from State to State. The typification actually applied is the internal one. Obviously, therefore, if this does not fully

⁶⁰ The substance or penal aspect of sanctions for breaches necessarily has to follow the progression “offence — responsibility — penalty”. Clearly therefore, in order to comply with their obligation to enact legislation to punish breaches, States have to begin by designating the offence and, therefore, “typifying” it.

⁶¹ In principle, classification of States according to their attitude to typification of breaches is independent of the general classification according to their attitude to fulfilling their obligation; but these classifications of course overlap.

cover international breaches the State concerned is not fully complying with its obligation to pass the necessary legislation.⁶²

Secondly must be mentioned other countries which, so to speak, go half way towards the international rules governing violations: they typify offences in their domestic legislation in a way that follows the international instruments, but use concepts of their own peculiar to their internal system of repression. In other words, they take into account international definitions of breaches so as to adapt to them, but express them in their own words and fit them into their own conception of punishment. There are therefore two typifications, an international one, and a domestic "retypification". As in the previous case, there are variants of this attitude — State typification may be global, or detailed, or mixed.⁶³

⁶² This group includes the following countries: very significantly, the *United States*, whose doctrine is that violations of the law of war committed by persons subject to the military law of the United States are usually violations of the Uniform Code of Military Justice and have therefore to be punished as offences contained in that Code. Violations of the law of war by persons not subject to military law, within the United States, are usually violations of Federal law or of State criminal law and must be prosecuted as offences covered by such law. The only offences prosecuted under international law are violations of the law of war committed by enemy nationals or persons serving the interests of an enemy State, in accordance with the old principle that "international law is part of the law of the land". *France*, whose Code of Military Justice and Regulations for General Discipline of the Armed Forces establish prohibitions that in part coincide with international breaches. Articles 407ff of the French Code of Military Justice typify some offences in detail and Article 445 of that Code appears also to adopt a global typification. Barras (*op. cit.*, pp. 422-423) states that there is also still repression by analogy, basing this opinion on the Ordinance of 28 August 1944 relating to the repression of war crimes, which was only temporarily in force but could be used as a system of analogy if needed. The *Federal Republic of Germany* introduced a Bill which appears to be formulated independently of the typification of international breaches but has its own detailed system of typification. In many ways it goes further than the Conventions or even Protocol I in providing for the protection of individuals. *Belgium* also introduced a Bill which with regard to typification of offences follows more or less the same lines. There is however some doubt that it can form part of this group of countries, for it seems to follow the definitions of grave breaches used in the Conventions and Protocol more closely than the German Bill. *Italy* must also be included; its Military Penal Code of 1941 contains a series of precepts for the repression of offences against the laws and customs of war. These naturally bear no relation to international breaches.

⁶³ Many countries may be included in this group, but because of its significance in relation to typification of punishable war offences *Ethiopia* may be singled out. As stated above, its Penal Code was drawn up by Professor Jean Graven, and adopts in detail all the breaches of the Conventions but with its own typification or re-typification. Another is *Spain*, Articles 68 to 79 of whose recent Military Penal Code of 9 December 1985 contain a somewhat controversial re-typification of many internationally defined breaches, adding other offences and ending with a general provision relating to the other acts contrary to the prescriptions of the international Conventions ratified by Spain. *Yugoslavia* has similarly inserted into its Penal Code, in Articles 124ff, a series of offences practically the same as all those classed as grave

The third and last group comprises countries that have most closely followed the international system of repression. Instead of adopting their own typification or re-typification, they have referred to the breaches contained in the international texts, thus adopting a policy of reference, or “renvoi”, to the international system.⁶⁴ What this actually means is acceptance of the international typification or adopting its wording by global reference, detailed reference or a combination of both.⁶⁵

c) *Minor violations* — As far as minor violations are concerned the problem facing States is clear, for States are not obliged to take legislative measures, nor are they duty bound to impose penal sanctions. They need only take such measures as are generally necessary to repress such breaches. The result is that:

- Since the international system does not oblige States to apply penal sanctions to minor violations, States are under no obligation to typify them; this technical problem only arises for subsequent penal purposes.

breaches in the Conventions, but like Spain reformulating them. *Holland*, soon after ratifying the Geneva Conventions, enacted a new “Act on War Criminal Law”, modifying and supplementing its previous legislation and adapting it to the international texts by a general provision repressing violations of the laws and customs of war, and inserting into its ordinary Penal Code a series of specific provisions for the repression of certain violations. Finally, *Norway’s* Military Penal Code gives a general typification and the civil Penal Code maintains specific typifications.

⁶⁴ The use of the word “renvoi” is acceptable only with reservations, because of its specific meaning in private international law. In any case, taking into account the reference of the international system to the domestic system of a State, and vice versa, one might speak of a “return renvoi”.

⁶⁵ There are many countries in this group: the *United Kingdom*, whose Geneva Conventions Act of 1957 punishes globally all the grave breaches enumerated in the Geneva Conventions and actually refers to the list of those breaches contained in each of those Conventions; *Ireland*, whose Act of 1962 follows the British model of general typification and as well as this reference to grave breaches contains other rules punishing “minor violations”; *Denmark*, Article 25 of whose Penal Code contains a global typification that refers to international regulations; *Australia*, whose Act of 1957 follows the British example; *Canada*, whose Act if worded in much the same way as the British one; *India*, *New Zealand*, *Uganda*, *Kenya*, *Nigeria* and *Malaysia*, that have more or less adopted the British example and approach; *Brazil*, Articles 400 to 408 of whose Military Penal Code adopted a system of global typification by reference to the breaches specified in the international texts; and *Switzerland*, where the Military Penal Code in force since 1968 adopts a general typification referring to the international Conventions on the conduct of war, undoubtedly because it considers that the typification in the Geneva Conventions is itself sufficiently clear.

The above list of countries is not exhaustive, any more than are the lists of countries adopting the other methods described above. Direct documentary sources are scanty, incomplete and unreliable, and some countries may therefore have been wrongly classified in the above groups.

● Nevertheless, since international regulations do not and cannot prevent States from adding (on their own responsibility and at their own risk) penal provisions to repress minor breaches, either punishing them as breaches or converting them into offences, if they adopt such provisions they will presumably have to typify the breaches.⁶⁶

C. Conclusions

To sum up, international humanitarian law has established a number of “universal types” of grave breaches that States are obliged to take up in their domestic legislation for any of the procedures just mentioned. If they do not do so they fail to comply with the undertaking they gave in ratifying the Geneva Conventions and, where appropriate, Protocol I. The international regulations do not require penal repression of other breaches and have therefore not established specific types. States are free merely to repress them or to impose penal sanctions for them. In the latter case they will have to adopt a classification of their own.

2. Penal responsibility

Responsibility is the consequence of conduct, and penal responsibility is the liability or duty to answer for the consequences of the offence. According to this general proposition, persons committing breaches of the law of war incur responsibility. For grave breaches that responsibility is necessarily a penal one. In principle it is not penal for other breaches.⁶⁷

As in the previous case, the present problem of penal responsibility arises basically at international level and for supplementary purposes at national level.

A. The international basis

At international level the law of war contains few rules, and many of these are only generic deductions.

⁶⁶ The need to typify any breach of the regulations when a penal sanction is to be imposed stems directly from the principle *nullum crimen sine lege*, which means that no offence is committed unless the law has previously stated that the action taken is an offence.

⁶⁷ Disregarding matters of theory which belong rather to any penal system, the three questions raised by the element of responsibility are: the persons who commit or take part in the offence, the degree of commission of the offence, and the extenuating circumstances or absence of civil responsibility. In certain cases (not considered here) there is civil as well as penal responsibility.

a) *The texts* of the Conventions and the Protocol quoted above contain occasional expressions referring to our present problem, and a few other international texts may be summoned to our aid.

The clause of Article 49 of the First Convention (and the identical articles in the other three Conventions) that refers to the necessary legislation to be enacted by States to provide penal sanctions specifies that these are “for persons committing, or ordering to be committed, any of the grave breaches of the present Convention”.

As previously stated, this is also applicable to grave breaches of the Protocol.

Article 86, para. 2, of Protocol I also raises the question of penal or disciplinary responsibility; it refers to a specific circumstance in which such responsibility is not waived, namely:

“The fact that a breach of the Conventions or of this Protocol was committed by a subordinate does not absolve his superiors from penal or disciplinary responsibility, as the case may be, if they knew, or had information which should have enabled them to conclude in the circumstances at the time, that he was committing or was going to commit such a breach and if they did not take all feasible measures within their power to prevent or repress the breach”.

It is also germane to our purposes to quote the Convention on the Non-Applicability of Statutory Limitations to War Crimes (and crimes against humanity) approved by Resolution 2391 (XXIII) of the General Assembly of the United Nations on 26 November 1968. Article Ia declares that no statutory limitation shall apply to war crimes as defined in the Charter of the Nuremberg Tribunal, and particularly *“the ‘grave breaches’ enumerated in the Geneva Conventions of 12 August 1949 for the protection of war victims”*.

Article II adds:

“If any of the crimes mentioned in Article I is committed, the provisions of this Convention shall apply to representatives of the State authority and private individuals who, as principals and accomplices, participate in or who directly incite others to the commission of any of those crimes, or who conspire to commit them, irrespective of the degree of completion, and to representatives of the State authority who tolerate their commission”.

b) **Comment and conclusion** — The following general rules may be deduced from these texts:

- The question of penal responsibility⁶⁸ arises in international law solely in relation to grave breaches, whether of commission or omission.
- The international law explicitly concerned with penal responsibility is scanty and the gaps therefore have to be filled by deduction or by applying general principles.
- Making allowances for this, penal responsibility for grave breaches raises the three traditional practical problems of responsibility of persons, responsibility for the degree of execution, and in certain cases extenuating circumstances or exemption from responsibility.
- As regards the persons responsible, the general principle is that all persons who in any way take part in the breach are responsible. That is, first, those persons who materially commit the breach, whether they are subordinates, private individuals, superiors or representatives of State authority; secondly, persons who take part in its commission in any way, e.g. accomplices, and persons inciting or conspiring for commission of the breach; and thirdly, persons ordering the commission of the breach and the superiors and authorities that tolerate it although they are able to prevent it, or fail to repress it.⁶⁹ This was the position adopted by the Charter of the Nuremberg Tribunal.⁷⁰

⁶⁸ The distinction between disciplinary and penal responsibility is a matter for each lawgiver to decide, to allow for the quantitative difference of the breach. We therefore refrain for the present from drawing any distinctions in international terms. In principle, all that is said of penal responsibility is applicable to disciplinary responsibility; more will be said on this later.

⁶⁹ Referring exclusively to the Conventions, as is only logical, the *Commentary on the First Convention, op. cit.*, p. 364, reads: "The penal sanctions which are to be provided for are for persons committing grave breaches or ordering them to be committed. The joint responsibility of the author of an act and the person ordering its commission is thus established. They are both liable to prosecution as accomplices. ... But there is no reference to the responsibility of those who fail to intervene, in order to prevent or suppress an infraction." This is undoubtedly true in the Conventions and has therefore been corrected in Article 86, para. 2, of Additional Protocol I (quoted above), to which the *Commentary on the Protocols, op. cit.*, para. 3540, p. 1011, refers as follows: "The recognition of the responsibility of superiors who, without any excuse, fail to prevent their subordinates from committing breaches of the law of armed conflict is therefore by no means new in treaty law. However, this principle was not specifically governed by provisions imposing penal sanctions". It is clear from this that responsibility has been extended to include persons "tolerating" breaches of Protocol I and of the Conventions, taking into account the terms of Article 86, para. 2, of Protocol I.

⁷⁰ Article 6 of the Charter adopted the principle of individual responsibility for the commission of any of the war crimes it defined, in addition to the responsibility of the leaders, organizers, instigators and accomplices in the formulation or execution of a common plan or conspiracy to commit the said crimes, and in all acts performed by any persons in execution of such plans.

- Penal responsibility is present at all degrees of execution of the breach, i.e., whether the breach was in fact committed, or whether it failed or never went beyond a mere attempt, although naturally the degree of responsibility will not be the same and the consequences will be different.
- Neither the Conventions nor Protocol I consider extenuation, aggravation or exemption from penal responsibility and only touch on it incidentally when they provide that the penal responsibility of a person committing a breach does not exempt a superior who tolerates the breach from penal responsibility. This question is therefore in the hands of national legislation.⁷¹ This represents a retreat from the Nuremberg position⁷² set out in the principles of international law recognized in the Nuremberg Charter.⁷³

B. Supplementary national legislation

The supplementary work of government legislation concerning penal responsibility is, as the above explanations will have made clear,

⁷¹ What the *Commentary on the First Convention, op. cit.*, p. 365 says on the question of guilt for acts committed on the orders of a superior may be regarded as generally applicable: "The Diplomatic Conference did not pursue this idea, however, preferring to leave the solution of the problem to national legislation".

⁷² At the Nuremberg and Tokyo trials the lawyers for the defence raised a number of objections to the requirement of penal responsibility, all of which were rejected as contrary to international law. These were (1) the principle *nullum crimen sine lege*, which was rejected by a broad interpretation of the law, to the effect that laws are not only written regulations but also customary laws; (2) that penal laws were not retroactive; this was also rejected for similar reasons, i.e., on the grounds that such crimes had already been recognized as such when they were committed; (3) the exculpatory circumstances that the acts were committed under orders from a superior, i.e., the defence of due obedience. This objection was overcome by enacting Article 8 of the Charter, providing that due obedience did not relieve the defendant of responsibility but was at most an extenuating circumstance; and (4) the objection of state of necessity, which was rejected because that excuse had never been accepted in international law and had been condemned by the civilized world.

⁷³ The *Principles of international law recognized in the Charter of the Nürnberg Tribunal and in the judgment of the Tribunal*, adopted in 1950 by the United Nations International Law Commission, reject certain objections to the requirement of penal responsibility. Principle II states that "The fact that internal law does not impose a penalty for an act that constitutes a crime under international law does not relieve the persons who committed the act from responsibility under international law". Principle III states that "The fact that a person who committed an act which constitutes a crime under international law acted as Head of State or responsible Government official does not relieve him from responsibility under international law". And Principle IV establishes that "The fact that a person acted pursuant to order of his Government or of a superior does not relieve him from responsibility under international law, provided a moral choice was in fact possible to him".

very great. The scarcity of international regulations on this point has to be remedied by an abundance of national laws.

a) *The texts* — The general principles on the subject already quoted (Article 49 of the First Convention and the corresponding articles in the other three Conventions, and Protocol I, Articles 85, para. 1, and 86, para. 1) say nothing about penal responsibility in particular. However, it is clear from the general provision, i.e., that States “undertake to enact any legislation necessary ... to provide penal sanctions for grave breaches” and “measures necessary” to suppress minor violations, that States are obliged to take whatever measures are necessary for those purposes, including those referring to penal responsibility although, as stated above, they are not specifically mentioned.

To summarize, as far as possible,⁷⁴ the position of various governments in this matter the starting point has to be the fundamental distinction between grave breaches and other breaches.

b) *Grave breaches* — On the subject of grave breaches (the only breaches for which there is penal responsibility under international law) governments have adopted one or other of three main positions:

- Some States treat penal responsibility under their domestic legislation, making no concessions to the fact that whatever the form in which the breaches appear in it they are breaches of international law. This applies to the declaration of individual responsibility, the degree of execution of the act, and the extent to which penal responsibility is affected by extenuating, aggravating or exculpatory circumstances.⁷⁵
- Some States have, in widely differing ways, adopted special regulations on penal responsibility for breaches of international humanitarian law. Sometimes these regulations reiterate principles that form part of the State legal system. In other cases they modify

⁷⁴ The necessary documentation is hard to come by.

⁷⁵ This is the position of nearly all States, although it often poses difficult problems. A typical case is that of the *United States*, which applies its domestic law, military or civil, to punish persons guilty of breaches equivalent to breaches under international law; at present the defence of due obedience is contested. Another State in this position is *France*. France too applies its domestic law on the matter of responsibility, sometimes its civil laws and at other times its military rules, whichever apply to the acts committed contrary to the laws and customs of war.

those principles in relation to individuals, to the act itself, or to non-responsibility.⁷⁶

- Lastly, some countries have taken up one or other of the few international rules on penal responsibility, applying their domestic legislation modified if necessary by the international regulations.⁷⁷

c) *Minor violations* — As regards minor violations and other breaches that are not grave breaches, and “acts contrary”:

- Since penal responsibility does not give rise to penal sanctions under international law, it is not a pressing problem for States.
- Nevertheless, when States convert these breaches into offences, establishment of penal responsibility in the same terms as for grave breaches becomes unavoidable.⁷⁸

C. Conclusions

To conclude, the international law of war makes little reference to penal responsibility for grave breaches, so practically all regulations on grave breaches have to be established by domestic legislation. As with the types of offence, the resultant disparities between the positions of various governments can only lead to inequities. As regards minor violations, only States that treat these as offences are obliged to deal with the question of penal responsibility.

⁷⁶ Some countries have introduced their own modifications of responsibility, among them *Spain*, which has restricted penal responsibility to members of the armed forces, and *Portugal*, which has done the same. This position is very much open to criticism, as persons who violate the laws and customs of war have to be tried for responsibilities that are hard to fit into other codes of punishment. The *United Kingdom* expressly establishes the responsibility of persons committing or taking part in, or acting as accomplices in or abettors of, breaches wherever committed (so rejecting its old territorial tradition); and *Holland* expressly assigns responsibility to a person giving an unlawful order.

Thorough examination of the texts (unfortunately not available) of other countries would probably lead to their inclusion in this list.

⁷⁷ *Sweden*, which has adopted the international rules on the penal responsibility of superiors for a breach committed by a subordinate, when the superior, although aware of it, did not repress it or did not prevent it if it had not yet taken place, and *Norway*, which assigns responsibility to persons committing breaches of the Conventions and to their accomplices, may be included in this group.

⁷⁸ As the *Commentary on the Protocols, op. cit.*, p. 976, Note 11, observes: “Nor does it prevent Contracting Parties from providing in their national legislation for the penal repression of yet other breaches; those, however, would only be punishable if committed by members of their own armed forces”. This was the position adopted by the Italian delegate to the Diplomatic Conference on Humanitarian Law of 1974-1977 (CDDH/SR.44).

3. Penal sanctions

The penal provisions of the law of war follow the general principle that the penal sanction is the immediate consequence of penal responsibility and the ultimate or intermediate consequence of the breach.

As in the whole system, the international basis of this principle is not at all clearly defined and it is absolutely essential to supplement it by domestic legislation.

A. The international basis

The international basis is so scanty as to be hardly more than an indication of a general principle.

a) *The texts* — The basic provisions referred to above (Article 49 of the First Convention and corresponding articles in the other three Conventions, and Articles 85 and 86, para. 1, of Protocol I) require States to enact any legislation necessary “*to provide effective penal sanctions*” for grave breaches. They go on to say that States must “*take measures necessary for the suppression of all acts contrary (to the Conventions and Protocol) other than ... grave breaches*”.

Protocol I merely broadens the scope of sanctions for the breaches it mentions.

b) *Comment and conclusion* — It follows that:

International law requires States to impose penal sanctions only for the breaches described as grave breaches in the Conventions and Protocol I.

- As for breaches not expressly described as grave, i.e., other acts contrary to international law, the only obligation required of States is to repress them. States are not obliged to fix penalties, but there is nothing to prevent them from doing so if they wish.⁷⁹
- The penal sanctions to be fixed by States for grave breaches have to be proportionate or adequate to the gravity of the breach.⁸⁰ This means that States have to establish a scale of penalties of various

⁷⁹ This only arises if States convert what international law regards as breaches other than grave breaches into offences or crimes. They can do this, and some of them have done it.

⁸⁰ The *Commentary on the First Convention, op. cit.*, p. 364, observes that “The legislation enacted on the basis of this paragraph should, in our opinion, specify the nature and extent of the penalty for each infraction, taking into account the principle of due proportion between the severity of the punishment and the gravity of the offence.”

degrees of severity and perhaps even of different kinds, following their usual internal methods.⁸¹

- These principles are applicable both to penalties for the grave breaches specified in the Conventions and to penalties for the grave breaches specified in Protocol I, since, as stated above, the system is the same for the Conventions and the Protocol.
- Needless to say, this — so to speak — complete delegation of the authority of international law to domestic legislation in the matter of penalties has caused complete anarchy in the system, with countless ill effects.⁸²

B. Supplementary national legislation

It is for States to supplement these principles in their domestic legislation.

a) *The texts* — As is clear from the general provisions under consideration, States “undertake to enact any legislation necessary” to provide penal sanctions for grave breaches and to take “measures necessary” to repress other breaches.

Under these international obligations, States undertake to adopt against grave breaches measures different from those they take against minor violations. We must therefore take this distinction as the starting point of our study of the measures taken.

b) *Grave breaches* — States imposing penalties for grave breaches in accordance with their undertaking generally take measures that are of three kinds:

In some countries the penalties for grave breaches or breaches rated as such because they are offences under ordinary law are severe or very severe. In exceptional circumstances, or when the breach has

⁸¹ A penalty is a creation of the law. Therefore, technically, a penalty is only a penalty if national legislation regards it as such. There is no international concept of penalty. Therefore penalties inevitably differ widely from one national legislation to another. Furthermore, breaches of the law of war have special connotations in relation to ordinary offences in all national legislations. Probably, therefore, it is not appropriate to apply only ordinary penalties to persons guilty of such breaches. (See J. Y. Dautricourt, “La protection pénale des Conventions internationales humanitaires”, *Revue de droit pénal et de criminologie*, vol. 35, No. 9, June 1955).

⁸² Although we previously referred to this matter in connection with differences between States in typifying breaches, it may be as well to recall that different States impose vastly different penalties for the same act. International law has just not succeeded in improving on this.

very serious consequences, the death penalty may be imposed.⁸³ Some of this group of countries impose their penalties by means of a global severe, or relatively severe, penal sanction, others by separate sanctions for offences specified in detail. A mixed system is sometimes adopted.⁸⁴

Another group imposes penalties that are relatively light in comparison with the seriousness of the offence.⁸⁵ As in the previous group, some of these countries fix a global penalty with a comparatively low upper limit; others provide penalties — none of them severe — for specific offences.⁸⁶

In some other countries⁸⁷ (whose system of penalties may be global, individual or mixed), penalties range from extremely light to extremely severe.

⁸³ Article 69 of the *Spanish Military Penal Code*, for example, provides that any person guilty of an act of violence against an enemy who has surrendered or is defenceless shall be imprisoned for a period of not less than four months and not exceeding four years. If he causes serious injury the penalty is from five to 15 years' imprisonment; and if he causes death, from 15 to 25 years' imprisonment, or even the death penalty.

⁸⁴ The countries that might be described as "severe penalty countries" are: the *United Kingdom*, which, for example, punishes the wilful murder of a person protected by one of the Conventions with life imprisonment; *Holland*, whose penalties vary from ten years' imprisonment to death, according to the seriousness of the breach and its consequences; *Australia*, where the maximum penalty for the wilful murder of a person protected by any of the Conventions is life imprisonment or death; *Canada*, which in similar circumstances can pass a death sentence; *Czechoslovakia*, *Hungary* and the *USSR*, which may pass the death sentence in certain cases; *Spain*, as stated above; and many other countries which we are unable to list.

⁸⁵ In fixing penalties for breaches of the law of war, States are conditioned by their penal systems and especially by their immediate past. Cf. Levasseur and Merle, *op. cit.*, p. 229: "It is apparently difficult to insert penalties for breaches of humanitarian law into a national system of penalties in a way sufficiently in harmony with the context. Such insertions recall the recent past: the severity of penalties varies greatly from State to State according to whether a large number of its nationals have been victims or perpetrators of breaches".

⁸⁶ In this group may be included *Norway*, where the maximum penalty in the Military Penal Code is four years' imprisonment but may undoubtedly be increased by applying special provisions; *Denmark*, where the maximum penalty is twelve years' imprisonment; *Switzerland*, where the term of imprisonment varies from three days to three years, and in serious cases from one year to twenty years; *Thailand*, which reports that its maximum penalty is seven years' imprisonment and, clearly, *Germany*, which has a Bill imposing a maximum penalty of ten years' imprisonment, which Levasseur and Merle: (*op. cit.*, p. 230) call "astonishingly moderate". Generally speaking, these penalties are lenient in comparison with those of other countries, but can in certain cases be heavy.

⁸⁷ *Sweden*, whose penalties for such breaches vary from two years' to life imprisonment; and *Brazil*, where they range from light to the death penalty. *Spain* (already referred to) might also be included; and — this classification being only approximate and somewhat capricious — so might some other countries.

c) *Minor violations* — The following rules for minor violations may be inferred from the preceding pages:

States are not obliged to fix any penalty for breaches of the law of war other than the grave breaches specified in the Conventions of 1949 and Protocol I of 1977.

They can, however, fix penalties and disciplinary sanctions if they convert breaches other than grave breaches into offences, or if they regard them merely as misdemeanours and include them in their regulations in order to repress them or make them liable to disciplinary sanctions.

C. Conclusion

To conclude, fixing penalties is entirely a matter for the States; international law imposes no limits; to say that sanctions have to be adequate is to give national legislation a blank cheque, as we have just seen.⁸⁸ For minor violations States have still greater freedom, being not even obliged to fix penalties for them.

III. THE PROCEDURAL LAW OF WAR

We now come to adjective or procedural rules, whose purpose is to apply the penal or substantive provisions of the law of war. It raises the fundamental problems of what courts are to try breaches, the competence of those courts and, lastly, the procedure to be followed.

1. The competent courts

It has not yet been settled what courts are to impose penalties for breaches. Indeed, the matter has hardly been raised. It will therefore have to be settled by rational interpretation of the subject matter rather than by reference to the very few relevant provisions.

⁸⁸ Again, it is distressing to see the great disparities in the penalties fixed, although the acts and their consequences are similar. Perhaps international law could not go any further; here too it seems that the thorny issue of national sovereignty is involved.

A. Relevant international law

In addition to some rare references to the subject in the general provisions on repression, the international treaties contain several other provisions that give invaluable guidance.

a) *The texts* — Under Article 49 of the First Convention (and its corresponding articles in the other Conventions), each Contracting Party is under the obligation to search for persons accused of grave breaches “and shall bring such persons before its own courts”. It may also, if it so prefers, “hand such persons over for trial to another High Contracting Party concerned” rather than, it is implied, trying them in its own courts.

Article 84 of the Third Convention of 1949, relative to prisoners of war, contains a rule that can shed light on the attitude of international law to this question; it says:

“A prisoner of war shall be tried only by a military court, unless the existing laws of the Detaining Power expressly permit the civil courts to try a member of the armed forces of the Detaining Power in respect of the particular offence alleged to have been committed by the prisoner of war.

In no circumstances whatever shall a prisoner of war be tried by a court of any kind which does not offer the essential guarantees of independence and impartiality as generally recognized” .

In connection with another kind of breach, Article 66 of the Fourth Convention relative to civilian persons requires the courts to be “properly constituted, non-political military courts”.

Article 75, para. 4, of Protocol I, which deals with the treatment of civilian persons who are in the power of a party to the conflict, states that:

“No sentence may be passed and no penalty may be executed on a person found guilty of a penal offence related to the armed conflict except pursuant to a conviction pronounced by an impartial and regularly constituted court” .

b) *Comment and conclusion* — All these provisions appear to indicate a general policy in international law regarding courts, which is basically as follows:

- The courts that are to try persons committing one of the grave breaches specified in the Conventions or Protocol I shall be the national courts of the Power in whose hands the accused persons

are, or the national courts of another Power to which those persons are handed over in circumstances we shall mention below.⁸⁹

- These national courts may be military or civil, depending on the existing laws of the Detaining Power, and there is accordingly no need of special courts for the grave breaches mentioned in the international texts.
- The national tribunals must offer the essential guarantees of independence and impartiality as generally recognized and be constituted in accordance with the law.
- Consequently, courts that on account of their composition or activities may be described as political courts may in no circumstances be used.
- The courts trying aliens must be the same as those trying nationals of the country for the same kind of grave breaches.⁹⁰

B. National courts

The supplementary regulations to be enacted by States on this subject present no difficulty, as the general delegation of powers to national courts means that States will use their own legal systems.

All States have, in principle, civil and military courts. Military courts try military personnel, their scope varying according to the criteria adopted. They may also try civilians in certain circumstances. However, since grave breaches of the Conventions and Protocol I can be committed only in wartime, we are at present concerned only with finding out what kind of courts exist in wartime.

Very briefly, and to give a few examples, in this respect States fall into three groups:

- States which in wartime have military courts to try breaches of the

⁸⁹ On various occasions the United Nations has envisaged setting up an "international judicial organ" or "Criminal Chamber of the International Court of Justice" (see the UN Resolutions of 11 December 1946 (No. 95(1)), 9 December 1948, and 11 December 1957). This has not yet been set up and is unlikely to be established in the near future. The law of war therefore has to resort to national tribunals.

⁹⁰ The *Commentary on the First Convention, op. cit.*, p. 366, observes that "Proceedings before the courts should be uniform in character, whatever the nationality of the accused. Nationals, friends and enemies should all be subject to the same rules of procedure, and should be judged by the same courts".

law of war, and also civil courts to try breaches committed by civilians;⁹¹

- States that have military courts in time of war and still have civil courts that in principle are competent to try these breaches, although part of their competence is taken over by the military courts;⁹²
- States that in time of war have only military courts to try persons accused of the breaches mentioned in the Conventions and Protocol I.⁹³

C. Conclusions

To conclude, the international law of war puts States under the obligation of acting through their national courts, which must offer as a minimum the guarantees mentioned above. To adapt to international law, States need not alter their legal system; all they have to do is use it to punish breaches of international law.⁹⁴

2. The competence of the courts

The competence of national courts is a matter to be settled by domestic legislation, but a number of international regulations will also be found useful in this respect.

A. International regulations

Of the international texts, only the Conventions are relevant here.

⁹¹ This group includes the *United States*, which in wartime has both kinds of courts and may set up other civil courts, *Ireland*, the *Federal Republic of Germany*, *Spain*, *Belgium* and *Denmark*.

⁹² As in the *United Kingdom*, which in wartime has military courts for military personnel and civil courts for civilians, although some civilians may be transferred to the competence of military courts, and *Norway*, whose practice is similar to that of the *United Kingdom*, military courts trying civilians in time of war for breaches committed in the theatre of war.

⁹³ For example, *Switzerland*, which in time of war and in the present context has only military courts, and *Italy*, where in time of war civilians accused of such breaches are tried by military courts.

⁹⁴ As stated above, because of the paucity of pertinent data we can present only a few examples, and these are disputed. This is also true of the competence of the courts, which will be examined below.

a) *The texts* — The second paragraph of Article 49 of the First Geneva Convention (and the corresponding articles in the other three Conventions) requires each High Contracting Party to search for persons accused of grave breaches,

“... and shall bring such persons, regardless of their nationality, before its own courts. It may also, if it prefers, ... hand such persons over for trial to another High Contracting Party concerned, provided such High Contracting Party has made out a prima facie case”.

b) *Comment and conclusion* — The effects of this provision may be summarized as follows:

- It establishes a rule of national jurisdiction rather than a rule of competence, for it does not determine the competence of each and every national court but does determine, much more fully, the jurisdiction of the State.
- State jurisdiction in relation to grave breaches is determined in accordance with the physical whereabouts of the accused persons, irrespective of their nationality.
- International law establishes the obligation to try persons accused of grave breaches but does not specify in which country they should be tried. It therefore leaves the State detaining the accused person to decide whether to try him in its own courts or hand him over to another State concerned.
- The only thing that the State holding the accused person may not do is to refrain from bringing him before its national courts whilst also refraining from handing him over. It must apply the old Roman adage *aut judicare aut dedere*.

B. The competence of national courts

Thus the entire problem of the competence of national courts is to be settled by each State as it sees fit. All States have their own rules regarding competence, which in time of war place them in one of two groups:

- Countries which have military courts to try military personnel accused of grave breaches, and only exceptionally hand over those persons to civil courts.⁹⁵

⁹⁵ This group comprises *Switzerland*, whose Military Penal Code declares that military jurisdiction is in all cases competent to try either military personnel or

- Countries which have civil courts to try civilians accused of grave breaches, but in some circumstances bring them before military courts.⁹⁶

C. Conclusions

To conclude, what international law establishes is the national jurisdiction of each State. The determining factor is the presence of the accused person on the territory of the State, irrespective of his nationality and of where the breach was committed. The competence of each court is a matter of national legal organization and depends on the existence of a state of war.⁹⁷

3. Judicial procedure

The question of what judicial procedure is to be followed in order to punish grave breaches of the Conventions of 1949 and Protocol I of 1977 is settled by reference to a number of international texts which establish minimum degrees of State action and of the procedural provisions that each State applies in this connection. In general, the greater part of this question appears to be regulated by national legislation.

A. Judicial procedure under international law

The international regulations are not really rules of procedure, but more exactly rules providing procedural guarantees; for international law does not establish the procedure itself.

a) *The texts* — The international provisions are contained in Article 49 of the First Convention (and its corresponding articles in the other three Conventions), reading:

civilians; *Turkey, Denmark, Belgium*, by virtue of the Bill put before Parliament; *France*, which brings its military personnel, persons treated as French military personnel and, in the absence of any document assigning competence, civilian persons also, before military courts; *Norway, Ireland, the United Kingdom, Canada, Brazil* and the *United States*, which in time of war try military personnel in civilian courts if no military court is available.

⁹⁶ *Denmark, the United States* (unless special courts are set up), *Ireland, Canada, the Federal Republic of Germany, and Brazil*.

⁹⁷ The legal organization of many of the States referred to is more complex, but we have purposely simplified it because grave breaches can be committed only in time of war.

“Each High Contracting Party shall be under the obligation to search for (accused) persons” for trial by its own courts or, if it prefers, “in accordance with the provisions of its own legislation, hand such persons over to another High Contracting Party concerned, provided such High Contracting Party has made out a prima facie case”.

The last paragraph of the Article adds that:

“In all circumstances the accused persons shall benefit by safeguards of proper trial and defence, which shall not be less favourable than those provided by Article 105 and those following of the Geneva Convention relative to the Treatment of Prisoners of War of August 12, 1949”.

These refer to the right of defence (Article 105), the right of appeal (Article 106), notification of sentence (Article 107) and execution of penalties (Article 108).

Article 52 of the First Convention, Article 53 of the Second Convention, Article 132 of the Third Convention and Article 149 of the Fourth Convention, which refer to the procedure for enquiry into violations of the Conventions, are also applicable.

Protocol I contains regulations directly concerning procedure:⁹⁸

“... ”

3. *Any person arrested, detained or interned for actions related to the armed conflict shall be informed promptly, in a language he understands, of the reasons why these measures have been taken. Except in cases of arrest or detention for penal offences, such persons shall be released with the minimum delay possible and in any event as soon as the circumstances justifying the arrest, detention or internment have ceased to exist.*

4. *No sentence may be passed and no penalty may be executed on a person found guilty of a penal offence related to the armed conflict except pursuant to a conviction pronounced by an impartial and regularly constituted court respecting the generally recognized principles of regular judicial procedure, which include the following:*

a) *the procedure shall provide for an accused to be informed without delay of the particulars of the offence alleged against him and shall afford the accused before and during his trial all necessary rights and means of defence;*

⁹⁸ See Protocol I, Article 75.

b) *no one shall be convicted of an offence except on the basis of individual penal responsibility;*

c) *no one shall be accused or convicted of a criminal offence on account of any act or omission which did not constitute a criminal offence under the national or international law to which he was subject at the time when it was committed; nor shall a heavier penalty be imposed than that which was applicable at the time when the criminal offence was committed; if, after the commission of the offence, provision is made by law for the imposition of a lighter penalty, the offender shall benefit thereby;*

d) *anyone charged with an offence is presumed innocent until proved guilty according to law;*

e) *anyone charged with an offence shall have the right to be tried in his presence;*

f) *no one shall be compelled to testify against himself or to confess guilt;*

g) *anyone charged with an offence shall have the right to examine, or have examined, the witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him;*

h) *no one shall be prosecuted or punished by the same Party for an offence in respect of which a final judgement acquitting or convicting that person has been previously pronounced under the same law and judicial procedure;*

i) *anyone prosecuted for an offence shall have the right to have the judgement pronounced publicly; and*

j) *a convicted person shall be advised on conviction of his judicial and other remedies and of the time-limits within which they may be exercised.*

5. *Women whose liberty has been restricted for reasons related to the armed conflict shall be held in quarters separated from men's quarters. They shall be under the immediate supervision of women. Nevertheless, in cases where families are detained or interned, they shall, whenever possible, be held in the same place and accommodated as family units.*

6. *Persons who are arrested, detained or interned for reasons related to the armed conflict shall enjoy the protection provided by this Article until final release, repatriation or re-establishment, even after the end of the armed conflict.*

7. *In order to avoid any doubt concerning the prosecution and trial of persons accused of war crimes or crimes against humanity, the following principles shall apply:*

a) *persons who are accused of such crimes should be submitted for the purpose of prosecution and trial in accordance with the applicable rules of international law; and*

b) *any such persons who do not benefit from more favourable treatment under the Conventions or this Protocol shall be accorded the treatment provided by this Article, whether or not the crimes of which they are accused constitute grave breaches of the Conventions or of this Protocol.*

8. *No provision of this Article may be construed as limiting or infringing any other more favourable provision granting greater protection, under any applicable rules of international law, to persons covered by paragraph 1”.*

Paragraph 1 refers to persons who are in the power of a party to the conflict and do not benefit from more favourable treatment.

Articles 89 and 90 of Protocol I also apply. They relate to co-operation with the United Nations and the International Fact-Finding Commission.

Lastly, Article 88 of Protocol I, referring to mutual assistance in criminal matters, reads:

“1. The High Contracting Parties shall afford one another the greatest measure of assistance in connexion with criminal proceedings brought in respect of grave breaches of the Conventions or of this Protocol.

2. Subject to the rights and obligations established in the Conventions and in Article 85, paragraph 1, of this Protocol, and when circumstances permit, the High Contracting Parties shall co-operate in the matter of extradition. They shall give due consideration to the request of the State in whose territory the alleged offence has occurred.

3. The law of the High Contracting Party requested shall apply in all cases. The provisions of the preceding paragraphs shall not, however, affect the obligations arising from the provisions of any other treaty of a bilateral or multilateral nature which governs or will govern the whole or part of the subject of mutual assistance in criminal matters”.

b) **Comment and conclusion** — The following international rules of procedure may be deduced from the above provisions:

- The first obligation of States is to search for persons accused of having committed grave breaches. This may be done *ex officio* or at the request of one of the parties,⁹⁹ whether or not the accused persons are on its territory.¹⁰⁰
- This obligation is the direct consequence of the existence of a grave breach. To establish that such a breach has been committed, the parties may resort to the enquiry procedure laid down in the Conventions or to the procedure of the International Fact-Finding Commission established in Protocol I and already considered above.¹⁰¹
- Once the existence of a breach has been established, and once the persons accused of the breach have been found, the State concerned is under an obligation to bring them before its courts, whatever the nature of the breach and the nationality of the accused, unless it prefers to hand them over to another State concerned for trial.
- If the State proposes to bring the accused persons before its own courts, due process shall be followed in accordance with the State's civil or military laws of procedure, as appropriate, but the following minimum safeguards established by international law must be observed:
 - as a general rule, all accused persons shall in all circumstances benefit by the safeguards of proper trial and defence, which shall not be less favourable than those specified for prisoners of war in Articles 105ff of the Third Convention (see above).¹⁰²

⁹⁹ The *Commentary on the First Convention, op. cit.*, p. 366, states: "It is not, therefore, merely at the instance of a State that the necessary police searches should be undertaken; they should be undertaken automatically."

¹⁰⁰ For this, recourse may be had to what is known as mutual legal assistance, or to Interpol (the International Criminal Police Organization, ICPO) or on specific points to the *Asistencia mutua judicial en materia penal*.

¹⁰¹ This procedure is applicable both to breaches committed by States and breaches committed by individuals. Accordingly, our previous remarks referring to States in this connection also apply.

¹⁰² Cf. the *Commentary on the First Convention, op. cit.*, p. 369: "The Diplomatic Conference acted wisely when it decided to refer to the rules already established for prisoners of war. It preferred not to make new law, but to refer instead to an existing body of law which had stood the test of time and would provide the accused with sure and certain safeguards." In our view it would perhaps have been preferable to adopt the contrary course of establishing the general safeguards in Article 49 of the First Convention (and the corresponding articles in the other Conventions) and referring to them in the Convention relative to prisoners of war.

- If the accused persons have prisoner-of-war status they must be afforded at least the guarantees stipulated for judicial proceedings in Articles 99ff of the Third Convention.
- Where the accused persons are in the hands of the Power that is to try them, are affected by the state of war and do not benefit by more favourable treatment, the procedural guarantees offered by paragraphs 3ff of Article 75 of Protocol I must be observed. The categories of persons protected by these guarantees are: nationals of States which are not party to the Conventions, nationals of States not party to the conflict, nationals of allied States, refugees and stateless persons, mercenaries, persons who have been refused prisoner-of-war status and persons who, because they are engaged in activities hostile to the security of the State, are not entitled to claim the protection of Article 5 of the Fourth Convention. Such guarantees are therefore only minimal.¹⁰³
- If the State holding the accused persons prefers to hand them over to another Contracting Party, it must do so in accordance with the provisions of its own legislation and only if that other party is concerned in the trial and has brought a *prima facie* case (“sufficient charges”) against the accused.¹⁰⁴ These conditions are merely safeguards in the event of extradition, which for that matter appear in nearly all treaties of this kind.
- Furthermore, the Parties must cooperate in the matter of extradition and give due consideration to the request of the State on whose territory the alleged offence was committed. The law of the Contracting Party to which the request is made shall apply in all cases. This shall not affect the obligations arising from the provisions of any other treaty on the subject of mutual assistance in criminal matters.
- In general, and not only in cases of extradition, the High Contracting Parties must afford one another the greatest measure

¹⁰³ See the *Commentary on the Protocols, op. cit.*, pp. 869-870.

¹⁰⁴ The meaning of “*prima facie* case” has been interpreted by doctrine. Thus the *Commentary on the First Convention, op. cit.*, p. 366, states: “But what exactly is meant by ‘sufficient charges’? The answer will as a rule rest with national legislation, but in general it may be assumed to mean a case in which the facts would justify proceedings being taken in the country to which application is made for extradition. Legal authorities in the Anglo-Saxon countries speak in such cases of *prima facie* case... and this term is used in the English text of the Article.”

of assistance in connection with criminal proceedings brought in respect of grave breaches.

B. National procedure

It is not, in principle, vitally important to refer to the position of States regarding procedure for the punishment of grave breaches, since each organizes its procedure as it sees fit; but they fall into two groups, as follows:

- Countries which have added to their internal legislation, in whatever form, provisions for punishment of the grave breaches specified in the Conventions and Protocol, but have not amended their relevant procedural legislation and therefore apply whatever general rules of procedure they see fit.¹⁰⁵
- Countries which have added to their legislation provisions for punishment of the grave breaches specified in the Conventions, and in the Protocol if they have ratified it, and have at the same time regulated the relevant procedure either independently or by modifying existing procedure.¹⁰⁶

C. Conclusions

To conclude, international law does not establish any procedure to enforce penal responsibility for commission of a grave breach. This is not surprising when it is realized that there are no international courts and no international competence. The procedure applicable is therefore that of each State whose courts deal with these breaches. International law merely establishes minimum procedural safeguards. These are usually present, at least formally, in the procedural legislation of nearly all States.

¹⁰⁵ The immense majority of countries are in this group. They include *Spain, Switzerland, Norway, Sweden* (which follows the British model in typification but not in procedure), *France, Italy, Portugal* and many others.

¹⁰⁶ These include *Holland*, which institutes special courts and procedure, the *United Kingdom*, which in its Geneva Conventions Act of 1957 goes further in adopting procedure for trial than in the offences themselves, and deals with nearly all the procedural problems touched on by international law, *Ireland, Canada, India, New Zealand* (which exactly follow the British model as far as procedure is concerned), and other countries, mainly members of the Commonwealth.

GENERAL CONCLUSIONS

The internal legislation of States provides for repression of breaches of its laws. International law too has in its own way a system of punishment; and as under international law unlawful acts can be committed by States, international organizations and individuals, repression of such acts is directed at these three classes of offenders.

The law of war is part of international law; it therefore shares all the problems of international law and can have recourse to general international regulations of all types. The system to repress breaches of the law of war is therefore, with variants, merely part of the system to repress violations of international law in general.

Evidently, States cannot only commit acts contrary to international law in general but also, specifically, unlawful acts of war when taking part in an armed conflict. International organizations are in the same situation, for, through the intermediary of the troops put at their disposal, they can take part in operations that are clearly warlike.

However, the most disquieting problem, and the one that prompts most questions, is that of breaches, and specifically breaches of the law of war, committed by individuals who are thus in violation of international law. The present system in that respect is a mixed one. International law provides the legal basis for repression and the States build on it with their own internal regulations. This raises many difficulties for which there is no easy solution at the present time.

José Luis Fernández Flores

José Luis Fernández Flores y de Funes is a Spanish Supreme Court judge and professor of public and private international law at the Madrid-Alcalá de Henares University. Professor Fernández Flores, who holds a doctorate from the Madrid-Complutense University, is also a Major-General, honorary adviser on defence matters, Director of the Spanish Red Cross Centre for Research on International Humanitarian Law, Director of the *Revista Española de Derecho Militar*, Chairman of the Academic Committee on Military Instructions at the San Remo International Institute of Humanitarian Law, and Vice-Rector of the Society for International Studies.

He has taught public international law, private international law and the law of war in a number of universities in Spain and abroad, and is a member of several national and international legal associations. Professor Fernández Flores has written many books and articles, including a *Traitado de Derecho Internacional Público* (Madrid, 1980), a *Manual de Derecho Internacional Privado* (Madrid, 1982) and *Del Derecho de la Guerra* (Madrid, 1982).

He holds the Grand Cross of the Royal and Military Order of San Hermengildo.

Compliance with International Humanitarian Law

by George H. Aldrich

In 1974, the University of Leiden (Netherlands) established a Chair of International Humanitarian Law, whose first incumbent was Professor Frits Kalshoven, a familiar name to readers of the Review. Mr. George Aldrich, who led the United States delegation at the Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts from 1974 to 1977, and who since 1981 has been a Judge at the Iran-United States Claims Tribunal in The Hague, was recently appointed as his successor.

During an official ceremony held at the University of Leiden on 13 November 1990, the new holder of the "Red Cross Chair", as it is sometimes called, made a pressing appeal in his inaugural lecture for compliance with international humanitarian law. In his talk Professor Aldrich described with a large measure of realism the obstacles to implementation of the law but showed cautious optimism in reviewing the means available to the international community to surmount those obstacles.

The Review is pleased to publish, with the author's agreement, the text of his lecture which brings to a close, on a note of appeal and hope, this series of articles devoted to implementation of international humanitarian law.

* * *

Rector Magnificus, Your Excellencies,
Ladies and Gentlemen,

It is a signal honor to be appointed as a professor by this renowned university, and I am grateful that so many of my friends and colleagues have found it possible to be present here in Leiden for the occasion. I am particularly appreciative that my distinguished predecessor in the

“Red Cross Chair”, Professor Frits Kalshoven, is here. Over the years, I have learned much from Frits, and I admire him for many reasons, among which is his magnanimity in being present today; for when he gave his farewell address in 1989 I was unfortunately unable to attend.

At the outset, I want to acknowledge the presence of those whose support has made it possible for me to accept the offer of the Chair of International Humanitarian Law: first and foremost, my wife Rosemary, whose constant support and encouragement have been absolutely vital; secondly my colleagues at the Iran-United States Claims Tribunal, whose advice and assistance are deeply appreciated; thirdly, the Netherlands Red Cross, particularly its President, Mr. van der Weel, and the members of the Curatorium of the “Red Cross Chair”; and finally, the expert staff of the International Law Department at Leiden University, in particular, Ms. Astrid Delissen, who is my able assistant in presenting the course.

* * *

I have chosen as my topic for this inaugural lecture the issue of compliance with international humanitarian law (IHL) — how Nation States and the members of the armed forces that those States send into combat can be brought to comply with the law throughout the course of military operations. This issue is, unfortunately, not only timely, it is also one of fundamental importance, as disrespect for the law breeds further disrespect. When nations are locked in mortal combat, the normal, peacetime methods of dispute resolution generally are no longer available. If the special methods provided by IHL for monitoring compliance and resolving disputes fail to stop serious and continuing breaches of that law, notions of reciprocity are all too likely to lead those nations into a downward spiral path of expanding noncompliance with the law, thereby vastly increasing the suffering of war victims, both combatants and noncombatants. In the end, widespread noncompliance with the law tends to bring the law itself into disrepute. One respected American news columnist, George F. Will, recently wrote that the phrase international law “often is virtually an oxymoron” and he asserted that, with respect to the use of force, it “often serves the ruthless by inhibiting only the scrupulous”.¹ One does not have to be so cynical as Mr. Will to recognize that not merely the law on the legality

¹ George F. Will, “The Perils of Legality”, *Newsweek*, 10 September 1990.

of the resort to force (*jus ad bellum*), but also the entire structure of the law governing the conduct of hostilities and the protection of war victims (*jus in bello*) is imperiled by widespread and serious violations, for that law, by definition, is applicable at times and in situations of utmost stress to the international legal order. One of this century's greatest authorities in the field of international law, Sir Hersch Lauterpacht, said:

*"(If international law is, in some ways, at the vanishing point of law, the law of war is, perhaps even more conspicuously, at the vanishing point of international law)".*²

IHL is scarcely vanishing in the law books. On the contrary, it is found in many treaties where it is elaborated extensively in hundreds of articles. Moreover, these treaties have achieved very wide acceptance. The four Geneva Conventions of 1949,³ in particular, have more than 160 Parties, and the newest treaty which codifies and develops customary law, Additional Protocol I of 1977,⁴ already has 97 Parties.⁵ Thus, the accepted law in the books is indeed robust. Where the law is in peril is in practice. The law in action seems anemic in comparison with the law in the books. Failure to comply with the law has been all too frequent. In some cases this failure clearly has resulted from considered policy decisions by governments that found it easier to agree to be bound by rules than to respect them when they are seen to be inconvenient in the course of an actual armed conflict, but such policy decisions are made easier by the same factors that are responsible

² H. Lauterpacht, "The Problem of the Revision of the Law of War", 29 *British Y.B. Int'l L.*, pp. 360, 382 (1952).

³ Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, of 12 August 1949, 6 UST 3114, TIAS No. 3362, 75 UNTS 31; Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, of 12 August 1949, 6 UST 3217, TIAS No. 3363, 75 UNTS 85; Geneva Convention relative to the Treatment of Prisoners of War, of 12 August 1949, 6 UST 3316, TIAS No. 3364, 75 UNTS 135; Geneva Convention relative to the Protection of Civilian Persons in Time of War, of 12 August 1949, 6 UST 3516, TIAS No. 3365, 75 UNTS 287.

⁴ For the text of Protocol I Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts, see *Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts, Final Act* (1977), reprinted in 16 ILM, p. 1391 (1977); D. Schindler and J. Toman, *The Laws of Armed Conflict*, Martinus Nijhoff Publishers, Dordrecht, Henry Dunant Institute, Geneva, 1988, (3rd edition), pp. 621-688; A. Roberts & R. Guelff, *Documents on the Laws of War*, Clarendon Press, Oxford, 1989, 2nd ed., pp. 389-446.

⁵ Information concerning the numbers of States party is taken from publications by the ICRC.

for most other instances of failure to comply. I suggest that these factors are, first, ignorance of the law, secondly, skepticism and cynicism engendered by the belief that compliance with the law cannot effectively be obtained through coercion and that violations cannot effectively be punished, and thirdly, the absence of effective monitoring, fact-finding, and dispute settlement mechanisms. These factors, I suspect, often interact with each other to increase noncompliance. Let us examine them one by one with a view to discovering where action may best be taken to improve the future prospects for compliance with the law.

* * *

First, ignorance. IHL, as it has developed to our day, is reasonably extensive and considerably complex. The four Geneva Conventions of 1949 comprise more than 450 treaty articles, and the two Additional Protocols of 1977 add another 130. Beyond these core treaty texts, there are various other relevant treaty provisions⁶ and a corpus of customary international law, particularly on the means and methods of combat. Faced with such an abundance of rules, one can readily understand why the average person, particularly in peacetime, would be likely to opt for ignorance. In fact, of course, to dispel ignorance in a population does not require that all citizens be taught everything about these detailed rules. The commander of a prisoner-of-war camp needs to understand both the spirit and the letter of the law relating to the treatment of such prisoners, but the average citizen needs to know only the general principles. The soldier needs to know more than the average citizen, but not so much as his commanders. The fundamental educational task — what the Red Cross calls the duty of dissemination — is thus not so formidable as it may at first appear. Nevertheless, it is my impression that it is not generally being carried out with even minimal success in the western countries with which I am familiar, and I understand that the International Committee of the Red Cross (ICRC) finds inadequate dissemination of IHL to be nearly universal.

⁶ For example, the 1907 Hague Convention No. IV respecting the Laws and Customs of War on Land and its annexed Regulations, the 1925 Geneva Protocol for the Prohibition of the Use in War of Asphyxiating, Poisonous or Other Gases and of Bacteriological Methods of Warfare, the 1954 Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict, and the 1981 United Nations Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons Which May be Deemed to be Excessively Injurious or to Have Indiscriminate Effects.

Under each of the relevant treaties, the responsibility for dissemination of knowledge of the law rests with the States party to the treaty. In Additional Protocol I, for example, this responsibility is laid down in the following terms:

*“The High Contracting Parties undertake to respect and to ensure respect for this Protocol in all circumstances.”*⁷

*The High Contracting Parties undertake, in time of peace as in time of armed conflict, to disseminate the Conventions and this Protocol as widely as possible in their respective countries and, in particular, to include the study thereof in their programs of military instruction and to encourage the study thereof by the civilian population, so that those instruments may become known to the armed forces and to the civilian population.*⁸

*Any military or civilian authorities who, in time of armed conflict, assume responsibilities in respect of the application of the Conventions and this Protocol shall be fully acquainted with the text thereof.”*⁹

With respect to the instruction of military personnel, I am confident that most armed forces teach at least some basic knowledge of parts of the law, but I am not at all confident that it is presented in ways that result in its being generally absorbed. It would be most interesting to see the results of a standardized knowledge test of IHL — practical, not academic knowledge — if such a test were given to military personnel in many countries. I suggest that the North Atlantic Treaty Organization consider designing and administering such a test to the allied forces assigned to it.

Insofar as instruction of civilians is concerned, I know of no country that distinguishes itself. Certainly as far as my own country is concerned, I am unaware that either I or any of my children ever heard a word about IHL throughout our years of elementary and secondary education. It was only in law school that I participated in an optional, and small, seminar on the subject. Is the situation substantially better in Europe? I hope so, but what I have heard makes me doubtful. Authorities responsible for public education need to be encouraged to teach the basic principles of IHL, and teachers need appropriate texts and training. National Red Cross Societies have an important role to play here, but governments may well need to provide financial incentives,

⁷ Art. 1, para. 1.

⁸ Art. 83, para. 1.

⁹ Art. 83, para. 2.

particularly in federal systems, such as the United States, where the federal government is responsible internationally for compliance with the treaties but state and local governments are responsible for public education.

When armed conflicts occur and are widely reported in the news media, useful opportunities are presented to inform the public about the law. People are more likely to note and remember legal rules when they are raised in the context of real and dramatic situations. I am certain, for example, that television and press comments about recent events in the Persian Gulf have taught millions of people that it is illegal to take civilians hostage and to hold them at military objectives in an effort to protect those objectives from attack. Yet, in the same news media comments, I hear speculation that, should hostilities begin, Baghdad will quickly be flattened. Such speculation seems never to recognize that the kind of indiscriminate "flattening" implicit in the suggestion would raise serious legal problems. Governments, scholars, and National Red Cross Societies could all, in my view, do more to inform the news media of the rules of IHL relevant to the stories they report, and the media could doubtless do more as well to ensure that they fully inform the public.

* * *

The second of the factors I have posited as responsible for inadequate compliance with the law is skepticism and cynicism. If a person believes that violations of certain rules of law cannot be prevented or halted by means of coercion and that such violations are unlikely to be punished or redressed, that person is likely to be skeptical about the law, and I am afraid that just such beliefs are widely held today, not only by military officers and civilian government officials, but also by scholars in the field of IHL.¹⁰ Unfortunately, there is a considerable basis in fact for such skepticism.

¹⁰ Judge Stephen M. Schwebel stated concisely the effects of compliance and of noncompliance. "If experience demonstrates that states may safely violate international law, its credibility suffers. States will not expect compliance by others and be the less conscientious about their own. Correspondingly, observance of the law, and enforcement of the law, will generate expectations of future compliance and will thus enhance the present effectiveness of international law." Schwebel, *The Compliance Process and the Future of International Law*, 1981 Proceedings, American Society of International Law, pp. 180-181.

The repression of breaches of the 1949 Geneva Conventions and of the 1977 Protocol I is stated by those treaties to be the responsibility not only of the Parties to the conflict but of all Parties to the treaties.¹¹ Persons accused of grave breaches of the treaties are required either to be prosecuted by the Party having jurisdiction over them or to be handed over to another Party for criminal prosecution.¹² Experience suggests, however, that, except for wars that end with the total defeat of one Party, such as the Second World War, virtually all punishment for war crimes, as well as repression of lesser violations of the law, rests in the hands of the Nation whose nationals are the accused. It is obvious that the competent authorities of such Nations frequently fail to note or prosecute violations of the law which are apparent to their enemies and that those authorities are, perhaps understandably, concerned with the morale of their personnel to the point where they are reluctant to punish what may be seen from their nationalistic perspectives as excesses of zeal in time of war. It is certainly not irrelevant in this connection that virtually all Nations in this century have been quick to exploit modern means of mass communication for propaganda and to control the flow of information to their people, leading to what Professor Julius Stone called the "nationalization of truth".¹³ An enemy quickly becomes demonized in the national consciousness; his war aims are seen as depraved and his soldiers as brutal and bloodthirsty. In such an atmosphere, respect for IHL suffers, and violations by one side, both real and imagined, are echoed by violations by the other side.

While the same restraints do not operate to deter punishment by the captor of prisoners of war who are accused of war crimes, there are other practical restraints which make such punishment rare. First, the captor frequently lacks adequate information during the hostilities to allege the culpability of particular prisoners and generally will find it difficult, if not impossible, to produce the witnesses or other evidence necessary for conviction. In addition, Parties to an armed conflict are understandably reluctant to prosecute and punish prisoners of war for fear that the enemy will see such action as

¹¹ Art. 1 common to all four Conventions and to Protocol I.

¹² See, for example, Arts. 146 and 147 of the 1949 Geneva Convention on the protection of civilians.

¹³ Julius Stone, *Legal Controls of International Conflict — A treatise on the dynamics of disputes and war law*, Maitland Publications Pty Ltd, Sydney, 1954, pp. 318-323.

unlawful mistreatment of its captured personnel and, as a result, will take reprisals against the prisoners it holds.

This brings me to the question of whether compliance with the law can effectively be obtained through coercion. The traditional means of such coercion is termed “reprisal”. To what extent can one Party to a conflict coerce its enemy to comply with IHL by threatening to take or by taking reprisals, that is, actions that are themselves violations of the law but that are justified as measures designed to induce the enemy to cease its violations? At the outset, I must admit that I venture into this subject with some trepidation, as my distinguished predecessor in this Chair remains the world’s foremost authority on the question of belligerent reprisals.¹⁴ Among the things that his scholarship in this field teaches are that reprisals are sometimes successful in ending violations of the law but more often are unsuccessful, that a threat of reprisal is more likely to be effective than the actual reprisal itself, that reprisals involve a serious risk of moving the Parties involved further away from compliance with the law — exactly the opposite of their purpose — because reprisals often lead to counter-reprisals, and finally that reprisals almost invariably and unavoidably injure persons who are completely innocent of the violations of law that the reprisals are designed to bring to an end.

Nevertheless, despite the limitations, risks, and unfairness of reprisals, the armed forces of many nations, and particularly the lawyers advising those armed forces, tend to cling tenaciously to the right of reprisal. Given the paucity of other devices to repress or punish war crimes by one’s enemies and the general assumption of our era — and perhaps of most eras — that one’s enemies are likely to be malevolent and will gladly violate the law if it suits their purposes, it is understandable that military lawyers would be reluctant to lose the only remedial measure which they can advise their commanders may lawfully be used in an effort to coerce the enemy to obey the law. Moreover, they can point out that, as enemy soldiers who commit war crimes and enemy commanders who order the commission of war crimes seem unlikely ever to be punished for their crimes for the reasons previously noted, justice requires that such unpunishable crimes be deterred or ended as

¹⁴ See, in particular, Frits Kalshoven, *Belligerent Reprisals*, Sijthoff, Leiden, 1971.

quickly as possible, and they can plausibly assert that the right of reprisal is essential to that end.

This point of view was consistently rejected in the negotiation of Additional Protocol I. In fact, as Professor Kalshoven has demonstrated, the right of reprisal, although well established in customary international law, has been rejected every time efforts have been made to recognize it in a humanitarian law treaty.¹⁵ But Protocol I went further and explicitly prohibited reprisals against virtually everyone and everything except the enemy's armed forces.¹⁶ And how, one may ask, can a Party to a conflict take reprisals against the enemy's armed forces whom it is in any event trying to kill or capture? The only answer I have heard to that question is that the Party could use otherwise prohibited weapons of warfare. I suggest that such a reprisal is unlikely to be either useful or desirable except, of course, in the situation where the reprisal is itself taken in response to the use by the enemy of prohibited weapons.

While it is clearly important to maintain the right to use illegal weapons in reprisal in order to deter or stop the use of such weapons, I suggest that it may not be the only reprisal measure that should be permitted. What is a country to do, for example, if its enemy adopts a practice of refusing quarter — that is, refusing to take prisoners of war — or of systematically slaughtering part or all of the population in occupied territory? Can the government of the victim State content itself with threats to try the responsible persons for war crimes should it prevail and be in a position to do so? I very much doubt it. I believe the victim in those admittedly extreme circumstances would be compelled to threaten belligerent reprisals of some kind and, if the threat failed to stop the enemy's practice, then to take reprisal action, regardless of the law. If I am correct, then States contemplating ratification or accession to Protocol I should seriously consider making a reservation to at least one of the prohibitions of reprisal set forth in that Protocol in the

¹⁵ For example, reprisals against prisoners of war are prohibited by Article 13 of the Third 1949 Geneva Convention, and reprisals against protected persons are prohibited by Article 33 of the Fourth 1949 Geneva Convention.

¹⁶ Sick, wounded, and shipwrecked persons, medical personnel, units, and transports (Art. 20), civilians and the civilian population (Art. 51), civilian objects (Art. 52), certain cultural objects and places of worship (Art. 53), objects indispensable to the survival of the civilian population (Art. 54), the natural environment (Art. 55), and dams, dikes, and nuclear power stations (Art. 56).

event of serious and systematic war crimes.¹⁷ Such a reservation should, of course, be so framed as to respect the traditional conditions of a lawful belligerent reprisal, that is, that prior warning has been given and has failed to stop the unlawful acts, that the decision to resort to reprisal is taken at a responsible political level, that the reprisal action is not disproportionate to the unlawful acts against which it is taken, and that the reprisal ends as soon as the unlawful acts by the enemy cease. A Party that accepts the competence of the International Fact-Finding Commission provided for in Protocol I¹⁸ should also condition its reservation by first according the Commission a reasonable time to investigate the alleged unlawful acts by its enemy in any case where its enemy also accepts the competence of the Commission. In my view, such a reservation by a Party that accepts the competence of the Fact-Finding Commission would not be an impermissible reservation, that is, one contrary to the object and purpose of the Protocol.¹⁹ Whether a reservation of a right of reprisal would be permissible if made by a Party that does not accept in advance the competence of the Commission is a more difficult question.

* * *

By mentioning the International Fact-Finding Commission, I have anticipated the third factor that I suggested was responsible for noncompliance with IHL — the general absence of effective monitoring, fact-finding, and dispute settlement mechanisms.

The 1949 Geneva Conventions rely primarily upon the traditional mechanism of the protecting power to verify compliance during armed conflicts.²⁰ Each Party to the conflict is obliged to designate as a protecting power a neutral State or a substitute international organization which must be acceptable to the opposing Party in whose territory it is to act. The task of the protecting power is to safeguard the interests of the Party that designated it by scrutinizing

¹⁷ The only Party to Protocol I that has made such a reservation, albeit an ambiguous one, is Italy.

¹⁸ Art. 90.

¹⁹ 1969 Vienna Convention on the Law of Treaties, Art. 19.

²⁰ See, for example, the Third 1949 Geneva Convention on prisoners of war, Arts. 8, 10, 11 and 126.

the application of the Conventions and by carrying out certain specific tasks set forth in the Conventions. Additional humanitarian functions of the ICRC are also envisioned by the Conventions and equally are subject to the consent of the Parties to the conflict.²¹

The practice of Parties to armed conflicts in the years since 1949 has shown that protecting powers have almost never been agreed to, and the monitoring mechanism on which the Conventions relied has thus been frustrated.²² During the Vietnam War, for example, the United States sought North Vietnam's agreement to a protecting power or to the ICRC as a substitute to observe the treatment of American prisoners held in the north, but Hanoi refused. While the United States and South Vietnam permitted the ICRC to inspect prisoner-of-war camps in the south and to provide relief to the prisoners held there, Hanoi never agreed that the ICRC or any State or other international organization could serve as its protecting power.

With this experience in mind, the negotiation of Additional Protocol I was seen as an opportunity to improve the available monitoring mechanisms. In the end, two significant improvements were made. First, if no protecting powers have been designated and accepted, the Protocol requires the ICRC to offer its good offices to the Parties to the conflict to facilitate designation of a protecting power.²³ Specifically, it authorizes the ICRC to ask each of the Parties to give it lists of at least five acceptable protecting powers and obligates them to provide such lists within two weeks. The ICRC is required to seek the agreement of any State named on both lists. If, despite these procedures, no protecting power can be agreed upon, the Protocol obligates the Parties to the conflict to accept an offer by the ICRC (should it make such an offer) to be a substitute for a protecting power. In the end, a Party cannot effectively be compelled against its will to accept a protecting power or to permit its delegates to scrutinize application of IHL within territory under its control, but these new provisions in the Protocol should at least make it more difficult and politically costly for a Party to the Protocol to refuse to accept a protecting power or substitute in a future armed conflict, thereby making such a refusal less likely.

²¹ See, for example, the Third 1949 Geneva Convention on prisoners of war, Art. 9.

²² The only significant exception occurred during hostilities between India and Pakistan.

²³ Art. 5.

In addition, the Protocol makes a major new contribution to the promotion of compliance by, as I noted earlier, providing for the establishment of a new permanent International Fact-Finding Commission, with its headquarters in Switzerland, which will be charged with investigating and reporting to the Parties involved on any allegations of grave breaches or other serious violations of the 1949 Conventions or of the Protocol. The Commission is to function whenever both Parties involved (the accuser and the accused) have accepted the competence of the Commission. The Commission will come into existence as soon as 20 Parties have agreed to accept such competence. At present, there are 19, one of which is the Soviet Union.²⁴ It seems clear that the establishment of the Commission and the acceptance of its competence by as many Parties as possible will greatly facilitate compliance with IHL. The recent ratification of the Protocol by the USSR and its surprising acceptance of the competence of the Commission are extremely promising developments and should cause the major Powers that have not yet done so to realize the potential benefits of taking the same steps at the earliest opportunity.²⁵

In conclusion, it is clear that the problems involved in improving compliance with IHL are both serious and urgent, but it is also clear that remedial actions are available and feasible. What is uncertain is whether the will to press for them can be created. Ignorance can be dispelled, but only by much greater efforts to disseminate knowledge of the law. Skepticism and cynicism can be counteracted, but only if violations of the law are seen to be repressed by means of coercion and by the punishment of those responsible for war crimes. And better monitoring, fact-finding, and dispute settlement mechanisms are becoming available for Nations prepared to accept them. It is the duty of all those who care about IHL to bring these issues to public attention and to impress upon people and upon governments the long-term importance of taking the necessary remedial measures that will strengthen respect for the law and improve in practice the protection accorded to victims of armed conflicts. No one should believe this will be an easy task.

²⁴ According to the ICRC, as at 31 March 1991 the following Parties have accepted the competence of the Commission: Sweden, Finland, Norway, Switzerland, Denmark, Austria, Italy, Belgium, Iceland, Netherlands, New Zealand, Malta, Spain, Liechtenstein, Algeria, USSR, Bylorussian SSR, Ukranian SSR, Uruguay, Canada and Federal Republic of Germany.

²⁵ During the Diplomatic Conference that adopted the Protocols, the USSR was a leading opponent of the Fact-Finding Commission.

Official and public skepticism and cynicism are entrenched and difficult to overcome, and we cannot afford to give any less than our best efforts to this endeavour. For my part, I appreciate the opportunity given me by the great university and by the Netherlands Red Cross to contribute to this vital task.

George H. Aldrich

George H. Aldrich received the LL.B. and LL.M. degrees from Harvard Law School. He has been Deputy Legal Adviser of the Department of State (1969-1977), Ambassador and Head of the U.S. Delegation to the Diplomatic Conference on International Humanitarian Law (1974-1977), Ambassador and Deputy Special Representative of the President for the Law of the Sea Conference (1977-1981), Member of the United Nations International Law Commission (1981), and Judge on the Iran-United States Claims Tribunal in The Hague since 1981. Concurrently in 1990 he became the second holder of the "Red Cross" Chair of International Humanitarian Law at Leiden University.

Protection of Victims of War

WORLD CAMPAIGN FOR THE PROTECTION OF VICTIMS OF WAR

The World Campaign for the Protection of Victims of War reached its peak on World Red Cross and Red Crescent Day, 8 May 1991. This was the day when members of the Movement were invited to form a "chain of light" around the world as a reminder that the role of the Red Cross and Red Crescent is to "light the darkness" for all victims of war.

Readers will recollect that the Campaign, launched officially on 28 January 1991, has three main objectives:

- To draw attention to the plight of thousands of war victims;
- To promote knowledge of and respect for international humanitarian law;
- To spur governments and the general public to ensure that all victims of war receive the protection and assistance to which they are entitled.¹

The main events which have marked the Campaign since the beginning of January 1991 are reviewed below.

* * *

"Nine out of ten victims of war today are civilians.

Millions of them face death, injury, imprisonment, mutilation, separation from their families and forced exile.

Their suffering is an insult to humanity".

With these words, former ICRC President Alexandre Hay launched the International Red Cross and Red Crescent Movement's World Campaign for the Protection of Victims of War in Geneva on 28 January 1991.

¹ In this connection, see "World Campaign for the Protection of War Victims", *IRRC*, No. 275, March-April 1990, pp. 138-143.

Mr. Hay, who is the Campaign Chairman, said its purpose was to bring the victims the *“protection and assistance to which they are entitled under international humanitarian law.”*

He went on to give facts and figures on *“man’s inhumanity to man”* during the so-called “post-war” period since the end of World War II in 1945.

“Today civilians are increasingly caught in the crossfire”, Mr. Hay declared. *“In the First World War they accounted for 15% of war victims. In the Second World War, they were 65%. Today, they are 90%. In such a situation, we cannot remain silent.*

War is an obsolete means of settling disputes. But as long as it persists, its victims must receive the protection and assistance to which they are entitled under international humanitarian law” .

The launching of the Campaign was marked by press conferences and special events organized in some 60 towns and cities around the world. At a press conference held in Geneva, H.R.H. Princess Christina of Sweden, Mr. Cornelio Sommaruga, President of the ICRC, and Mr. Mario Villarroel Lander, President of the League of Red Cross and Red Crescent Societies, stressed the need to promote respect for the victims of armed conflicts.

Heads of State and government and other leading figures took part in the launching of the Campaign. The Secretary-General of the United Nations, Mr. Javier Pérez de Cuéllar, said in a message of support: *“Today’s Solferinos occur mainly within the borders of a country, where brother fights brother and the innocent victims are women, children and old people. The initiative to launch this Campaign brings honour to the International Red Cross and Red Crescent Movement”* .

* * *

Many National Red Cross and Red Crescent Societies were keen to play an active part in the last six months of the Campaign. Indeed, never before had all the components of the International Red Cross and Red Crescent Movement participated on such a scale in a single project. In addition to the international events described below, the National Societies organized promotional campaigns, seminars, symposia and lectures on the protection of victims of war, exhibitions of posters, photographs and children’s drawings, the issue of postage stamps, the striking of medals, etc. They were also enthusiastic in

collecting signatures, particularly from government circles within their own countries, in support of the February 1990 Appeal calling for respect for “the fundamental human rights of individuals at all times and in all circumstances”.²

The World Campaign also enjoyed the support of a number of *international and national “ambassadors”*.

Chosen for their reputation and influence in the world of the arts, culture and science, their role was to promote the Campaign in the media and thereby ensure that its message reached as large an audience as possible. Among others, the actress Nastassja Kinski and the actor and author, Sir Peter Ustinov, took an active part in the Campaign as international ambassadors.

In addition, National Societies were invited to nominate their own “national ambassadors” from among prominent countrymen whose integrity, independence and interest in the humanitarian cause were indisputable.

On several occasions these ambassadors went on field visits to areas affected by conflict. They were accompanied by journalists and gave several press conferences.

At both international and national levels, the Campaign was supported by large multinational companies and organizations such as the World Veterans Association.

To assist National Societies in promoting the World Campaign in general and World Red Cross and Red Crescent Day in particular, the International Promotion Bureau (IPB), set up jointly by the ICRC and the League and headed by Maurice Graber and George Reid, prepared *audiovisual and written material*. This included articles, eye-witness accounts, information sheets on conflicts, humanitarian law and the Principles of the Movement, suggestions for humanitarian projects, sets of posters, photographs, badges, etc. A video film was made illustrating the reality of war, with John Lennon’s song “Imagine” providing the background music.

Several kits were sent to the National Societies, together with copies of the IPB’s newsletter, “Humanity”.

In addition, a report intended for the general public and entitled “*Victims of conflicts*” was prepared by the Peace and Conflict Research Department of the University of Uppsala (Sweden). This independent publication scrutinizes modern armed conflicts and the

² *Ibid.*, p. 149.

plight of their victims from the general viewpoint of international humanitarian law. It is reviewed below (see pp. 342-344).

* * *

The *International Drawing Competition* for children under fifteen was a great success. Its theme was protecting women, children and the elderly.

“By reaching out to young people and children in schools and asking them to understand and to show the necessity for the protection of victims of war through their paintings, we are continuing to spread the vital message of the Red Cross and Red Crescent Movement”, said Nastassja Kinski, Ambassador for the World Campaign.

Over 600 paintings were received in Geneva from 58 National Red Cross and Red Crescent Societies, and it was estimated that the total number of entries worldwide were in the tens of thousands. A number of National Societies also organized drawing contests within their own countries.

The jury, presided over by Nastassja Kinski, met on 20 March 1991 at the International Red Cross and Red Crescent Museum in Geneva to select the ten winning entries. The prize-winners will be invited to Geneva in August; together they will visit the ICRC and the League, the city itself and the surrounding countryside. Each entrant selected for the international competition will receive a Certificate of Merit.

An exhibition of 105 paintings, including at least one from every National Society that entered the competition, was on display in the foyer of the International Red Cross and Red Crescent Museum in Geneva up to 14 May 1991; the exhibition will also be mounted at the International Conference of the Red Cross and Red Crescent in Budapest in November 1991.

* * *

The culminating point of the World Campaign was 8 May 1991, *World Red Cross and Red Crescent Day*. Its slogan, “Light the Darkness”, was taken from Albert Schweitzer who likened the International

Red Cross and Red Crescent Movement to a light in the darkness for all those living under the shadow of violence, death and exile.³

In some 130 countries, the occasion was marked at nightfall by the lighting of lamps, torches and candles to express solidarity with the victims of war and a universal desire to ensure respect for humanitarian law.

In Geneva, on the Avenue de la Paix (Avenue of Peace), between the United Nations and the ICRC, thousands of people attended a concert given by the *London Chamber Orchestra* and accompanied by a spectacular display of special lighting effects. The ceremony concluded with the song "When will there be peace?", by Nick Bicât, sung by children in several languages while thousands of candles were lit to form a chain of light in support of the victims of war.

Other ceremonies of a similar nature were held on the Great Wall of China, in Hiroshima, New York, Beirut, Cairo and Moscow, in Norway and Fiji, in refugee camps in Asia and guerrilla camps in Latin America, at ICRC delegations, and by National Societies, etc.

BBC television (BBC 1), in conjunction with television networks in other countries, produced an international programme on this chain of light around the world. Presented by Sir Peter Ustinov and with the ceremony in Geneva as its theme, the programme is made up of sequences showing various aspects of war, extracts from the Geneva Conventions being read by famous actors and scenes of events to mark 8 May which were filmed in the four corners of the world.

The programme was broadcast by BBC 1 on 10 May and at a later date by television stations in many countries.

The IPB advised National Societies to take full advantage of the possibilities offered by this programme. For instance, they could suggest that television stations in their own countries broadcast chat shows and discussions explaining the role and activities of the National Society, organize meetings on the National Society's work between representatives of government ministries, the press and television, and local and international organizations, both governmental and non-governmental; or televise publicity material to raise funds, recruit new members, etc.

* * *

³ See also below, p. 312, the joint message from the League of Red Cross and Red Crescent Societies and the International Committee of the Red Cross.

In Switzerland, several events with a humanitarian theme have taken place over the past six months, most of them in connection with the celebration of the 700th anniversary of the Swiss Confederation. The *Review* will be covering some of these in its July-August 1991 issue.

WORLD RED CROSS AND RED CRESCENT DAY 1991

JOINT MESSAGE OF THE LEAGUE OF RED CROSS
AND RED CRESCENT SOCIETIES
AND THE INTERNATIONAL COMMITTEE OF THE RED CROSS

“Light the Darkness!”

That is the slogan of this year’s World Red Cross and Red Crescent Day, which is being celebrated throughout the world today, 8 May, the anniversary of the birth of our Movement’s founder, Henry Dunant. Today also marks the culminating point of the World Campaign for the Protection of Victims of War.

War and violence continue to devastate vast areas of the world. At this very moment more than 30 conflicts are raging. Millions of people have been killed, wounded, imprisoned or forced to flee their homes or their countries.

Most of them are civilians. Their suffering and distress are beyond imagination.

Bringing a ray of hope into the darkness of war and violence. Protecting human life and dignity. Caring for the wounded. Visiting prisoners. Bringing help to refugees. Tracing the missing. Reuniting families. Protecting civilians who are defenceless and without shelter. Such is the mission of the volunteers, delegates and staff of the Red Cross and Red Crescent Movement who are engaged daily in the humanitarian battle.

But their work is still only a drop in the ocean, and too often their efforts are frustrated by lack of understanding and outright cynicism on the part of military men and politicians, not to speak of the indifference of world public opinion.

Millions of people today are deprived of the assistance and protection to which they are entitled under international humanitarian law.

The Geneva Conventions, ratified by 164 States, are constantly flouted and violated.

The most basic human rights, which must be respected at all times and in all circumstances, are disregarded.

Civilians are subjected to indiscriminate attack, summary execution, rape and torture.

Obstacles are often put in the way of humanitarian aid, and famine, epidemics and mass population movements are the result.

This situation cannot be tolerated. The victims have rights. We must respect those rights and ensure that they are respected by others.

That is why the International Red Cross and Red Crescent Movement is calling on governments, combatants and all peoples of the world:

- to seek peaceful settlements for disputes;
- to remedy situations of injustice and oppression which lead to wars;
- to meet their humanitarian commitments;
- to release the resources needed to protect and assist the victims of armed conflicts.

In response to this appeal, let everyone show solidarity with the victims of war by making this night of 8 May 1991 glow with millions of lights!

By being part of this “chain of light”, everyone can help break the chains of violence, enforce respect for humanitarian law and ensure that all war victims receive protection and assistance, everywhere, at all times.*

* This message has been recorded by:
Mr. Cornelio Sommaruga, President of the International Committee of the Red Cross (speaking in *French, German and Italian*);
Dr. Mario Villarroel Lander, President of the League of Red Cross and Red Crescent Societies (speaking in *Spanish*);
Mr. Pär Stenbäck, Secretary General of the League of Red Cross and Red Crescent Societies (speaking in *English*);
Dr. Ahmad Abu-Goura, Chairman of the Standing Commission of the Red Cross and Red Crescent (speaking in *Arabic*);
The recording (on 7 1/2 reel tape or cassette) can be obtained from the Press Division of the International Committee of the Red Cross.

International Committee of the Red Cross

NEWS FROM HEADQUARTERS

NEW EXECUTIVE STRUCTURE

At the meeting of its Assembly, on 2 May 1991, the International Committee of the Red Cross decided to set up a single executive body. The decision was prompted by the need to keep pace with the growing complexity of the ICRC's humanitarian work worldwide and to respond with optimum efficiency to the marked expansion in its activities.

Part of the former Directorate will now be incorporated into the Executive Board. The new Board will have direct responsibility for the three structures that oversee the ICRC's activities, i.e. the General Directorate, and the Directorates of Operations and of Principles, Law and Relations with the Movement.

The seven members of the new Executive Board will, as previously, be elected by the Assembly for renewable terms of four years. On 2 May the Assembly elected:

Guy Deluz, Director General, whose task it will be to co-ordinate administrative activities; **Jean de Courten**, Director of Operations, and **Yves Sandoz**, Director for Principles, Law and Relations with the Movement.

The other members of the Executive Board will be:

Cornelio Sommaruga, ICRC President; **Claudio Caratsch**, permanent Vice-President; **Rudolf Jäckli**, member of the ICRC; **Anne Petitpierre**, member of the ICRC.

André Ghelfi and Pierre Keller have asked to be relieved of their duties as members of the Executive Board while remaining members of the Assembly.

This new system will take effect on 10 May 1991. It follows a previous reorganization and the creation of the post of Director General in January 1990 and is the result of specific proposals put forward by a working group of Committee members following extensive consultations throughout the institution.

The Assembly, whose main task is to provide overall supervision of the institution's work and to determine the principles and policy that govern its activities, will remain essentially unchanged. It will continue to have 15 to 25 members, who are all Swiss citizens and most of whom serve on a voluntary basis, but has decided to increase the number of its meetings from eight to at least ten per year. In addition, it has set up a management control commission, consisting of five members not on the Executive Board. The commission will be chaired by Pierre Languetin and will assist the Assembly in supervising the institution's executive structure and administration.

The ICRC, always open to opportunities for dialogue, intends to step up its consultations with international experts and to establish closer working relations with the National Red Cross and Red Crescent Societies and their federation, the League of Red Cross and Red Crescent Societies.

PRESIDENTIAL MISSIONS

Luxembourg (12 March)

The President of the ICRC, accompanied by Mr. Michel Convers, head of the Operational Support Department, travelled to Luxembourg on 12 March 1991.

He was received by H.R.H. the Grand Duchess of Luxembourg, President of the National Society, in the presence of Mr. Henri Ahlborn, Vice-President of the Luxembourg Red Cross. The discussions were concerned mainly with a possible financial contribution by the Grand Duchy towards the work of the ICRC in Jordan and with the dissemination of international humanitarian law.

At government level, the ICRC President had talks with Mr. Jacques Poos, Deputy Prime Minister and Minister for Foreign Affairs, on various ICRC operations in the Middle East and Africa.

Financial issues were then examined in an interview with the Secretary of State for Foreign Affairs, Mr. Georges Wohlfart; Luxembourg's overall contribution to the ICRC is going to be considerably increased and should exceed 2.5 million Swiss francs in 1991.

During a meeting with the European Community's Political Cooperation Committee (composed of policy directors from the Ministries of Foreign Affairs from the twelve Member States) there was a broad exchange of views on the relevance of the Protocols additional to the Geneva Conventions in the context of the Middle East conflict (especially as regards the environment), the meaning and scope of Article 1 common to the four Geneva Conventions, and the ICRC's operations in the Gulf region, in Africa and in the Israeli-occupied territories; consideration was also given to the development of international humanitarian law, several aspects of which will be broached during the forthcoming International Conference of the Red Cross and Red Crescent. These subjects gave rise to numerous topics of discussion, which were also extended to include relations between the ICRC and the United Nations.

Federal Republic of Germany (15 March)

On 15 March 1991, the German Red Cross held an Extraordinary General Assembly to celebrate its reunification and to elect its new Presidium. As a guest, the President of the ICRC, who was invited to take part, conveyed the ICRC's congratulations and, in his address, laid emphasis on the unity and solidarity of the International Red Cross and Red Crescent Movement. The League of Red Cross and Red Crescent Societies was represented by Dr. Karl Kennel, President of the Swiss Red Cross, and Vice-President of the League. Mrs. Gerda Hasselfeldt, Minister of Health, expressed the Government's best wishes. Chancellor Helmut Kohl had sent a letter to the German Red Cross confirming the validity of the official decree recognizing the National Society in 1956.

The General Assembly also served as an opportunity to elect the members of the new Presidium. Botho Prince of Sayn-Wittgenstein-Hohenstein was elected President and the former President of the German Red Cross of the German Democratic Republic, Dr. Christoph Brückner, was elected as one of its Vice-Presidents.

Italy (15 April)

The President of the ICRC, accompanied by Mrs. Cristina Piazza, a member of the ICRC's Legal Division, went to Turin on 15 April

to give a lecture at the “Scuola d’Applicazione”— a military college for Italian Army career officers.

Some 500 people — officers from the college and civilian and military authorities — attended this lecture, which was entitled “The role of the ICRC during crises and conflicts”.

During his visit, the President met the directors of the Provincial Committee of the Italian Red Cross, the supervisors of the “Scuola d’Applicazione” and the Mayor of Turin.

In the Red Cross and Red Crescent World

NATIONAL RED CROSS AND RED CRESCENT SOCIETIES

THE ALBANIAN RED CROSS YESTERDAY AND TODAY

The Albanian Red Cross, founded in 1921, will celebrate its 70th anniversary in December. Its history, like that of its country, has been marked by alternating periods of intense activity and temporary stagnation.

The trend in Albania in recent months towards greater openness to the outside world and possible democratic reform of the State has had a stimulating effect on the National Society. As remarked by Thierry Germond, ICRC Delegate General for Europe and North America, and Jean-François Berger, Regional Delegate for the Balkan States, during a mission to the country in December 1990, "the Albanian Red Cross has entered a period of renewal".

The first sign of renewal was the National Society's decision, formally adopted by governmental decree in 1989, to reorganize itself and lay fresh foundations for its activities or, in the words of its current President, Dr. Çiril Pistoli, to "recharge its batteries".

The ICRC welcomed this approach and has undertaken to give the National Society short- and medium-term support in strengthening its operational capacity by providing material assistance, training its staff at the Central Tracing Agency in Geneva and helping it to set up a dissemination programme.

*The Review will continue to keep its readers informed of the National Society's progress and is pleased to publish below an article by the President of the Albanian Red Cross retracing its history from the 1920s to the present.**

* * *

The Albanian Red Cross, which was founded on 30 December 1931, was recognized by the International Committee of the Red Cross and became a member of the League of Red Cross Societies on 2 August 1923.

* An earlier version of this article appeared in the Albanian Red Cross periodical *Shkenca dhe Jeta*, No. 3, 1990. Its title here is given by the *Review*.

At that time the National Society was not yet a broad-based voluntary association. Its 600 members carried out mainly charitable work. During the 1920s the Albanian Red Cross thus ran an orphanage, set up a dispensary in Tirana, where two doctors and a nurse provided free medical care for the indigent, and opened a soup kitchen. In 1937 it also founded a nursing school.

During Albania's occupation by fascist forces the National Society came under the control of the authorities in Rome. Not long after, it was dissolved.

After the country's liberation, the Albanian Red Cross was re-established. In 1946 a congress was convened at which 80 delegates adopted new Statutes and elected a General Council of 11 members and a President, Vice-President and Secretary General.

National Society branches headed by elected committees were set up in every district of the country. Membership of the Albanian Red Cross rose from 11,500 in 1946 to 160,000 in 1962. Since then it has grown even more rapidly and has now become a broad-based voluntary association with democratically elected leaders.

After its re-establishment the Albanian Red Cross launched various humanitarian activities to help communities cope with the aftermath of the war. It thus set up an orphanage for destitute children and a home for the elderly, the sick and the needy, organized distributions of milk for children and ran a soup kitchen. While continuing to assist destitute families and orphans, the Albanian Red Cross then set up medical and social programmes for war invalids and the victims of natural disasters.

In order to bolster the medical services in its country, the National Society founded another nursing school. It also organized first-aid training for volunteers, who subsequently manned first-aid posts in their workplaces. In all these ways the Albanian Red Cross has endeavoured over the years to keep pace with its country's economic and social development.

The National Society has been particularly active in recent months following the elections held in each district in the first half of 1990 and the National Conference convened in Tirana on 27 June 1990, which adopted the Society's new programmes.

The Albanian Red Cross intends not only to continue its activities in its traditional fields (assistance to the needy, primary health care, etc.), but also to break new ground. In the area of health education, it plans not only to co-operate with the public health institutions but also to organize its own programmes, in particular for the elderly. It intends also to launch blood collection campaigns and to set up a programme to assist the parents of children in nursery and elementary schools.

A priority task for the National Society is to improve the training of Red Cross first-aid workers so as to create a network of volunteers who will provide care not only in schools, enterprises and agricultural co-operatives,

but also at public gatherings (assemblies, parades and athletic events). Another priority task is to increase its preparedness to provide medical care in the event of natural disasters. In this area, the Albanian Red Cross, as a member of the League of Red Cross and Red Crescent Societies, may if necessary call on the International Red Cross for support.

The National Society's other major priorities are to provide social and medical assistance for elderly persons living at home and needing constant attention, to care for invalids and to help Albanian citizens to restore ties with their relatives abroad.

Within the framework of these various activities, the National Society intends also to develop its relations with sister Societies abroad.

The Albanian Red Cross is confident that its 300,000 members, mainly young people, will ensure the success of its new programmes.

SILVER JUBILEE OF THE KENYA RED CROSS SOCIETY

25 YEARS AT WORK... PROTECTING HUMAN LIFE AND DIGNITY

The Kenya Red Cross Society (KRCS) has been in existence for a quarter of a century. It was founded on 21 December 1965, recognized by the ICRC on 3 November 1966 and admitted to the League of the Red Cross Societies on 5 September 1967.

The National Society's Information Officer, Henry Wahinya, wishes to share with the readers of the Review his reflections on its "25 Years at Work... Protecting Human Life and Dignity" and the latest communication strategy of the International Red Cross and Red Crescent Movement.

Health Programmes

It is nearly 1 o'clock in the afternoon. And there is a sigh of relief among passengers in the two land cruisers. The vehicles finally come to a halt, having reached their final destination some 450 km to the west of Nairobi.

Mr. Ephraim M. Gathaiya, the National Society's Secretary General, emerges from the truck. With him is the Society's Primary Health Care (PHC) Co-ordinator, Mr. Amos Odongo.

Their mission? To participate in an outreach immunization campaign launched by the Society against the six vaccine-preventable diseases which have wreaked havoc in the communities owing to the lack of medical facilities in Oyugis Division, South Nyanza District.

At Aolo Primary School, the hunt for the Red Cross jab by mothers is quite evident, as infants are strapped on their backs while those in their arms suckle.

Some children play hide-and-seek in a nearby maize plantation, oblivious to what is happening around them. A few kilometres away from the two classrooms converted into "wards", a crowd has sought refuge under a huge shade tree called an *Ober* in the local dialect.

A downpour had hit the area the previous night, making the air damp under the blazing sun. Mothers have endured the harsh weather conditions, covering many kilometres since the early hours of the morning to ensure that their children do not miss the Red Cross jab against polio, tetanus, measles, diphtheria, tuberculosis and whooping cough.

From the primary school, Mr. Philip Omolo, one of the Society's PHC Red Cross volunteer workers, discloses that the nearest dispensary is about 10 km away.

"Health facilities are hard to come by in Oyugis", mourns Mr. Omolo.

In this age of the AIDS (Acquired Immune Deficiency Syndrome) scare, the Red Cross does not take any chances. Syringes are well sterilized.

In one of the classrooms, Florence Matete, a nurse and a member of the National Society's field staff, has her right ear on the abdomen of a woman lying on a bed as the rest of the "patients", their faces drawn with despair and weariness, wait for their turn.

"She is suffering from a false pregnancy. She is also anaemic", explains Miss Matete.

The role of the Red Cross nurse in the provision of this health service to the community is to examine expectant mothers. She refers scores of them to the local dispensary.

The programme is a manifestation of the wide range of humanitarian activities that the National Society has carried out in part of its twenty-five years in existence.

"Under the PHC programme" says Mr. Odongo, "workshops are conducted for community leaders".

"Armed with the necessary knowledge", he adds, "community leaders impart basic health care skills to Red Cross volunteers who in turn advise at the grassroot levels, through Village Health Committees, on basic health measures to contain the incidence of preventable diseases and improve the quality of life of rural communities by means of this down-to-earth approach".

"Other community-oriented health programmes undertaken by the National Society", Mr. Odongo added, "include the protection of water sources and the digging of wells to provide clean water".

"Where the Red Cross has moved in, the high child mortality rate recorded in the past, which was caused by water-borne diseases due to consumption of contaminated water has declined", explains the PHC Co-ordinator, who has also introduced unique pit latrines in churches and primary schools.

The PHC programme is among others that the National Society has been implementing since it was founded by Act of Parliament on 21 December 1965. Prior to that date, what the country had was an extension of the British Red Cross, whose activities consisted mainly in providing welfare materials

and first-aid teaching. But under its Five-Year Development Programme of 1983-1987, the National Society, while retaining traditional activities, set out to introduce more programmes and diversify the existing ones.

Information and dissemination

Recognizing that it is hard to “market” the product — the humanitarian message — in a country which has known peace since independence, information and dissemination have been accorded priority.

Perception of the Red Cross by members of the public as a foreign institution whose sole mission in life was to dish out relief and provide first aid has had adverse effects on the Society in terms of membership recruitment and financial support.

For a population which only “received” from the Red Cross, especially in pre-independence days, and among whom the notion prevailed that the Red Cross exists only to provide and not to be given to by others, the change of attitude has been an uphill task.

But the task has had to be accomplished, though gradually, through specific communication/dissemination projects whose channels have been put into good use to “transport” (convey) the “product” (message) to the “consumer” (target audience) on who we are, what we do and why, where, when and how.

Radio talk-shows with both English and Kiswahili commentaries highlighting the humanitarian work of the components of the Movement besides regular press releases and bulletins have been utilized to reach a wider audience. The same has been done on television.

Editorials, special supplements especially during World Red Cross Day, public awareness campaigns, news articles and photographs either emanating from press releases or skilfully staged press conferences have captured the attention of print media editors.

The Nairobi-based Organization of African Unity (OAU) Pan African News Agency has “hit” 44 African countries with information material as the Society’s contribution to a wider dissemination of the whole Movement’s humanitarian work.

Although seen as a service arm of the Society, arranging for eye-catching public events that gather crowds and the attention of the media, the department organizes specific events aimed at raising the “profile” of the Society such as tree-planting, exhibitions, contests, garbage collection and special awareness campaigns so that the Red Cross can be seen, read, heard, remembered and supported in terms of financial backing and volunteer service.

Humanitarian activities for the last quarter have been quite visible in the field of relief. Volunteers have gained useful skills to prepare them to handle disasters as members of Red Cross Action Teams. These members have been mobilized at the national and branch levels at short notice to render volunteer service in drought-, flood- and fire-stricken areas.

Inspired by the Red Cross principle of Humanity, volunteers over the years have provided care to sudden influxes of refugees from neighbouring countries.

Though recent, the AIDS programme has protected human life in several respects. Memories are still fresh among the public of a nationwide information campaign launched by the Society in 1987, with posters and leaflets on the dreaded malady bearing the famous "Help Crush AIDS" logo.

Printed in English and Kiswahili to reach a wider audience, the "Spread Facts... Not Fear" materials brought hope to a desperate population ignorant of what the disease was, how it spread and how to avoid contracting it. Blood-screening equipment to detect the AIDS virus was donated to key government hospitals.

Since the campaign, the programme has taken on a new dimension — the training of volunteers, staff and youth on counselling techniques so that they may bring hope to AIDS sufferers and the orphaned.

Other humanitarian activities that the Red Cross has carried out in the past 25 years include the training of first-aid volunteers at national and branch levels to save life in emergency situations. Community programmes carried out at the grass roots level are as diverse as the existing Red Cross branches. They range from homes for the handicapped to youth programmes and various welfare services. Assistance is based on the need of a particular community or affected families.

Recognized as a National Society by the ICRC in 1966 and admitted to the League the following year, the Society has set out to reverse the up-down approach to development in order to strengthen the capacity of branches to cope with the various humanitarian domains in which communities have looked to the Red Cross for help. The Society's development should begin at the grass roots level, not the other way round.

Information policy

A detailed informative, educational account was given by Helena Korhonen, Head of Development Programmes with the Finnish Red Cross in

the *International Review* dated May-June 1990.¹ Her article dwelt at length on the lack of trained manpower, finance, equipment and vital materials.

These obstacles pose a challenge to the Movement in our endeavours to heighten the “profile” of the Red Cross by projecting a common image in order to compete favourably with other agencies seeking for assistance from the same sources.

Implementation of the communication strategy furthermore requires experienced staff to draw up budgets, to formulate and implement information plans at regional and national levels, and especially to co-ordinate the production of relevant information/dissemination materials so as to convey the message in dialects the populations would understand, taking into account the diverse cultures and languages in operating National Societies.

Imbalances with regard to resources have also constituted further setbacks for personnel responsible for information sections.

As Helena Korhonen implies in her article, the leadership in operating National Societies has miserably failed to institute information policies to be integrated into the overall operations of those institutions.²

According to her, there is pressure to “produce”. But the question is to “produce” what? Marketing a “product”, or public relations, is an expensive undertaking. In some operating Societies, proposals to produce materials aimed at raising the profile or enhancing the image of those institutions is seen as “too expensive”.

Although the League stipulates that public relations budgets be set aside by National Societies for sustaining Red Cross contacts, in certain Societies such requests are silently resisted. Whereas for the leadership, this “entertainment” amount is automatic, those responsible for information matters can use their own incomes.

Henry Wahinya
Information Officer
Kenya Red Cross Society

¹ Helena Korhonen, “Support for information services in developing National Societies”, *IRRC*, No. 276, May-June 1990, pp. 249-258.

² *Ibid*, p. 253.

OBITUARY

DEATH OF YVONNE HENTSCH

Miss Yvonne Hentsch, former Under-Secretary General of the League of Red Cross and Red Crescent Societies, died in Geneva on 4 May 1991 at the age of 84. Her passing is a major loss for the Red Cross and for the world of nursing in general.

Miss Hentsch was a graduate of "La Source" School of Nursing in Lausanne, Switzerland, the world's first endowed school of nursing (founded in 1859). She began her professional career at a maternity hospital in Bari in southern Italy and later took up postgraduate studies at Bedford College (London University), the Royal College of Nursing, London, and the Teachers' College of Columbia University in New York.

Her international career was to begin at the League of Red Cross Societies in 1939; she was Director of the League Nursing Bureau for more than thirty years before going on to be appointed Under-Secretary General in charge of the Services to the National Societies Sector of the League Secretariat. She remained in this post until her retirement.

Miss Hentsch maintained close contacts with the ICRC, the International Council of Nurses, the World Health Organization, and especially the National Red Cross and Red Crescent Societies, as well as with national and regional nursing associations throughout the world. She carried out missions to some 80 National Societies and took part in many international meetings in connection with the Red Cross, nursing and social welfare.

Miss Hentsch was a member of the *Association du Bon Secours* in Geneva and was National President of the Swiss Nursing Association. In 1977 she received the Florence Nightingale Medal, which is the highest distinction awarded by the ICRC to nurses for outstanding dedication to the Red Cross and Red Crescent cause.

The International Committee of the Red Cross would like to convey its deepest sympathy to Miss Hentsch's family and many friends.

INTERNAL DISTURBANCES AND TENSIONS

NEW DRAFT DECLARATION OF MINIMUM HUMANITARIAN STANDARDS

In its January-February 1988 issue (No. 262), the *Review* published a series of articles on the protection of the individual in situations of internal disturbances and tensions, under the title

Internal disturbances and tensions: a new humanitarian approach?

Contributions by various authors examined different aspects of such situations, which are not covered by international humanitarian law. One article was devoted to the ICRC's protection and assistance activities in situations of internal disturbances and tensions. The issue also contained two papers expressing the personal views of experts on the subject and dealing with normative questions such as how to effectively strengthen legal provisions for the protection of individuals caught up in such situations. In one of these papers Professor Theodor Meron points out the inadequacy of existing international provisions in this regard and submits a draft Model Declaration on Internal Strife as a basis for discussion on the negotiation of a new legal instrument. In the other, the author of the present article proposes a Code of Conduct intended primarily as an instrument for the dissemination of a few basic rules which it is particularly important to observe in situations of internal disturbances and tensions.

The purpose of the two texts was to stimulate interest in possible ways of strengthening legal mechanisms for the protection of the individual against abuse of power on the one hand, and in humanitarian activities in behalf of victims of violence on the other.

Since the publication of that special issue of the *Review*, the debate on these questions has progressed in many ways. Without discounting the importance of the other articles which appeared at the same time,

the *Review* wishes to report here on a seminar which elaborated on the approach proposed by Professor Meron by drafting a new legal instrument. At the invitation of the *Institute for Human Rights* of the Åbo Akademi University, Turku/Åbo (Finland), a group of private experts met there from 30 November to 2 December 1990 to draw up a draft *Declaration of Minimum Humanitarian Standards*.

The purpose of the Declaration was to codify certain international rules pertaining to situations of violence not subject to the provisions of humanitarian law applicable in non-international armed conflicts (in particular Article 3 common to the Geneva Conventions of 12 August 1949 and Protocol II of 8 June 1977). Since international rules providing for the protection of the individual (human rights law) are not always adequate to meet the special humanitarian requirements that arise in situations of internal disturbances and tensions, the codification of a set of rules in the form of a non-binding declaration appears to constitute a promising approach to the problem of providing better protection for individuals caught up in violence. A solemn declaration of this type might be the first step towards the codification of new, binding regulations.

The draft Declaration is based first and foremost on human rights instruments. It also draws freely upon the Geneva Conventions and their Additional Protocols, for example the rules limiting the use of force and those relating to the assistance to be given to victims. Like the humanitarian law instruments, the rules contained in the draft Declaration are intended for all those resorting to the use of force.

The text of the Declaration appears below. Its publication in the *Review* does not in any way reflect the position of the ICRC.

Hans-Peter Gasser

* * *

Declaration of Minimum Humanitarian Standards

[The appropriate United Nations organ,]

Recalling the reaffirmation by the Charter of the United Nations and the Universal Declaration of Human Rights of faith in the dignity and worth of the human person;

Considering that situations of internal violence, disturbances, tensions and public emergency continue to cause serious instability and great suffering in all parts of the world;

Concerned that in such situations human rights and humanitarian principles have often been violated;

Recognizing the importance of respecting existing human rights and humanitarian norms;

Noting that international law relating to human rights and humanitarian norms applicable in armed conflicts to not adequately protect human beings in situations of internal violence, disturbances, tensions and public emergency;

Confirming that any derogations from obligations relating to human rights during a state of public emergency must remain strictly within the limits provided for by international law, that certain rights can never be derogated from and that humanitarian law does not admit of any derogations on grounds of public emergency;

Confirming further that measures derogating from such obligations must be taken in strict conformity with the procedural requirements laid down in those instruments, that the imposition of a state of emergency must be proclaimed officially, publicly, and in accordance with the provisions laid down by law, that measures derogating from such obligations will be limited to the extent strictly required by the exigencies of the situation, and that such measures must not discriminate on the grounds of race, colour, sex, language, religion, social, national or ethnic origin;

Recognizing that in cases not covered by human rights and humanitarian instruments, all persons and groups remain under the protection of the principles of international law derived from established custom, from the principles of humanity and the dictates of public conscience;

Believing that it is important to reaffirm and develop principles governing behaviour of all persons, groups, and authorities in situations of internal violence, disturbances, tensions and public emergency;

Believing further in the need for the development and strict implementation of national legislation applicable to such situations, for strengthening co-operation necessary for more efficient implementation of national and inter-

national norms, including international mechanisms for monitoring, and for the dissemination and teaching of such norms;

Proclaims this Declaration of Minimum Humanitarian Standards.

Article 1

This Declaration affirms minimum humanitarian standards which are applicable in all situations, including internal violence, disturbances, tensions, and public emergency, and which cannot be derogated from under any circumstances. These standards must be respected whether or not a state of emergency has been proclaimed.

Article 2

These standards shall be respected by, and applied to all persons, groups and authorities, irrespective of their legal status and without any adverse discrimination.

Article 3

1. Everyone shall have the right to recognition everywhere as a person before the law. All persons, even if their liberty has been restricted, are entitled to respect for their person, honour and convictions, freedom of thought, conscience and religious practices. They shall in all circumstances be treated humanely, without any adverse distinction.

2. The following acts are and shall remain prohibited:

- a) violence to the life, health and physical or mental well-being of persons, in particular murder, torture, mutilation, rape, as well as cruel, inhuman or degrading treatment or punishment and other outrages upon personal dignity;
- b) collective punishments against persons and their property;
- c) the taking of hostages;
- d) practising, permitting or tolerating the involuntary disappearance of individuals, including their abduction or unacknowledged detention;
- e) pillage;
- f) deliberate deprivation of access to necessary food, drinking water and medicine;
- g) threats or incitement to commit any of the foregoing acts.

Article 4

1. All persons deprived of their liberty shall be held in recognized places of detention. Accurate information on their detention and whereabouts, including transfers, shall be made promptly available to their family members and counsel or other persons having a legitimate interest in the information.

2. All persons deprived of their liberty shall be allowed to communicate with the outside world including counsel in accordance with reasonable regulations promulgated by the competent authority.

3. The right to an effective remedy, including habeas corpus, shall be guaranteed as a means to determine the whereabouts or the state of health of persons deprived of their liberty and for identifying the authority ordering or carrying out the deprivation of liberty. Everyone who is deprived of his or her liberty by arrest or detention shall be entitled to take proceedings by which the lawfulness of the detention shall be decided speedily by a court and his or her release ordered if the detention is not lawful.

4. All persons deprived of their liberty shall be treated humanely, provided with adequate food and drinking water, decent accommodation and clothing, and be afforded safeguards as regards health, hygiene, and working and social conditions.

Article 5

1. Attacks against persons not taking part in acts of violence shall be prohibited in all circumstances.

2. Whenever the use of force is unavoidable, it shall be in proportion to the seriousness of the offence or the objective to be achieved.

3. Weapons or other material or methods prohibited in international armed conflicts must not be employed in any circumstances.

Article 6

Acts or threats of violence the primary purpose or foreseeable effect of which is to spread terror among the population are prohibited.

Article 7

1. The displacement of the population or parts thereof shall not be ordered unless their safety or imperative security reasons so demand. Should such displacements have to be carried out, all possible measures shall be taken in order that the population may be transferred and received under satisfactory conditions of shelter, hygiene, health, safety, and nutrition. Persons or groups thus displaced shall be allowed to return to their homes as soon as the conditions which made their displacement imperative have ceased. Every effort shall be made to enable those so displaced who wish to remain together to do so. Families whose members wish to remain together must be allowed to do so. The persons thus displaced shall be free to move around in the territory, subject only to the safety of the persons involved or reasons of imperative security.

2. No persons shall be compelled to leave their own territory.

Article 8

1. Every human being has the inherent right to life. This right shall be protected by law. No one shall be arbitrarily deprived of his or her life.

2. In addition to the guarantees of the inherent right to life, and the prohibition of genocide, in existing human rights and humanitarian instruments, the following provisions shall be respected as a minimum.

3. In countries which have not yet abolished the death penalty, sentences of death shall be carried out only for the most serious crimes. Sentences of death shall not be carried out on pregnant women, mothers of young children or on children under 18 years of age at the time of the commission of the offence.

4. No death sentence shall be carried out before the expiration of at least six months from the notification of the final judgment confirming such death sentence.

Article 9

No sentence shall be passed and no penalty shall be executed on a person found guilty of an offence without previous judgment pronounced by a regularly constituted court affording all the judicial guarantees which are recognized as indispensable by the community of nations. In particular:

- a) the procedure shall provide for an accused to be informed without delay of the particulars of the offence alleged against him or her, shall provide for a trial within a reasonable time, and shall afford the accused before and during his or her trial all necessary rights and means of defence;
- b) no one shall be convicted of an offence except on the basis of individual penal responsibility;
- c) anyone charged with an offence is presumed innocent until proved guilty according to law;
- d) anyone charged with an offence shall have the right to be tried in his or her presence;
- e) no one shall be compelled to testify against himself or herself or to confess guilt;
- f) no one shall be liable to be tried or punished again for an offence for which he or she has already been finally convicted or acquitted in accordance with the law and penal procedure;
- g) no one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence, under applicable law, at the time when it was committed.

Article 10

Every child has the right to the measures of protection required by his or her condition as a minor and shall be provided with the care and aid the child requires. Children who have not yet attained the age of fifteen years shall be recruited in or allowed to join armed forces or armed groups or allowed to take part in acts of violence. All efforts shall be made not to allow persons below the age of 18 to take part in acts of violence.

Article 11

If it is considered necessary for imperative reasons of security to subject any person to assigned residence, internment or administrative detention, such decisions shall be subject to a regular procedure prescribed by law affording all the judicial guarantees which are recognized as indispensable by the international community, including the right of appeal or to a periodical review.

Article 12

In every circumstance, the wounded and sick, whether or not they have taken part in acts of violence, shall be protected and treated humanely and shall receive, to the fullest extent practicable and with the least possible delay, the medical care and attention required by their condition. There shall be no distinction among them on any grounds other than their medical condition.

Article 13

Every possible measure shall be taken, without delay, to search for and collect wounded, sick and missing persons and to protect them against pillage and ill-treatment, to ensure their adequate care; and to search for the dead, prevent their being despoiled or mutilated, and to dispose of them with respect.

Article 14

1. Medical and religious personnel shall be respected and protected and shall be granted all available help for the performance of their duties. They shall not be compelled to carry out tasks which are not compatible with their humanitarian missions.

2. Under no circumstances shall any person be punished for having carried out medical activities compatible with the principles of medical ethics, regardless of the person benefitting therefrom.

Article 15

In situations of internal violence, disturbances, tensions or public emergency, humanitarian organizations shall be granted all the facilities necessary to enable them to carry out their humanitarian activities.

Article 16

In observing these standards, all efforts shall be made to protect the rights of groups, minorities and peoples, including their dignity and identity.

Article 17

The observance of these standards shall not affect the legal status of any authorities, groups, or persons involved in situations of internal violence, disturbances, tensions or public emergency.

Article 18

1. Nothing in the present standards shall be interpreted as restricting or impairing the provisions of any international humanitarian or human rights instrument.

2. No restriction upon or derogation from any of the fundamental rights of human beings recognized or existing in any country by virtue of law, treaties, regulations, custom, or principles of humanity shall be admitted on the pretext that the present standards do not recognize such rights or that they recognize them to a lesser extent.

NEW PARTIES TO THE ADDITIONAL PROTOCOLS

Accession to the Protocols by Uganda

Uganda acceded, on 13 March 1991, 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 Uganda on 13 September 1991.

This accession brings to **101** the number of States party to Protocol I and to **91** those party to Protocol II.

Accession to the Protocols by Djibouti

Djibouti acceded, on 8 April 1991, 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 Djibouti on 8 October 1991.

This accession brings to **102** the number of States party to Protocol I and to **92** those party to Protocol II.

Chile ratifies the Protocols

On 24 April 1991, Chile ratified the Protocols additional to the Geneva Conventions of 12 August 1949 and relating to the protection of victims of international (Protocol I) and non-international (Protocol II) armed conflicts, adopted in Geneva on 8 June 1977.

The instrument of ratification contained the following declaration:

“In accordance with Article 90 of Protocol I the State of Chile declares that it recognizes, in relation to any other High Contracting Party accepting the same obligation, the competence of the International Fact-Finding Commission”.

Chile is the **twenty-second** State to make this declaration concerning the International Fact-Finding Commission.

Pursuant to their provisions, the Protocols will enter into force for Chile on 24 October 1991.

Chile is the **103rd** State to become party to Protocol I and the **93rd** to Protocol II.

Books and reviews

THE SIGNIFICANCE OF CODIFICATION FOR GENERAL INTERNATIONAL LAW WITH PARTICULAR ATTENTION TO THE RULES FOR THE PROTECTION OF CIVILIANS AGAINST THE EFFECTS OF HOSTILITIES*

When States wish to create new international laws, they assemble their representatives at a diplomatic conference. A great deal of time, energy, money and sometimes political prestige is expended while diplomats and government lawyers draw up a new treaty which they then proudly cite as an example of “codification”. Everyone knows that international treaties are binding only on those States — and they are sometimes few in number — that have become party to them through ratification or accession. But what about the other members of the international community? Does codification have consequences for States that are not party to the treaties involved? Does it also have an effect on the rest of international law?

In the doctoral thesis he wrote at the University of Basel, Marco Sassòli looks at these questions in the light of a specific example: the codification, by Protocol I additional to the Geneva Conventions, of the protection afforded by international law to the civilian population against the effects of hostilities. The author has undertaken to show the extent to which the 1977 Protocol has an impact on “general international law”, by which he means customary international law and the general principles of law. Obviously, Sassòli’s study will undoubtedly be of great significance for the implementation of international law, for he helps to highlight and explain those provisions of international humanitarian law intended to protect civilians against the effects of military operations in all circumstances, regardless of whether the government involved has ratified Protocol I. The relevance of this subject in today’s world is evident. While preparing his thesis, Sassòli worked as a lawyer in the ICRC Legal Division.

In collecting his source material and seeking answers to the question set, the author touches on a whole range of problems that I found very interesting but which limited space does not permit me to discuss here. Suffice it to say

* Marco Sassòli. *Bedeutung einer Kodifikation für das allgemeine Völkerrecht, mit besonderer Betrachtung der Regeln zum Schutze der Zivilbevölkerung vor den Auswirkungen von Feindseligkeiten*, Helbing & Lichtenhahn, Basel and Frankfurt am Main, 1990, 590 pp. (in German only).

that Sassòli defies all opinion to the contrary and bases his work on a concept of international law that takes the normative element as its centrepiece. With the aid of the considerable more recent literature on the subject, he gains a clear view of the various sources of international law. He is particularly interested in the most widely accepted but also the most difficult to grasp of those sources: customary law. Sassòli attaches key importance to the general acceptance of the rules by those to whom they are addressed, above all the States. He concurs with the bulk of legal opinion and obviously also with the International Court of Justice (Nicaragua ruling) in that he is prepared to attribute less importance in individual cases to the classic requirement of State practice. This is a tenable view, at least as far as international humanitarian law is concerned. As the author shows, it is a distinct exception to be able to speak of verifiable State practice as regards the rules discussed here.

After stressing the importance of codification for international law as a whole, Sassòli ventures forth to examine the phenomenon of especial interest to him in the course of his study: the influence that a codifying instrument has upon its "environment", and primarily upon general international law relating to the same subject. To do so he works out a method that he calls "multi-factor analysis". This is basically a way of taking into account a variety of factors that have played some part in the creation of a treaty rule. Obvious examples of such factors are the statements made by representatives of States or their conduct during the decision-making process. These factors as a whole are capable of confirming existing customary international law, initiating changes in it or even replacing it.

This provides Sassòli with the methodological basis for discussing the particularities of those rules of international law that are destined to protect the civilian population against the effects of hostilities. In doing so, he confines himself to the law governing international armed conflict. Customary rules have always played an important role in the law of war. At the same time, ascertaining State practice is especially difficult because often neither one's own conduct nor the response to violations (by one's own side or by the opposing side) provides conclusive indications as to the actual legal convictions held by the respective State. To see whether an individual State agrees with a rule or not, it is necessary to look elsewhere, for example the standing orders of its armed forces. It is such orders that reveal what the supreme authorities consider legitimate conduct for their armed forces.

It goes without saying, of course, that the actual behaviour of States also has to be taken into account, as must the reasons they give to justify their actions, especially when this involves an alleged breach of the law. Sassòli therefore also studies the most recent practice in international law. The legal view of the Allies' air offensive during the Second World War, which culminated in the destruction of Dresden and the dropping of atomic bombs on Japan, is very instructive in this respect. After the war, Churchill remarked: "It seems to me that the moment has come when the question of bombing of German cities simply for the sake of increasing terror, though under other pretexts, should be reviewed" (p. 263). Churchill's warning remains valid in

other circumstances as well. Sassòli also rightly reminds us that qualifying an illegal act as a reprisal is not necessarily designed to strengthen the rule relating to reprisals. Sassòli also looks at various post-war conflicts, in particular the Vietnam War which raises a number of interesting points.

A description of the 1974-77 Diplomatic Conference, its history and decision-making process, leads into an analysis of individual provisions in that section of Protocol I which is devoted to the protection of the civilian population against the effects of hostilities. In examining each provision, Sassòli considers whether it corresponds with existing general international law and to what extent, if any, it can influence the international law that applies outside the scope of Protocol I. He bases his judgment above all on the reception given to each new provision during the work preliminary to the Conference (the *travaux préparatoires*), and the response of the States to it once adopted (as shown by their subsequent policy, any reservations or interpretative declarations made or justifications advanced for reprisals, etc.). Particular attention is given to fourteen provisions from Part IV of Protocol I (Articles 48 to 58). For example, Sassòli's analysis of Article 48 shows that the principle of distinction (between combatants and the civilian population and between military objectives and civilian objects) is part of general international law. Sassòli feels that this principle, which had been jeopardized by the alarming turn that State practice took during the Second World War, has been saved and given new strength by the codification accomplished in 1977. «Das ZPI ist ein Dementi gegen die These, es sei in *desuetudo* gefallen (*"Additional Protocol I belies the claim that the principle has fallen into disuse"*) (p. 359).

In this way, the author considers the status in general international law of each provision. The prohibition of indiscriminate attacks — in particular carpet bombing — understandably receives the greatest attention (Article 51, paras 4 and 5). This provision introduces the proportionality principle into codified international law and specifies with greater precision the concept of the (still permissible) collateral damage occurring in lawful attacks. On the basis of the plentiful literature on these issues and the discussions at the Diplomatic Conference, Sassòli describes this provision, too, as being part of existing general international law, with the exception of the prohibition of attacks by methods or means that cannot be directed at a specific target. This latter prohibition he considers to be a creation of treaty law.

Sassòli's views on prohibitions of reprisals reflect the same realism that runs through the entire book. Although he cannot discern in general international law a comprehensive prohibition of reprisals against the civilian population, he does feel that, all in all, the rules of customary law do impose a certain limit in that reprisals against the civilian population may not be contemplated unless the other side has itself violated the prohibition of attacks on civilians. This conclusion seems justified.

In his final remarks, Sassòli reminds the reader of the oft-proclaimed renaissance of customary international law, a renaissance which, paradoxically, can also be attributed to the diligent work of codification. His thesis shows that rules of customary law to protect the civilian population have emerged in even stronger form from the codification of international humanitarian law by the Diplomatic Conference. His conclusions — carefully thought out and supported with an unbelievable abundance of source material — are important because they can help in making clear what law is in force for States that have not ratified Protocol I. It is no mean feat to have placed specific, current problems of international humanitarian law in the broader context of general international law. The rigorous logic of Sassòli's mental processes and his clarity of expression in German make this voluminous work a stimulating read.

Hans-Peter Gasser

CASUALTIES OF CONFLICTS
*Report for the World Campaign for
the Protection of Victims of War*

Casualties of Conflict is an independent report prepared by the Department of Peace and Conflict Research of Uppsala University (Sweden) and designed as a contribution to the World Campaign for the Protection of Victims of War and as a reference document for the humanitarian endeavours of the International Red Cross and Red Crescent Movement.*

The authors of the report, Christer Ahlström and Kjell-Åke Nordquist, have tried to describe contemporary armed conflicts as objectively as possible, to depict in their many different aspects the sufferings that these conflicts cause to various categories of victims and to identify the different means, especially legal ones, that are available to the international community for limiting these sufferings.

* Christer Ahlström with contributions by Kjell-Åke Nordquist, *Casualties of Conflict — Report for the World Campaign for the Protection of Victims of War*, Department of Peace and Conflict Research, Uppsala University, Sweden, 1991, 74 pp.

This report, financed by the Canadian, Finnish and Swedish Red Cross Societies, is an independent reference document which does not express the opinions of the International Red Cross and Red Crescent Movement. It also exists in French and Spanish and may be obtained from the International Promotion Bureau, P.O. Box 109, 1211 Geneva 20, Switzerland.

This has resulted in a short logically structured book of some 70 pages, combining theory with practice and accompanied by a number of statistical tables and basic texts. Its simple formulation and direct approach make it interesting and accessible to a wide variety of readers.

On the basis of the comprehensive data contained in studies compiled by the Department of Peace and Conflict Research and by the Stockholm International Peace Research Institute (SIPRI), the authors begin by devoting two chapters to contemporary armed conflicts, their definition, their nature, their development and their individual characteristics. We thus learn that of the 36 armed conflicts recorded in 1988-1989 only five involved combat between States and that in all the other cases fighting took place within one country. At least five million people, mostly civilians, have lost their lives in these conflicts since the outbreak of hostilities. The analysis naturally also had to cover the question of armaments, as well as the development of the new so-called "blind" weapons which place civilians at serious risk. The statistics are eloquent in this respect: over 30 million mines were sown in Afghanistan in the 1980s, and it is estimated that between 1.3 and 1.5 million people in that country and some 40,000 in Angola are now disabled, largely as the result of mine explosions.

The report goes on to deal at length with the various categories of victims of conflict, basing the analyses on statistics set out in several tables. Special attention is paid to the cases of child-soldiers (an estimated 200,000 children under the age of 15 are reportedly currently used as soldiers), refugees (over 16 million in the world in 1989) and people displaced in their own countries (over two million in Sudan). Giving a real-life dimension by eye-witness accounts and quotations from publications to what might otherwise be dry statistical data, the authors describe the efforts made by the United Nations, particularly the Office of the United Nations High Commissioner for Refugees, and the International Red Cross and Red Crescent Movement to provide protection and assistance for these especially vulnerable categories of victims.

What are the means at the disposal of the international community for alleviating the sufferings of victims of conflict and imposing "constraints on inhumanity"? In a series of short paragraphs, the report traces the development of international humanitarian law since the 1864 Convention, laying stress on the provisions of the Geneva Conventions and their Additional Protocols concerning the protection of the wounded and sick, prisoners of war and the civilian population, and also on the fundamental principle that a distinction must be made between military targets and civilian populations and between combatants and non-combatants, the prohibition on causing superfluous injury and unnecessary suffering, the rule against perfidy, etc. The authors dwell on various implementation mechanisms provided by law, the application of which often comes up against the principle of State sovereignty.

The “challenges of today” as seen by the authors of the report are to propagate information on the humanitarian law which is all too often violated and to promote the development of that law with regard to internal conflicts. The existing array of legal instruments is certainly not inconsiderable, but it must be extended further. International public opinion has a part to play through the pressure, or even sanctions, that it can impose on a defaulting State. To quote the authors, *“It is of utmost importance to victims that the ICRC maintains its mandate and role in assisting and protecting the victims of war. It is difficult, however, for the ICRC to contribute, through its humanitarian action, to the implementation of international humanitarian law and, at the same time, to denounce systematically and publicly the violations of international humanitarian law”*.

Accordingly, the authors very optimistically suggest the establishment of an independent body *“whose main objective would be to generate public response, based on its findings, in support of the observance of international humanitarian law”*.

They further add that it would be desirable to bring about closer coordination of supervision and vigilance in humanitarian matters — for example, through a Council of Experts — and to reiterate in a legal document the existing fundamental rules on respect for the human person in cases of internal disturbances and tension.

The authors conclude by calling upon all international organizations concerned with international humanitarian law to observe carefully all international and internal developments which may give its ideas new life. *“The ongoing reorganization of the international community affords, in particular, the opportunity to study how international humanitarian law can be more effectively applied to internal conflict”*.

Jacques Meurant

The **International Review of the Red Cross** is the official publication of the International Committee of the Red Cross. It was first published in 1869 under the title "Bulletin international des Sociétés de secours aux militaires blessés", and then "Bulletin international des Sociétés de la Croix-Rouge".

The **International Review of the Red Cross** is a forum for reflection and comment and serves as a reference work on the mission and guiding principles of the International Red Cross and Red Crescent Movement. It is also a specialized journal in the field of international humanitarian law and other aspects of humanitarian endeavour.

As a chronicle of the international activities of the Movement and a record of events, the **International Review of the Red Cross** is a constant source of information and maintains a link between the components of the International Red Cross and Red Crescent Movement.

The **International Review of the Red Cross** is published every two months, in four main editions:

French: REVUE INTERNATIONALE DE LA CROIX-ROUGE (since October 1869)

English: INTERNATIONAL REVIEW OF THE RED CROSS (since April 1961)

Spanish: REVISTA INTERNACIONAL DE LA CRUZ ROJA (since January 1976)

Arabic: المجلة الدولية للصليب الأحمر
(since May-June 1988)

Selected articles from the main editions have also been published in German under the title *Auszüge* since January 1950

EDITOR: Jacques Meurant, D. Pol. Sci.
ADDRESS: International Review of the Red Cross
19, avenue de la Paix
1202 - Geneva, Switzerland
SUBSCRIPTIONS: one year, 30 Swiss francs or US\$ 18
single copy, 5 Swiss francs.
Postal cheque account No. 12 - 1767-1 Geneva
Bank account No. 129.986.0, Swiss Bank Corporation, Geneva

The **International Committee of the Red Cross (ICRC)**, together with the League of the Red Cross and Red Crescent Societies and the 147 recognized National Red Cross and Red Crescent Societies, is one of the three components of the International Red Cross and Red Crescent Movement.

An independent humanitarian institution, the ICRC is the founding body of the Red Cross. As a neutral intermediary in case of armed conflict or disturbances, it endeavours on its own initiative or on the basis of the Geneva Conventions to protect and assist the victims of international and civil wars and of internal troubles and tensions, thereby contributing to peace in the world.

**INTERNATIONAL
REVIEW**

**IMPLEMENTATION OF
INTERNATIONAL HUMANITARIAN LAW**
(Part II)

**Repression of breaches of the law of war
committed by individuals**

**Compliance with International
Humanitarian Law**

*World Campaign for the Protection
of Victims of War*

**World Red Cross and Red Crescent
Day 1991**